ValpoScholar Valparaiso University Law Review

Volume 42
Number 1 *Fall 2007*

*pp.*191-244

Fall 2007

Disenfranchise This: State Voter ID Laws and Their Discontents, a Blueprint for Bringing Successful Equal Protection and Poll Tax Claims

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DISENFRANCHISE THIS: STATE VOTER ID LAWS AND THEIR DISCONTENTS, A BLUEPRINT FOR BRINGING SUCCESSFUL EQUAL PROTECTION AND POLL TAX CLAIMS

I. INTRODUCTION

Since the passage of the Help America Vote Act in 2002,[1] nearly half of the states have enacted some form of an identification requirement as a prerequisite to in-person voting.[2] Proponents argue that such laws are necessary to combat alleged voter fraud.[3] While the actual scope of voter fraud, particularly in-person voter fraud, is widely disputed, state voter identification laws are becoming increasingly prevalent.[4] In fact,

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1 Help America Vote Act, 42 U.S.C. §§ 15401-15406 (Supp. IV 2000) [hereinafter HAVA]. "The first focused effort by Congress to regulate the actual mechanisms by which elections are administered, HAVA set forth comprehensive requirements designed 'to assist in the administration of Federal elections and . . . to establish minimum election administration standards for States and units of local government.'" *Developments in the Law-Voting and Democracy*, 119 HARV. L. REV. 1127, 1148 (2006) [hereinafter *Voter Identification Laws*].

2 As of August 1, 2006, twenty-four states required voters to show identification prior to voting, seven of which required photo identification. *See* National Conference of State Legislatures, State Requirements for Voter ID, http://www.ncsl.org/programs/legismgt/elect/taskfc/VoterIDReq.htm (last visited Jan. 13, 2007) [hereinafter *National Conference of State Legislatures*]. While seven states currently request photo identification, most allow alternatives. *See* David H. Harris Jr., *Georgia Photo ID Requirement: Proof Positive of the Need to Extend Section 5*, 28 N.C. CENT. L.J. 172, 182 (2006) [hereinafter *Proof Positive*] (listing examples of alternatives); *see also* Ariel Hart, *Georgia Voters May Soon Need Photo IDs*, N.Y. TIMES, Apr. 1, 2005, at A15 [hereinafter *Hart I*] (comparing photo ID requirements in different states). However, as of August 1, 2006, four states had strictly mandated that only government-issued photo IDs will be accepted for in-person voting. *See National Conference of State Legislatures supra*.

3 *See Voter Identification Laws*, *supra* note 1, at 1146 n.4. Drawing mostly on anecdotal evidence, state legislators complain of inflated voter rolls, purchased votes, and ballots cast by illegal immigrants, felons, and the deceased. *See* American Center for Voting Rights, *Vote Fraud, Intimidation & Suppression in the 2004 Presidential Election*, http://www.ac4vr.com/reports/072005/default.html (last visited Jan. 13, 2006) (detailing findings of alleged voter fraud in several states); *see also Voter Identification Laws*, *supra* note 1, at 1145 (describing "bloated" voter rolls, containing the names of felons and the deceased).

4 *See Voter Identification Laws*, *supra* note 1, at 1152-53 (describing how reports can overstate the extent of voter fraud and the actual effect it has on elections). Thus far, in cases involving voter ID laws in Indiana, Georgia, and Missouri, the courts have all noted the lack of evidence documenting in-person voter fraud in those states. *See* Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1361, 1366 (N.D. Ga. 2005) [hereinafter *Common Cause I*]; Common Cause/Georigia v. Billups, 439 F. Supp. 2d 1294, 1350 (N.D. Ga. 2006) [hereinafter *Common Cause II*]; Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 792-93, 826 (S.D. Ind. 2006); Weinschenk v. Mo., 203 S.W.3d 201, 217 (Mo. 2006).

Congress recently took a cue from the states and began considering a national voter identification requirement as well.[5]

Creating the greatest controversy are a few states that have passed statutes requiring every in-person voter to show a government-issued photo ID before casting a ballot.[6] Because these extra-stringent laws have the potential to disenfranchise registered voters lacking proper identification, they have provoked heated partisan debate, spurring a flurry of litigation.[7] In particular, the disproportionate impact that these

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[5] Federal Election Integrity Act, H.R. 4844, 109th Cong. (2006) (this Act is not listed in the Code and did not appear in the House Bill Status report which might suggest that it was not passed). In September of 2006, the U.S. House of Representatives passed the Federal Election Integrity Act, modeled after State voter ID laws to require proof of citizenship and photo ID to vote in the 2008 election. The Act passed the House of Representatives by a vote of 228 to 195. *See* Marc H. Morial, *National Voter ID Legislation Poses Direct Threat to Right to Vote*, 101 CHI. DEFENDER 87, Oct. 4. 2006. Some perceived the bill as merely election year politics, but several Senators were greatly alarmed by the sweeping bill and asked that it not be brought to vote in the Senate. *See Senate Democrats Decry Modern-Day Poll Tax*, U.S. FED. NEWS, Sept. 22, 2006; *Democratic Members of the Senate and House of Representatives Hold a News Conference on the Voter ID Requirement Bill*, FDCH CAPITAL TRANSCRIPTS, Sept. 27, 2006; Adam Cohen, *American Elections and the Grand Old Tradition of Disenfranchisement*, N.Y. TIMES, Oct. 8, 2006, at § 4 (claiming that the proposed bill undermines American democracy). *See also* Morial *supra* (stating "Americans are as likely to commit election fraud as they are getting killed by lightening. Since October of 2002, a total of 86 U.S. residents have been convicted of federal election fraud, while nearly 197,000,000 ballots have been cast in general elections."). Specifically, members of Congress concerned with the proposed law characterized it as a poll tax which would unnecessarily disenfranchise millions of American voters. *See This Poll Tax Isn't Welcome*, BOSTON GLOBE, Oct. 8, 2006, at E8:

> Two days after the House vote, a report by the widely respected Center on Budget and Policy Priorities showed that some 11 million citizens don't have a birth certificate or a passport in their home. The elderly are far more likely to lack such documents than the nonelderly; low-income residents were nearly twice as likely not to have them. The script almost starts to write itself: About 2 million black and 4.5 million rural residents also lack the required documents, according to the report. No matter how you slice it, the numbers amount to a serious dismantling of voting rights.

Id.

[6] These extra-stringent laws are the subject of this Note. At the time of this writing, Georgia, Indiana, Missouri, Arizona, South Dakota, and Ohio had passed voter ID statutes with this extra-stringent requirement. *See National Conference of State Legislatures*, *supra* note 2.

[7] *See infra* Part II (describing partisan passage of voter ID laws, the potential for such laws to disenfranchise some voters, and subsequent litigation); *see also Voter Identification Laws*, *supra* note 1, at 1146 (introducing the argument that the democratic process is better served by encouraging broad participation in the electoral process and limiting voting restrictions which have the potential to discourage or disrupt voting). *But see IDs and Voter Confidence Political Parties are Bitterly Divided on an Issue it Behooves Them to Work Together On*, FORT WAYNE NEWS SENTINEL, Oct. 19, 2006, at A6:

laws may have on the indigent, elderly, disabled, and minority voters raises great concern regarding the constitutionality and morality of such laws.[8]

Using the extra-stringent voter ID statutes of Indiana, Georgia, and Missouri as case studies, Part II of this Note will provide a factual background, discussing the legislative history, concerns of disenfranchisement, and subsequent judicial treatment of each law.[9] Focusing specifically on Equal Protection and poll tax challenges, Part III of this Note will undertake a more detailed analysis of the case law by distinguishing factors that contribute to successful claims.[10] Finally, Part IV of this Note will offer a blueprint for successful challenges against state voter ID laws, synthesizing trends gleaned from the cases decided thus far.[11]

II. BACKGROUND

Before undertaking a detailed legal analysis of state voter ID laws, it is important to appreciate that the requirements and issues they create are relatively novel and judicially untested.[12] While most states have long required some form of identification to vote, the absolute requirement to show a government-issued photo ID, exclusive of all

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> It seems clear that Republicans are not just interested in fraud. The most likely kinds of fraud - people who vote in two states, for example, or cheat on absentee ballots - are not addressed by photo IDs. But it's also obvious that Democrats are not just interested in protecting the rights of the downtrodden. This is about each side getting as many votes as it can in a bitter political culture and at a time when big elections can be decided in a handful of precincts. In the process of waging this war, the two parties are making weary, suspicious voters have even less faith in the system.

Id.

[8] Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1365-66 (N.D. Ga. 2005) ("*Common Cause I*"):

> Unfortunately, the Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting. For those citizens, the character and magnitude of their injury—the loss of their right to vote—is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.

Id.

[9] *See generally infra* Part II.

[10] *See generally infra* Part III.

[11] *See generally infra* Part IV.

[12] In 2005, Indiana was the first state to mandate a government issued photo ID to vote. *See infra* notes 47-57 (discussing promulgation of the first voter ID statute only a few years ago).

other forms of identification, is new.[13] The creation and subsequent adjudication of state voter ID requirements represent a prime example of developing law, evidencing both the laboratory of the states and the crucible of the courtroom.[14] The state voter ID laws, thus far enacted, have been markedly similar in both creation and effect, raising the same political, social, and legal concerns through nearly identical requirements.[15] The developing judicial treatment of the statutes has been more fluid, however, with courts taking different approaches of analysis and producing divergent outcomes.[16]

Given the newness of this rapidly developing area of law, this Note takes a conservative approach in order to establish more reliable conclusions regarding the anticipated direction of the developing law.[17] Part II.A begins by providing a brief overview of relevant election law precedent.[18] Next, Part II.B consecutively introduces the enactment and subsequent judicial treatment of three current voter ID statutes.[19] In doing so, Part II also highlights the similar requirements, legislative history, and concerns raised by all three laws.[20] Additionally, Part II discusses the distinct judicial treatment that each law has encountered, in regard to Equal Protection and poll tax challenges.[21] The sharply divergent judicial outcomes spawning from nearly identical statutes lay the foundation for subsequent legal analysis in Part III.[22]

A. Brief Overview of Federal Election Law Under Equal Protection and Poll Tax Precedent

In order to best understand the legal challenges raised as a result of the recently enacted state voter ID laws, a basic understanding of the

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13 For example, prior to adoption of its stringent voter ID law, Georgia permitted eight forms of identification to vote, including a birth certificate, a social security card, a copy of a current utility bill, a government check, a payroll check, or a bank statement with the voter's name and address. *See Common Cause I*, 406 F. Supp. 2d at 1331.

14 *See generally infra* Part II and Part III. The structure of this Note is that of a comparison and contrast of the similar requirements and divergent judicial treatment of the initial state voter ID statutes.

15 *See generally infra* notes 47-57, 77-85, 120-26 (introducing the similarities in development and requirement of the earliest voter ID laws).

16 *See generally infra* notes 58-76, 86-119, 127-136 (discussing the divergent judicial treatment of the earliest voter ID laws).

17 *See generally infra* Part II and Part III.

18 *See generally infra* Part II.A.

19 *See generally infra* Part II.B.

20 *See supra* note 15.

21 *See supra* note 16.

22 *See generally infra* Part III.

legal tests used to analyze them is necessary.[23] Part II.A.1 introduces the legal tests used for Equal Protection challenges, and Part II.A.2 introduces the tests under the Twenty-Fourth Amendment's prohibition of Poll Tax laws.[24]

1. Challenges under Equal Protection: Election Laws Imposing an Undue Burden

The right to vote is a fundamental right - arguably, the most important fundamental right.[25] Voting is the way citizens impact the legislative process in a representative democracy.[26] Indeed, voting is "preservative of other basic civil and political rights" and demands extra judicial protection.[27] The right to vote, however, is not absolute.[28] Instead, the states have some authority to impose voter qualifications and regulate elections.[29] For instance, the United States Constitution grants the states the ability to establish time, place, and manner regulations on federal elections.[30] This power is limited, however, as state voting regulations may not unduly burden or abridge the right to vote.[31]

When a state-imposed election regulation has the potential to disenfranchise some voters, the regulation may be challenged on Fourteenth Amendment Equal Protection grounds.[32] Courts considering

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[23] This section borrows heavily, in both structure and substance, from the legal standards laid out in *Common Cause I*. *See generally Common Cause I*, 406 F. Supp. 2d 1326, 1359-61, 1366-68 (N.D. Ga. 2005). Because this section attempts only to present a basic overview of current election law precedent, particularly in regards to Equal Protection and poll tax challenges, the concise explanations in the *Common Cause I* decision were used without much deviation. After introducing the legal frameworks used to analyze election law challenges, this Note proceeds in a more detailed description of how recent cases have employed these methods to analyze state voter ID laws.

[24] *See generally infra* Part II.A and accompanying text. These tests will be referenced frequently in subsequent sections when discussing the legal analysis of state voter ID laws.

[25] *See Common Cause I,* 406 F. Supp. 2d at 1359 (citing Burdick v. Takushi, 504 U.S. 428, 433 (1992)).

[26] *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.").

[27] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[28] *See Common Cause I,* 406 F. Supp. 2d at 1359 (citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972)).

[29] *Id.*

[30] U.S. CONST. art. I, § 4, cl. 1.

[31] *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986).

[32] U.S. CONST. amend. XIV.

such challenges have traditionally applied the strict scrutiny analysis, requiring that the regulation employ narrowly tailored means to accomplish a compelling regulatory interest.[33] In more recent cases, however, courts have not automatically applied strict scrutiny analysis to all regulations impacting the right to vote, but instead apply the more flexible *Burdick* test.[34] Under the *Burdick* test, a court must balance the "character and magnitude" of the harm imposed on the right to vote against the state's reason for enacting the regulation and the necessity of the regulation.[35] When using the *Burdick* test, courts possess discretion to utilize either strict scrutiny or a standard similar to rational basis to review the challenged regulation, depending on how "severe" the court determines the imposed harm to be.[36] If the court determines that the right to vote is severely harmed by a state regulation, the court will proceed under strict scrutiny analysis.[37] However, if the court determines that the right to vote is not severely harmed, it will proceed under a rational basis-like review, requiring only that the regulation be reasonable to advance an important regulatory interest.[38]

2. Challenges under the Twenty-Fourth Amendment: Election Laws Imposing a Cost

A second constitutional challenge, common in every decision thus far decided, are allegations that state voter ID laws impose a material requirement on the right to vote, in violation of the Twenty-Fourth Amendment.[39] The Twenty-Fourth Amendment provides: "The right of citizens of the United States to vote . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."[40] A poll tax has been defined as the imposition of any

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33 *See, eg., Common Cause I*, 406 F. Supp. 2d at 1361-62. For purposes of simplification, this will be hereinafter referred to as "outright strict scrutiny analysis."

34 *See* Burdick v. Takushi, 504 U.S. 428, 433-34 (1992).

35 *See Common Cause I,* 406 F. Supp. 2d at 1360 (citing Burdick v. Takushi, 504 U.S. 428, 433 (1992)).

36 *Id.*; *see also infra* note 38 and accompanying text (briefly discussing the elements of rational basis review).

37 *See, e.g., Common Cause I,* 406 F. Supp. 2d at 1360. For purposes of simplification, this will be hereinafter referred to as "strict scrutiny analysis under the *Burdick* test."

38 *Id.* For purposes of simplification, this will be hereinafter referred to as "rational basis analysis under the *Burdick* test."

39 *See infra* notes 69-74, 101-05, 113-16, 130-33 and accompanying text (discussing poll tax challenges to voter ID laws in Indiana, Georgia, and Missouri).

40 U.S. CONST. amend. XXIV. Poll tax laws have historically been used to discourage unwanted voters from participating in federal elections by imposing material requirements on the right to vote. *See generally Common Cause I*, 406 F. Supp. 2d at 1367-68 (citing examples of unconstitutional poll taxes).

material requirement on the voting process in order to discourage voting or to deflect the administrative costs of an election.[41] The requirement need not be monetary or of high value to run afoul of the prohibition, so long as the requirement is a "material" hurdle that the voter must overcome before exercising her right.[42] The most common way a poll tax is imposed is through a direct or primary cost on the right to vote, such as a voting "fee." However, courts have considered the imposition of poll taxes through incidental or secondary costs as well.[43] Secondary costs are not directly imposed by the challenged regulation, instead, they are often imposed as a result of overlapping regulations.[44] Whether the challenge is against primary or secondary costs, it is within the court's discretion to determine whether a regulation imposes an impermissible material requirement on the right to vote or merely imposes a permissible and tangential burden.[45]

B. Factual Background and Subsequent Judicial Treatment of Three State Voter ID Laws

This section will simultaneously introduce the enacted voter ID statutes, highlighting their similar history and purpose and noting their disputed constitutionality.[46]

1. Indiana

On July 1, 2005, amidst heavy partisan disagreement, Indiana became the first state to require a government-issued picture ID ("photo ID") as an absolute condition for in-person voting.[47] The Indiana law mandated that all in-person voters present a photo ID card before casting

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41 *See generally Common Cause I,* 406 F. Supp. 2d at 1367-69; Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 826-27 (S.D. Ind. 2006).

42 *Common Cause I*, 406 F. Supp. 2d at 1367-69.

43 Claims against secondary costs are more common in cases involving state voter ID laws. *See, e.g., Common Cause* II, 439 F. Supp. 2d 1294, 1354-55 (N.D. Ga. 2005); *Rokita*, 458 F. Supp. 2d at 827.

