ROAD TO THE POLL[1]: HOW THE WISCONSIN VOTER ID LAW OF 2011 IS DISENFRANCHISING ITS POOR, MINORITY, AND ELDERLY CITIZENS

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The right to vote has been irrefutably established as one of the most treasured and fundamental rights guaranteed to citizens by the United States Constitution, and Wisconsin's Act 23 ("Act 23") violates this standard. In May 2011, the Wisconsin legislature passed this act, which mandated that any person attempting to vote in person or via absentee ballot had to present an approved form of government-issued photo identification. In application, Act 23 would fail to satisfy its main goal of preventing voter fraud because, had it not been enjoined in March 2012, the law would not have prevented any of the limited attempts at voter fraud that have already occurred in the state. In the modern era of jurisprudence, the U.S. Supreme Court has determined that this right is so fundamental that any attempt to limit or violate it must be met with an extraordinarily close and careful examination, and any such examination would find Act 23 to be unconstitutional. The process of obtaining a valid form of identification is a great burden for the state's poor, minority and elderly citizens, and this burden is not met with a necessary and narrowly tailored law sufficient to justify the equal protection injuries inflicted on the voting population. Act 23 also violates the Twenty-Fourth Amendment by not offering a completely free form of identification for indigent citizens, thereby creating a poll tax. Lastly, the Wisconsin Constitution has a complete article on suffrage and on the conditions necessary for changing voting laws, which Act 23 fails to meet, rendering it unconstitutional at both the state and federal levels.

[1] A shrewd reader might recognize that the adage used in the title of this note should end with the plural as opposed to the singular form of the word "poll," an assessment that would be accurate if it were referencing the location where voting takes place. However, this title refers not to polling locations but rather to the poll tax laws that were prevalent during the Jim Crow South and, more specifically, how Wisconsin's voter identification law is an unfortunate step in that direction.

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I. INTRODUCTION

There is no right "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."[2] The electoral process is structured in a way that is meant to maintain the integrity of the democratic system,[3] and the ability to vote is the right to participate in that process. Even the structure of the Constitution indicates that the right to vote is of the most fundamental significance; therefore, the electoral process is understood to come with some regulation in order to preserve the integrity of that right.[4] This regulation, however, is designed to guide the electoral process and to improve its efficiency, not to make it more difficult for citizens to participate in the political franchise.[5]

The right to vote has always been an important issue to citizens, and the problem with suffrage in the past has not been its significance but rather the reasons why certain citizens are given these rights and others are not.[6] In the modern era of voting rights, the Supreme Court has determined that, because this right is so fundamental, any limitation or violation of it must be examined closely and carefully.[7] Our law prohibits factors such as wealth, race, and creed from determining a citizen's ability to exercise the right to vote and recognizes that any introduction of such factors as evidence of a voter's qualifications is irrelevant and wayward.[8] But historically, this notion did not always reflect the mindset in this country; moreover, certain examples of those unequal suffrage principles, such as barriers to voting for Black citizens, arguably might be resurfacing in present-day laws.

In May 2011, the Wisconsin legislature passed 2011 Wisconsin Act 23 ("Act 23").[9] The Act mandated that in order to vote in person or via absentee ballot, a voter had to present an approved form of government-issued photo identification.[10] This Note will examine the scope of this law, its effects on citizens, and its constitutionality, and it will suggest recommendations for addressing the failure of Act 23 to satisfy any of its goals in a manner that justifies the burdens it places on Wisconsin citizens.

This Note is divided into three parts. Part II will discuss the history of voting rights in its entirety. Voting rights, and the groups allowed to exercise those rights, have gone through many changes in the two centuries since the ratification of the Constitution. In order to recognize how Act 23 may be reversing some of the progress made with regard to suffrage, it is important to understand how suffrage rights have not always been available to all citizens. Part III will examine the development of voter identification laws generally, looking specifically at what spurred their conception and at three important judicial decisions regarding state voter identification laws that were challenged on various grounds. Part IV will provide an analysis of the Wisconsin voter ID law, will argue that it violates both the U.S. Constitution and the Wisconsin Constitution, and will urge that it be struck down as unconstitutional and for the burdens it places on Wisconsin's citizens. This section will also address the prevalent counterarguments for its validity and necessity, namely, the existence of voter fraud and the act's ability to impede such fraud.

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[2] Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

[3] Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

[4] Burdick v. Takushi, 504 U.S. 428, 433 (1992).

[5] *Id.* at 433–35.

[6] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667–68 (1966) (discussing the arguments for and against the existence of a fee requirement for exercising the right to vote).

[7] *Id.* at 667 (citing Reynolds v. Sims, 377 U.S. 533, 568 (1964)).

[8] *Id.* at 668.

[9] Wisconsin Act 23, 2011 WIS. LEGIS. SERV. 1 (West) (codified in scattered sections of WIS. STAT. §§ 5.02–343.50).

[10] *Id.* at §§ 1, 2.

II. THE PROGRESSION OF VOTING RIGHTS IN THE UNITED STATES

A. Pre-Civil War

From very early on in the history of the country, there has been a link between the right to vote and a requirement of proof that one qualifies as a member of the electorate.[11] Since the eighteenth century, disenfranchisement has been a consistent theme in voting laws. At every juncture in the tale of American suffrage, there has been at least one group of people, most often Black citizens or the poor, whose rights to vote have been under attack.

The original text of the Constitution is essentially silent with regard to the voting rights of citizens and does not make any concrete suppositions about who might be allowed to vote and under what conditions.[12] The voting guidelines in the Constitution are explained fairly directly, but they do not detail the composition of the electorate responsible for choosing representatives, nor do they state which legislators will choose the senators; these decisions are left to the states.[13]

In determining how to proceed with elections, most states used a similar method to define which individuals were eligible to vote and which ones were not. On close examination of the history of suffrage rights in the states before the Civil War, it appears that the requirement of a form of "identification" in order to exercise one's right to vote is not a particularly new one; in fact, it has existed since the early days following the ratification of the Constitution.[14] Unlike today's requirements of proof of identity, however, the original requirement was more akin to an identification of economic status.[15] In order to vote, an individual needed to demonstrate that he had a stake in the economy of the locality in which he wished to vote.[16] Most states implemented this condition by requiring that a potential voter own property, either real property or a minimum of $300 to $500 worth of personal property, depending on the state.[17] The effect of this voting requirement was that only wealthy white men were allowed to vote, a result that persisted for decades.[18]

Eventually, as the country grew, the property requirement became less feasible because it excluded certain desirable voters, particularly in the South, from voting.[19] In North Carolina alone, the property requirement disenfranchised approximately fifty thousand eligible white men.[20] With the

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[11] C. VANN WOODWARD, A HISTORY OF THE SOUTH: ORIGINS OF THE NEW SOUTH 1877–1913, at 331–32 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1951).

[12] Wesberry v. Sanders, 376 U.S. 1, 12–18 (1964). The case delivers a comprehensive dialogue of the factors that were taken into consideration by the Framers in determining how the right to vote would be dictated in the Constitution. One of the major issues discussed in this debate was the question of how citizens of the states would be represented in the legislative body of the federal government.

[13] *See* U.S. CONST. art. I, II. The Constitution explains that "the People of the several States" are to choose their representatives for the House of Representatives and that state legislators shall choose the members of the Senate for their respective states. *Id.* art. I, §2, cl. 1. The Constitution goes on to explain that the President and Vice President of the country will be elected using the Electoral College system. *Id.* art. II, §1, cl. 1–4.

[14] *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 8–10 (2000) (discussing the movements of the 1950s and 1960s that brought about voting and civil rights and other historically related topics).

[15] *Id.* at 9, 29.

[16] *Id.*

[17] VANN WOODWARD, *supra* note 11, at 331.

[18] KEYSSAR, *supra* note 14, at 9 (suggesting that only white men with property were significantly affected by the law in a capacity that earned them the privilege of voting and that the interests of those without property could be adequately represented by these wealthy white men).

[19] *Id.* at 40–42.

[20] *Id.* at 41.

increase in would-be voters demanding their right to vote, the property requirement finally met its complete demise in the mid-1800's.[21] However, as the country moved past the Civil War, new methods for restricting suffrage rights began to develop.

B. Reconstruction

During Reconstruction, the recent enemies in the North and the South attempted to resolve their differences and unify as one country; it was a time of incredible volatility in United States politics, the effects of which were felt in voter disenfranchisement policies.[22]

Reconstruction witnessed the passage of the Fourteenth and Fifteenth Amendments and the beginning of federal, as opposed to state, control over voting rights.[23] The Reconstruction Amendments planted the seed of a new conceptualization of the right to vote and memorialized a promise that states could not infringe on the rights of United States citizens.

The Fourteenth Amendment defines a citizen of the United States as any "person born or naturalized in the United States, and subject to the jurisdiction thereof" and protects such citizens' "privileges or immunities."[24] The Fifteenth Amendment complements the Fourteenth and provides that the right of citizens "to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[25] Though the language in the Amendments seems clear, several courts throughout history, including the Supreme Court, have found ways to recast the Amendments in a manner that denies certain citizens the right to vote. One of the clearest examples of this perverse interpretation is the case of *Minor v. Happersett*, in which a woman was denied the right to vote and the Supreme Court held that the Fourteenth Amendment does not protect voting rights.[26]

1. *Minor v. Happersett*[27]

Virginia Minor was a native-born citizen of Missouri.[28] She was over the age of twenty-one, she met all the necessary requirements for voting (including the unofficial requirement of being white), and still she was refused the right to register to vote in the general election of 1872.[29] In rendering its decision, the Supreme Court agreed that within the definition provided by the Fourteenth Amendment, Minor was a citizen and was therefore entitled to the protection of her privileges and immunities.[30] Still,

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[21] *Id.* at 42.

[22] For a more detailed discussion on political disenfranchisement during the Reconstruction period and the political violence that accompanied it, see VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI 1865–1890, at 181–206 (1984); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 279, 342–44, 425–44 (1988); Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism: A Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1397–1414 (2009).

