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UPDATING *ANDERSON-BURDICK* TO EVALUATE PARTISAN ELECTION MANIPULATION

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This Article analyzes jurisprudence concerning the judicial review of election laws. It suggests that the United States Supreme Court's approach should acknowledge the realities of political partisanship when reviewing challenged laws and regulations. Specifically, this Article proposes a judicial test to evaluate election laws for partisan biases using factors modeled on those employed by the Court in Gingles v. Thornburg. *Simply put, the manipulation of election laws to pursue partisan advantages poses the greatest threat to our democracy. Accordingly, this Article concludes that protecting our democracy from election practices that falsely benefit one party over another in the guise of administrative ease or neutrality is paramount to maintaining fair and meaningful elections.*

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INTRODUCTION

The right to vote is the bedrock of a democratic society. In the United States, courts must ensure that the right to vote is equally accessible to all citizens and that states administer elections without partisan favoritism.[1] Over the last several decades, however, the U.S. Supreme Court's jurisprudence has greatly deferred to the states' authority to administer elections.[2] In doing so, the Court has sanctioned states' use of weak justifications for burdening the right to vote while ignoring socio-economic, political, and historical factors such as the relevant political landscape.

The current judicial framework for analyzing challenges to election laws originates from *Anderson v. Celebrezze*[3] and *Burdick v. Takushi*.[4] This framework, commonly known as the *Anderson-Burdick* test, balances a plaintiff's First and Fourteenth Amendment rights against a state's interest in conducting an election. The *Anderson-Burdick* test's weaknesses, however, are particularly evident when considering political entrenchment[5] and structural burdens on political expression. This Article proposes an alternative framework to address barriers to the right to vote that give the dominant political parties electoral advantages over their opponents.

This proposal draws inspiration from the "Senate factors" formulated in *Thornburg v. Gingles*.[6] In *Gingles*, the Court identified nine factors for courts to consider in challenges to election laws under Section 2 of the Voting Rights Act of 1965 ("VRA").[7] This Article's proposed framework attempts to incorporate the actual and existing political context to the judiciary's burden analysis when reviewing claims that affect the right to vote. The proposed test accomplishes two things. First, it facilitates judicial analysis of difficult-to-analyze structural issues in election administration. Second, the test prevents unfair electoral manipulation by legislators—or other bad-faith state actors—by scrutinizing the political impacts of election laws.

H. Goldfeder, Jason D'Andrea, and Robin Fisher for their endless efforts to aid in the pursuit of my passion.

[1] This Article recognizes that the U.S. Supreme Court has held that partisan gerrymandering is a non-justiciable political question. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019). Thus, this Article does not discuss the particular issue.

[2] *See* Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. ONLINE L. J. 50, 51 (2020).

[3] 460 U.S. 780 (1983).

[4] 504 U.S. 428 (1992).

[5] This Article defines "political entrenchment" as the way incumbents use election laws to maintain their positions in anti-democratic ways—such as restricting access to vote for certain groups and making it more difficult for challengers to run.

[6] *See* 478 U.S. 30, 36-37 (1986) (citing S. REP. NO. 97-417, at 28-29 (1982)).

[7] 52 U.S.C. § 10301.

Part I of this Article analyzes the criticisms and failings of the *Anderson-Burdick* test as it is currently applied. Part II then examines the Senate factors established in *Gingles* and discusses the benefits of its multi-factor framework as applied to relevant political analysis. Lastly, Part III outlines the proposed test and provides examples of its potential application from prior Supreme Court cases.

I. CRITICISMS OF *ANDERSON-BURDICK* AND CONSIDERATIONS OF ANTI-COMPETITIVE PRACTICES FROM A STRUCTURAL PERSPECTIVE

The Supreme Court devised the *Anderson-Burdick* test to balance the competing interests of an individual's right to vote against the state's justifications for burdening that right through the challenged law or regulation.[8] In *Anderson*, the Court held that, in evaluating a state's election regulations, a court must first assess the "character and magnitude" of the declared injury to the rights protected by the First and Fourteenth Amendments that the challenger seeks to vindicate.[9] If the burden is severe, courts apply strict scrutiny—requiring that the imposition must be necessary to serve the state's compelling interest.[10] On the other hand, if the burden is not severe, which is more often the case,[11] then judicial scrutiny is more relaxed. In this situation, the court evaluates the strength of the state's interests the challenged restriction purports to serve and considers the state's justifications for imposing such a burden. Lastly, the reviewing court then considers "the extent to which those interests make it necessary to burden the plaintiff's rights."[12] Essentially, the test weighs the challenger's First and Fourteenth Amendment right to vote against the state's interest in implementing the subjected law or regulation. To this end, the party with the weightier interest prevails.