44 *See, e.g.*, Weinschenk v. Mo, 203 S.W.3d 201, 207-08 (discussing the overlapping requirements of Missouri's voter ID law and the federal REAL ID Act).

45 *See generally Common Cause I,* 406 F. Supp. 2d at 1367-69; *Rokita*, 458 F. Supp. 2d at 826-27.

46 *See generally infra* Part II.B.

47 IND. CODE §§ 3-5-2-40.5; 3-10-1-7.2; 3-10-8-25 (2006). Prior to enactment of the new law, Indiana did not require any form of identification at the polls, relying instead on signature comparisons, voter challenges, and criminal penalties to catch and deter in-person voter fraud. *Rokita*, 458 F. Supp. 2d at 788; *see also id.* at 783 (stating that "[t]his litigation is the result of a partisan legislative disagreement that has spilled out of the state house into the courts.").

a ballot.[48] According to the provisions of the statute, the state was required to issue free photo IDs to all registered voters who are at least eighteen years old and who lack a valid driver's license.[49] Similar to voter ID statutes in other states, the proffered legislative purpose for enacting Indiana's law was preventing voter fraud.[50] However, at the time of its passage, there was no evidence of in-person voter fraud in Indiana.[51] Instead, the state justified its actions as a means of combating potential in-person fraud, as well as decreasing voter perception of fraud.[52]

When Indiana adopted its voter ID law, the number of registered Indiana voters who lacked a requisite government-issued photo ID was in dispute.[53] Nevertheless, it was predicted by opponents that the new law would decrease voter turnout among minorities, the disabled, and

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[48] Voters without the requisite card are permitted to cast a provisional ballot on the day of an election, conditioned on the voter presenting acceptable photo identification to the circuit court clerk or to the county election board within ten days after the election. IND. CODE §§ 3-11-8-25.1(e), 3-11-7.5-2.5(a) (2006). Further, the law permits voters without photo identification due to indigence to cast a provisional ballot, conditioned on the voter returning to the clerk's office within ten days to sign a poverty affidavit. IND. CODE § 3-11.7-5-1 (2006). Additionally, the stringent requirements of the new law are not applicable to absentee voting or to votes cast from state licensed care facilities. IND. CODE §§ 3-10-1-7.2(e), 3-11-8-10-1.2 (2006).

[49] IND. CODE § 9-24-16-10 (2006).

[50] *Rokita*, 458 F. Supp. 2d at 825, 826.

[51] The *Rokita* court noted plaintiffs' evidence that no Indiana voter has ever been charged with attempted in-person voter fraud and that evidence of such fraud was not presented during enactment of Indiana's voter ID law. *Rokita*, 458 F. Supp. 2d at 792-93. *But see* Crawford v. Marion County Elec. Bd., 472 F.3d 949 (7th Cir. 2007) (Judge Posner argued that the lack of proven in-person fraud was due to difficulty detecting in-person fraud rather than proof that it didn't actually occur in Indiana). The court also noted that the defendants' conceded that the state is unaware of any evidence of in-person voter fraud in Indiana. *Rokita*, 458 F. Supp. 2d at 792-93. However, when the law was passed, there was evidence of absentee voter fraud and inflated voter rolls; voting areas which were left untouched by the new voter ID statute. *See* Pabey v. Pastrick, 816 N.E.2d 1138 (Ind. 2004) (Indiana Supreme Court vacated the results of East Chicago's mayoral election due to pervasive absentee voter fraud). *See also Rokita*, 458 F. Supp. 2d at 793 (discussing the "Benson Report," estimating Indiana's voter inflation are among the highest in the country); Niki Kelly, *Parties Bicker over Voter Lists Disagree on How to Fix Inaccuracies*, THE J. GAZETTE, June 15, 2006, at 1C; Niki Kelly, *Bipartisan Plan Seeks Cleaned-up VoterRolls*, THE J. GAZETTE, June 24, 2006, at 3C [hereinafter *Bipartisan Plan*].

[52] The state presented evidence of in-person voting fraud in other states. *Rokita*, 458 F. Supp. 2d at 793-94. The state also argued that "perception" of fraud impacted voter confidence in the election system. *Id.* at 794.

[53] The *Rokita* court concluded that the Brace Report submitted by the plaintiffs for the purposes of estimating the scope of potential disenfranchisement was "utterly incredible and unreliable." *Id.* at 803. The Brace Report estimated that potentially 989,000 registered Indiana voters lacked photo identification. *Id.*

the elderly.[54] In particular, the time and financial burdens incidental to obtaining a birth certificate, a necessary prerequisite for obtaining an Indiana voter ID, concerned those serving vulnerable populations.[55] Chiefly, opponents argued that the often difficult and frustrating process of obtaining a birth certificate might cause some eligible voters to forgo voting.[56] However, proponents of the law saw these concerns as unwarranted, especially because the Indiana Bureau of Motor Vehicles successfully issued more than 82,000 voter IDs in the year between the law's adoption and the federal mid-term elections in November 2006.[57]

a. Indiana Democratic Party v. Rokita

In the spring of 2005, Indiana's voter ID law was challenged in federal court on state and federal constitutional claims.[58] Before beginning its analysis, the *Rokita* court extensively considered the factual background of Indiana's voter ID law.[59] The court acknowledged the lack of evidence of in-person voter fraud in Indiana and noted the

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[54] The *Rokita* court discussed a report by Professor Marjorie Hershey of Indiana University [hereinafter *Hershey Report*] which concluded that the time, transportation, and fees needed to obtain the necessary documentation, "threaten[ed] to be most difficult for the disabled, homeless, persons with limited income, those without cars, people of color, those who are part of 'language minorities,' and the elderly." *Id.* at 795 (internal quotations omitted). The *Rokita* court also noted depositions and reports that were submitted to warn of potential disenfranchisement of disabled, homeless, and elderly voters in Indiana. *Id.* at 795-96. These concerns were magnified by the decreasing availability of BMV branches in Indiana and a lack of proposed voter education. *See id.* at 792 (noting closure of several BMV branches in Indiana, increasing travel costs for some Indiana voters); *see also Bipartisan Plan supra* note 51 (discussing proposed voter education).

[55] *Rokita*, 458 F. Supp. 2d at 791-92.

[56] The *Rokita* court noted affidavits of registered voters who had difficulty obtaining birth certificates. *Id.* at 791 n.18 (citing Affidavits of Mary Anderson and Theresa Clemente). The Indiana Department of Health is legally required to charge ten dollars to conduct a birth-certificate search. *Id.* (citing IND. CODE §§ 16-37-1-11; 16-37-1-11.5 (2006)). The cost of such searches at local health departments ranges between two and ten dollars. *Id.* For individuals born in other states, the cost for obtaining a birth certificate can be much more expensive and take even more time. *Id.*

[57] *Indiana BMV Expects Fewer Voter Problems*, EVANSVILLE COURIER PRESS, Oct. 10, 2006, at B7.

[58] *Rokita*, 458 F. Supp. 2d at 775. The plaintiffs' federal constitutional claims included arguments that the law substantially burdened the fundamental right to vote, impermissibly discriminated between different classes of voters, disproportionately affected disadvantaged voters, was unconstitutionally vague, imposed a new and material requirement for voting, and was not justified by existing circumstances or evidence. *Id.* at 783-84. The court criticized the plaintiffs for utilizing a "haphazard, 'shot gun' approach" in raising these issues and faulted the plaintiffs for not substantiating their claims with actual proof of harm or legal precedent. *Id.* at 784 n.6.

[59] *See generally id.* at 784-809.

potential for the photo ID requirement to disenfranchise Indiana voters.[60] The court additionally noted, however, evidence of in-person fraud in other states exposes a direct correlation between the perception of fraud and voter confidence in the election system.[61]

Significant in the court's review of the record, however, was criticism of the lack of reliable evidence submitted to prove voter disenfranchisement.[62] In particular, the court faulted the plaintiffs for not submitting affidavits of individual voters who lacked a government-issued photo ID and who would be prevented or discouraged from voting as a result of the law.[63] Similarly, the *Rokita* court entirely dismissed a report, submitted by the plaintiffs to estimate the number of Indiana voters without a photo ID, as "utterly incredible and unreliable," effectively eliminating all of the evidentiary support for the plaintiffs' claim of voter disenfranchisement.[64] The *Rokita* court's conclusions

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[60] The court noted that both parties stipulated that there was no evidence of in-person voter fraud in Indiana. *Id.* at 792-93. The court also acknowledged expert conclusions that Indiana's voter ID law would negatively impact voters from lower socio-economic backgrounds, particularly the homeless, senior citizens, people with disabilities, the poor, and minorities. *Id*. at 795 (citing conclusions of the *Hershey Report*).

[61] *Id.* at 793-94. The court rejected the plaintiffs' attempt to exclude this evidence by claiming that the data was unsworn, unauthenticated, contained hearsay, and was not relied on by the Indiana legislature in passing the statute. *Id*. at 843-44. The *Rokita* court's argument that the state did not have to empirically justify its purpose seems influenced by the court's decision to use rational basis review, highly deferential to legislative judgments. *Id*. The *Rokita* court expressed that a court should defer to legislative judgments, balancing prevention of voter fraud versus encouragement of voter turnout, unless such judgments are "grossly awry." *Id.* at 825. In contrast, the *Weinschenk* court, analyzing Missouri's voter ID statute under strict scrutiny, held that empirical justifications were necessary and that mere perception of fraud was insufficient justification for enacting a law which impacted a fundamental right. Weinschenk v. Mo., 203 S.W.3d 201, 218 (Mo. 2006).

[62] *Rokita*, 458 F. Supp. 2d at 822-24.

[63] *Id.* at 819 (dismissing the "Organizational Plaintiffs" on standing grounds). The court stated, that "[t]he only information provided to the court are the unsubstantiated hearsay statements alleging that unnamed individuals will be burdened by SEA 483; such statements are totally lacking in fending off summary judgment." *Id.* Specifically, the court faulted the plaintiffs for "fail[ing] to produce any evidence of any individual, registered or unregistered, who would have to obtain photo identification in order to vote. . . ." *Id.* at 822-23; *see also* Crawford v. Marion County Elec. Bd., 472 F.3d 949 (7th Cir. 2007) (affirming the *Rokita* decision for the same reason).

[64] *Rokita*, 458 F. Supp. 2d at 803. The Brace Report was a statistical report which estimated the extent of potential voter disenfranchisement caused by Indiana's voter ID law. *See generally id.* at 803-09. It was created by comparing the number of registered voters on the state voter roll with the number of residents with a state-issued ID, as indicated by state licensing records. *Id.* The court held that this report carried no evidentiary weight given its failure to comport with the standards propounded in the Rule 702 of the Federal Rules of Evidence. *Id.* at 803. In particular, the *Rokita* court faulted the Brace Report for (1) failing to account for voter roll inflation, (2) comparing demographic

regarding the lack of evidence submitted to prove voter disenfranchisement was influential in the court's subsequent legal analysis.[65]

Because of the claimed evidentiary inadequacies, the *Rokita* court quickly determined that the harm imposed by Indiana's voter ID law was not severe and did not warrant traditional strict scrutiny review.[66] Proceeding under the *Burdick* test and using rational basis review, the court concluded that the requirements of Indiana's voter ID law were reasonable to advance the state's important regulatory interest in preventing voter fraud.[67] Defending its position, the *Rokita* court held that the state did not have to show actual proof of in-person fraud to justify its voter ID law and could rely instead on evidence of voter fraud in other states and the impact of perception of voter fraud in Indiana.[68]

Next, considering the claim that Indiana's voter ID statute constituted a poll tax, the *Rokita* court quickly concluded that the law did not impose any impermissible costs on the right to vote.[69] The court noted that the Indiana statute required that the IDs be issued without

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data from different years without qualification or analysis, (3) drawing inaccurate and illogical conclusions, and (4) failing to qualify the statistical estimates based on socioeconomic data. *See generally id.* at 803-07. The *Rokita* court's outright rejection of the Brace Report is somewhat confusing however, given the court's subsequent use of statistical conclusions in the Brace Report to indirectly support the defendants' counter-arguments. *See, eg., id.* at 806-07 (citing Brace Report statistics suggesting that 99% of Indiana voters already have a photo ID).

65 *See infra* notes 66-68 and accompanying text. Given the court's repeated contention regarding the lack of evidence proving actual harm, it is somewhat confusing why the court proceeds to decide the claims on the merits rather than dismissing the claims for lack of standing. *Rokita,* 458 F. Supp. 2d at 825 n.75. Instead, it is often difficult to assess the *Rokita* court's conclusions, given the court's preference to dismiss claims as unsubstantiated without articulating more substantive legal analysis. *Id.* at 819.

66 *Id.* at 820. Specifically, the court claimed that the plaintiffs had not presented individual affidavits or statistical evidence of voters who will be severely or disproportionately burdened by the law. *Id.* at 822-24.

> [I]t is a testament to the law's minimal burden and narrow crafting that Plaintiffs have been unable to uncover anyone who can attest to the fact that he/she will be prevented from voting . . . Lacking any such individuals who claim they will be prevented from voting, we are hard pressed to rule that SEA 483 imposes a severe burden on the right to vote.

Id. at 823.

67 *Id.* at 826. *See supra* note 38 and accompanying text (discussing rational basis-like review under the *Burdick* test).

68 *Rokita*, 458 F. Supp. 2d at 826 (noting evidence of in-person voter fraud in other states).

69 *Id.* at 827.

cost to registered voters lacking government-issued photo IDs.[70] Similarly, the court held that the law did not impose secondary costs on the right to vote.[71] Specifically, the court held that most Indiana voters already had government-issued photo IDs, eliminating the chance that they would be forced to pay for a birth certificate to obtain a voter ID card.[72] The *Rokita* court bolstered this conclusion by pointing again to the lack of affidavits of voters who actually incurred those costs.[73] In the alternative, the court held that the fees for acquiring a birth certificate were set by the federal government and were out of the control of the states.[74]

Having found the law to withstand all of the plaintiffs' claims, the *Rokita* court held that Indiana's voter ID statute was a reasonable time, place, and manner regulation, and granted the State's motion for summary judgment.[75] On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the holding, making Indiana's voter ID statute the first and only of its kind to survive constitutional judicial review.[76]

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70 *Id.* at 827 n.80. *See also* IND. CODE § 9-24-16-10 (2007).

71 *Rokita,* 458 F. Supp. 2d at 827 (noting the transportation and monetary costs, necessary to obtain a birth certificate). The court held that "the imposition of tangential burdens does not transform a regulation into a poll tax." *Id.*

72 *Id.* In making this conclusion, the court suspiciously relied on estimates taken from the formerly rejected Brace Report. *See supra* note 68. It seems that the *Rokita* court both "had its cake and ate it too," in regards to its use of the plaintiffs' primary evidence for supporting the claim of voter disenfranchisement.

73 *Rokita*, 458 F. Supp. 2d at 827. The *Rokita* court held that it was "purely speculative" that some voters would incur costs to obtain a birth certificate, given the lack of voter affidavits from those incurring such a cost. *Id.*

74 *Id.* at 827.

75 *Id.* at 845. The *Rokita* court also dismissed numerous other claims against the voter ID law, including federal and state Constitutional claims and statutory Civil Rights claims. *See generally id.* at 828-43. However, these claims are beyond the scope of this paper, which limits its analysis to federal Constitutional claims involving the First, Fourteenth, and Twenty Fourth Amendments.

76 On January 4, 2007, the Seventh Circuit affirmed the *Rokita* decision, without substantially changing the analysis of the district court. Crawford v. Marion County Elec. Bd., 472 F.3d 949 (7th Cir. 2007). In a short opinion, authored by J. Richard Posner, the court affirmed that, despite the potential for some voters to be disenfranchised by Indiana's voter ID law, there were no affidavits submitted to attest to disenfranchisement. *Id.* at 952. The court also affirmed that Indiana's voter ID law did not impose a poll tax that the submitted statistical report was methodologically flawed and argued that the lack of proven voter fraud in Indiana was due to the difficulty detecting in-person fraud, rather than proof that it did not exist in the state. *Id.* at 952-53.

Most remarkably about the decision is J. Posner's anecdotal discussion on how to measure severe harm against the right to vote. *See id.* at 951-54. Posner, who is acclaimed

2. Georgia

On August 26, 2005, Georgia became the second state to require a government-issued photo ID in order to vote in-person.[77] Similar to Indiana's law, passage of Georgia's voter ID law created heated partisan controversy in the state legislature and was ultimately passed along strict party lines.[78] In its original form, Georgia's voter ID law was

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for his theory of "Law and Economics," argued in *Crawford* that the "severe" harm should not be judged in the abstract terms of value of the right to vote to a few individuals (only a small percentage of Indiana voters lacked a government-issued ID) but should rather be judged in more objective and quantifiable terms. *Id.* at 952-53. To J. Posner it did not seem to matter that some Indiana voters would be disenfranchised by the law, so long as the number of those disenfranchised was small enough to offset the legislative purpose for enacting the law. *Id.* at 954.

Although, the *Crawford* decision carries some controlling weight, this Note will rely primarily on the opinion of the district court for discussion and will make reference to the *Crawford* decision only as it is helpful for interpretation. Because the appellate court affirmed on the same grounds as *Rokita* and did not substantially alter the court's reasoning, this Note uses the *Rokita* opinion for analysis because the reasoning is more expansively articulated in the *Rokita* decision.