[23] The Fourteenth and Fifteenth Amendments were ratified in 1868 and 1870, respectively. For a more in-depth analysis of the Reconstruction Amendments and their interplay with racial discord and suffrage rights, see Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397 (2002).

[24] U.S. CONST. amend. XIV, § 1.

[25] *Id.* amend. XV, § 1.

[26] Minor v. Happersett, 88 U.S. 162, 163 (1874).

[27] Though the case involves the voting rights of women, its use in this Note is not to highlight the women's suffrage movement but rather to exemplify how some laws have been used historically to prevent the granting of voting rights. This Note discusses both race and gender in explaining the history of voting rights and recognizes the difference between the two. However, these differences will not be addressed because, for the purposes of this Note, those differences are irrelevant.

[28] *Minor*, 88 U.S. at 163.

[29] *Id.*

[30] *Id.* at 165.

in a decision that prevented suffrage rights from being granted to women, the Court held that the right to vote was not one of the privileges or immunities of citizenship protected by the Fourteenth Amendment.[31]

According to the Court, the Fourteenth Amendment did not add to the privileges or immunities of citizens; it merely "furnished an additional guaranty for the protection of such as [they] already had."[32] Therefore, unless Minor's right to vote existed in her state at the time of the passage of the Fourteenth Amendment, the right was not protected.[33] The Court's opinion stated that birthright citizenship was not enough to guarantee a right to vote and that groups of citizens could still be disenfranchised under the aegis of the law,[34] a trend that continued throughout the Jim Crow era in the South.

C. Jim Crow

Just as *Minor v. Happersett* illustrates how the law might be used to exclude individuals from the right to vote, the Jim Crow era provides many examples of laws and rules that were created specifically for that purpose.[35]

Prevented by the Fifteenth Amendment from using race as a justification for the denial of suffrage rights, the former Confederate states found other ways to disenfranchise Black and African American[36] voters.[37] The lawmakers of the Jim Crow era blatantly attempted to prevent Black citizens from voting by creating qualifications that were intended solely to keep these individuals from registering as voters.[38]

1. Poll Taxes

Depending on one's point of view, the measures taken by the former Confederate states at the turn of the twentieth century relating to voting rights may be considered ingenious or abhorrent. The poll tax was an extremely effective tool used by many southern states to exclude numerous voters—mostly Black voters—who were deemed unfit for participation in the electorate.[39] While not directly discriminating against anyone, the poll tax, like earlier property requirements, kept poorer individuals out of the process by requiring voters to meet a certain economic status. The cleverness of the poll tax was in its simplicity; it kept people from voting because it was expensive.[40] That slavery was abolished only a few decades prior to the introduction of poll taxes and that most Black voters consequently did not have

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[31] *Id.* at 178.

[32] *Id.* at 171.

[33] *Id.*

[34] Minor v. Happersett, 88 U.S. 162, 170–74 (1874).

[35] The Jim Crow era was a period that lasted roughly from the 1890s until the mid-1960s. *See* Ronald L. F. Davis, *Creating Jim Crow: In-Depth Essay*, DIABLO VALLEY COLLEGE, http://voyager.dvc.edu/~mpowell/afam/creating2.pdf (last visited Dec. 2, 2012), for a more in-depth explanation of the beginning of this era, its impact on the country, and the negative effects it had on the country.

[36] It is recognized that there are differences between the definitions of what makes a person Black and what makes a person African American. This Note will use both terms interchangeably, with both denoting people that would identify themselves as members of either group.

[37] E. Earl Parson & Monique McLaughlin, *The Persistence of Racial Bias in Voting: Voter ID, the New Battleground for Pretextual Race Neutrality*, 8 J.L. SOC'Y 75, 78 (2007).

[38] *Id.*

[39] *Id.*

[40] J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 64, 72 (1974)..

the assets to cover the tax resulted in the exclusion of the vast majority of Black people from the right to vote.[41]

It was not until the middle of the twentieth century that the last of the state poll taxes was eliminated. States like Alabama and Mississippi held out until federal law made the poll tax illegal, but some states, such as North Carolina, rid themselves of the tax before they were required to do so.[42] The damage, however, had already been done, in large part well before the end of the poll tax era.[43] In the twenty years between 1885 and 1905, the rate of participation of Black voters in the electoral process dropped from ninety-eight percent to a low of ten percent.[44] During this period, courts throughout the country upheld the constitutionality of state poll taxes, thereby increasing their effectiveness and use.[45]

2. Supreme Court Approves Exclusion

As the nineteenth century transitioned into the twentieth, there was no apparent end in sight for state efforts to disenfranchise the Black voting population. Starting most prominently with the decision in *Williams v. Mississippi*,[46] the Supreme Court and other courts heard various challenges to the validity of poll taxes and consistently ruled in favor of their constitutionality.[47] Two such cases, *Breedlove v. Stuttles*[48] and *Butler v. Thompson*,[49] are ubiquitously cited for their holdings and reasoning.

In *Breedlove*, the question before the court was whether a Georgia statute requiring every citizen to pay a poll tax before he or she could register to vote was constitutional.[50] The appellant in *Breedlove*, a twenty-eight year-old white man, was unable to register to vote because he had failed to pay the requisite poll taxes.[51] Mr. Breedlove filed suit against the tax collector on the grounds that the denial of his registration violated the Equal Protection and the Privileges or Immunities clauses of the Fourteenth Amendment.[52] The Court explained that the privilege of voting comes not from the United States but rather from the individual states, and that the states are not prohibited by the Constitution from defining

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[41] J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 670–71 (1995).

[42] *See* Michael J. Klarman, *The Supreme Court and Black Disenfranchisement*, U. VA. L. SCH. PUB. L. LEGAL THEORY WORKING PAPER SERIES 8 (T2005), http://law.bepress.com/cgi/viewcontent.cgi?article=1049&context=uvalwps) (explaining that only three states—North Carolina, Louisiana, and Florida—had done away with the poll tax before they were required to do so).

[43] It is clear that during this time period there were more factors than just poll taxes that were at work in preventing Black voters from casting their votes, namely voter harassment and intimidation from organizations such as the Ku Klux Klan. Because the focus of this Note is on the effects of written law on suffrage rights, that social issue and certain others will not be discussed in detail. For a deeper discussion on political violence during this period, see Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 83–96 (2008).

[44] Kousser, *supra* note 40, at 174.

[45] *See, e.g.*, *id.* at 262.

[46] Williams v. Mississippi, 170 U.S. 213 (1898).

[47] *Williams* involved an African American who appealed his conviction on the grounds that the composition of his jury was not constitutional. The jury makeup was based on a Mississippi statute that required potential jurors to pay poll taxes before being eligible to become a juror. The Court found that the language of the poll taxes did not discriminate on the basis of race and was valid. Justice McKenna stated that the poll tax laws of Mississippi did "not on their face discriminate between the races, and it [was not] shown that their actual administration was evil; only that evil was possible under them." *Id.* at 225.

[48] Breedlove v. Stuttles, 302 U.S. 277 (1937).

[49] Butler v. Thompson, 97 F. Supp. 17 (E.D. Va. 1951), *aff'd*, 341 U.S. 937 (1951).

[50] *Breedlove*, 302 U.S. at 279–80.

[51] *Id.* at 280.

[52] *Id.*

voting rights as they see fit as long as they do not violate the Fifteenth or Nineteenth Amendments.[53] The Court then held that poll tax payment was ingrained in the history of reasonable regulation in Georgia and other states[54] and that Georgia's measures reasonably could have been deemed essential to that form of levy.[55]

Nearly fifteen years later, the Court affirmed a decision made in another southern state, Virginia, with virtually the same outcome. In *Butler v. Thompson*, the appellant, an African American woman, was refused the opportunity to vote on the ground that she had not paid the required poll taxes for several preceding years, a problem that was compounded by the cumulative nature of unpaid poll taxes.[56] Butler argued, *inter alia*, that the poll tax requirement was "invalid because of the evil motives of the draftsmen of the Virginia Constitution of 1902 and subsequent poll taxes"[57] and that the poll tax requirement violated the Fourteenth and Fifteenth Amendments.[58] As in *Breedlove*, the district court held that the poll tax law did not violate the Constitution and that voting is a privilege created by the states and not the national government.[59] Perhaps more disturbing than its decision was the court's response to Butler's contention that the poll taxes were the product of hatred for Black voters. The court admitted that the participants in the 1902 Virginia Constitutional Convention manifested a desire to create poll tax laws in order to exclude the African American vote but claimed that they wanted to bring about this result "by means that were valid under the Federal Constitution or Federal laws."[60] *Butler* was decided in 1951, only one or two generations removed from the penning of this paper, while the Supreme Court was still maintaining the constitutionality of laws that had been concededly created solely for the purpose of invidious discrimination and disenfranchisement. These laws continued to serve as the status quo for voting rights for another decade until the national Civil Rights Movement brought about their demise.

3. The Death of Jim Crow

The first big step toward ending class and race-based disenfranchisement was the ratification of the Twenty-Fourth Amendment to the Constitution in 1964. This Amendment ended half a century of voter suppression by giving U.S. citizens the ability to vote in all federal elections without being required, by either the federal or state governments, to pay a poll tax.[61] In the same year, the Civil Rights Act of 1964 barred unequal application of voter registration requirements and significantly undermined the legality of facially discriminatory laws in the states.[62] A third major accomplishment of the mid-1960's, the Voting Rights Act of 1965, gave the Justice Department fairly broad powers to initiate lawsuits involving discrimination claims based on denial of suffrage rights.[63]

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[53] *Id.* at 283.

[54] *Id.* at 283–84.

[55] *Id.* at 284.

[56] Butler v. Thompson, 97 F. Supp. 17, 19–21 (E.D. Va. 1951), *aff'd*, 341 U.S. 937 (1951).

[57] *Id.* at 20.

[58] *Id.* at 19.