[77] GA. CODE ANN. § 21-2-417 (2003) (amended 2006). Prior to adoption of its voter ID law, Georgia permitted seventeen forms of identification to access the polls. *See* David H. Harris, Jr., *Georgia Photo ID Requirement: Proof Positive of the Need to Extend Section 5*, 28 N.C. CENT. L.J. 172, 182 (2006) [hereinafter *Proof Positive*] (discussing previous acceptable forms of identification). Similar to the Indiana law, Georgia's voter ID statute permitted voters without ID to cast a provisional ballot, stipulated on their ability to show proper identification within forty-eight hours of the election. *See Common Cause I*, 406 F. Supp. 2d 1326, 1354 (N.D. Ga. 2005) (discussing the deposition of Georgia's Secretary of State, Cathy Cox). Election officials, the news media, and national legislators were quick to characterize the new law as one of the "strictest" in the country. *See Georgia's New Poll Tax*, N.Y. TIMES, Sept. 12, 2005, at A20 [hereinafter *Georgia's New Poll Tax*]; Ariel Hart, *Georgia Voters May Soon Need Photo IDs*, N.Y. TIMES, Apr. 1, 2006, at A15 [hereinafter *Hart I*]; *Proof Positives, supra* note 77, at 195.

[78] *See* Jim Tharpe, *Photo ID Approval Brings Warning*, Atlanta J.-Const., June 20, 2006, at B1 [hereinafter *Warning*] (stating the Republican and Democrats were "at war" over the ID requirement). State Democrats vigorously criticized the proposed law as an effort by their Republican counterparts to suppress the votes of the poor, the elderly, and minorities; groups who have a history of supporting Democratic candidates. *See* Brenda Goodman, *Judge Blocks Requirement in Georgia for Voter ID*, N.Y. TIMES, July 8, 2006, at A10; Jill Young Miller & Carlos Campos, *Photo ID Hot Topic*, ATLANTA J. AND CONST., July 19, 2006, at D6; Cynthia Tucker, *Our Opinion*, ATLANTA J.-CONST., June 25, 2006, at C6 [hereinafter *Our Opinion June 25, 2006*]; and *Warning, supra* note 78. State Republicans countered that the vast majority of Georgians supported a photo identification requirement and that the new requirement was reasonable. *See Georgia's Voter ID*, N.Y. TIMES, Aug. 14, 2005 at 4; *Warning, supra* note 78. Ultimately, the law was passed along strict partisan lines. *See Common Cause I*, 406 F. Supp. 2d 1326, 1331 (N.D. Ga 2005) (noting approval of the Conference Committee Report along strict party lines). In addition to creating partisan disagreement, the proposed voter ID law also provoked racial tension in the Georgia legislature, culminating in a walk-out by the majority of the State's African American lawmakers. *See* Associated

unique because it mandated a direct fee to obtain a voter ID card, raising concern among many legislators who saw the law as an effort to suppress voting.[79] Another concern among lawmakers was the fact that Georgia's photo ID requirement was limited to in-person voting despite a lack of evidence of in-person voting fraud in the state.[80] Additionally suspect and seemingly in conflict with the proffered legislative purpose of preventing voter fraud, Georgia's legislature simultaneously loosened restrictions on absentee voting, an area of voting where fraud had been proven.[81] Some argued that this shift in legislative preference toward absentee ballots would have a disproportionate effect on many African American voters who preferred to vote in-person out of historical distrust of the electoral system.[82]

Upon passage of Georgia's voter ID law,[83] the Secretary of State's office issued a report indicating that 676,246 registered Georgia voters lacked government-issued photo identification.[84] The report was

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Press, *Lawsuit to be Filed Over New Voting Law in Georgia*, N.Y. TIMES, Sept. 6, 2005, at A17; *Hart I,* supra note 77.

79 *See Common Cause I,* 406 F. Supp. 2d at 1338, 1339-40. At the same time that Georgia adopted its voter ID requirement, the state legislature also doubled the minimum cost for a state-issued photo ID from $10 to $20 for a five year ID and authorized a $35 fee for a ten year photo ID card. *Id* at 1337.

80 *Id.* at 1333-34, 1366.

81 *See id.* at 1332-35, 1352 (discussing the concerns of Georgia's Secretary of State, articulated in depositions and memoranda sent to the governor and state legislature). *See also Our Opinion June 25, 2006, supra* note 78; Lyle V. Harris, *Our Opinion,* ATLANTA J.-CONST., July 2, 2006, at C8 [hereinafter *Opinion July 2, 2006*]; *Hart I, supra* note 77 (quoting Georgia's Secretary of State's as stating that the new law would "open the floodgates" to "rampant fraud in absentee voting").

82 *See Common Cause I,* 406 F. Supp. 2d at 1353 (noting statistical data showing that, in Georgia, Caucasians vote absentee more often than African Americans). *Cf. Proof Positive, supra* note 77, at 194 (discussing the preference of African Americans to vote in-person due to historical disenfranchisement).

83 *See generally* Voting Rights Act, 42 U.S.C. § 1973 (2000). At the time of its adoption, Georgia's voter ID law remained subject to pre-clearance by the United States Justice Department. On August 26, 2005, in a controversial decision, the Chief of the Voting Division overruled the objection of four Justice Department attorney's and granted approval for the law. *See generally Proof Positive, supra* note 77. S*ee also Criticism of Voting Law Was Overruled*, KANSAS CITY STAR, Nov. 17, 2005, at A.; Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice: Veterans Exit Division as Traditional Cases Decline*, WASH. POST, Nov. 13, 2005, at A1; Dan Eggen, *Justice Plays Down Memo Critical of Ga. Voter ID Plan*, WASH. POST, Nov. 18, 2005, at A3; NOW Transcript—Show 235, Sept, 1, 2006, *available at,* http://www.pbs.org/now/transcript/235.html; William R. Yeomans, *An Uncivil Division: Political Appointees to the Justice Department's Civil Rights Division are Driving Career Lawyers to Retirement—Then Skipping the Retirement Parties,* LEGAL AFFAIRS, Sept./Oct. 2005, at 20.

84 Associated Press, *More than 675,000 Georgia Voters Lack Photo ID*, MACON TELEGRAPH, June 19, 2006, at C. Despite such high numbers of Georgia voters without the requisite photo IDs, the state legislature did not provide funding or plan public education efforts to

criticized as "deceptive" by proponents of the law. However, the potential disenfranchisement of such a large number of Georgia voters created concern, particularly because the majority of those without photo IDs were among politically vulnerable classes; namely minority, indigent, and rural voters.[85]

a. Common Cause/Georgia v. Billups ("Common Cause I")

In the fall of 2005, Georgia's voter ID law met its first of several legal challenges, facing claims that the law imposed an undue burden on the right to vote and created an unconstitutional poll tax. This case raised nearly identical claims to those brought against Indiana's voter ID law in *Rokita*.[86] Extensively, considering the factual background of the law, the *Common Cause I* court noted the lack of in-person fraud in the state as well as the failure of the new law to address proven fraud in absentee voting and voter registration.[87] Particularly influential in this regard

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inform registered voters of the law's new requirements. *See Common Cause I*, 406 F. Supp. 2d at 1332. *But see* Shannon McCaffrey, *Georgia Voters Must Have Photo IDs: The U.S. Department of Justice Cleared the Law Wednesday, and the Elections Board Decided to Require IDs for the July 18 Primary*, INTELLIGENCER, June 30, 2006, at A10. Relying primarily on the education efforts of non-profit organizations, the state proposed only minimal education outreach to voters. *See Common Cause I*, 406 F. Supp. 2d at 1332. However, the state did provide for limited voter-outreach to voters unable to access a DDS office. *Id.* at 1338-39. At the time of the law's passage, Georgia had only 58 DDS centers for all of the state's 159 counties. *Id.* at 1338. Such a disparate spread of service centers can result in long drives, particularly for rural voters. *Id.* S*ee also Georgia's New Poll Tax, supra* note 77 (decrying the law's burden on rural voters).

[85] *See Georgia Republican Party: Common Sense Ignored by Another Fulton County Judge*, US FED. NEWS, July 7, 2006 (quoting Republican criticism of the *Common Cause I* decision); *see also Georgia's New Poll Tax, supra* note 77 (discussing impact on the poor); *Hart I, supra* note 77 (discussing concerns of the AARP, the ACLU, and the League of Women Voters and the impact of the new law on rural voters); *Our Opinion July 2, 2006, supra* note 81 (expressing concerns raised by the report and citing racial demographics of those without photo ID from the Secretary of State's report).

[86] *Common Cause I*, 406 F. Supp. 2d at 1354. The plaintiffs raised numerous statutory Civil Rights claims as well. *Id. at 1370-75*. However, these claims are beyond the scope of this paper and were not determinative in the outcome of the case. *Id.* Further, and more important to the ultimate outcome of Georgia's voter ID law, the plaintiffs also claimed that Georgia's photo ID requirement violated the Georgia state constitution by improperly creating a non-enumerated prerequisite to voting. *Id.* at 1357. The *Common Cause I* court dismissed the state claim as well, noting that the Eleventh Amendment barred the court from review. *Id.* at 1357-58. However, on Sept. 9, 2006, a Georgia state court ultimately held that the photo ID requirement violated the state constitution and permanently enjoined the law, mooting the unresolved federal claims. *See* Lake v. Perdue, 2006CV119207 (Sup. Ct. Fulton County Sept. 19, 2006), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/StateInjunction.pdf

[87] The court noted the legislative history of the new law, taking in the partisan passage of the bill, the fee increase for all government-issued IDs, and the simultaneous loosening

were the depositions of Georgia's Secretary of State, Cathy Cox, who argued that the simultaneous legislative changes to in-person and absentee voting regulations were both unnecessary and "opened a gaping opportunity for fraud."[88] Additionally, in sharp and determinative contrast to the *Rokita* case, the *Common Cause I* court noted hundreds of affidavits of would-be voters affected by the law, lending support to the plaintiffs' claim of voter disenfranchisement.[89]

Although Georgia was not the first state to enact a strict voter ID requirement, Georgia's voter ID law was the first to be tested in federal court.[90] Given the uncertainty of how to analyze the new form of voting regulation, *Common Cause I* prudently chose to analyze the Equal Protection claim under both traditional strict scrutiny and the *Burdick* test.[91] Under traditional strict scrutiny analysis, the court quickly determined that Georgia's voter ID law was not narrowly tailored to the legislature's stated interest in preventing fraud.[92] Specifically, the court reasoned that by making the law exclusively applicable to in-person voting while simultaneously loosening the requirements for absentee voting, the state "left the field wide open for voter fraud by absentee voting."[93]

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of restrictions on absentee voting. *Common Cause I,* 406 F. Supp. 2d at 1331-38. The court also made note of the procedures for obtaining a photo ID, including the cost of obtaining a birth certificate and the process for completing a poverty affidavit. *Id*. at 1338-40. Additionally, the court considered the testimony of Secretary of State Cathy Cox who explained that she had not received a single report of in-person voter fraud during her tenure. *Id*. at 1350.

88 *Id.* at 1351. *See also id.* at 1332-35, 1361-62. Secretary of State Cox said that she had not received a single report of in-person fraud during her nine-year tenure. *Id*. at 1350.

89 *Common Cause I*, 406 F. Supp. 2d at 1340-42; Common Cause/Georgia v. Billups ("*Common Cause II*"), 439 F. Supp. 2d 1294, 1312-13 (N.D. Ga 2006). Alleged difficulties included: (1) voters lacking a car; (2) voters lacking a drivers license or alternative form of government-issued voter ID; (3) voters with mental of physical difficulties; (4) voters lacking access to public transportation; (5) voters who lived far from their respective registrar's office; (6) voters who distrusted absentee voting; and (7) voters having difficulty accessing the voter outreach van. *Common Cause I,* 406 F. Supp. 2d at 1340-42.

90 *Rokita* was decided six months after the *Common Cause I* decision. *See supra* note 58.

91 The *Common Cause I* court characterized the right to vote as fundamental and preservative of other rights, subject only to regulations which do not "unduly burden" the right. *Common Cause I,* 406 F. Supp. 2d at 1359. *See supra* notes 25-38 and accompanying text (describing Equal Protection Analysis under the two tests).

92 *Common Cause I,* 406 F. Supp. 2d at 1361.

93 *Id.* at 1362. In doing so, the court also dismissed the defendants' argument that the legislature was permitted to enact under-inclusive laws when attempting to remedy voter fraud, holding instead that the state must "narrowly tailor" legislation which burdens a fundamental right. *Id.* at 1361. Further, the court argued that the legislature "may not choose the way of greater interference" but must instead "choose [the] less drastic means"

Similarly, the court in *Common Cause I* concluded that Georgia's voter ID law would likely fail the *Burdick* test as well.[94] First, the court concluded that the "character and magnitude" of the asserted injury was significant, given the likely disproportionate effect on voters from vulnerable classes to whom the right to vote is of particularly high value.[95] Similarly, because the law made the exercise of the right to vote extremely difficult, the court held that a strict scrutiny-like analysis should be used under the *Burdick* test.[96] This is in stark contrast to the *Rokita* decision, which did not characterize the harm as severe, but instead denied any disenfranchisement due to a lack of evidentiary support.[97]

Pursuant to its analysis under the *Burdick* test, the *Common Cause I* court held that the state's interest in preventing voter fraud was important, but reasoned that the law's photo ID requirement did not rationally serve that interest.[98] Specifically, the court held that the law's photo ID requirement did "absolutely nothing to preclude or reduce the possibility for the particular types of voting fraud that are indicated by the evidence . . . ."[99] Noting again the lack of evidence of in-person voter fraud in the state and the simultaneous removal of absentee voting

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to accomplish its purposes, particularly when the legislature has numerous "less burdensome alternatives available." *Id at 1362.* Specifically, the court pointed to the effective use of previous identification requirements and criminal sanctions to prevent in-person voter fraud. *Id.*

94 *Id.* at 1362.

95 *Id.* The law's potential disproportionate effect on voters from socially vulnerable classes was influential in the court's characterization of the injury as significant. *Id.* at 1365-66. *See also supra* note 8.

96 *Common Cause, I* 405 F. Supp. 2d at 1362, 1365. In concluding that the harm was "severe," the *Common Cause I* court noted the difficulty accessing state DDS offices and held that the voter outreach van was not a feasible alternative for those who lacked transportation. *Id.* at 1365. Similarly, the court held that the availability of free ID cards through a poverty affidavit and the option of voting absentee were not reasonable alternatives to standard in-person voting procedures, given that the alternatives were not sufficiently publicized and were potentially stigmatizing. *Id.* at 1363-65. Additionally, the court concluded that the ability to vote by provisional ballot was illusory, given the short forty-eight hour time period allotted to return with a valid voter ID. *Id.* at 1365.

97 Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 824-25 (S.D. Ind. 2006). S*ee also supra* note 76 and accompanying text (expounding on J. Posner's unique argument in *Crawford* regarding how severe harm should be determined). Judge Richard Posner preferred to use objective and quantifiable evidence of disenfranchisement instead of estimating severe harm in terms of the abstract value to voting to a relatively few number of individuals. *Id.*

98 *Common Cause I,* 406 F. Supp. 2d at 1366.

99 *Id.*

restrictions, the court argued that Georgia's voter ID law would have the likely effect of increasing, not decreasing, fraud.[100]

Finally, in addition to concluding that Georgia's voter ID statute likely created an undue burden on the right to vote, *Common Cause I* also held that the law likely imposed an unconstitutional poll tax.[101] Specifically, the court faulted the suspect twenty dollar "fee" for a voter ID card, characterizing it as a material requirement on the right to vote.[102] In addition, the court argued the poverty affidavit exception, which allowed poor voters to obtain free ID cards in exchange for legal affirmation of indigence, imposed a material requirement which would have a chilling effect on voting.[103] This is in contrast to *Rokita* which upheld a similar provision in the Indiana voter ID law as an adequate safeguard for preventing disenfranchisement.[104] Holding completely opposite to *Rokita* on both claims of undue burden and poll tax, the *Common Cause I* court held that Georgia's voter ID law was likely unconstitutional and granted a preliminary injunction against the law.[105]

b. Common Cause/Georgia v. Billups ("Common Cause II")

In January of 2006, the Georgia legislature quickly replaced the enjoined version of the 2005 statute with a nearly identical law, absent

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[100] *Id.* ("In short, HB 244 opened the door wide to fraudulent voting via absentee ballots.").

[101] *Id.* The Twenty-Fourth Amendment to the U.S. Constitution bars the imposition of a monetary fee on the right to vote. U.S. CONST. amend. XXIV. *See also supra* notes 39-45 (discussing Supreme Court jurisprudence regarding unconstitutional poll tax requirements).

[102] *Common Cause I,* 406 F. Supp. 2d at 1366, 1370. The court argued that the state's attempt to characterize the twenty dollar cost as an administrative "fee" did not change it from being a tax on the right to vote. *Id.* at 1366-67, 1369. Additionally, the court was concerned that few voters would utilize a poverty affidavit, out of fear of perjury, embarrassment, or simply because they were unaware of the exception. *Id.* at 1369-70. The court noted that many voters lacking a government-issued ID did not believe themselves to be indigent but did not have $20 to spend on a voter ID. *Id.* at 1340.

[103] *Id.* at 1369-70. Even though the Georgia DDS claimed that they had a "no questions asked" policy regarding the affidavits, the *Common Cause I* court held that the policy was not publicized and was contrary to the stated purpose of the affidavit. *Id.* The court also noted that many voters lacking government-issued ID did not believe themselves to be indigent but did not have the $20 to spend on a voter ID. *Id.* at 1340.

[104] Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 823 n.70, 824 n.73, 829 (S.D. Ind. 2006).

[105] *Common Cause I,* 406 F. Supp. 2d at 1376 (stating "[i]n reaching this conclusion, the Court observes that it has great respect for the Georgia legislature. The Court, however, simply has more respect for the Constitution.").

the fee and poverty affidavit requirements.[106] A month later, the plaintiffs from the original *Common Cause I* suit sought another injunction, asserting that the revised law was invalid on the same claims as before.[107] With the opportunity to review Georgia's voter ID law a second time and the *Rokita* decision for guidance on how to approach the analysis, the *Common Cause II* court relied exclusively on the *Burdick* test for analysis of the revised law.[108]

While mimicking *Rokita's* framework for analysis, the *Common Cause II* court diverged in its primary choice of analysis. The court relied solely on the *Burdick* test and held that Georgia's voter ID law imposed severe harm on the right to vote given the law's potential to disenfranchise thousands of Georgia voters due to insufficient time to acquire comporting ID before the approaching primary elections.[109] Influential in its conclusion, the *Common Cause II* court relied on a statistical estimate of potential disenfranchisement created by Georgia's Secretary of State's office, which indicated that nearly 700,000 Georgia voters lacked a valid government-issued photo ID.[110] The *Common Cause II* court's adoption of this statistical evidence is in stark contrast to the *Rokita* court's rejection of a similar report and its subsequent holding that the harm imposed by Indiana's voter ID law was not severe given the lack of evidence of voter disenfranchisement.[111] Proceeding under a strict scrutiny-like analysis and using similar language to the previous *Common Cause I* suit, the *Common Cause II* court reasoned that Georgia's voter ID law did not address known types of voter fraud in the state and was therefore not narrowly tailored.[112]

However, the *Common Cause II* court rejected the claim that secondary costs, incidental to acquiring identifying documents for an ID

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106 GA. CODE ANN. § 21-2-417 (2003) (amended 2006); *see also* Common Cause/Georgia v. Billups ("*Common Cause II*"), 439 F. Supp. 2d 1294, 1304-05 (N.D. Ga. 2006) (noting the partisan passage of both versions of Georgia's voter ID law).

107 *Common Cause II*, 439 F. Supp. 2d at 1297.

108 *See generally id.* at 1345-52.

109 *Id.* at 1346-49. The court also held that the law's exceptions were unrealistic alternatives to in-person voting. *Id.* Specifically, the court held that the exceptions of absentee voting and voting by provisional ballot were insufficiently publicized, too difficult for some voters, and made unrealistic demands upon some voters. *Id.*

110 *Id.* at 1311. The court also pointed out that the majority of those potentially disenfranchised were elderly, infirm, indigent, or from a racial minority. *Id.* at 1304, 1311. Additionally, the court repeated its prior assertion that that the loss of the right to vote to vulnerable classes is "undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights." *Id.* at 1350.

111 *See* Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 823-24 (S.D. Ind. 2006).

112 *Common Cause II*, 439 F. Supp. 2d at 1346-50.

card, constituted a poll tax.[113] Drawing on language directly from the *Rokita* decision, the *Common Cause II* court reasoned that tangential burdens on the right to vote were permitted and argued that incidental costs to obtain birth certificates were "speculative."[114] Specifically, birth certificates and other certified government documents were not exclusively mandated to obtain a voter ID under Georgia's statute.[115] Thus, the *Common Cause II* court held that the revised law likely did not impose an invalid poll tax.[116]

c. Lake v. Perdue

On September 19, 2006, a Georgia state court permanently enjoined Georgia's voter ID law, holding that the state legislature exceeded its authority under the Georgia constitution by impermissibly adding a non-enumerated ground for denying the right to vote.[117] Although this case is not helpful for analyzing federal Equal Protection claims, it is useful for demonstrating that, in addition to exceeding the general regulatory power of the states under the federal constitution, state voter ID laws can also improperly exceed the more narrowly defined regulatory authority of state legislatures under state constitutions.[118]

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[113] *Id.* at 1355. The *Common Cause II* court commended the state legislature for amending the statute to issue voter ID cards without cost to all voters who lacked a government-issued photo ID. *Id.* at 1354. The alternative outcome in *Common Cause II* suggests that the court felt the Georgia legislature had sufficiently amended the law by eliminating the fee and poverty affidavit requirements.

[114] *Id.* at 1355 (citing *Rokita*, 458 F. Supp. 2d at 827).

[115] *Id.* The Georgia voter ID statute uniquely allows utility bills, employment-issued photo IDs, and voter registration cards to prove identity for purposes of obtaining a voter ID. *See* GA. CODE ANN. § 21-2-417.1 (2006).

[116] *Common Cause II*, 406 F. Supp. 2d at 1355.

[117] Lake v. Perdue, 2006CV119207 (Sup. Ct. Fulton County Sept. 19, 2006), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/StateInjunction.pdf. Specifically, the court held that the provisional ballot requirement of the law, requiring voters without a photo ID to produce the requisite voter ID card within forty-eight hours of voting in order to have their vote counted, improperly added a non-constitutionally enumerated ground for denying the right to vote. *Id.* at 13-14.

[118] Similar state constitutional claims were brought in federal court in *Rokita* and *Common Cause I.* The *Rokita* court decided the claim on the merits, holding that the Indiana legislature did not exceed its constitutional authority in enacting the statute. Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 843 (S.D. Ind. 2006). Instead, the *Rokita* court reasoned that the state legislature had exclusive authority to enact reasonable time, place, and manner restrictions on the right to vote. *Id.* In contrast, the *Common Cause I* court held that it did not have jurisdiction to decide the claim because of conflicts with state and federal law, giving rise to the separate suit in *Lake*. Common Cause/Georgia v. Billups ("*Common Cause I*"), 406 F. Supp. 2d 1326, 1358 (N.D. Ga. 2005).

Additionally, the *Lake* decision is important because it effectively mooted the federal Equal Protection claim against the previously enjoined law.[119]

3. Missouri

On June 14, 2006, Missouri became the third state to require a government-issued photo ID in order to vote in-person.[120] Similar to other voter ID laws, Missouri's statute passed quickly along strict partisan lines.[121] At the time of its passage, an estimated 170,000 registered Missouri voters, primarily seniors, the disabled, and the poor, lacked a government-issued photo ID.[122] Similar to Georgia, Missouri's Secretary of State, Robin Carnahan, expressed concern regarding the law's potential to disenfranchise and vowed to educate voters about the

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[119] *Lake*, 2006CV11920 at 15. The day after Fulton County Superior Court enjoined Georgia's voter ID law, the state Election Board mailed 79,496 letters to registered Georgia voters without driver's licenses, informing them where they could obtain a free voter ID. Ernie Suggs, *State Backtracks on Voter ID Alert*, ATLANTA J.-CONST., Oct. 18, 2006, at A1 [hereinafter *Backtracks*]. Five days later, the state Board mailed an additional 115,747 letters. *Id.* Some claimed that the letters were intentionally sent by the Republican-controlled election Board to confuse voters about the law's requirements. *See* Vicky Eckenrode, *Voters Will Get Letters on IDs*, THE AUGUSTA CHRON., Oct. 18, 2006, at B5. Members of the U.S. Congress, concerned by the suspicious mailings, requested a federal investigation. *Lewis, Two Senators Request Voter ID Letter Investigation*, MACON TELEGRAPH, Oct. 22, 2006, at F. Likewise, on Oct. 16, 2006, former Governor Roy Barnes filed a civil contempt suit against the Board. Ernie Suggs, *Barnes Says Letters End his Voter ID Lawsuit*, ATLANTA J.-CONST., Oct. 19, 2006, at D7 [hereinafter *Barnes Says*]. The following day, the Board decided to mail new letters, emphasizing that voter IDs were not required to vote, and decided to issue public service announcements declaring the same. *Voter ID Letter: New Mailings Set to Clarify the Rules*, ATLANTA J.-CONST., Oct. 22, 2006, at E4. Mailing the new letters cost the state an additional $127,000. *See Backtracks supra.* As a result of the Board's remedial actions, Governor Barnes dropped his suit, but some argued that a federal investigation was still necessary. *See Barnes Says supra*.

[120] MO. ANN. STAT. § 115.427 (West 2003 & Supp. 2006). The Missouri law mandated that the IDs be issued free of charge and uniquely permitted voters to cast a provisional ballot without a voter ID until 2008, to allow voters time to comply with the new requirement. *See* Virginia Young, *State Starts Issuing Voter IDs*, ST. LOUIS POST-DISPATCH, June 15, 2006, at A1 [hereinafter *State Starts*].

[121] *See* Steve Walsh, *Senate Cuts Off Debate and Approves Photo ID Voting Bill*, May 12, 2006, *available at* www.missourinet.com.

[122] *See* Weinschenk v. Mo., 203 S.W.3d 201, 212-13 (Mo. 2006) (citing estimates between 169,215 and 240,000 voters). S*ee also State Starts*, *supra* note 120 (citing the number of Missouri voters without IDs and discussing the difficulty for persons with disabilities to obtain a voter ID); *Missouri Secretary of State Carnahan Issues Statement on Photo ID Bill Signing*, US STATE NEWS, June 14, 2006 [hereinafter *Statement*] (quoting Secretary Carnahan's concerns about the new law). *But see Letters from Readers*, ST. LOUIS POST-DISPATCH, July 24, 2006, at B8 (state Senator Delbert Scott, proponent of the new legislation, explains the law's exception for senior citizens and touts the Department of Revenue's proposed outreach to nursing homes).

new ID requirement before the 2006 midterm elections.[123] In particular, Secretary Carnahan and others feared that the new law would have a disproportionate impact on indigent, disabled, and elderly voters, a concern common to every state voter ID law thus far enacted.[124] To combat this concern, the Missouri Department of Revenue hired temporary employees to provide outreach to the elderly and disabled by contacting senior living facilities and sheltered workshops and dispatching mobile outreach vans to process voter ID applications.[125] Similar outreach was not provided for indigent voters.[126]

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[123] *See Statement*, *supra* note 122. Secretary of State Carnahan began a public awareness initiative, "Show Your Face at the Polls," to inform the general public about the requirements of the new law, including a mass-mailing, public service announcements, a toll-free help line, and a four-city tour across Missouri. *See Secretary of State Carnahan Launches Photo ID Awareness Campaign*, U.S. STATE NEWS, July 21, 2006; *Carnahan Promotes Voter ID Law*, ST. LOUIS BUS. J., July 25, 2006; *Senate 2006 Missouri: Identification Problems*, AM. POL. NETWORK, July 26, 2006 [hereinafter *Problems*]. While expressing her eager intent to vigilantly provide outreach to voters, Secretary Carnahan expressed frustration that the legislature did not budget any money to finance voter outreach. *See Statement*, *supra* note 122; *State Starts*, *supra* note 120.

Department of Revenue offices are prevalent in Missouri, each equipped to distribute IDs. *Letters from Readers*, ST. LOUIS POST-DISPATCH, Aug. 1, 2006, at B6 (editorial submitted by the Missouri Department of Revenue, emphasizing the numerous offices located across the state, including nineteen within the city of St. Louis). However, as a result of the lack of voter outreach, it is not surprising that Missouri voters did not quickly "catch on" to the new ID requirement. During the first month that the law was in effect, only 629 of the 170,000 registered Missouri voters without a government-issued photo ID obtained a voter ID. *See Problems supra*; *Revenue Department Continues Proactive Push to Distribute Photo IDs in Advance of November Election*, U.S. STATE NEWS, July 21, 2006.

[124] *See State Starts*, *supra* note 120. Most significantly, concern was raised regarding the financial and time costs incidental to obtaining a birth certificate, a mandatory prerequisite to achieve a voter identification card. *Id.* For example, the Department of Health and Senior Services encouraged voters to allow two weeks to process requests for birth certificates and up to six months if the documents need correction due to misspelling or name changes. *Id. But see Problems*, *supra* note 123 (Missouri Governor Blunt discounted the law's financial effect on low-income voters). Documentary costs and other incidental costs, such as the costs of time and transportation needed to obtain a voter ID, were not provided for by the state. *See State Starts*, *supra* note 120 (quoting Missouri Governor Blunt, "We're not going to reimburse people who are driving to fulfill a civic obligation. That's an absurd suggestion.").

[125] *See* Virginia Young, *Lawsuit is Filed Against Voter ID Law*, ST. LOUIS POST-DISPATCH, July 18, 2006, at B1. Since adoption of the state voter ID law, mobile outreach was chiefly initiated on an "as-needed" basis, determined through phone conversations with facility administrators for the elderly and disabled. *See Revenue Department Continues Proactive Push to Distribute Photo IDs in Advance of November Election*, U.S. STATE NEWS, July 21, 2006. From these conversations, the Revenue Department concluded that about 25 percent of the facilities had "no need" for a visit. *Id.; see also Letters from Readers*, ST. LOUIS POST-DISPATCH, Aug. 1, 2006, at B6 (quoting the Director of the Missouri Department of Revenue, "[n]early 300 so far have told us there is no need."). With such a high number of

a. Weinschenk v. Missouri

On October 16, 2006, the Missouri Supreme Court struck down the state's voter ID law on state Equal Protection grounds.[127] Reviewing the law exclusively under the rubric of federal Equal Protection analysis, the *Weinschenk* court seemingly combined what previous courts analyzed as distinct Equal Protection and poll tax claims.[128] In contrast to the holdings of *Rokita* and *Common Cause II*, the *Weinschenk* court held that the incidental costs of time and money, necessary to obtain a voter ID, imposed direct costs on the right to vote and constituted "severe" harm against the fundamental right.[129]

Unique in its analysis, the *Weinschenk* court astutely reasoned that the Federal REAL ID Act mandated the states to require proof of citizenship, exclusively through a birth certificate or U.S. passport, before issuing a photo ID.[130] Due to the statutory overlap, the *Weinschenk* court reasoned that Missouri's voter ID law indirectly forced some voters to pay documentary costs before obtaining a voter ID card; directly

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facility administrators rejecting voter outreach for their residents, it seems suspect how much input was actually submitted from the residents themselves.

126 *See Problems*, *supra* note 123 (quoting Trish Vincent, Director of the Missouri Department of Revenue, "[t]he law is clear. We are to work with older folks, the seniors and the disabled, not the low-income.").

127 Weinschenk v. Mo., 203 S.W.3d 201 (Mo. 2006). Although, the *Weinschenk* court's holding was based on the strict requirements of Missouri's state constitution, the court's reasoning is useful as anecdotal analysis under the more general protections of the federal Equal Protection clause. *Id.* at 219. For instance, although the Missouri state constitution provided greater protection of the right to vote than its federal counterpart, the *Weinschenk* court used strict scrutiny analysis to evaluate the severity of harm imposed by the Missouri voter ID law; a method of analysis common to both state and federal constitutions. *Id.* at 212, 215-16. The only notable difference in the court's analysis was the choice to use strict scrutiny outright rather than under the *Burdick* test, in an effort to comport with the "more protective" state constitution. *Id.* at 212, 216. Thus the *Weinschenk* court's analysis is both poignant and valuable for comparable Equal Protection challenges under the federal Constitution. *Id.*

128 *Id.* at 210-19.

129 *Id.* at 213-14, 216. Distinguishing the present case from the holdings of *Rokita* and *Common Cause I*, the *Weinschenk* court held that plaintiffs had proved through affidavits that actual voters would be forced to incur monetary costs before obtaining the requisite voter IDs. *Id.*

130 *Id.* at 207-08 (citing the REAL ID ACT, Pub. Law 109-13, Title II). *See also Weinschenk,* 203 S.W.3d at 208-09 (discussing secondary costs of time and money that are needed to obtain a voter ID). The determination by the Weinschenk court that these secondary costs imposed direct costs on the right to vote is in sharp contrast to the *Rokita* decision, where the court held that characterizing such costs as a poll tax was a "dramatic overstatement of what fairly constitutes a 'poll tax.'" *See* Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2005).

imposing a more than "*de minimus* cost" on the right to vote.[131] However, instead of characterizing these costs as a poll tax, the *Weinschenk* court considered the combined effect of secondary costs, the difficulty obtaining a voter ID, and the potential disenfranchisement of 240,000 voters as jointly imposing a severe burden on the fundamental right to vote.[132] In addition to documentary costs, the court found that the law imposed heavy practical costs, such as time and travel.[133]

Given both the gravity of the harm and the more stringent protections of the Missouri state constitution, the *Weinschenk* court reasoned that the law must be reviewed outright under strict scrutiny and not under the more flexible *Burdick* test.[134] While finding that Missouri's interest in preventing fraud was compelling, the court held that Missouri's voter ID law was neither necessary nor narrowly tailored to meet that interest.[135] Thus, the court concluded that Missouri's voter ID law violated the Equal Protection clause of the state constitution.[136]

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[131] *Weinschenk*, 203 S.W.3d at 213. The court reasoned that the voter IDs are not free, so long as voters were required to spend money to acquire a birth certificates or passport to obtain a voter ID. *Id.* Additionally, the court noted that such costs would likely be forced upon those least able to bear them. *Id*. at 214.

> For Missourians who live beneath the poverty line, the $15 they must pay in order to obtain their birth certificates and vote is $15 that they must subtract from their meager ability to feed, shelter, and clothe their families. The exercise of fundamental rights cannot be conditioned upon financial expense.