[59] *Id.* at 22. The district court judge claimed, "To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate." *Id.* (citing, *inter alia*, Minor v. Happersett, 88 U.S. 162, 170 (1874)).

[60] *Id.* at 21.

[61] U.S. CONST. amend. XXIV, § 1.

[62] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

[63] Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

The final blow to the formalized Jim Crow south was *Harper v. Virginia State Board of Elections*.[64] *Harper* involved a suit by Virginia residents who challenged the constitutionality of the state's poll tax.[65] A three-judge panel at the district court level dismissed the complaint in accordance with *Breedlove*, and the Supreme Court heard the case on appeal.[66] The Court described the appellants simply as residents of the state, failing to mention at the outset that they were Black and that they were employed in low-income professions.[67] The Court concluded that the poll tax violated the Equal Protection Clause because it involved invidious discrimination against those who could not afford to pay the tax.[68] However, the Court did not address the fact that the tax had overwhelming effects on African American voters, and it hardly mentioned the word "race," even while making its decision during one of the most racially divided periods of the century.[69]

The most important holdings from *Harper* were the designation of voting as a fundamental right and the striking down of the poll tax—the most effective tool of disenfranchisement—as unconstitutional.[70] The essence of the opinion and the reason why it departed from precedent regarding poll taxes were captured in the words of Justice Douglas when he said:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.[71]

At the same time, it is important to notice that even at the level of the Supreme Court, there was still a deep-seated battle between those who viewed the right to vote as fundamental and those who believed that the right was not absolute and that barriers should be left in place if the states desired them. These competing viewpoints resulted in the creation of a test that set standards for voting laws but carved out a way to preserve some level of deference to the states.

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[64] Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

[65] *Id.* at 664.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 666.

[69] The rationale for why the Supreme Court chose to write an opinion in which it did not describe the appellants as anything more than residents is unexplained, but considering that the opinion was written in the same period as the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, one might draw the conclusion that it did so in order to de-racialize the poll tax. Regardless of the rationale, however, the fact that the Court only mentioned Black (or "Negro") citizens in reference to separate public facilities and to make it clear that it did not believe poll taxes were being used to deny these citizens their right to vote might signify either naiveté or willful blindness to the truth behind the poll tax laws. But when one examines the makeup of the Court at the time, nine white men, and considers that Justice Black, who wrote a dissenting opinion, was formerly a member of the Ku Klux Klan, perhaps the rationale behind the description of the appellants becomes clearer: during a volatile period in race relations, the Court chose to write an opinion based on the law as it interpreted it rather than using race as a lynchpin.

[70] Three justices dissented from the decision in *Harper*, in two dissenting opinions. Justice Black dissented on the grounds that according to section five of the Fourteenth Amendment, it was the job of Congress to pass laws that protected the rights guaranteed by the Amendment, not the job of the Court to make that decision. *Id.* at 678–79 (Black, J., dissenting). Justice Harlan, joined by Justice Stewart, said that the Equal Protection Clause does not necessarily guarantee social equality amongst citizens, that the constitutionality of a poll tax hinged on whether it had a rational basis, and that the poll tax at issue met this standard. Justice Harlan even went on to suggest that a poll tax could be supported by the arguments that it helps to "weed out those who do not care enough about public affairs to pay [the tax,]" that people with the means to pay the tax have more credentials to vote, and that the country would be better managed if only they could exercise that right. *Id.* at 681–82, 685 (Harlan, J., dissenting).

[71] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

D. Balancing the Burdens on Voters

The Supreme Court developed a balancing test for voter laws in two decisions. The first, *Anderson v. Celebrezze*, addressed the constitutionality of Ohio's requirement that independent presidential hopefuls file for candidacy earlier than party candidates.[72] The Court held that not every restrictive state voting law was necessarily unconstitutional and that states had the right to apply reasonable, nondiscriminatory restrictions on the right to vote.[73] The proper test, according to the Court, was first to consider the "character and magnitude" of the injury to the plaintiff under the First and Fourteenth Amendments and then to "identify and evaluate" the state interests presented as a justification for the rule.[74] When weighing these two factors, the court must first consider how the state's interests make it necessary to burden the plaintiff, and only then make a decision regarding the law's constitutionality.[75]

This balancing analysis by the Court has been named the Burdick Test after the second decision that helped to shape it, *Burdick v. Takushi*.[76] In *Burdick*, a registered voter in Hawaii claimed that the state's prohibition of write-in voting unreasonably infringed upon the rights of voters under the First and Fourteenth Amendments.[77] The Court held that "having a voice" in the election process is a "precious" right, but that it is a right to participate in a structured process.[78] In making its decision, the Court employed the balancing test laid out in *Anderson* with the added proviso that a court must analyze the gravity of the injury to the voter's rights before weighing the voter's interest against that of the state.[79] When the restrictions on the voter's rights are severe, the state law must be narrowly tailored to advance

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[72] Anderson v. Celebrezze, 460 U.S. 780, 780 (1983).

[73] *Id.* at 788.

[74] *Id.* at 789. Justice Stevens clarified:

> [A] court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id.

[75] *Id.*

[76] Burdick v. Takushi, 504 U.S. 428 (1992).

[77] *Id.* at 430.

[78] *Id.* at 441.

[79] *Id.* at 434. Justice White explained the approach as follows:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.
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> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

Id. (internal citations omitted).

a compelling state interest; if the imposition is reasonable and nondiscriminatory, an important state interest is sufficient to support the law.[80] The Court still applies this standard.

III. THE DEVELOPMENT OF VOTER IDENTIFICATION LAWS

A. Federal Acts

Until the end of the last century, the federal government had very limited involvement in the regulation of suffrage rights. Since the majority of the decisions regarding the right to vote had been handled by the states, the range of different rules and requirements was expansive. This section will explain the federal laws that were passed at the end of the twentieth century and the beginning of the twenty-first, and will address both their purposes and their effects on general suffrage rights in America.[81]

1. National Voter Registration Act

The National Voter Registration Act of 1993 (NVRA), also called the "Motor Voter Law," was the first major piece of federal legislation enacted explicitly to influence the actions of voters and states, specifically by allowing citizens to register to vote while applying for a driver's license. Not to be confused with the Voting Rights Act discussed above, one purpose of the NVRA was to enhance participation of eligible citizens in the electoral process.[82] In essence, this Act made it easier for citizens to exercise their right to vote, thereby decreasing the levels of disenfranchisement across the nation. The NVRA removed nonvoting as a valid reason for a state to remove voters from registration records.[83] It also required states to accept mail-in registration forms, which, by default, prevented states from requiring the in-person registration that they had been using as an opportunity to check voter identification.[84] Other provisions required fairly complicated procedures to remove voters who had changed addresses from registration rolls,[85] and allowed those voters to vote in the precincts of their old or new addresses.[86] Opponents of the NVRA claimed that these new standards only made it more difficult for polling places to maintain the integrity of elections and that the Act made it easier for dishonest citizens to vote under the names of others.[87] Over time, these opponents sought a way to even out what they claimed to be unfair, and the Help America Vote Act was a strong start in that direction.

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[80] *Id.*

[81] The focus of this Note is the Wisconsin voter identification law; however, since 2001 there have been approximately 1,000 bills that have been introduced in forty-six states to somehow tie voting to a form of identification. Twenty-six states have passed major legislation since 2003 and those states are Alabama, Colorado, Georgia, Idaho, Indiana, Kansas, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. For more information on these laws see *Voter Identification Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections-campaigns/voter-id-state-requirements.aspx (last updated Oct. 24, 2012).

[82] *See* 42 U.S.C. § 1973gg(b) (describing the purposes for the act as a whole).

[83] *See* 42 U.S.C. § 1973gg-6(b) (2006) (disallowing states to remove voters from registration records unless they followed a complicated procedure only applicable to specific groups).

[84] *See* 42 U.S.C. § 1973gg-4 (necessitating that states accept from voters a standard federal mail-in registration form).

[85] *See* 42 U.S.C. § 1973gg-6(b).

[86] *See* 42 U.S.C. § 1973gg-6(e) (specifying the various options available to a voter that moves from one voting jurisdiction to another).

[87] *See* JOHN H. FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 24 (Encounter Books 2d ed. 2004) (listing data that suggests American citizens would prefer a voter identification requirement).

2. Help America Vote Act of 2002

Seven years after NVRA was enacted, the elections calamity of 2000 provided an opportunity for proponents of voter identification requirements to seek a path of implementation for voter ID laws. During the 2000 elections, thirty-one states did not have requirements that voters prove or verify their identity at polling places.[88] Four of these states had optional identification requests, nine required voters simply to state their names in order to vote, and eighteen required voters to sign a poll book.[89] The remaining states required each voter either to show proof of identity through a wide range of possible documentary forms or to provide a signature at the polling place that would be compared to a signature made elsewhere.[90]

The presidential elections of 2000 and state voting requirements during that time are particularly relevant to the subsequent explosion of state voter identification requirements because of the immense voter problems that led to the contested outcome of that race. The problems with the Florida ballots[91] brought a surplus of attention to the election processes of both that state and the country as a whole[92] and resulted in Congress' grueling passage of the Help America Vote Act of 2002 (HAVA).[93] The Act aimed to reform the voting system and attempted to ensure that another event like the one in Florida did not happen again by preventing voter fraud, especially in the voter registration systems in the states.[94] HAVA mandated the creation of a nationwide database of voter registrants and the uniform and regular maintenance of state lists, and required mail-in voters to designate that they were citizens and over eighteen.[95] HAVA also included a voter identification requirement.[96]

This identification provision required that mail-in registrants who had not previously voted in the state show proof of identification either upon registration or arrival at the polling location for the first time.[97] The requirement could be fulfilled by submitting a utility bill, paycheck, or other government-approved document showing name and address, or by providing a driver's license number

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[88] *See Election Reform: What's Changed, What Hasn't and Why 2000–2006*, ELECTIONLINE (2006), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/reports/election_reform/electionline_022006.pdf (discussing the 2000 elections and the voter identification requirements of the states).