Id. at 214.

[132] *Id.* at 212-16.

[133] The court noted that the waiting period to obtain a Missouri birth certificate can extend between six to eight weeks. *Id*. at 208-09.

[134] *Id.* at 215-16.

[135] *Id.* at 217. The court also concluded that the State's proffered interest in combating perceived, but unproven, in-person voter fraud was insufficient to interfere with the fundamental right to vote. *Id.* at 218.

> [I]f this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.

Id. at 218.

[136] *Id.* at 219, 221-22. Weighing heavily in the court's analysis was the State's concession that the law did not seek to prevent known fraud in absentee voting and voter registration, but rather attempted to eliminate in-person voter fraud, which was "not a problem in Missouri." *Id.* at 217. Following *Weinschenk*, the Missouri Republican Party issued a press release calling it a "direct attack on free and fair elections by activist judges." *See* Scott Lauck, *Missouri Republican Party Blames Voter ID Law Decision on the Court*, MO. LAW. WEEKLY, Oct. 23, 2006.

C. *Foreshadowing the Continued Development of Voter ID Law:* Purcell v. Gonzalez

Indicating the urgency of the issues created by state voter ID laws and potentially foreshadowing future judicial review, the U.S Supreme Court intervened less than three weeks before the 2006 midterm state and federal elections in an Arizona federal case involving a constitutional challenge to Arizona's voter ID law.[137] Without commenting on the issues, the Court vacated a federal appellate court injunction against the law, holding that enforcing the injunction would likely create voter confusion so close to the upcoming elections.[138]

Although the Court subsequently granted *certiorari* in September of 2007, it is uncertain how the Supreme Court will ultimately rule on the issues presented by state voter ID laws and how narrowly it will construe its holding.[139] Given the rising prevalence of state voter ID laws across the nation and the high political and sociological stakes accompanying them, however, it is certain that more legal challenges

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[137] Purcell v. Gonzalez, 127 S. Ct. 5 (2006). This Note does not directly discuss Arizona's voter ID law. However, *Purcell* is influential because the requirements of Arizona's statute and the issues raised are similar to those of voter ID laws in other states. *See* ARIZ. REV. STAT. ANN. § 16-579A (2006). S*ee also* Joyce Purnick, *Parties Divided on Laws Requiring ID for Voters*, INT'L HERALD TRIB., Sept. 27, 2006, at 1R (discussing the legislative history of the law's enactment and concerns regarding disenfranchisement of the poor, the elderly, and Native Americans in the state).

As a testament to the Court's rapid intervention, the Court vacated a federal court injunction against the law only one week after it had been ordered by the lower court. *See Purcell*, 127 S. Ct at 7-8. What is most interesting in the Court's decision is Justice Steven's concurring opinion, which suggested that allowing the midterm elections to proceed under the new law would have the added advantage of producing a factual record of alleged harms. *Id.* at 8. Such historical facts, he suggests, will assist courts evaluating Constitutional claims against state voter ID laws in the future. *Id.* However, neither Justice Stevens nor the U.S. Supreme Court indicated whether the Court would be utilizing such a record in the near future. *Id.*

[138] *Id.* at 7. Arizona voters had anticipated that the law would take effect ever since a 2004 state-wide referendum enacting the law. *See* David G. Savage, *High Court Allows Arizona to Enact New Voter ID Law*, L.A. TIMES, Oct. 21, 2006, at 12 (explaining that the law passed by 56% of the vote). Further, the Supreme Court chided the Court of Appeals for giving insufficient deference to the factual findings of the District court and for insufficiently justifying its decision. *See Purcell*, 127 S. Ct. at 7.

[139] *See supra* note 137. In the *Purcell* opinion, the court did not indicate whether it would soon take up the issue itself. However, on September 25, 2007, the Court granted *certiorari* in *Indiana Dem. Party v. Rokita*. *See* 2007 WL 1999963 (2007); 2007 WL 1999941. *See infra* notes 300-12 for further discussion regarding the pending Supreme Court appeal.

will be brought in the future.[140] Additionally, as a result of the diverse outcomes and reasoning in the cases thus far decided, it is likely that the case law regarding voter ID statutes will continue to develop differently across separate jurisdictions.[141] As courts continue to grapple with this rapidly developing area of law, it may serve useful for future litigators and legal scholars to understand what makes some claims more successful than others.[142] Focusing exclusively on Equal Protection and poll tax claims, this Note turns now to a more detailed analysis of the initial case law in search of such trends.[143]

III. ANALYSIS

Having considered the similar creation and divergent judicial treatment of three voter ID laws, this Note will now attempt to reconcile these initial cases in order to determine why some constitutional claims have been more successful than others.[144] In doing so, Part III serves as a detailed analysis, comparing and contrasting current judicial reasoning.[145] In addition, Part III provides some commentary to clarify and critique judicial reasoning that was insufficiently developed or supported.[146] Part III also examines how the law is presently developing in order to anticipate how it might continue to develop in the future.[147] Part III.A first considers Equal Protection claims which allege that state voter ID statutes unduly burden the right to vote.[148] Part III.B considers poll tax claims against state voter ID laws.[149]

A. Equal Protection–Voter ID Statutes Unduly Burden the Right to Vote

Courts evaluating Equal Protection challenges to state voter ID laws have varied in the use of outright strict scrutiny and the *Burdick* test,

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140 At the time of this writing, legal challenges and appeals were pending in Arizona, Michigan, New Mexico, and Ohio. *See* Moritz College of Law, Ohio State University, *Major Pending Election Law Litigation*, http://moritzlaw.osu.edu/electionlaw/litigation.

141 *See id.*

142 *See infra* Part III (discussing the judicial outcomes of the earliest challenges against state voter ID laws).

143 *See infra* Part III.

144 *See generally infra* Part III.

145 *See generally infra* Part III.

146 *See generally infra* Part III.

147 *See generally infra* Part IV (attempting to synthesize these insights into a blueprint for successful litigation against state voter ID laws in the future).

148 *See infra* Part III.A.

149 *See infra* Part III.

often providing little or no direct insight into their choice of analysis.[150] Regardless whether the court selects strict scrutiny analysis outright or as part of the *Burdick* test, it is the court's decision to use the more stringent analysis subsequently under either approach that is often determinative of the ultimate success of the claim.[151] Thus, it is important for those considering bringing claims against state voter ID laws to understand the factors which appear most influential in the courts' determination to use strict scrutiny analysis.[152]

1. A Uniform Standard for Analyzing State Voter ID Laws is Still Developing

A likely reason for the lack of a uniform judicial approach for analyzing state voter ID laws is the sheer newness of the developing law, with different judges experimenting with alternative approaches.[153] However, more recent cases may indicate a potential shift in judicial preference towards exclusive reliance on the *Burdick* test. For example, *Common Cause I*, the first court to decide an Equal Protection claim against a state voter ID law, prudently chose to analyze the law under both standards, given the lack of established case law.[154] In *Common Cause II*, however, the court had the opportunity to re-analyze a nearly identical voter ID law but only evaluated the law under the *Burdick* test.[155] Neither the evidence nor the claims substantially changed in the interim period between *Common Cause* suits.[156] What did change during the interim period was the resolution of the *Rokita* case, analyzing Indiana's voter ID law exclusively under the *Burdick* test and providing legal precedent for the *Common Cause II* court.[157] Given the dramatic shift in the court's choice of analysis, without any significant changes in the record, it can be reliably inferred that the *Common Cause II* court

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150 *See supra* notes 66-68, 91-100, 108-12, 134-36 (citing judicial analysis and outcome in the initial legal challenges to state voter ID laws).

151 *See supra* notes 66-68, 91-100, 108-12, 134-36 (citing judicial analysis and outcome in the initial legal challenges to state voter ID laws).

152 *See infra* Part IV (citing importance of striking down stringent voter ID laws that will disproportionately disenfranchise vulnerable classes of voters).

153 *See supra* notes 108-09 and accompanying text (discussing the *Common Cause* court's evolving choice of analysis in the subsequent suits).

154 Common Cause/Georgia v. Burdick, 406 F. Supp. 2d 1326, 1361-66 (N.D. Ga. 2005) (Common Cause I).

155 *Id.* at 1345-53.

156 Indeed, the *Common Cause II* court also used nearly identical language in a substantial part of its opinion. *Compare Common Cause I*, 406 F. Supp. 2d at 1362-66, *with* Common Cause/Georgia v. Burdick, 439 F. Supp. 2d 1294, 1345-53 (N.D. Ga. 2006).

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

modeled its analysis after the *Rokita* decision, in an attempt to adopt a more uniform standard for analyzing state voter ID laws.[158]

Another factor that may influence a court's choice of analysis is how the particular court resolves the tension between the "conflicting constitutional principles" of the state's authority to regulate elections and the constitutional protection of the fundamental right to vote.[159] The subtle drafting differences in the courts' legal standards, some courts strongly characterizing the right to vote as fundamental while others more expansively articulating the states' authority to regulate elections, directly correlates with the standard of review adopted by each court.[160]

For instance, both *Common Cause* courts and the *Weinschenk* court strongly emphasized the right to vote as fundamental but only briefly mentioned the state's regulatory authority, making clear that provisions in state and federal constitutions limited the authority.[161] All three courts acknowledged that the state had some regulatory authority over federal elections but tempered this with case law suggesting limitation on the state's authority.[162] Reflecting their similar depiction of the conflicting principles involved, all three courts also adopted strict scrutiny analysis and struck down the challenged voter ID laws as imposing a severe and undue burden on the right to vote.[163]

In contrast, the *Rokita* court only cursorily acknowledged the right to vote as fundamental, yet quickly and more expansively emphasized that the right was not absolute and was subject to the state's "broad" authority to "impose extensive restrictions on voting."[164] Similarly, the *Rokita* court only cursorily mentioned the limitations on the state's power to regulate.[165] Reflecting this characterization and diverging from the *Common Cause* and *Weinschenk* decisions in both choices of analysis and

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158 *See supra* notes 108-09 and accompanying text.

159 *Rokita,* 458 F. Supp. 2d at 821.

160 *See infra* notes 161-66 and accompanying text.

161 The *Common Cause* courts emphasized both the fundamental nature and the extreme importance of the right to vote, underscoring that voting is essential to preserving other rights. *See Common Cause I*, 406 F. Supp. 2d at 1359; *Common Cause II*, 439 F. Supp. 2d at 1343-44. Similarly in *Weinschenk,* the court emphasized that the fundamental right to vote was protected against state regulatory authority by both the Federal Constitution and the more protective Missouri Constitution. *See* Weinschenk v. Mo., 203 S.W.3d 201, 210-12 (Mo. 2006).

162 *See supra* note 130.

163 *See Common Cause II*, 439 F. Supp. 2d at 1350-51; *Common Cause I*, 406 F. Supp. 2d at 1361-62, 1366; *Weinschenk,* 203 S.W.3d at 215-18.

164 *Rokita*, 458 F. Supp. 2d at 820-21.

165 *Id.*

outcome, the *Rokita* court proceeded under the *Burdick* test and rational basis review and concluded that Indiana's voter ID law was a valid "time, place, and manner" restriction on the right to vote.[166]

At first glance, the courts' asymmetrical descriptions, subtly favoring either the constitutional protections of the fundamental right to vote or the power of the states to regulate elections, may not appear significantly influential in their choice of analysis.[167] However, given the courts' distinct characterizations of these "potentially conflicting constitutional principles" and the corresponding level of deference granted to the states' enactment of voter ID laws, the courts' subtle descriptions of the competing rights may actually represent more careful judicial drafting. Such careful drafting might reflect a preferred resolution to the tension created by state voter ID laws.[168]

In sum, the choice of judicial standard for reviewing state voter ID laws is still developing.[169] While it may be helpful to be able to predict which standard a court will likely use to review an Equal Protection claim, the court's initial choice of standard is not always determinative of the outcome of the claim.[170] This is especially true, given that a court may use strict scrutiny analysis under the *Burdick* test as well as outright, so long as the court determines the harm to the right to vote is severe.[171] What is important is not that the court adopts traditional strict scrutiny outright, but rather that the court ultimately decides to utilize strict scrutiny analysis if it chooses to review the challenged regulation under the *Burdick* test.[172]

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166 *Id.* at 820-21, 823-26, 845.

167 *See supra* notes 161-66 and accompanying text (discussing the correlation between the court's drafting of legal standard and its subsequent choice of analysis).

168 *See supra* note 159 and accompanying text (the *Rokita* court's decision to discuss the "conflicting" constitutional principals suggests that the court was concerned with this tension and was attempting to resolve it through its choice of judicial analysis).

169 At the time of this writing several legal challenges against state voter ID laws were pending, with new challenges being raised as frequently as the development of the laws. *See supra* note 140 and accompanying text (citing pending challenges).

170 *See supra* notes 108-12 and accompanying text (*Common Cause II*'s decision to exclusively rely on the *Burdick* test did not prevent that court from striking down Georgia's revised voter ID statute).

171 *See supra* notes 32-38 and accompanying text (describing judicial analysis under the *Burdick* test).

172 *Id.*

2. The Use of Strict Scrutiny Analysis is Justified by Evidence of "Severe" Harm

The sufficiency and reliability of evidence used by the plaintiffs to show "severe" harm is largely determinative on a court's decision to utilize strict scrutiny as part of its Equal Protection analysis.[173] The types of evidence most influential in this determination of "severe" harm—including affidavits of registered voters, prohibited or dissuaded from voting as a result of a voter ID law, and statistical reports—estimate the extent of potential disenfranchisement imposed by the law.[174] Additionally, determining the extent to which a voter ID law makes the exercise of the right to vote more difficult as a whole is also useful for proving "severe" harm to the right.[175]

The use of affidavits is essential to show actual voters are affected by the law.[176] Without these, a court may quickly determine that the harm is not severe and dismiss the claim under rational basis review.[177] For example, in the *Common Cause* cases, hundreds of affidavits of voters adversely affected by Georgia's voter ID law were submitted to show actual and "severe" harm.[178] Similar affidavits were not submitted in *Rokita*, an omission that the court severely criticized at numerous points in its analysis.[179] In fact, *Rokita's* primary justification for holding that the harm was not severe and for rejecting nearly every claim brought against Indiana's voter ID law was the plaintiffs' apparent inability to identify a single voter affected by the law.[180] Somewhat incredulously, but arguably justified on strict evidentiary grounds, the *Rokita* court reasoned that the plaintiffs' failure to submit such affidavits was proof

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173 Although this terminology sounds specific to analysis under the *Burdick* test, characterizing the harm as severe is also useful for judicial analysis under outright strict scrutiny as well. *See supra* notes 32-38.

174 *See supra* notes 62-65, 110-12 and accompanying text (discussing the different approaches of both the *Rokita* and *Common Cause II* courts towards such evidence).

175 *See infra* note 193 and accompanying text. Such difficulties include: the complexity of obtaining a voter ID, insufficient voter education, inadequate alternatives, and the disproportionate impact on poor, elderly, disabled, and minority voters.

176 *See infra* notes 178-81 and accompanying text (discussing *Rokita's* criticism of the lack of this type of evidence submitted to prove actual harm).

177 *Id.*

178 *See supra* note 89.

179 Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 784 n.6, 822-23 (S.D. Ind. 2006); *see also supra* notes 62-63 and accompanying text.

180 *Rakita,* 458 F. Supp. 2d at 822-23.

that the law was both narrowly tailored and equipped with sufficient safeguards to avoid disenfranchising voters.[181]

Similarly, the use of statistical reports to estimate the scope of voter disenfranchisement is essential for establishing the alleged harm as severe and for justifying the utilization of strict scrutiny analysis.[182] Influential factors in the courts' reliance on such reports as evidencing "severe" harm are the scientific integrity of the reports and the source and purpose of creating the report.[183] For example, in *Common Cause II*, the plaintiffs submitted a report created by the Georgia Secretary of State's Office drafted pursuant to the state legislature's consideration of the proposed voter ID law.[184] The report, made from statistical comparisons of voter registration lists and DDS licensing information, estimated that 676,246 registered voters lacked an ID.[185] This report was accepted by the court to prove severe harm.[186]

In sharp contrast, the *Rokita* plaintiffs submitted a report using similar comparisons. However, that report was created by a statistical expert and made pursuant to the litigation.[187] The *Rokita* court completely rejected this report as wholly unreliable evidence, severely criticizing the scientific methods used and the motive for creating the report.[188] Similar to the effect of its conclusions regarding the lack of

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181 *Id.* at 823.

182 *See infra* notes 184-86 and accompanying text (discussing use of statistical evidence in *Common Cause II* and its effect on the court's ultimate conclusion).

183 *Id.*

184 *Common Cause II*, 439 F. Supp. 2d at 1306. It is uncertain why the plaintiffs did not submit this report in *Common Cause I* as well. It is also uncertain why the Secretary of State denied having knowledge of the numbers of voters without ID in her testimony and depositions. *See Common Cause II*, 439 F. Supp. 2d at 1331; *Common Cause I*, 406 F. Supp. 2d at 1353.

185 *Common Cause II*, 439 F. Supp. 2d at 1311.

186 *Id.* at 1345-46. The court also noted statistical reports made from census data and data from the U.S. Department of Transportation estimated the number of voters without comporting photo ID to be 874,420. *Id.* at 1306.