[89] *Id.*

[90] *Id.* The range of possibilities even within the states that required some sort of proof of identity was quite varied. For documentary proof, states allowed documents such as utility bills, credit cards and leases. For signatures, some states compared them to signatures that were already officially on file, and some states compared them to the signatures that were on a piece of identification presented by the voter.

[91] The 2000 Presidential elections, specifically what occurred in Florida, drew significant attention to the way voting was taking place in the various states. In Florida specifically, due to a close initial count of the ballots, there were several recounts of all ballots along with a Supreme Court decision (*Bush v. Gore*, 531 U.S. 98 (2000)) which together, declared Bush the winner of the election. For more detail on the Florida election, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

[92] *Id.* at 693 (arguing that the problems that arose in Florida opened people's eyes to the electoral systems across the country).

[93] Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§15301–15545 (Supp. IV 2004)). *See also* Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 426–28 (2004) (detailing the complications in the passage and the legislative history of the Help America Vote Act of 2002, including the fourteen month process of back-and-forth discussion between the parties on what would be included in the act and the shift in power from the Republicans to the Democrats).

[94] *See* 42 U.S.C. § 15483 (2002) (listing specific requirements for the computerization of statewide voter registration lists and mail-in registration).

[95] *Id.*

[96] *See* 42 U.S.C. § 15483(b)(1)-(3) (2002).

[97] *Id.*

or the last four digits of a Social Security number.[98] Though this provision in HAVA was one of the most limited in terms of its effects, it served as a springboard for proponents of voter identification laws to push forward with state legislation in that regard.[99]

When HAVA was passed, only eleven states were in compliance with its voter identification requirement.[100] This fact pushed states to act quickly, and legislators who favored strict voter identification laws used it as an opportunity to get such laws passed.[101] HAVA included a stipulation that arguably supported the proposition for strict voter identification laws; the Act specified that its requirements were minimal and that states were free to enact stricter rules as long as they did not clash with federal law.[102] As of January 2012, thirty states had enacted voter identification requirements in order to register to vote.[103] Due to the speed of expansion of these new voter identification laws, several challenges to their validity have been brought before the nation's courts.

B. Challenges to State Voter ID Laws

There have been various challenges to the constitutionality of voter identification requirements in numerous states since the passage of HAVA, and the results have not been consistent.[104] Because of the similarities between different state laws, it may be helpful to understand the legal claims that have been made and the different holdings reached by courts in different states in order to highlight the inconsistencies between both the laws and the decisions. This Section will provide the relevant facts and statutory issues surrounding key decisions in Georgia, Missouri, and Indiana. These cases were selected because each one was heavily litigated and appealed, and together they paint a broad picture of how the courts have approached voter identification laws around the country. The cases also show the variety of approaches that courts can take when analyzing these laws, each of which will be addressed below with regard to the Wisconsin voter identification law.

1. Georgia

Three years after the passage of HAVA, Georgia's passage of a highly restrictive photo identification requirement rendered Georgia the second state to make the presentation of a photo ID an absolute requirement in order to cast a ballot in elections.[105] This 2005 law was possibly the strictest voter identification regulation to be passed after HAVA; it gave no opportunity for free photo identifications to individuals who could not afford them, and it allowed no provisional ballot option to those arriving at polling locations without proper identification.[106] The legislature even voted to increase the costs of existing photo identifications along with passage of the law.[107] The plaintiffs in this suit, consisting mostly of Black and African American civil rights groups such as the NAACP, claimed that this law violated the Fourteenth and Twenty-Fourth Amendments, the Civil Rights Act of 1964, and the

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[98] *See* 42 U.S.C. § 15483(b)(3)(B) (2002); *see also* 42 U.S.C. § 15483(b)(2)(A) (2002).

[99] *See Election Reform*, *supra* note 88, at 6 (explaining various provisions in the Help America Vote Act and how the states tackled issues they had).

[100] *See id.* at 39–72 (showing that before the passage of HAVA very few states had any type of mandatory showing of voter identification).

[101] *See id.* at 13–14.

[102] *See* 42 U.S.C. § 15484 (2002).

[103] *See Voter Identification Requirements*, *supra* note 81.

[104] To develop a deeper understanding of the various cases across the country that concern election law, see *Election Law @ Moritz*, OHIO STATE U. MORITZ COLL. OF LAW, http://moritzlaw.osu.edu/electionlaw/litigation/ (last visited Dec. 2, 2012).

[105] Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1305 (N. D. Ga. 2006).

[106] *Id.*

[107] *Id.* at 1304–05.

Voting Rights Act of 1965.[108] The district court preliminarily enjoined the law, finding that the plaintiffs had a substantial likelihood of success on their claims.[109] The court agreed with the claim that the law placed undue burdens on citizens and operated as a poll tax,[110] and provided several examples of the types of undue burdens placed on citizens:

> Many voters who do not have driver's licenses, passports, or other forms of photographic identification have no transportation to a voter registrar's office or DDS service center, have impairments that preclude them from waiting in often-lengthy lines to obtain Voter ID cards or Photo ID cards, or cannot travel to a registrar's office or a DDS service center during those locations' usual hours of operation because the voters do not have transportation available. . . . [M]any voters who lack an acceptable Photo ID for in-person voting are elderly, infirm, or poor, and lack reliable transportation to a county registrar's office. For those voters, requiring them to obtain a Voter ID card . . . is unduly burdensome.[111]

Even though the district court found that the law served only to disenfranchise citizens, legislators did not give up and created an amended version very quickly.

In January of the following year, the Georgia legislature passed a new law that repealed the 2005 version and added provisions to fill some of the holes that the court had found in the law's predecessor.[112] Under the new law, citizens could present one of many forms of photo ID when attempting to vote,[113] and a new acceptable form of identification was to be offered for free to individuals who could provide the proper documentation.[114] For voters who had no form of photo identification, the administrative regulations allowed the presentation of documents such as birth certificates, prior year's tax returns, or marriage certificates as proof of identity.[115] For voters who could not verify their identities, the new law allowed provisional ballots that would be counted if the voters' identities could be proved within a specified timeline.[116]

The same plaintiffs claimed that the 2006 law violated the Georgia Constitution, the Fourteenth and Twenty-Fourth Amendments, the Civil Rights Act of 1964, and the Voting Rights Act of 1965.[117] This time, the district court ruled that it would be a stretch to consider burdens such as the gathering of documentation or the travel time expended to get to an approved location as poll taxes,[118] and it rejected

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[108] *Id.* at 1297.
[109] *Id.* at 1298.
[110] *Id.*
[111] *Id.* at 1345.
[112] *Id.* at 1305.
[113] GA. CODE ANN. § 21-2-417(a) (West 2006).
[114] GA. CODE ANN. § 21-2-417.1 (West 2006).
[115] GA. COMP. R. & REGS. 183-1-20.01(4)(b) (West 2006).
[116] GA. CODE ANN. § 21-2-417(b) (West Supp. 2008).
[117] Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1298 (N. D. Ga. 2006).
[118] *Id.* at 1354–55. The court used the reasoning from the Southern District of Indiana in Indiana Democratic Party v. Rokita to explain that election laws invariably come with some burden on the voters. The rationale was that tangential burdens are not poll taxes, and the cost of time and transportation qualify as tangential and also exist for voter registration or in-person voting, thereby disqualifying them as additional burdens. The court went on to say that no proof was offered that any individual might have to purchase a birth certificate in order to get the free form of identification, invalidating that argument under the poll tax claim. The court did not consider, however, the relative number of registration locations or polling locations on Election Day to the number of DMV offices available on a given day or in a given county.

the arguments that the law violated any of the provisions of the Civil Rights or Voting Rights Acts.[119] The district court also found, however, that the plaintiffs had a valid equal protection claim, because even though the state's interest in preventing voter fraud was "important and legitimate," the law was not narrowly tailored to that interest.[120] The district court used the Burdick Test as the standard for review.[121] It weighed factors such as the weakness of the state's efforts to educate voters on changes in the law,[122] the lack of proof of voter fraud as a problem,[123] the availability of less burdensome alternatives,[124] and the fact that the time period before the election was too brief to pass a law such as this one.[125] The court made clear that it based this decision in favor of the plaintiffs on the fact that the law was not narrowly tailored to the state's interest, and not on any invalidity of the law itself.[126] In fact, in response to another challenge to the law the following year, the same court upheld the constitutionality of the law, denied a permanent injunction request, and found the law reasonably related to the state's interest.[127] In explaining the difference between the 2007 decision and the previous one, the court specifically noted the state's efforts to educate the public about the changes in the law.[128]

The 2006 law was again attacked at the state level in 2011, at which point it reached the state supreme court.[129] Different plaintiffs brought the same claims against the law that had been made in 2006.[130] The court found that the photo ID requirement was a reasonable procedure under the Georgia Constitution; that the statute did not deprive voters from casting a ballot and was therefore constitutional; and that the requirement was a minimal, reasonable, and nondiscriminatory restriction that served the state's interest in preventing voter fraud.[131] Georgia's photo identification law was thus upheld by the state's highest court as valid and constitutional, and has not been challenged since.[132]

2. Missouri

The same year that Georgia passed its amended photo ID law, the state of Missouri passed its own law mandating that voters present valid in-state or federal photo identification in order to vote.[133] The state claimed that this identification requirement was intended to prevent the impersonation of registered voters.[134]

Missouri's law required each voter to "present as identification a document issued by the state or federal governments that contains the person's name as listed in the voter registration records, the

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[119] *Id.* at 1355–58.

[120] *Id.* at 1350–51.

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

[122] *Id.* at 1346–47.

[123] Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1350 (N. D. Ga. 2006).

[124] *Id.* at 1351.

[125] *Id.* at 1351–52.

[126] *Id.*

[127] *Id.* at 1337.

[128] *Id.* at 1378–79.

[129] Democratic Party of Georgia, Inc. v. Perdue, 707 S.E.2d 67 (Ga. 2011).

[130] *Id.*

[131] *Id.* at 74–75.

[132] *Id.* at 75.

[133] Weinschenk v. State, 203 S.W.3d 201, 204–06 (Mo. 2006).

[134] *Id.*

person's photograph, and an expiration date."[135] The law allowed the casting of provisional ballots if voters would sign an affidavit swearing that they did not have, or were not able to obtain, a proper photo ID due to religious beliefs, disability, or a birthdate on or before 1941.[136] The law also gave those without proper photo identification and without the means to obtain it the option to request a free non-driver's license.[137] The legislature even provided mobile processing units that would be made available upon request to the disabled and elderly for the distribution of such licenses.[138]

What the law did not provide was a method for individuals who did not possess the necessary documents, such as birth certificates or marriage licenses, to acquire a valid photo ID without having to pay for it.[139] The law also only allowed provisional ballots to be circulated to people who met specific conditions that did not include common problems such as a lack of funds or difficulty in navigating the process of obtaining a proper identification,[140] and required a signature for each of these ballots.[141] The signature provided on the affidavit had to match the signature on file with the election authority, and the law did not provide an alternative for disabled individuals who were unable to produce the same signature or for those whose signatures had changed.[142]

The state supreme court struck down the law as unconstitutional.[143] Because the right to vote is a fundamental right under the Missouri Constitution, the court applied strict scrutiny to its analysis of the law.[144] The court examined the monetary and procedural burdens that were placed on citizens and found that even the free form of identification came with costs related to the acquisition of proper proof of identification.[145] The court stated that even though the cost associated with the requirement of a document such as a birth certificate or passport does not qualify as a poll tax, "it is a fee that qualified, eligible, registered voters who lack an approved photo ID are required to pay in order to exercise their right to free suffrage under the Missouri Constitution."[146] In the end, the court decided that the weight of the bureaucratic process in place lay unfairly on the shoulders of the poor and the elderly.[147]

Even though the court found the state law invalid and unconstitutional, it determined that the state's interest in the prevention of voter fraud was compelling.[148] However, it held that the law was not narrowly tailored to this interest because the photo ID requirement prevented only in-person fraud and did not affect absentee or registration fraud.[149] The court further held that state laws enacted after the passage of HAVA had already effectively contained voter fraud.[150] It then concluded that the law violated the Missouri Constitution.[151]

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[135] *Id.* at 205.
[136] *Id.* at 206.
[137] *Id.*
[138] *Id.*
[139] Weinschenk v. State, 203 S.W.3d 201, 207–08 (Mo. 2006).
[140] *Id.* at 206.
[141] *Id.* at 206–07.
[142] *Id.* at 207.
[143] *Id.* at 221–22.
[144] *Id.* at 215.
[145] Weinschenk v. State, 203 S.W.3d 201, 213 (Mo. 2006).
[146] *Id.*
[147] *Id.* at 214–15 (comparing *Common Cause/Georgia*, 439 F. Supp. 2d at 1294, with respect to its discussion of the law's effect on the elderly).
[148] *Id.* at 217.
[149] *Id.*
[150] *Id.*
[151] Weinschenk v. State, 203 S.W.3d 201, 222 (Mo. 2006).

3. Indiana

In 2005, Indiana passed the Senate Enrolled Act No. 483 (SEA 483), which applied to citizens voting in person at polling locations during both general and primary elections.[152] The law required these citizens to present a valid, government-issued photo ID in order to cast their ballots.[153] It allowed voters with religious objections to being photographed or who could not afford the proper form of identification to cast provisional ballots that would be counted if each voter signed an affidavit with the circuit court clerk within ten days of the election.[154] Voters who claimed to have an appropriate form of photo ID but were unable to present it at the polling location could also cast provisional ballots that would be counted if they presented it to the county clerk within ten days.[155] SEA 483 did not apply to absentee ballots and exempted voters living in state-licensed facilities such as nursing homes.[156] Voter registration did not require a photo ID, and qualified voters able to prove residence and identity could obtain free photo identification.[157]

The case against Indiana's law was the first time a specific state voter identification law came before the U.S. Supreme Court. The issue before the Court was whether the law requiring government issued photo identification to vote violated the Fourteenth Amendment and the Voting Rights Act.[158]

In a plurality decision with three justices joining the Court's opinion, one justice concurring and filing a separate opinion, two justices filing one dissent, and one justice filing a separate dissent, the Court held that the state interests identified as justifications for the Indiana statute were sufficiently weighty to validate any limitation the requirement imposed on voters.[159] In announcing the Court's judgment, and writing for Chief Justice Roberts, Justice Kennedy and himself, Justice Stevens claimed to agree with the general rule that "evenhanded restrictions" that protect the "integrity and reliability of the electoral process itself" were not invidious and satisfied the standard set forth in *Harper*.[160] This standard was that rational restrictions on the right to vote were invidious if not properly related to voter qualifications.[161] The Court found no such problem with the law at issue and decided that each of Indiana's interests in protecting the electoral process was adequately related to the photo ID restrictions.[162] The first valid interest was the state's desire to detect and deter voter fraud by participating in the national effort to reform election procedures that were seen as outdated.[163] The next valid interest lay in the prevention of voter fraud that might occur due to the high number of names on Indiana's voter registration rolls of individuals who were deceased or who had moved out of state.[164] With regard to this interest, the Court admitted that SEA 483 only addressed in-person voter impersonation, which, according to the evidence before the Court, had not actually occurred in any Indiana election.[165] Justice Stevens nonetheless maintained the validity of the interest by mentioning occurrences of this type of fraud in other states and discussing a mayoral race five years earlier that had

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[152] Crawford v. Marion County, 553 U.S. 181, 185 (2008).
[153] *Id.*
[154] *Id.* at 186 (citing IND. CODE ANN. §§ 3-11.7-5-1, 3-11.7-5-2.5(c) (West 2006)).
[155] *Id.* (citing IND. CODE ANN. § 3-11.7-5-2.5(b) (West 2006)).
[156] *Id.* at 185–86 (citing IND. CODE ANN. § 3-11-8-25.1(e) (West Supp. 2007)).
[157] *Id.* (citing IND. CODE ANN. § 9-24-16-10(b) (West Supp. 2007)).
[158] Crawford v. Marion County, 553 U.S. 181, 185 (2008).
[159] *Id.* at 204.
[160] *Id.* at 189–90 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788, n.9 (1983)).
[161] *Id.* at 189.
[162] *Id.* at 191.
[163] *Id.* at 191–94.
[164] Crawford v. Marion County, 553 U.S. 181, 195–96 (2008).
[165] *Id.* at 194.

involved potentially fraudulent absentee voting, a problem not addressed by SEA 483.[166] Justice Stevens used these examples to demonstrate the reality of the threat of fraud and its potential effect on close elections.[167] The final state interest the Court addressed was the desire to protect public confidence in elections because confidence encouraged participation in the electoral process.[168]

In reaching its decision, the Court applied the Burdick Test, weighing the state's interest against the burdens imposed by the law's requirement.[169] In its discussion of possible burdens, the Court found that any photo ID requirement would create some type of burden that other methods of identification might not.[170] It used the example of an individual's loss of his wallet before voting to explain how burdens "arising from life's vagaries" were not serious or frequent enough to raise constitutional questions.[171] The Court also found that burdens such as the inconveniences of retrieving a valid ID or gathering the documents needed to prove identity are not substantial enough to represent a significant increase over normal burdens associated with voting.[172] The Court determined that the most significant burdens, such as those placed on people who could not afford photo identifications or who could not secure any of the required documentation to prove identity, were indeed severe, but that in light of the low number of individuals affected by such conditions, these burdens did not establish the grounds necessary to strike down the law.[173]

IV. ARGUMENT AGAINST THE WISCONSIN VOTER ID LAW

With a background of the development of laws surrounding suffrage rights over time and examples of what courts in other states have decided regarding voter identification laws, this section will discuss the voter ID law in Wisconsin and explain how it is invalid. This section will argue that Act 23 fails to satisfy the Burdick Test as applied by the courts and violates both the U.S. and Wisconsin Constitutions.

A. The Law

In May 2011, the Wisconsin legislature passed Act 23, a law that changed the state's rules regarding voters, voting, registration, and identification cards.[174] The Act requires voters to present one of nine possible forms of identification at polling locations in order to vote:

1) A Wisconsin driver's license issued by the Wisconsin Department of Transportation (WisDOT);
2) A photo identification carded issued by WisDOT;
3) A U.S. uniformed service identification card;
4) A U.S. passport;
5) A U.S. naturalization certificate issued within two years of the election where the certificate is being presented;
6) An unexpired driving receipt issued by WisDOT;

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[166] *Id.* at 195–96.
[167] *Id.*
[168] *Id.* at 191, 197.
[169] *Id.* at 201; *see also* Burdick v. Takushi, 504 U.S. 428 (1992)
[170] Crawford v. Marion County, 553 U.S. 181, 197 (2008).
[171] *Id.*
[172] *Id.* at 198.
[173] *Id.* at 199–200.
[174] Wisconsin Act 23, 2011 WIS. LEGIS. SERV. 1 (West) (codified in scattered sections of WIS. STAT. §§ 5.02–343.50).