187 *Rokita*, 458 F. Supp. 2d at 803-04. Both the *Common Cause II* and *Rokita* statistical reports estimated potential voter disenfranchisement by comparing voter registration rolls with state licensing records. *Id.* (criticizing the Brace Report for comparing current voter rolls with census data from several years ago); *Common Cause II*, 439 F. Supp. 2d at 1311; *see also 675,000 Voters*, *supra* note 84.

188 *See generally Rokita*, 458 F. Supp. 2d at 803-10. The *Rokita* court's disfavor of the statistical evidence was so strong that the court held it was entitled to "zero weight" in the court's determination of summary judgment. *Id.* at 804. Although the *Rokita* court specifically criticized the methods used to create the data and did not elaborate on its claim of illicit motive, given the marked similarities in the methods used to create the reports in *Common Cause II* and *Rokita*, the source and motive may have also played a role in the courts analysis.

voter affidavits, the effect of the *Rokita* court's decision to discard the statistical report caused the dismissal of plaintiffs' claims as "purely speculative[,]" and further supported the argument that the lack of evidence suggesting voter disenfranchisement was proof that the law was narrowly tailored and did not cause significant harm.[189]

The practical effect of *Rokita*'s rejection of the plaintiffs' evidence and subsequent dismissal of the claims was that the court was forced, or perhaps chose, to turn a "blind eye" to the potential disenfranchisement of thousands of Indiana voters.[190] Regardless of the court's reasoning, *Rokita* serves as a stern warning to those bringing Equal Protection claims against state voter ID laws to include a significant number of voter affidavits and scientifically reliable statistical reports to prove disenfranchisement.[191]

Finally, in addition to voter affidavits and statistical reports, the use of evidence to show that exercising the right to vote is made more difficult by a state voter ID law is also essential to show severe harm and to justify the court's adoption of a strict scrutiny analysis.[192] For example, these types of evidence show: (1) difficulty obtaining a voter ID; (2) insufficient voter outreach; (3) potential disenfranchisement of politically vulnerable classes; (4) inadequate alternatives to the law; (5) inadequate voter education; and (6) insufficient time to obtain a voter ID before the upcoming primary elections.[193]

3. Use of Strict Scrutiny is Likely Determinative of the Success of the Claim

A court's choice of analysis regarding Equal Protection challenges against state voter ID laws is likely determinative of the outcome of the

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189 *Id.* at 825 n.75.

190 *See supra* note 60 and accompanying text (discussing the estimated number of Indiana voters potentially affected by the law).

191 *Id.*

192 *See Common Cause II*, 439 F. Supp. 2d at 1345-50; *Common Cause I*, 406 F. Supp. 2d at 1362-66.

193 *See Common Cause II*, 439 F. Supp. 2d at 1345-50; *Common Cause I*, 406 F. Supp. 2d at 1362-66. These claims and others were raised in both Common Cause suits and were influential in the court's determination of the harm as severe. *See Common Cause II*, 439 F. Supp. 2d at 1345-50; *Common Cause I*, 406 F. Supp. 2d at 1362-66. Nearly identical concerns were raised in *Rokita*; however, because the court had previously rejected the plaintiffs' statistical evidence and had faulted the plaintiffs for failing to provide voter affidavits to show proof of disenfranchisement, the court did not give significant consideration to them. *See Rokita*, 458 F. Supp. 2d at 824.

claim.[194] If a court chooses strict scrutiny, either outright or under the *Burdick* test, the voter ID law will likely be struck down.[195] Alternatively, if the court chooses to use rational basis review under the *Burdick* test, the court will likely uphold the voter ID statute as a reasonable time, place, and manner restriction on voting.[196] For those cases proceeding under strict scrutiny, it is probable that the court will hold the regulatory interest in preventing voter fraud is compelling.[197] Actual proof of in-person voter fraud may not be necessary to justify the regulatory interest as compelling; however, a regulation enacted to prevent perceived voter fraud may be insufficient to qualify as a compelling.[198]

Additionally, for those cases proceeding under strict scrutiny, the case law indicates that to be considered narrowly tailored, a voter ID law must actually address proven types of fraud in the state.[199] For instance, in *Common Cause I*, the court found it counter-intuitive that the state legislature would impose severe restrictions on in-person voting where there had been no proof of fraud, while simultaneously loosening restrictions on absentee voting where actual voter fraud had been

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194 *See supra* notes 66-68, 91-100, 108-12, 134-36 and accompanying text.

195 *See supra* notes 91-100, 108-12, 134-36 and accompanying text (discussing holdings of the *Common Cause* and *Weinschenk* cases).

196 *See supra* notes 66-68 (discussing the *Rokita* holding).

197 *See Rokita,* 458 F. Supp. 2d at 826; *see also Common Cause II*, 439 F. Supp. 2d at 1349-50; *Common Cause I*, 406 F. Supp. 2d at 1362; *Weinschenk*, 203 S.W.3d at 217. When the government's interest is defined broadly to prevent voter fraud the interest has been held sufficiently important or compelling. *Id.* A more narrowly defined interest in preventing in-person voter fraud may be harder for the government to justify, given that no states, enacting voter ID laws, have been able to present evidence of in-person fraud in state. *Id.*

198 *Weinschenk*, 203 S.W.3d at 218. Using perceived harm as a justification for creating laws which impacted a fundamental right, such as voting, was emphatically rejected by the *Weinschenk* court. *Id.* Legislating on voter perception of fraud is insufficient to justify government interference with the fundamental right to vote. *Id.* The *Weinschenk* court analyzed the law under strict scrutiny which requires narrow tailoring between the government's interest and the means used to advance that interest. *Id.* at 215. In contrast, the *Rokita* court held that the state did not have to empirically justify its legislative purpose; however, if required to do so, despite a lack of evidence of in-person voting fraud in Indiana, evidence of in-person voter fraud in other states created the potential for fraud in Indiana and created voter perception of fraud, sufficiently justifying the enactment of Indiana's voter ID law. *Rokita,* 458 F. Supp. 2d at 826. One explanation for such divergent opinions regarding the use of evidence of perceived fraud to justify the state's interest is that the *Rokita* court utilized rational basis-like analysis which is highly deferential to the legislature. *Id.*

199 *Common Cause I*, 406 F. Supp. 2d at 1361-62. Several factors contributed to the court's conclusion that the law was not narrowly tailored: (1) the lack of evidence proving in-person voter fraud, (2) the legislative decision to loosen absentee ballot restrictions, (3) the legislative decision not to address known voter registration fraud, and (4) the availability of successful, less restrictive alternatives to prevent fraud. *Id.*

proven.[200] Similarly, narrow tailoring demands that the legislature choose the least drastic means available when burdening the fundamental right to vote.[201] For example, in *Common Cause I*, the court argued that the use of criminal sanctions to deter in-person voting fraud and the more flexible list of documents to verify voter identity were effective and "less drastic" means for accomplishing the state's purpose of preventing voter fraud.[202]

In sum, a court's decision to use strict scrutiny analysis to review an Equal Protection challenge to a voter ID law is crucial to the success of the claim.[203] A court may choose to use strict scrutiny either outright or under the *Burdick* test.[204] Regardless of the standard adopted, however, in order for a court to justify utilizing strict scrutiny, it must first determine that the harm imposed upon the right to vote is severe.[205] Severe harm is shown through voter affidavits and statistical reports which suggest voter disenfranchisement and through evidence showing that the right to vote has been made more difficult by the requirements of a voter ID statute.[206] Once a court adopts strict scrutiny analysis, it will likely find that the state has a compelling interest in preventing fraud, but will probably hold that the voter ID law is not narrowly tailored due to a lack of proven in-person fraud in the state.[207]

B. Poll Tax–Voter ID Statutes Impose a Direct Cost on the Right to Vote

Another constitutional challenge with varying success thus far is the claim that state voter ID laws create an unconstitutional poll tax by imposing an impermissible cost on the right to vote.[208] There are two

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[200] *Id.* at 1366. The court relied heavily on testimony of Secretary of State Cathy Cox, who testified to the lack of in-person fraud in comparison to the prevalence of fraud in voter registration and absentee voting. *Id.* at 1350-52. Similarly, while subsequently reviewing the law under the *Burdick* test, the *Common Cause I* court additionally argued that the law was likely not even rationally based on preventing voter fraud. *Id.* at 1366.

[201] *Id.* at 1361.

[202] *Id.* at 1362.

[203] *See supra* notes 194-202 and accompanying text.

[204] *See supra* notes 194-202 and accompanying text.

[205] *See supra* notes 194-202 and accompanying text.

[206] *See supra* notes 194-202 and accompanying text.

[207] *See supra* notes 194-202 and accompanying text.

[208] *See supra* notes 34-45 and accompanying text (discussing the legal tests used to analyze poll tax challenges against state voter ID laws). In federal courts, plaintiffs have argued that state voter ID laws violate the Fourteenth and Twenty-Fourth Amendments to the U.S. Constitution. *See Common Cause II*, 439 F. Supp. 2d at 1352; *Common Cause I*, 406 F. Supp. 2d at 1367-68; *Rokita*, 458 F. Supp. 2d at 826-27. However, in *Weinschenk,* a Missouri court analyzed the imposition of such costs under the state Equal Protection clause, but characterized the costs in terms of an "undue burden" on the right to vote. *Weinschenk*, 203

possible ways in which to argue that a state voter ID law creates an unconstitutional poll tax.[209] The first argument, claiming that a state voter ID law imposes *primary* costs on the right to vote, has only been successful in one case where the state mandated and simultaneously increased a direct fee to obtain a voter ID.[210] Because most states now require that voter IDs be issued without charge, a more common argument is that *secondary* costs, incidental to obtaining a voter ID, impose impermissible costs on the right to vote.[211] Thus far, such secondary cost arguments have had limited success.[212] However, recent case law suggests that such claims may be more effective in future cases due to recent judicial analysis revealing an overlap between state voter ID laws and the REAL ID Act, which together necessitate incurring documentation costs to obtain a voter ID.[213]

1. Voter ID Statutes Impose Primary Costs on the Right to Vote

A poll tax is likely found whenever a material requirement is directly imposed as a pre-requisite to voting.[214] In the cases analyzing voter ID laws thus far, both a twenty dollar fee and a poverty affidavit requirement have been held to be impermissible primary costs on the right to vote.[215] It did not appear difficult for the *Common Cause I* court to hold that Georgia's $20 fee to obtain a voter ID imposed a direct cost on the right to vote.[216] Although the state argued that the fee was necessary to offset the administrative costs of distributing the IDs, the

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S.W.3d at 210-19. Although the *Weinschenk* holdings are based on a state Constitution and made pursuant to equal protection analysis, the court's reasoning regarding direct and indirect costs on the right to vote remains applicable for comparison with federal poll tax claims as well. *Id.*

209 *See supra* notes 34-45 and accompanying text.

210 *Common Cause I*, 406 F. Supp. 2d at 1366-70. The Georgia state legislature simultaneously raised the cost of IDs when passing the voter ID law. *See supra* note 79 and accompanying text. The *Common Cause I* court held that, even though the state attempted to justify the cost as covering administrative costs, the law still imposed an impermissible fee on the right to vote. *Id*. at 1366, 1369.

211 *See supra* notes 71-73, 113-16, 128-36 and accompanying text (discussing judicial analysis of claims that state voter ID laws impose secondary costs on the right to vote).

212 *See Common Cause II,* 439 F. Supp. 2d at 1355-56 (rejected poll tax claims based on secondary costs); *Rokita*, 458 F. Supp. 2d at 827 (same).

213 As more states adopt the requirements of the Real ID Act of 2005, such secondary cost claims will likely gain more success as courts will have less room to argue that such costs are avoidable through use of more flexible lists of acceptable proof of identity to obtain a state-issued voter ID.

214 *See supra* notes 39-45 and accompanying text (providing a brief overview of Twenty-Fourth Amendment precedent).

215 *Common Cause I,* 406 F. Supp. 2d at 1369-70.

216 *Id.*

court argued that calling it a fee instead of a cost did not change it from being a cost on the right to vote.[217] Given that no states have since included a fee requirement in subsequently-enacted voter ID laws, it appears likely that the *Common Cause I* opinion has served as a bellwether against such requirements.[218]

Similarly, although somewhat less clear for predicting future judicial decisions, *Common Cause I* additionally held that the requirement for indigent voters to sign a poverty affidavit in order to vote without an ID imposed a direct and material cost on the right to vote.[219] Primarily, the *Common Cause I* court held that the poverty affidavit alternative was unconstitutional because it would cause some to forgo voting out of embarrassment or fear of perjuring themselves, having a chilling effect on voting.[220] However, in muddling contrast, the *Rokita* court upheld a similar provision in the Indiana voter ID law, holding that Indiana's poverty affidavit exception was an adequate safeguard for preventing disenfranchisement of indigent voters.[221]

On their faces, the two outcomes appear somewhat irreconcilable, especially given the limited reasoning provided by the *Rokita* court's decision.[222] However, for those attempting to litigate the issue in the future, it may prove useful to emphasize that voter ID laws' poverty affidavit requirements will have a chilling effect on the votes of low income voters.[223] As with all claims, this argument should be supported by affidavits of low-income and truly-indigent voters, unwilling to sign

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[217] *Id.* at 1366, 1369.

[218] *See supra* notes 101-02 and accompanying text (discussing the court's reasoning in *Common Cause I*).

[219] *Common Cause I*, 406 F. Supp. 2d at 1369-70 (2005).

[220] *Id.* Even though the Georgia DDS claimed that they had a "no questions asked" policy regarding the affidavits, the *Common Cause I* court held that the policy was not publicized and was contrary to the stated purpose of the affidavit. *Id.* The court also noted that many voters lacking government-issued ID did not believe themselves to be indigent but did not have the $20 to spend on a voter ID. *Id.* at 1340-42.

[221] *See Rokita*, 458 F. Supp. 2d at 823 n.70, 824 n.73, 829 (arguing perfunctorily that the indigency exception served as an adequate safety valve to prevent indigent and homeless voters from losing their right to vote). Indiana's "indigency exception" permitted indigent voters to vote by provisional ballot without and ID, conditioned on their return to sign a poverty affidavit the following week. *Id.*

[222] *See supra* notes 220-21.

[223] Additionally, a potential Equal Protection challenge may exist, given that such requirements mandate that the poor take additional steps to vote, both in having to sign an affidavit attesting to their indigence and in having to make extra trips to the clerk's office to insure that their votes are counted.

such documents or unable to make multiple trips to ensure that their votes are counted.[224]

2. Voter ID Statutes Impose Secondary Costs on the Right to Vote

The more likely poll tax claim to be brought against state voter ID laws is that voter ID laws impermissibly require voters to incur secondary documentation costs to obtain a government-issued photo ID.[225] The most commonly alleged documentation costs are the monetary expenses incurred while gathering certified documentation of identity, requisite in some states to obtain a government-issued photo ID.[226]

Rokita, the first court to consider the issue, summarily rejected the argument that secondary costs imposed by voter ID laws impose an impermissible poll tax.[227] Characterizing the argument as a "dramatic overstatement of what fairly constitutes a 'poll tax,'" the court argued that such tangential burdens were incidental to all forms of voting and did not transform a valid voting "regulation" into a poll tax.[228] Although the court surmised that the costs of obtaining a birth certificate might plausibly be regarded as imposing a cost on the right to vote, the *Rokita* court argued that the chance of voters having to incur the costs was "purely speculative," given that the plaintiffs had not presented affidavits of voters actually incurring them.[229] Alternatively, the *Rokita* court deflected responsibility for such costs, *should they exist*, away from the states claiming that the federal government was responsible for setting the costs of such documents.[230] In effect, the *Rokita* court attempted to speak out of both sides of its mouth, arguing on the one hand that voters are unlikely to incur documentation costs while simultaneously arguing that, should voters actually incur such costs, the

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224 *See supra* notes 176-81 and accompanying text (discussing the importance of using voter affidavits to prove harm).

225 *See supra* notes 211-13 and accompanying text.

226 *See supra* notes 211-13 and accompanying text.

227 *Rokita*, 458 F. Supp. 2d at 827.

228 *Id.*

229 *Id.* To further support its reasoning that few voters would be adversely affected by Indiana's voter ID law, the *Rokita* court, using statistical conclusions from the previously rejected Brace Report, noted that the majority of Indiana residents already had a state-issued photo ID. *Id.* The Brace Report estimated that, as of 2005, fewer than 1 percent of Indiana's voting age population, approximately forty-three thousand residents, lack ID. *Id. at 807.* However, with numerous elections being decided on less than a few thousand votes in recent years, this small percentage of potentially disenfranchised voters has significant potential to sway the outcome of elections in tighter races.

230 *Id.* at 827-28.

ultimate responsibility for documents issued by the federal government rests on the federal government and not the Indiana legislature.[231]

The court's argument that the majority of Indiana voters will not have to pay a fee in the process of obtaining a voter ID, while potentially sound on a strict evidentiary basis because of the lack of supporting affidavits, is illogical and potentially dangerous.[232] Because the express requirements of the Indiana voter ID law mandate the showing of government documentation such as a birth certificate in order to obtain a voter ID, it is almost impossible to believe that no Indiana voters will ever have to obtain such a document.[233] Additionally making the court's argument particularly suspect, is that rather than simply dismissing the claim for lack of evidentiary support, the *Rokita* court went further to hold that the lack of evidence was "a testament to the law's minimal burden and narrow crafting" and proof of the law's adequate safeguards against disenfranchisement.[234] Even without affidavits, it seems to go against common sense and rudimentary statutory interpretation to accept the court's conclusion that few Indiana voters would be disenfranchised by the law, particularly on account of the safeguards within the voter ID law itself.[235]

Similarly, in reaching its conclusions to deflect responsibility for federal documentation costs, *should they actually occur*, onto the federal government, the *Rokita* court ignores that the Indiana legislature expressly required voters to present certified government identification in order to obtain a voter ID.[236] Thus, regardless of which legislative

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231 *Id.*

232 The fundamental right to vote is arguably the most important right because it is the only way to secure other rights in a representative democracy. *See* Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1359 (N.D. Ga. 2005). If even a relatively few number of voters are forced to incur costs in order to vote, or, worse, choose to forgo voting because of inability to pay the cost, the social harm would be severe. *But see supra* note 76 (J. Richard Posner argues that severe harm should be determined by quantifiable numbers of disenfranchisement rather than by subjective value judgments regarding the right to vote).