7) An unexpired identification card receipt issued by WisDOT;
8) An identification card issued by a federally recognized Indian tribe in Wisconsin; or
9) An unexpired Wisconsin university or college identification card with a signature and an issuance date and expiration date no more than two years apart.[175]

The Act also requires voters either to reside in a district for twenty-eight consecutive days or to vote from their previous address. New residents who move into the state within twenty-eight days of the election are not eligible to vote for any office except that of President and Vice President.[176] Act 23 does not require a photo ID for registration forms, and it allows exceptions for groups of voters traditionally unable to vote, such as the indefinitely confined (e.g. nursing home residents).[177] It also requires all absentee voters not explicitly exempted from the Act to present an approved photo ID with their absentee ballot requests.[178] Students using the approved form of university or college ID also have to provide proof of their current enrollment at the time of an election.[179] The ballots of voters who fail to show an appropriate form of photo identification must be set aside as provisional and counted only if such voters present such identification to the municipal clerk or board of election commissioners by 4:00 p.m. on the Friday immediately following the election.[180] Those with religious beliefs that prevent them from being photographed may be exempted from the photo ID requirement if they sign an affidavit identifying the religion and its tenets that prohibit photography.[181] Finally, eligible voters will not be charged a fee for an approved photo ID if they request the available free version at the time of application.[182]

This list of rules that Wisconsin voters must follow imposes previously nonexistent obstacles to the exercise of their suffrage rights. Act 23 makes voting so much more difficult that it fails to satisfy the Burdick Test, because the burdens the law places on citizens far outweigh the state's interests.

B. Burdick Test

The court in *Burdick* laid out a four-step process to determine the constitutionality of a law affecting voting rights: first, an analysis of the gravity of the injury to the rights in question; second, a consideration of the character and magnitude of the injury; third, an evaluation of the state interest being pursued; and fourth, a balancing of these elements to determine whether the state's interest is sufficient to justify the burdens on voters.[183]

1. Burdens

A claim against Wisconsin's Act 23 might be filed on the ground that the Act places undue burdens on the right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment. The burdens that the Act imposes inflict harsh injuries, especially on minority, poor, and elderly citizens. This section will argue that these burdens are so severe that they may prevent eligible Wisconsin voters

[175] *Id.* §§ 1–2.
[176] *Id.* § 14.
[177] *Id.* § 76.
[178] *Id.* § 19.
[179] *Id.* § 33.
[180] *Id.* §§ 89–91.
[181] *Id.* § 116.
[182] *Id.* § 140.
[183] *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

from exercising their right to vote, and in some cases may even remove that right from those who have been voting for years without the currently required documentation.

The first burden is the travel associated with acquiring one of the types of identification needed to cast a ballot under Act 23.[184] Each one of the seventy-two counties in Wisconsin may have well over ten congressional districts, but some have as few as one Department of Motor Vehicles (DMV) office.[185] The burden of having to go to a DMV in order to obtain a photo ID is drastically different from that imposed by the previous law, under which voters could both register to vote and cast their ballots at one of the several polling locations in each congressional district by providing acceptable forms of proof of residence, which could be as simple as residential leases or a utility bills.[186] Adams County, for example, had twenty polling locations in September 2010[187] and has only one DMV office.[188] Crawford County also has only one DMV office,[189] and it had twenty-one polling locations listed for the 2012 elections.[190] The statistics for other counties are similar. When combined with the facts that over fifty of Wisconsin's seventy-two counties had no available county-wide or multi-county public transit system in 2012,[191] that over 600,000 citizens of the state live below the poverty line,[192] and that over 780,000 citizens are over sixty-five years old,[193] the statistics indicate that this law is likely to disenfranchise many voters. These hundreds of thousands of low-income and elderly citizens may well be the majority of those who do not own or cannot operate cars and who will be disenfranchised by the requirement that they obtain a proper photo ID. These groups, Black or African Americans, the poor and the elderly, are also most likely not to possess already one of the nine forms of approved identification,[194] either because they have no need for a car or because they cannot afford one.[195]

Another of Act 23's disenfranchising injuries is the cost of obtaining an approved photo ID. One must pay a fee of twenty-eight dollars to obtain an original Wisconsin driver's license, thirty-four dollars to renew a license, fourteen dollars to obtain a duplicate, and fifteen dollars to take the necessary skills exam.[196] For twenty-eight dollars, the state also issues identification cards that are approved, non-driver's licenses,[197] and the more involved process of obtaining a passport includes a fee of 165

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[184] *See* Wisconsin Act 23, 2011 WIS. LEGIS. SERV. 1 (West) (codified in scattered sections of WIS. STAT. §§ 5.02–343.50).

[185] *See State of Wisconsin Congressional Districts*, WISCONSIN.GOV, http://legis.wisconsin.gov/ltsb/redistricting/Maps/con11.pdf (last visited Dec. 2, 2012); *see also* WISCONSIN DEP'T OF TRANSPORTATION, http://dot.wi.gov/about/locate/dmv/scmap.htm (last visisted Dec. 2, 2012).

[186] WIS. STAT. ANN. §§ 6.34, 6.55 (West 2012).

[187] *Notice, Location and Hours of Polling Places*, ADAMS COUNTY WISCONSIN, http://www.co.adams.wi.gov/Portals/0/General%20Docs/CtyClerk/Election/Sept2010/Type%20D%20Notice%20Locations%20and%20Hours%20of%20Polling%20Places.pdf (last visited Dec. 2, 2012).

[188] *See State of Wisconsin Congressional Districts*, *supra* note 185.

[189] *Id.*

[190] *Notice of Location and Hours of Polling Places*, CRAWFORD COUNTY WISCONSIN, http://crawfordcountywi.org/clerk/election_results.htm (last visited Dec. 2, 2012).

[191] *2012 Wisconsin Public Transit Systems*, WISCONSIN DEP'T OF TRANSPORTATION, http://www.dot.wisconsin.gov/travel/maps/docs/transit-systems.pdf (last visited Jan. 23, 2013).

[192] *State & County Quickfacts, Wisconsin*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/55000.html (last visited Dec. 10, 2012).

[193] *Id.*

[194] *Why Millions of Americans Have No Government ID*, NPR (Feb. 1, 2012), http://www.npr.org/2012/02/01/146204308/why-millions-of-americans-have-no-government-id.

[195] *Id.*

[196] *Driver Licensing Fees*, WISCONSIN DEP'T OF TRANSPORTATION, http://dot.wi.gov/drivers/drivers/driver-fees.htm (last visited Dec. 2, 2012).

[197] *Id.*

dollars.[198] The remaining forms of approved photo ID involve unique and detailed processes that do not apply to the majority of the population.[199]

Along with the identifications that come with a fee, the state also offers a free form of identification that can be used for voting.[200] However, there are still costs associated with the free form of ID because citizens applying for the ID must prove, through original documentation, their name and date of birth, their legal status in the country, their identity, and their Wisconsin residency.[201] Each of these four categories must be proved individually, and each has its own specific set of required authentic documents.[202] To prove name and date of birth, the only permissible forms of documentation are a certified birth certificate, a certificate of citizenship, a foreign passport, a TSA worker ID, or a valid court order.[203] Since the last four documents in the list likely apply only to a miniscule portion of the population, the only document relevant to the majority is the birth certificate. To obtain a birth certificate in the state of Wisconsin, one must pay a fee of twenty dollars and prove one's identity;[204] the primary forms of identification for this purpose are a driver's or non-driver's license with a photo.[205] These two types of proof are thus inherently irrelevant to voters applying for a free photo ID, because if they had one, they would not be applying in the first place. Secondary forms of identification, of which two types must be presented, include passports, major credit cards, checkbooks, government photo IDs, health insurance cards, recent leases, utility bills, or traffic tickets. Some of these types of documentation (traffic tickets, utility bills, and leases) require a photo ID to obtain them at the outset, so this list, too, is limited. Those most likely to need a free form of identification, the poor and the elderly, are also the most likely not to have access to their birth certificates and thus the most likely to go through this process.[206] Voters born before birth certificate records were kept, who were never issued birth certificates, or who were issued incorrect certificates, have no relief under Act 23.[207]

In order to obtain a free photo ID, then, Wisconsin citizens must present their birth certificate at some point in the process. If such an individual does not already have one, he or she must pay a twenty-dollar fee to obtain a new one and compile separate forms of identification to prove his or her identity. In other words, the photo ID that is supposed to be free for those who need it could potentially require the payment of twenty dollars and the presentation of two forms of identification (secondary forms) in order to get the identification (birth certificate) needed to get the identification (free photo ID) needed to exercise the fundamental right to vote. Therefore, in reality, it may be impossible for many Wisconsin citizens who need the "free" ID option to take advantage of it.

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[198] *Passport Fees*, TRAVEL.STATE.GOV, http://travel.state.gov/passport/fees/fees_837.html (last visited Dec. 2, 2012).

[199] *See* Wisconsin Act 23, 2011 WIS. LEGIS. SERV. 1 (West) (codified in scattered sections of WIS. STAT. §§ 5.02–343.50).

[200] *Id.* § 145.

[201] *Obtaining a Wisconsin State ID Card for Free*, GOV'T ACCOUNTABILITY BD., http://gab.wi.gov/sites/default/files/publication/137/free_state_id_pdf_10679.pdf (last visited Dec. 2, 2012).

[202] *Id.*

[203] *Id.*

[204] *Obtaining a Birth Certificate*, GOV'T ACCOUNTABILITY BD., http://gab.wi.gov/sites/default/files/publication/137/birth_certificate_pdf_21175.pdf (last visited Dec. 2, 2012).

[205] *Id.*

[206] *Voter Suppression: The "Schurick Doctrine" and the Unraveling of American Democracy*, OPENDEMOCRACY (Aug. 27, 2012), http://www.opendemocracy.net/5050/ruth-rosen/voter-suppression-schurick-doctrine-and-unravelling-of-american-democracy.

[207] *See Why Millions of Americans Have No Government ID*, *supra* note 194.

Moreover, the cost of obtaining a birth certificate only serves the purpose of proving name and date of birth along with legal presence.[208] One must also prove identity and Wisconsin residency in order to get a valid photo ID; additional documents are required to satisfy those categories.[209] Procurement of these other necessary documents may not come with the same hassle associated with a birth certificate, but the effect is the same. Those who are most likely to need free photo IDs—African Americans, the poor, and the elderly—are those who are the least likely to have the documents necessary to acquire such IDs.[210] This is especially true in the many cases in which the standard in place requires an existing form of photo ID to get the free photo ID.

The costs of the burdens imposed by Act 23 are not just monetary but also practical. To acquire an approved photo ID, a citizen must travel to a state-operated DMV office. Aside from the practical and financial difficulties associated with getting to one of these offices are those associated with the hours during which these offices are open. None of the DMV offices are open on weekends, few are open past 5:00 p.m., many are open only two or three times a week, and several are open only two or three times a month.[211] The majority of the offices are open from 7:00 a.m. to 5:00 p.m. on their days of operation,[212] but these are the working hours of most citizens. Moreover, citizens who do not already have valid forms of photo identification are legally unable to drive, so getting to the DMV offices when they are open becomes a compounded burden on those who can least afford it. It is also well-known that a trip to the DMV is often one of hours, not minutes, and that once a citizen has successfully applied for a proper ID, there is usually a waiting period before he or she receives it.[213]

2. State Interest

Wisconsin has interests in preserving the electoral integrity of the state, in preventing and deterring voter fraud, and in boosting voter confidence through the execution of a more structured electoral system.

3. Balancing Test

In order to determine how to balance the burdens that a law like Act 23 imposes on citizens against the interests of the state, the first step is to look at the injuries that result from the burdens imposed.[214] When the restrictions on voters' rights are severe, the law must be necessary and narrowly tailored to advance a compelling state interest; if the impositions are reasonable and nondiscriminatory, an important state interest is sufficient to sustain the law.[215] Since the burdens imposed by Act 23 are severe, a court would be most likely to apply the more stringent level of scrutiny, and determine that the Act must be both necessary and narrowly tailored to advance Wisconsin's compelling interests. This section will argue that an application of the balancing test to Act 23 demonstrates that the law's burdens on citizens far outweigh its benefits to the state. The section will then address possible counterarguments, along with their merits and their likelihood of success in court.

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[208] *Obtaining a Wisconsin State ID Card for Free*, *supra* note 201.

[209] *Id.*

[210] *See Why Millions of Americans Have No Government ID*, *supra* note 194.

[211] *DMV service centers*, WISCONSIN DEP'T OF TRANSPORTATION, http://www.dot.wisconsin.gov/about/locate/dmv/scmap.htm#city (last visited Dec. 2, 2012). Scroll down to the DMV service center links and select a link to determine hours of operation.

[212] *Id.*

[213] *See Voter Suppression*, *supra* note 206, at 194.

[214] *See* Burdick v. Takushi, 504 U.S. 428 (1992).

[215] *Id.*

By passing Act 23, Wisconsin's legislature imposed an undue burden on the fundamental right to vote, which may well violate the Equal Protection Clause by disparately impacting suspect classes of citizens—namely African Americans, the poor, and the elderly—in a way that reveals discriminatory intent.

The Wisconsin Supreme Court has held that the right to vote is a fundamental right provided by the state constitution, and that any statute that "denies a qualified elector the right to vote is unconstitutional" and void.[216] This ruling applies directly to Act 23. The state's new voter ID provisions require every individual voter to present one of nine forms of approved photo identification, the most frequently used being a state driver's or non-driver's license.[217] As mentioned earlier, twelve percent of Wisconsin's population lives below the poverty line and fourteen percent is over sixty-five years of age.[218] Though it is likely that many of these citizens, especially the elderly, are registered voters who have been voting for years, this law will keep them from exercising that right. The Missouri Supreme Court, considering a similar set of facts in *Weinschenk v. State*, found that a denial of suffrage to this extent imposed more than a *de minimis* burden and struck down the voter identification law in question.[219]

For citizens who do not have any appropriate form of identification, the process for obtaining one is arduous and time-consuming. In order to apply for a driver's license, a non-driver's license, a passport, or even a free photo ID, citizens must offer documents of proof of identity before their ID applications will be accepted.[220] The easiest and most common document proving identity is a birth certificate, which comes with its own set of requirements and fees.[221] The result is that potential voters will have to show identification to retrieve the identification necessary to obtain the identification necessary to vote, even when attempting to acquire the free form of photo ID. This burden may impose an injury as severe as complete disenfranchisement. Citizens who are otherwise eligible to vote will be unable to exercise that right because they cannot afford ID fees, find a way to make it to a DMV office when one is open, or provide the documentation needed to apply for an approved photo ID.

Because of the severe nature of the burdens placed on citizens by the requirements of Act 23, strict scrutiny must apply to the state's law, which thus must be necessary and narrowly tailored to a compelling state interest.[222] The interests in preserving electoral integrity, preventing fraud, and increasing voter confidence and participation are all compelling state interests; however, the requirements of Act 23 are not tailored narrowly enough to those goals.

Act 23 directly addresses possible fraud by in-person voters and by absentee voters, but it does not address fraud issues concerning double voters or convicts voting illegally. According to the Wisconsin Constitution, those convicted of felonies may be excluded from suffrage rights.[223] In 2004, a number of inmates signed up to vote using absentee ballots; though several of the inmates were felons and thus ineligible to vote,[224] a small number of these ineligible inmates cast their ballots without being

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[216] Ollmann v. Kowalewski, 300 N.W. 183, 185 (Wis. 1941).

[217] Wisconsin Act 23, 2011 WIS. LEGIS. SERV. 1 (West) (codified in scattered sections of WIS. STAT. §§ 5.02–343.50).

[218] *See State & County Quickfacts*, *supra* note 192.

[219] Weinschenk v. State, 203 S.W.3d 201, 213 (Mo. 2006).

[220] *See Voter Photo ID Law Information*, GOV'T ACCOUNTABILITY BD., http://gab.wi.gov/elections-voting/photo-id (last visited Dec. 2, 2012). Click the links on the left side of the page for the desired silo of information.

[221] *Obtaining a Birth Certificate*, *supra* note 204.

[222] *See* Burdick v. Takushi, 504 U.S. 428 (1992).

[223] WIS. CONST. Art. 3 § 2.

[224] *See The Truth About "Voter Fraud"*, BRENNAN CENTER FOR JUSTICE (Sept. 2006), http://www.brennancenter.org/page/-/d/download_file_38347.pdf.

caught, including one who presented a Department of Correction identification card with the word "offender" on it at the polling location.[225] Act 23 addresses neither this type of fraud nor that perpetrated by double voters. In the same 2004 elections, dozens of voters registered twice and were listed twice on the state's registration rolls.[226] Double registration is easily accomplished by registering at two separate locations due to the common occurrence of different people's having the same name and/or birthday. Act 23 does nothing to prevent this type of fraud, either.

Not only is Act 23 unable to address these types of fraud, but it is also unnecessary to the achievement of its purported goals. A law cannot be narrowly tailored to the accomplishment of an interest if it is unnecessary. The 2004 election in Wisconsin was a hot button issue due to the wide allegations of fraud and the accompanying legislative pressures to pass more restrictive identification requirements.[227] The concerns about fraud spurred an investigation into the election that uncovered a total of only seven individuals who knowingly cast invalid ballots; all of them had felony convictions.[228] These seven cases equated to 0.0002% of Wisconsin's votes.[229] With this rate of fraud, a voter would be thirty-nine times more likely to be struck by lightning than to commit voter fraud.[230] Because such fraud is thus not a problem in Wisconsin, Act 23 is an unnecessary law. The Act is even more irrelevant because HAVA would likely resolve the miniscule fraud problems that do exist, or would at least prevent as much fraud as Act 23.[231] The 2002 federal law, as discussed above, requires voters to present proof of identity or residence at polling locations and requires the computerization of both statewide voter registration lists and mail-in registration.[232] The modernization of the system would help to keep out potential double voters, and HAVA's broader list of approved photo identifications would place fewer burdens on voters.

Though it goes without saying that Wisconsin has compelling interests in maintaining a fair electoral system, Act 23 sweeps too broadly to justify the burdens it imposes. Act 23 does not meet the necessary and narrowly tailored standard because it does not prevent the only type of fraud that has been relevant in the state. Act 23 is, moreover, unnecessary in light of the facts that the low incidence of fraud that has been discovered indicates that fraud is not actually an issue in the state, and that HAVA already provides a more effective way to address the state's interests.

C. Twenty-Fourth Amendment

Act 23 also violates the Twenty-Fourth Amendment through its imposition of a poll tax. With only limited exceptions, voters without approved photo IDs must spend money to obtain the necessary supporting documentation. The supposedly "free" photo ID option is irrelevant and imaginary because voters attempting to procure such an ID will still incur costs to produce the other necessary documents. According to the Supreme Court in *Harper v. Virginia*,[233] "[w]ealth or fee-paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened."[234] Under Act 23's approved photo ID requirement, however, most eligible voters in Wisconsin will have to pay a fee

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[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Despite a 0.0002 Percent Rate of Voter Fraud, Reince Priebus Claims Wisconsin is "Riddled With Voter Fraud"*, THINKPROGRESS (Dec. 2, 2011), http://thinkprogress.org/justice/2011/12/02/381172/reince-priebus-voter-fraud/.

[231] *See The Truth About "Voter Fraud"*, *supra* note 224.

[232] *See* 42 U.S.C. § 15483 (2002).

[233] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1963).

[234] *Id.* at 670.

to exercise the right to suffrage.[235] Moreover, the citizens who currently lack proper identification are those least capable of bearing the cost. For the hundreds of thousands of Wisconsin citizens living below the poverty line, a twenty-dollar fee for a birth certificate is a severe burden to endure. In 1956, the Supreme Court found that the exercise of fundamental rights cannot be conditioned upon financial expense.[236] Under Act 23, however, citizens without an approved photo ID must incur costs to exercise their indisputably fundamental right to vote. The Act disenfranchises those who cannot afford such costs, thereby stripping them of a right guaranteed to them by the constitutions of both the state and the country.

Wisconsin's Act 23 not only fails to meet the constitutional standards of the Twenty-Fourth Amendment, but it is also invalid under the Wisconsin constitution. The state legislature's passage of the Act was an abuse of discretion under the language of the state constitution.[237]

D. Wisconsin Constitution

The Wisconsin constitution's provisions on suffrage are very specific, and invalidate Act 23 both on its merits and with regard to how it was passed into law. The discussion above addresses a federal constitutional approach; this section will argue the invalidity of Act 23 from the perspective of the state's constitution.