233 The Indiana statute expressly mandates that a registered voter must show a primary identifying document, exclusively limited to a birth certificate, passport, or merchant marine photo ID. *See Rokita*, 458 F. Supp. 2d at 790 (highlighting the primary document requirement).

234 *Id.* at 823.

235 It might be argued that, in coming to its conclusion, the *Rokita* court relied on the ability of voters without a birth certificate to forgo obtaining an ID and voting by absentee ballot as a way of circumventing documentation costs. However, this argument is also suspect because it encourages voters to seek ways around the law rather than allowing them to comply with its requirements without cost.

236 *See* IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (2006).

body ultimately sets the costs for acquiring such documents, it was the state's voter ID law and not the federal government which set up Indiana voters to incur those costs, unilaterally mandating voters who lack a government-issued photo ID to incur an expense in order to vote.[237] To argue after the fact that the state played no role because the costs of such documents are outside of its control seems incredulous. [238]

The second court to consider the issue, *Common Cause II*, also held that secondary costs do not constitute a poll tax.[239] However, rather than critically analyzing the effect of secondary costs on the right to vote, the court's opinion seems influenced more by a desire to encourage the good-faith efforts of the Georgia legislature to revise its voter ID law to comply with the court's previous *Common Cause I* ruling, in regards to primary costs.[240] Regardless of motive, the holding in *Common Cause II* seems more justified than the *Rokita* decision given the different primary document required by Georgia's statute.[241] Specifically, unlike Indiana's voter ID statute, Georgia's law did not exclusively mandate a certified government document to verify identity, permitting voter ID applicants to show multiple forms of ID and theoretically allowing them to avoid secondary documentation costs.[242] Thus, unlike the *Rokita* court which claimed that secondary monetary costs were only speculatively incurred

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237 *Id.*

238 *Id.*

239 *See supra* notes 113-15 and accompanying text.

240 Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1354 (N.D. Ga. 2006). For instance, following *Common Cause I's* injunction against the 2005 version of the law on grounds that Georgia's voter ID law likely violated Equal Protection and imposed an unconstitutional poll tax, the Georgia legislature acted quickly to amend the law, dropping the $20 fee and poverty affidavit requirements from the law, two elements of the 2005 law which were especially disfavored by the *Common Cause I* court. *Id*. The *Common Cause II* court, while claiming that the legislature had still not come far enough to bring the law into compliance with the constitution, based on Equal Protection grounds, was quick to encourage the legislature's efforts to avoid imposing a poll tax as "admirable." *Id*. at 1351.

241 *See* GA. ANN. STAT. § 21-2-417.1(e)(1) (2006) (listing other acceptable documents to prove identity).

242 *Common Cause II,* 439 F. Supp. 2d at 1355; *see also* GA. ANN. STAT. § 21-2-417.1(e)(1) (2006) (listing other acceptable documents to prove identity). However, as Georgia adopts the requirements of the Real ID Act of 2005, the overlap of federal and state laws will absolutely require certified government identification to obtain a government-issued ID, placing the *Common Cause II* conclusion on much shakier grounds. *See supra* notes 130-32 and accompanying text. *See also infra* notes 244-47 (analyzing the *Weinschenk* court's reasoning).

due to a lack of evidence, the *Common Cause II* court argued the same on much firmer statutory grounds.[243]

Potentially altering the direction of analysis on this issue, the unique reasoning in *Weinschenk* may prove most influential in cases considering whether the secondary documentation costs impose impermissible costs on the right to vote.[244] Using the statutory overlap of Missouri's voter ID law and the federal REAL ID Act of 2005 as justification for its holding and relying on affidavits of registered voters actually incurring documentation costs, the *Weinschenk* court concluded that the secondary documentation costs, necessary to obtain a voter ID card, did impose an impermissible cost on the right to vote.[245] The REAL ID Act mandates that every person must prove U.S. citizenship by showing either a certified birth certificate or U.S. passport before obtaining a government-issued photo ID.[246] The *Weinschenk* court astutely noted that when this federal requirement is read in conjunction with the overlapping requirement of Missouri's voter ID law, mandating the use of a government-issued photo ID to vote, any voter lacking a state-issued photo ID and a certified document to prove identity *must* unavoidably incur a cost in order to vote.[247]

Under the *Weinschenk* reasoning, even if a state voter ID law includes a broader list of identifying documents, due to the statutory overlap with the REAL ID Act, the state is federally mandated to require either a birth

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[243] *Common Cause II*, 439 F. Supp. 2d at 1355. What is unnecessary and potentially confusing in the *Common Cause II* opinion, however, is the adoption of language from the *Rokita* decision, characterizing the potential for voters to incur secondary costs as "speculative." *Id.* Whereas *Rokita's* "speculative" language is based on the lack of voter affidavits to support the plaintiffs' claim, the *Common Cause II* court's characterization of "speculative" harm is based on distinct statutory requirements in the Georgia voter ID law. *See supra* notes 241-42. The danger in *Common Cause II's* use of language similar to that used in *Rokita* is that future courts may not consider the fundamentally different reasoning between the two decisions, mistakenly concluding that incurring secondary costs is always speculative.

[244] Although the *Weinschenk* court considered the issue of secondary costs under the state Equal Protection clause, the court's reasoning is applicable to the federal poll tax issue, given the use of comparable language and reasoning by the court. Weinschenk v. Mo., 203 S.W.3d 201, 210-19 (Mo. 2006). Using language of both Equal Protection and poll tax analysis, the *Weinschenk* court held that secondary costs impermissibly imposed a direct cost and unduly burdened the right to vote. *Id.* at 214.

[245] *Id.* at 207-08, 219.

[246] *Id.* at 208 (citing Pub. L. No. 109-13., tit. II).

[247] *Id.* at 207-08, 210-19. It appears that this reasoning is applicable to all states where this statutory overlap exists, potentially impacting future cases considering the issue of secondary costs imposing a poll tax.

certificate or U.S. passport before issuing a voter ID.[248] Thus, in cases like *Common Cause II* which held that the broad list of documents accepted to obtain a Georgia voter ID made incurring secondary costs potentially avoidable, the statutory overlap with the REAL ID Act would eliminate this possibility.[249]

In sum, state voter ID laws may impose impermissible material requirements on the right to vote in two ways.[250] Voter ID laws impose primary costs on the right to vote through direct fees to obtain an ID or through poverty affidavit exceptions, which require voters to attest to indigency and take extra steps to vote.[251] Additionally, although the law in this area is still developing, voter ID laws may also impose secondary costs on the right to vote by requiring voters to incur documentation costs to obtain a voter ID.[252]

IV. CONTRIBUTION

This Note attempts to analyze how the law is developing in order to draw thoughtful conclusions as to where rapidly-developing state voter-ID law is headed, rather than haphazardly attempting to direct its development. Reflecting on this analysis, Part IV constructs a blueprint for bringing successful Equal Protection and poll tax challenges against state voter ID laws, synthesizing trends gleaned from successful claims and cases decided thus far.[253] Following the presentation of a blueprint, or checklist, of steps to take to advance successful challenges to state voter ID laws, Part IV provides additional subsections which further emphasize and explain the importance of taking each step in light of the initial cases decided, and which provide methods for pursuing each step in greater detail.

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248 *Id.*

249 *See supra* note 213 and accompanying text. However, regardless of the potential statutory overlap, without affidavits of actual voters lacking a government-issued photo ID and a requisite birth certificate, the *Rokita* court would likely fall back on its primary argument that the harm is "speculative." Even with affidavits, the *Rokita* court would likely attempt to shift the burden for such costs onto the federal government again. *See* Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006) (claiming that such costs may be out of the state's control).

250 *See supra* notes 39-45 and accompanying text.

251 *See supra* notes 39-45 and accompanying text.

252 *See supra* notes 39-45 and accompanying text.

253 Part IV will not attempt to suggest a particular framework for judicial analysis, given the law is too quickly changing and would quickly render such guesses moot. Nor will Part IV attempt to propose alternatives and safeguards to voter ID laws, as these concepts are currently being explored in contemporary scholarship. *See generally* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

In order to advance successful Equal Protection and poll tax claims against state voter ID laws, litigators would be prudent to take the following steps:

> *A. Bringing a Successful Equal Protection Claim against a State Voter ID Law*
>
> *1. Advocate that the court adopt the use of strict scrutiny analysis either outright or under the Burdick test by persuading the court that the law imposes severe harm.*
>
> *a. Emphasize that the right to vote is fundamental.*
>
> *b. Effectively utilize sufficient and reliable evidence to prove voter disenfranchisement through voter affidavits and statistical reports.*
>
> *c. Stress the significant burdens that the law imposes on the right to vote.*
>
> *2. Successfully advocate under strict scrutiny analysis that the law is not narrowly tailored to advance a compelling government interest by emphasizing that the law does not rationally prevent or reduce existing voter fraud in the state.*
>
> *B. Bringing a Successful Poll Tax Claim against a State Voter ID Law*
>
> *1. Argue that the law imposes primary costs on the right to vote through fee and poverty affidavit requirements.*
>
> *2. Argue that the law imposes secondary costs on the right to vote by directly or indirectly forcing voters to incur documentation expenses.*

A. Bringing a Successful Equal Protection Claim against a State Voter ID Law

Part IV.A states the necessary steps to bringing a successful Equal Protection challenge against state voter ID laws, demonstrating why the steps are important in light of the case law and explaining how to apply each step in terms of general litigation strategy.

1. Advocating the Use of Strict Scrutiny Analysis

Two methods have been used to analyze whether a state voter ID law imposes an undue burden on the right to vote.[254] A voter ID law analyzed under strict scrutiny will likely be struck down as not being narrowly-tailored.[255] In contrast, a court's decision to use rational basis analysis under the *Burdick* test will likely prove fatal to claims against a voter ID statute.[256] Plaintiffs must persuade the court that strict scrutiny is warranted, either outright or under the *Burdick* test, to improve the potential success of their Equal Protection claim.[257] To do so, it is essential that plaintiffs prove that the harm imposed by a voter ID law is severe.[258] Based on current precedent, proving that severe harm is done by emphasizing the right to vote as fundamental, effectively utilizing sufficient and reliable evidence of voter disenfranchisement, and simultaneously stressing the cumulative burdens imposed on the right to vote by state voter ID laws.

a. Characterizing the Harm as Severe: Emphasizing the Right To Vote As Fundamental

Although definitive correlations are somewhat difficult to make from the few cases thus far decided, courts which have expansively characterized the right to vote as fundamental and have emphasized the state's regulatory authority as limited have chosen strict scrutiny analysis.[259] Alternatively, the only court to use rational basis review under the *Burdick* test only cursorily noted the right to vote as fundamental and provided a more expansive discussion of the power of the state to regulate the administration of that right.[260] Thus, plaintiffs challenging a voter ID law under Equal Protection should vigorously emphasize the right to vote as fundamental. In doing so, plaintiffs should argue that the right to vote is one of the most important rights, forming the basis for protecting all other rights in a democratic society.[261] Likewise, plaintiffs should emphasize that the state's regulatory power is

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254 *See supra* notes 32-38.

255 *See* Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1361-62 (N.D. Ga. 2005) (using strict scrutiny under the *Burdick* test); Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1349-50 (N.D. Ga. 2006) (using strict scrutiny under the *Burdick* test); Weinschenk v. Missouri, 203 S.W.3d 201, 215-16 (Mo. 2006) (using strict scrutiny outright).

256 *See, e.g.,* Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 826 (S.D. Ind. 2005).

257 *See generally supra* notes 161-72 and accompanying text.

258 *See generally supra* notes 161-72 and accompanying text.

259 *See generally supra* notes 161-72 and accompanying text.

260 *Rokita*, 458 F. Supp. 2d at 820-30.

261 *See generally supra* notes 161-72 and accompanying text.

limited by constitutional provisions, such as the provision against unduly burdening the fundamental right to vote.[262] Plaintiffs should similarly underscore that the fundamental right to vote is of particular importance to the politically and economically vulnerable, emphasizing that such voters have few alternative avenues to gain influence in today's aristocratic democracy.[263]

b. Characterizing the Harm as Severe: Utilizing Evidence to Prove Disenfranchisement

Next, arguably the most important factor for characterizing the harm as severe is the sufficiency and reliability of evidence submitted to prove voter disenfranchisement.[264] The types of evidence most influential in a court's decision are affidavits of registered voters prohibited or dissuaded from voting, and statistical evidence predicting the extent of potential disenfranchisement.[265] Voter affidavits are necessary to prove actual harm to individual voters and are critical to the success of every claim.[266] Without affidavits of voters actually incurring the harm alleged, courts are given the freedom to not provide clear judicial reasoning, arguing instead that the harm is "speculative" or more audaciously arguing that the lack of evidence represents a voter ID law's narrow tailoring to prevent disenfranchisement.[267] Thus, to bolster every claim, especially claims involving voter disenfranchisement, plaintiffs should identify numerous voters who will actually incur the harm alleged.[268]

Similarly, as important as the use of voter affidavits, plaintiffs' efficacious use of statistical evidence is necessary to establish proof of severe harm.[269] Such reports are essential for estimating the scope of potential disenfranchisement that a state voter ID law will have on vulnerable classes of voters.[270] The most common method used to estimate disenfranchisement is the use of data comparisons between the number of residents or registered voters in the state the number of residents without state-issued photo identification.[271] However,

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262 *See generally supra* notes 161-72 and accompanying text.
263 *See generally supra* notes 161-72 and accompanying text.
264 *See generally supra* notes 173-93 and accompanying text.
265 *See generally supra* notes 173-93 and accompanying text.
266 *See generally supra* notes 177-81 and accompanying text.
267 *See generally supra* notes 177-81 and accompanying text.
268 *See generally supra* notes 177-81 and accompanying text.
269 *See generally supra* notes 182-91 and accompanying text.
270 *See generally supra* notes 182-91 and accompanying text.
271 *See generally supra* notes 182-91 and accompanying text.

statistical reports prepared using this method alone may be insufficient to ensure a court's adoption of the report in its subsequent analysis.[272]

Plaintiffs preparing such reports should be careful to ensure that the methods employed for creating them comport with the requirements of Federal Rule of Evidence 702.[273] Additionally, the source and motive for the creation of statistical reports may be influential in the court's decision to accept the report as reliable evidence.[274] For instance, statistical reports created by government officials and made pursuant to official duty or legislation may be considered more dependable than reports made by statistical experts in preparation of trial.[275] However, since the ready existence of reports made by government officials is out of the plaintiffs' control, plaintiffs submitting their own reports should focus on using reliable methods to ensure scientific reliability.[276]

c. Characterizing the Harm as Severe: Stressing the Burdens on the Right to Vote

Finally, important for characterizing the harm as severe and influential in the court's decision to use strict scrutiny analysis is the use of the record as a whole to show that the right to vote is substantially burdened by the requirements of a state voter ID law.[277] Effectively stressing the cumulative burdens is accomplished by highlighting every roadblock imposed by the requirements of a voter ID law, which makes the process of voting significantly more difficult.[278] Such roadblocks include: (1) difficulty obtaining an ID due to lack of transportation, distantly located licensing offices, or inconvenient hours of operation; (2) significant time and transportation costs to obtain requisite documentation; (3) inadequate voter education of a law's newly-imposed requirements; (4) insufficient time to comply with a law before an approaching election; or (5) inappropriate alternatives to a law's strict ID

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272 *See generally supra* notes 182-91 and accompanying text.

273 *Id.* FRE 702 sets the admissibility standards for expert testimony used to assist the trier of fact to determine a fact in issue. *See* Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 803-09 (S.D. Ind. 2006) (discussing the faults of the Brace Report). These standards require that: (1) the testimony is based on upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *Id.*

274 *See generally supra* notes 187-88 and accompanying text.

275 *See generally supra* notes 187-88 and accompanying text.

276 *See generally supra* notes 187-88 and accompanying text.

277 *See supra* notes 192-93 and accompanying text.

278 *See supra* notes 192-93 and accompanying text.

requirement, such as unrealistic provisional ballots and highly sophisticated absentee ballots.[279]

In sum, successfully characterizing the harm as severe is essential to a court's decision to use strict scrutiny analysis and to the likely success of an Equal Protection claim. Thus, to prove severe harm, plaintiffs should be sure to emphasize the right to vote as fundamental, effectively utilize sufficient and reliable evidence of voter disenfranchisement, and simultaneously stress the cumulative burdens imposed on the right to vote by state voter ID laws.