Article 3 of the Wisconsin constitution sets out the rules of suffrage for the state. Section 1 of the article specifies who qualifies as an elector, and its language is clear: "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."[238] Section 2 supplies more detail. It states that suffrage laws may only be enacted if they define residency, provide for registration of electors and for absentee voting, exclude specific persons under specific conditions, and are subject to ratification by the people in a general election in the event of an extension of voting rights to additional classes.[239] The persons who may have their suffrage rights removed are those convicted of a felony, unless restored to civil rights, and those determined by a court to be fully or partially incompetent, if such persons do not understand the elective process.[240]

Article 3 of the Wisconsin Constitution does not provide that the state legislature can exclude citizens from the right to participate in the electoral process for any reason not listed in Section 2(4). The article also does not give the legislature the right to add to the qualifications listed in Section 1. Act 23, however, made both of these errors. The Act creates a separate class of citizens, those without a specific type of photo ID, and excludes them from the voting process. Unless these individuals are felons or incompetent, such exclusion violates Section 2. The exclusion also violates Section 1's mandate that, barring the listed exceptions, all that is required to be a qualified voter is U.S. citizenship, an age of at least eighteen, and residency in the district where one's ballot is cast.

Wisconsin Act 23 is thus unconstitutional as a violation not only of the Equal Protection Clause of the Fourteenth Amendment and the Twenty-Fourth Amendment of the U.S. Constitution, but also of the Wisconsin Constitution's Article 3, Sections 1 and 2.

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[235] Wisconsin Act 23, 2011 WIS. LEGIS. SERV. 1 (West) (codified in scattered sections of WIS. STAT. §§ 5.02–343.50).

[236] Griffin v. Illinois, 351 U.S. 12, 16–19 (1956).

[237] WIS. CONST. art. 3.

[238] *Id.* art. 3, § 1.

[239] *Id.* art. 3, § 2.

[240] *Id.* art. 3, § 2(4).

E. Possible Arguments Made by Proponents of Act 23

The main argument put forth by Act 23's proponents is the importance of the state's interests in protecting the electoral process and preventing fraud. As discussed above, this argument does not meet the standards needed to justify the injuries sustained by Wisconsin citizens. Furthermore, fraud in the system is virtually nonexistent. The 2004 elections in Wisconsin involved a significant number of fraud allegations and a heightened debate about voter ID regulations because two years after the passage of HAVA, proponents of stricter photo ID requirements saw an opportunity to get such provisions passed.[241] The truth about the amount of fraud in that election, however, is unimpressive and unpersuasive. Throughout the general election, there were only nineteen substantiated cases of votes cast by ineligible voters; eleven from Milwaukee alone (all cast by felons) and eight throughout the rest of the state (two cast by felons, one by a foreign national, one by a seventeen-year-old child, and four ballots by deceased voters).[242] Only seven of these votes were actually counted, and Act 23 would have prevented none. The total number of fraud allegations in the election was 6,877, under categories of unprocessed registration cards, flawed addresses, convicted criminals, double voters, and fictitious voters.[243] Even if all of these allegations had been accurate and had been counted, which they were not, the total number still would have equaled only 0.2% of the state's votes, and Act 23 would have prevented none of them.

Proponents of the law might also point to *Crawford v. Marion County*, in which the Supreme Court held that Indiana's interest in preventing fraud was both neutral and sufficiently strong to require rejection of such attacks on the statute in question.[244] Indiana's law is similar to that of Wisconsin in that both require proof of identification through a photo ID. Unlike Indiana, however, the evidence of fraud in Wisconsin is far from strong, and Act 23's implicit requirement that a select class of citizens pay some amount in order to vote leans more in the direction of its functioning as the equivalent of a poll tax, in violation of the Twenty-Fourth Amendment.

On their faces, the laws (and to a certain extent the burdens) appear similar, but there are key differences that would likely lead the Court to a different conclusion regarding Act 23 than that reached in *Crawford*. The first difference is that Indiana's law allowed citizens who could in no way afford the costs associated with voting to still vote successfully. Under the law's indigent provision, each destitute voter had the option of casting a ballot and then executing an affidavit with the clerk explaining his or her situation.[245] Upon completion of such an affidavit, the vote would be counted without any monetary costs to the voter. Wisconsin's Act 23 includes no such provision. Another difference is that the Court is unlikely to apply the same heavy emphasis on the burden of proof to Act 23 that it applied to Indiana's law. The Court determined that the petitioners in the Indiana case bore a heavy burden of persuasion because they were waging a broad attack on the law.[246] The petitioners ultimately failed to produce enough evidence to convince the Court that the law imposed a severe burden on voters, so the Court concluded that only a limited burden existed that did not require narrow tailoring or a compelling interest.[247] The facts are not the same in Wisconsin because Act 23 does not include an indigent provision and because the nearly one million poor and elderly voters affected by its requirements will

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[241] *See The Truth About "Voter Fraud"*, *supra* note 224.

[242] *Id.*

[243] *Id.*

[244] Crawford v. Marion County, 553 U.S. 181, 204 (2008). Justice Stevens stated "that application of the statute to the vast majority of Indiana voters was amply justified by the valid interest in protecting the integrity and reliability of the electoral process." *Id.*

[245] *See* IND. CODE ANN. §§ 3–11.7–5–1, 3–11.7–5–2.5(c) (West 2006).

[246] *Crawford*, 553 U.S. at 200.

[247] *Id.* at 200–04.

certainly be able to provide enough evidentiary examples to convince a court that the law imposes severe injuries. Justice Stevens himself differentiated between the severe burdens that might be imposed on certain voters and the relative inconveniences that would be placed on others.[248] The differences between the burdens in Indiana and those in Wisconsin are not important; what matters is the application of the two laws and how those burdens become severe for hundreds of thousands of affected people in Wisconsin and the lack of an indigent provision that would otherwise allow them to vote. In *Crawford*, the Court said that trips to the DMV and the gathering of appropriate documents would not be a substantial burden for many, but that they might be heavier for others due to economic or other personal limitations.[249] The difference between the case in Indiana and that in Wisconsin is that the *Crawford* Court determined that any significant burden would be placed only on a limited number of people.[250] However, variances in the two laws and, possibly, in the demography of the two states, will cause the number of people affected by the "inconveniences" stated in Crawford to be numerous; the effect will be that of a substantial burden for many because the hundreds of thousands of affected potential voters will either fall into the economic pool that cannot afford to obtain any form of identification or the age pool that has neither proper documentation nor the means to acquire it.

Act 23 does not stand up to the burden analysis of the Burdick Test because it is not necessary and narrowly tailored enough to justify the devastating Equal Protection injuries it inflicts on the voting population. The Act is also unconstitutional because its requirements effectively impose a poll tax on citizens without photo identification and without the necessary supporting documentation, in violation of the Twenty-Fourth Amendment. Act 23 also violates the Wisconsin Constitution because it excludes voters from the suffrage process and adds qualifications to the definition of an elector in a way that the state's article on suffrage does not prescribe. Act 23 is thus invalid on several grounds and will serve only to prevent qualified voters from exercising their rights. It should therefore be struck down.

V. CONCLUSION

The United States is a fairly young nation, but it is one with a rich history and a great deal of promise. The cliché that history repeats itself and that the collective "we" should learn from it and not let the worst of it happen again, while overused, is still an axiom to be followed. Laws such as Wisconsin's Act 23 come dangerously close to allowing some of the worst parts of our history to rise again.

Voting rights in this country, as they exist today, are the result of a complicated past. The country initially allowed only wealthy white men to participate in the electoral process. Later amendments to the Constitution allowed white women, and, theoretically, African Americans to enjoy suffrage rights, but the sanctioning of suffrage laws affecting only the latter soon thwarted these rights. The rationality and fairness of voting laws finally began to even out in the middle of the twentieth century, but it appears that certain states are again seeking to displace the suffrage rights of specific groups of voters.

This Note is not intended to be political in its scope, but one cannot help but notice the relationship between the passage of strict voter identification requirements in the states and the political party in power at the time. Act 23 was not passed in Wisconsin until there was a Republican governor and a Republican-run legislature. In fact, when Act 23 was passed in 2011, the state assembly adopted

[248] *Id.* at 199–200.
[249] *Id.*
[250] *Id.* at 199.

only one out of 376 bill amendments proposed by Democrats.[251] In 2008, the following groups voted Democrat: seventy-three percent of families making less than $15,000 per year; sixty-three percent of those who did not graduate from high school; fifty-four percent of voters in the Midwest; sixty-six percent of voters under thirty years old; sixty-seven percent of Hispanic voters; and ninety-five percent of Black and African American voters.[252] These happen to be the same groups whose members are most likely not to possess a proper photo ID and to be unable to afford the costs associated with retrieving one.[253] The reader can draw his or her own conclusions about this happenstance.

Act 23 places extraordinary burdens on those listed above who seek to exercise their constitutional right to vote. The Act places the poor, many of whom are African American, into a position of marginalization that is at odds with our historical struggle against racial inequality. Potentially hundreds of thousands of eligible and registered voters may find themselves in a situation in which, unable to obtain an appropriate photo ID, they will be unable to cast their ballots. This would be a tragedy and a return to a period in history that should not be revisited.

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[251] *Wisconsin Rep. Brett Hulsey says only one of 376 Bill Amendments Proposed by a Democrat was Adopted by GOP-controlled Assembly*, POLITIFACT, http://www.politifact.com/wisconsin/statements/2011/sep/11/brett-hulsey/wisconsin-rep-brett-hulsey-says-only-one-376-bill-/ (last visited Dec. 2, 2012).

[252] *Election Results 2008*, N.Y. TIMES, http://elections.nytimes.com/2008/results/president/national-exit-polls.html (last visited Dec. 2, 2012).

[253] *See Why Millions of Americans Have No Government ID*, *supra* note 194.