2. Advocating Under Strict Scrutiny Analysis

Regardless of a state's ability to produce actual evidence of in-person voter fraud, most courts will likely hold that a state's interest in preventing voter fraud is compelling.[280] Thus, once a court has elected to use strict scrutiny analysis, plaintiffs must argue that the stringent photo ID requirement of a state voter ID law is not narrowly tailored to serve the government's interest.[281] The best chance for success is to argue that the strict requirement of a state voter ID law, as applied, is counter-intuitive to the proffered legislative purpose of combating voter fraud.[282] In doing so, plaintiffs should emphasize the lack of evidence of in-person fraud in the state and, whenever applicable, plaintiffs should point out that the law ignores or makes easier areas of voting where actual fraud has been proven, such as absentee voting and voter registration.[283] Additionally, plaintiffs should argue that narrow tailoring requires state legislatures to use the least drastic means and choose the least restrictive alternatives when enacting laws that impact a fundamental right.[284] Subsequently, plaintiffs should argue that the lack of evidence of in-person voting fraud is proof that the previous identification requirements were effective to prevent fraud and were less restrictive than the state's voter ID law.[285]

In sum, plaintiffs bringing claims against voter ID laws under Equal Protection must convince a court that strict scrutiny analysis is

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279 *See supra* notes 192-93 and accompanying text (evidence of such factors should also be sufficiently backed up with affidavits of individual voters actually incurring the alleged harm).

280 *See generally supra* notes 197-98 and accompanying text.

281 *See generally supra* notes 199-202 and accompanying text.

282 *See generally supra* notes 199-202 and accompanying text.

283 *See generally supra* notes 199-202 and accompanying text.

284 *See generally supra* notes 199-202 and accompanying text.

285 *See generally supra* notes 199-202 and accompanying text.

warranted, given the severe harm imposed by the law. Severe harm is shown through voter affidavits, statistical reports, and evidence highlighting the increased difficulty in the ability to vote as a result of the requirements of a state voter ID law. Once strict scrutiny is adopted, either outright or under the *Burdick* test, plaintiffs must show through common-sense presentation of the evidence that the law's requirement is not narrowly tailored to the state's goal of preventing fraud.

B. Bringing a Successful Poll Tax Claim Against a State Voter ID Law

Part IV.B explains the necessary steps for bringing a successful poll tax challenge against state voter ID laws, explaining why the steps are important in light of the case law and how to apply each step in terms of general litigation strategy. The claim that state voter ID laws impose unconstitutional costs on the right to vote can be brought under two theories. The first theory is that voter ID laws impose *primary* costs by mandating a fee or by requiring an indigent voter to sign a poverty affidavit. The second theory is that voter ID laws impose *secondary* costs by indirectly requiring voters to spend time and money acquiring documentation.

1. State Voter ID Laws Impose Primary Costs through Fee and Poverty Affidavit Requirements

State voter ID laws which impose a mandatory fee to obtain a voter ID will likely be struck down easily, given that such requirements more clearly violate the express constitutional prohibition against poll taxes.[286] This is true regardless of whether the state attempts to argue that the cost is a necessary fee to cover administrative costs.[287] Given the obvious constitutional violation, no states have since included a mandatory fee in subsequent voter ID laws and will likely not include them in the future. Thus, the more likely claim is that poverty affidavit requirements, requiring voters to sign an affidavit attesting to indigency before voting without an ID, impose primary costs on the right to vote.[288] Under this claim, plaintiffs should argue that such requirements are material and will have a chilling effect on voting, causing many to forgo voting rather than face potential embarrassment or risk perjuring themselves by signing a poverty affidavit.[289] Similarly, plaintiffs should also argue that poverty affidavit requirements, which necessitate additional steps to

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286 *See generally supra* notes 214-22 and accompanying text.
287 *See generally supra* notes 214-22 and accompanying text.
288 *See generally supra* notes 222-24 and accompanying text.
289 *See generally supra* notes 222-24 and accompanying text.

vote (such as a return trip to a registrar's office following an election) will also have a chilling effect on voting due to the added costs of time and travel.[290]

2. State Voter ID Laws Impose Secondary Costs through Documentation Expenses

Claiming that the secondary costs imposed by voter ID statutes constitute a poll tax consistently fails in federal court.[291] However, such claims may still prove successful in the future, especially when supported by voter affidavits and when understood in light of the statutory overlap with the REAL ID Act of 2005.[292] In response to the argument that voter ID statutes impermissibly impose secondary costs on the right to vote, most judges have argued that voters may not be forced to actually incur such costs.[293] The primary method for justifying their reasoning in this regard is to note the lack of affidavits identifying voters who have actually incurred or will incur documentation costs in order to obtain a voter ID.[294] Thus, as with all claims, plaintiffs should present affidavits of voters actually forced to incur a monetary expense to acquire a birth certificate or other required government document in the process of obtaining a voter ID card.[295]

Another judicial response to the argument that voter ID statutes impose secondary costs on the right to vote is to argue that documentation costs are avoidable due to a voter ID statute's flexible list of identifying documents used to obtain a voter ID.[296] In this situation, the court argues that a state voter ID law does not impose secondary costs because the law does not exclusively mandate a birth certificate or passport to verify identity for the purposes of obtaining an ID.[297] However, in states where the federal REAL ID Act of 2005 has taken effect, plaintiffs should argue that the statutory overlap between the federal and state requirements imposes secondary documentation costs on the right to vote.[298] Building on the reasoning of the *Weinschenk* court and documenting the monetary costs necessary to acquire a birth

290 *See generally supra* notes 222-24 and accompanying text.
291 *See generally supra* notes 227-43 and accompanying text.
292 *See generally supra* notes 227-43 and accompanying text.
293 *See generally supra* notes 227-43 and accompanying text.
294 *See generally supra* notes 227-43 and accompanying text.
295 *See supra* notes 176-81 and accompanying text.
296 *See generally supra* notes 182-83 and accompanying text.
297 *See generally supra* notes 182-83 and accompanying text.
298 *See generally supra* notes 182-83 and accompanying text.

certificate and requisite for obtaining a state voter ID should prove convincing on this claim.[299]

In sum, plaintiffs bringing poll tax claims against voter ID statutes can argue that such laws impose both primary and secondary costs on the right to vote. Plaintiffs arguing primary costs should attack any mandatory fees or poverty affidavit requirements imposed by a voter ID law, pointing out clear constitutional violations and the chilling effect that such requirements will have on voting. Similarly, plaintiffs arguing secondary costs should present voter affidavits of actual voters incurring monetary expenses to acquire the requisite identifying documents to obtain a voter ID; they should emphasize that the statutory overlap between the federal REAL ID Act and the state voter ID law mandates the states to require a more limited, and ultimately more costly, list of identifying documents to issue a voter ID.

V. CONCLUSION

Given the high number of voters potentially disenfranchised by extra-stringent voter ID laws and the disproportionate impact that such laws may have on particularly vulnerable classes of voters, it is imperative that such laws do not take effect as proposed. Because the right to vote is often the only way for the socially and economically vulnerable in society to preserve their rights, the loss of the right is particularly detrimental. Thus, regardless of the illicit political motivations for and against enacting state voter ID laws, it is crucial that future legal challenges prove successful. Ideally, this Note will serve as a useful tool for litigators presently bringing claims against state voter ID laws and will lay the foundation for a more comprehensive legal analysis in the future.

Exploring the factual background and subsequent judicial treatment of three similarly enacted voter ID statutes, this Note deduces factors which contribute to successful claims against these laws. Building on conclusions from this analysis, this Note constructs a blueprint for bringing successful Equal Protection and poll tax claims against similarly enacted laws in the future. Given the prevalent enactment of state voter ID laws and the gravity of potential harm imposed by them, effective utilization of the factors set forth in this Note may prove influential in preserving the fundamental right to vote for millions of Americans in the future.

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[299] *See generally supra* notes 182-83 and accompanying text.

VI. AFTERWORD

While anticipating publication of this Note, rapid developments took place during the Summer of 2007. On June 11, 2007, the Georgia Supreme Court vacated the Fulton County Superior Court decision in *Perdue v. Lake*, concluding that the plaintiff lacked standing to challenge the Georgia voter ID statute.[300] Two weeks later, the Federal Court of the Northern District of Georgia lifted the stay of proceedings in the federal case and set trial on the merits.[301] On Sept. 6, 2007, mimicking the approach and frequently citing the *Rokita* opinion, district court Judge J. Murphy declined to issue a further injunction against the Georgia voter ID law.[302] Throwing out the testimony of the plaintiffs' experts regarding voter disenfranchisement, the court adopted the language and reasoning of *Rokita* stating, "[p]laintiffs have failed to produce any evidence of any individual . . . who would undergo any appreciable hardship to obtain photo identification in order to be qualified to vote."[303] The court further adopted the language and reasoning of *Purcell v. Gonzalez*, arguing that the state had a compelling interest in preventing *perceived* voter fraud and that the law should be upheld under rational basis analysis.[304] Although the court's merits discussion is arguably dicta, given the court's prior determination regarding

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[300] Perdue v. Lake, 647 S.E.2d 6 (Ga. 2007); *see also* Common Cause v. Billups, 2007 WL 2601438 *5 (N.D. Ga. 2007) ("*Common Cause III*").

[301] *See* Common Cause v. Billups, 2007 WL 2601438, *5 (N.D. Ga. 2007) ("*Common Cause III*").

[302] *Id.*

[303] *Id.* at *37-38, *47 (quoting Indiana Dem. Party v. Rokita, 458 F. Supp. 2d 775, 821-23 (S.D. Ind. 2006).

[304] *Id.* at *47-48 (quoting Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006)) ("a state indisputably has a compelling interest in preserving the integrity of its election process.". . ."[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will *feel* disenfranchised.") (emphasis added); *see also* Linda Greenhouse, *Justices Agree to Hear Case Challenging Voter ID Laws*, N.Y. TIMES, Sept. 26, 2007, at A24 [hereinafter "*Greenhouse*"] (noting the shift in judicial reasoning that preventing *perception* of voter fraud is a sufficient state interest to overcome the risk of actual disenfranchisement).

Directly controverting its previous analysis, the *Common Cause III* court went on to argue that Georgia's voter ID law was "rationally related" to the state's compelling interest in preventing fraud. *Common Cause III*, 2007 WL 2601438, *48 n.9 ("In a previous Order, the Court speculated that the Photo ID requirement probably was not even rationally related to the asserted justification of preventing voting fraud. That speculation, however, is not binding on the Court and, frankly, proved to be inaccurate."); *see also Greenhouse*, *supra* note 304 (suggesting J. Murphy's reliance on Justice Posner's analysis in reversing his own legal analysis from that of the previous *Common Cause* decisions). Further adopting the language of *Rokit*a, the court stated, "the legislature has wide latitude in determining the problems it wishes to address and the manner in which it desires to address them." *Id.* at *48 (quoting *Rokita*, 458 F. Supp. 2d at 829).

standing,[305] the court's dramatic change of course from its previous opinions and strong reliance on *Rokita* highlights judicial confusion regarding how to approach constitutional challenges to state voter ID laws.[306] It also underscores the critical importance of submitting strong evidentiary support of voter disenfranchisement in order to encourage courts to strike down the laws under strict scrutiny analysis.

On September 25, 2007, the United States Supreme Court granted *certiorari* in *Indiana Democratic Party v. Rokita* to decide the issues therein in early 2008.[307] While it is impossible to predict with certainty the outcome of the Court's decision, the author predicts that the Court will likely adopt much of the Seventh Circuit's reasoning and uphold the Indiana voter ID law under *Burdick*-rational basis review. First, the Court's selection of *Rokita* to discuss constitutional challenges to voter ID laws presents a relatively easy case for the Court if it wishes to uphold Indiana's law, due to the "weak" evidentiary record of voter disenfranchisement presented in that case.[308] Indeed, this Note has attempted to caution future litigators of the evidentiary pitfalls plaguing constitutional challenges to voter ID laws, using the *Rokita* case as an example of *what not to do*. Second, the timing of the Court's hearing and decision, shortly before the 2008 presidential election, suggests the likely outcome of the Court's decision. In *Purcell v. Gonzalez*, the Court rapidly

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[305] *See id.* at *41. Accordingly, this Note's discussion regarding the previous *Common Cause* rulings remains useful. The reader is cautioned, however, to note the court's change in approach toward the evidence submitted by the plaintiffs to prove voter disenfranchisement, pursuant to the bench trial in *Common Cause III*. *See generally Common Cause III*, 2007 WL 2601438, *37-49.

[306] *See Common Cause III* at *46-47 (The court goes to great lengths in its attempt to distinguish its analysis from it previous opinions in which the court granted two preliminary injunctions against the Georgia voter ID law, claiming that the evidentiary standards are more strict at the trial stage and highlighting the state's efforts to educate voters regarding the new requirement). *See also Legal Challenges to New Voter-ID Laws Should be Resolved Before Next Round of National Elections to Avoid Chaos*, GRAND RAPIDS PRESS, Oct. 7, 2007, at A14 (arguing that Supreme Court resolution of the issue is necessary to avoid confusion in the 2008 presidential election); *Reasonable Voter ID Laws*, WASH. TIMES, Oct. 2, 2007, at A16.

[307] *See* 2007 WL 1999963; 2007 WL 1999941; *see also* Greenhouse, *supra* note 304. The appeal consolidated Indiana Dem. Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006), and Crawford v. Marion Co. Elec. Bd., 2007 WL 16194 (7th Cir. 2007). *Id.*

[308] A strong record of voter disenfranchisement has proved critical for the adoption of strict scrutiny analysis in all of the cases decided thus far. Indeed, the constitutional challenges made against the Georgia and Missouri laws had more sufficiently developed evidentiary records, presented stronger arguments for adopting strict scrutiny either outright or under *Burdick* analysis, and would likely have made for a more robust discussion on the merits by the Supreme Court had the Court chosen to hear or consolidate its 2008 *Rokita* hearing with one of those cases.

intervened to reinstate Arizona's voter ID law, cautioning that removing the state voter ID law so close to the 2006 primary elections would likely cause more disenfranchisement than the law itself.[309] With nearly half of the states currently employing voter ID requirements in one form or another, common sense and the Court's past jurisprudence suggests that the Court is highly unlikely to call into doubt numerous laws so close to a major election.

Third, and most unfortunate, the ideological makeup of the Court may play a significant role in determining the outcome. As with all state voter ID laws, the Indiana law passed along strict party lines.[310] The legislative split highlights a partisan divide and suggests that the real controversy over state voter ID laws concerns political power and not the prevention of voter fraud *nor* the protection of the rights of society's most politically vulnerable. Similarly, the Seventh Circuit *Rokita* court was divided along political appointment lines in both decisions to grant appeal from the District Court and to uphold the law.[311] In an era of increasing partisanship, although lamentable, it would be overly-idealistic to avoid taking the ideological composition of the Court into account when predicting outcome.[312] Recognizing the harm caused when the rights of society's most politically vulnerable become a "political football" for any political party, however, the author hopes that the Court's decision in *Rokita*—regardless of outcome—will expose the underlying partisan motives *for and against* state voter ID laws, will

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309 Purcell v. Gonzalez, 127 S. Ct. 5 (2006).

310 *See generally supra* Part II.

311 *See* Adam Liptak, *Fear but Few Facts In Debate on Voter IDs*, N.Y. TIMES, Sept. 24, 2007, at A12; *Voter ID*, BUCKS CO. COURIER TIMES, Oct. 3, 2007, at A10 (quoting the Seventh Circuit dissenting opinion, "[t]he Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

312 *See, e.g.*, *The Roberts Court Returns*, N.Y. TIMES, Sept. 30, 2007.

> The Supreme Court begins its new term as bitterly divided as it has ever been. There are three hardened camps: four very conservative justices, four liberals, and a moderate conservative, Justice Anthony Kennedy, hovering in between. The division into rigid blocs is unfortunate, because it makes the court seem more like a political body than a legal one. . . . Today, the justices seem just as political, wrapping their views on controversial social issues in neutral-sounding legal doctrines. The case that will most test the court's ability to rise above partisanship is a challenge to Indiana's voter ID law. . . . If the justices act as umpires and call balls and strikes, this term could produce some real victories in voting rights . . . It could result in some terrible setbacks . . . however, if . . . the court is calling balls and strikes but has moved the strike zone far to the right."

rise above any real and perceived ideological divides within its own ranks, and will blindly balance the competing interests.

If the Court does uphold Indiana's voter ID law as predicted, the author encourages future litigators to consider the potential for a narrow interpretation of the Court's decision. In particular, if the Court justifies the use of rational basis due to the weak evidentiary record of voter disenfranchisement, the *Rokita* decision may be distinguishable in future constitutional challenges to voter ID laws. In particular, litigators would be well-advised to assemble more sufficiently developed evidentiary records of disenfranchisement in order to advocate for more stringent judicial analysis in future challenges. In such cases, the author hopes that this Note will remain a useful tool for understanding the evidentiary pitfalls plaguing previous challenges and serve as a blueprint for constructing stronger records and, thus, more effective constitutional challenges in the future.

Kelly T. Brewer[313]

[313] Dedicated to all of those who "speak [] for those who cannot speak for themselves, for the rights of all who are destitute." Be encouraged; "[s]peak up and judge fairly; defend the rights of the poor and needy." *Proverbs* 31:8-9. NIV Trans. Kelly Brewer graduated with a B.A. from Valparaiso University in 2001. Subsequently, he served people with mental and physical disabilities as a social worker. He will be a J.D. candidate in the Spring of 2008. He thanks his God, his family, his girlfriend Jenny, and the supportive students and faculty at Valparaiso School of Law in making this Note possible.