Many scholars have criticized the *Anderson-Burdick* test, arguing that it affords too much deference to the states and ignores the political impacts of challenged laws.[13] For example, courts often adopt, with little skepticism, a state's vague justifications—such as

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[8] *See Anderson*, 460 U.S. at 789.
[9] *Id.*
[10] *Id.*
[11] Joshua A. Douglas, *A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations That Adversely Impact an Individual's Right to Vote*, 75 GEO. WASH. L. REV. 372, 382-86 (2007).
[12] Burdick v. Takushi, 504 U.S. 428, 434 (1992).
[13] *See, e.g.*, Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote*, 35 HASTINGS CONST. L.Q. 643 (2008); Matthew R. Pikor, *Voter ID in Wisconsin: A Better Approach to Anderson/Burdick Balancing*, 10 SEVENTH CIR. REV. 465 (2015); Douglas, *supra* note 11; Lowell J. Schiller, *Recent Development, Imposing Necessary Boundaries on Judicial Discretion in Ballot Access Cases:* Clingman v. Beaver, *125 S. Ct. 2029 (2005)*, 29 HARV. J.L. & PUB. POL'Y 331 (2005).

"preventing voter confusion" or "efficient election administration" to permit voting restrictions.[14] And even when a more specific justification is proffered, such as combating a particular kind of voter fraud, courts have not required states to produce empirical evidence when evaluating the legitimacy of the state's rationale.[15] By contrast, the Court has found that when a plaintiff lacks empirical evidence to support their challenge, this absence weighs heavily against finding for the plaintiff.[16] As a result, the state virtually always meets its burden of showing a valid rationale for burdening the right to vote.

The flaws of the *Anderson-Burdick* test are particularly evident in cases concerning structural barriers and partisan entrenchment. *Burdick*, the other case from which the test was created, provides an example of the test's failure to guide courts through a thorough analysis of statutory schemes and socio-political factors that operate to effectively entrench the power of a given political party.

Burdick involved a challenge to Hawaii's ban on write-in voting, which prohibited voters from casting votes for candidates not named on the ballot.[17] A voter sued the state requesting the opportunity to vote for candidates not listed on ballots in future elections.[18] The Supreme Court upheld the law, finding that the state's regulatory interest outweighed the First and Fourteenth Amendment rights of Hawaiian voters.[19] In analyzing the "character and magnitude" of the burden on the voter's First and Fourteenth Amendment rights, Justice White, writing for a plurality, characterized the right to vote via write-in as merely a "generalized expressive function," rather than having any value to the electoral process.[20] A write-in, the Court opined, is simply an individual interest whose prohibition was justified by the need to run a stable election process.[21]

This assessment, however, ignored the existing political dynamic in Hawaii, resulting in a decision that suppressed political

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[14] *See* Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986) ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access.").

[15] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198-200 (2008). *See also* Frank v. Walker, 768 F.3d 744, 750 (7th Cir. 2014), *cert. denied*, 573 U.S. 913 (2015).

[16] Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 457 (2008) (ruling that the plaintiffs' failure to show evidence of voter confusion prevented a successful challenge).

[17] *Burdick*, 504 U.S. at 428-30.

[18] *Id.* at 441-42.

[19] *Id.* at 441.

[20] *Id.* at 438.

[21] *Id.*

competitiveness.[22] At the time of the decision, and for all practical purposes, Hawaii was a one-party state: Democrats dominated political life and dictated public policy at all levels.[23] Additionally, Hawaii's laws made it difficult for third parties and independent candidates to garner the political support sufficient to place their names on the ballot, effectively cutting off any opportunity for winning an election.[24] These restrictions were compounded by the fact that the winner of the Democratic Party primary inevitably won the general election.[25] In a searing article on the issue, Professors Samuel Issacharoff and Richard H. Pildes analyzed it this way:

> Although write-in ballots are not always necessary for mobilizing political opposition, in Hawaii the write-in option is particularly significant because other avenues for opposition are so effectively closed off. Around a third of general election races for the state legislature are uncontested, and in these uncontested races substantial numbers of voters who vote for other seats refuse to cast an affirmative vote. Instead, they leave their ballots blank. . . . The ban on write-in votes prevents this disaffection from coalescing behind a specific alternative candidate to the choice of the Democratic Party.[26]

As Issacharoff and Pildes point out, Hawaii's justifications for banning write-in votes—the prevention of "party raiding"[27] and "unrestrained factionalism"[28]—serve the interests of the dominant political party, the Democrats.[29] Indeed, the state officials who created these restrictions were Democrats themselves, and, as Issacharoff and Pildes suggest, it entrenched their power against competition.[30] Exacerbating the ban on write-ins were restrictive procedures for getting on the ballot or switching parties to vote in closed primaries, making it extremely difficult for insurgents or dissidents to challenge the hegemony of the Democratic Party.[31]

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[22] Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 670-73 (1998) ("A political process case more wrongly decided than *Burdick* is difficult to imagine.").
[23] *See id.*
[24] *See id.*
[25] *See id.* at 671.
[26] *Id.* at 672.
[27] *Id.* at 673, n.115 (noting that the Court defined "party raiding" as one party's efforts to "switch a bloc of voters from one party to another" to change the election's outcome).
[28] *Id.* at 673, n.116 (noting that the Court discussed the state's interest in "preventing write-in votes.").
[29] *Id.* at 673.
[30] *See id.*
[31] *See id.*

This Court's use of the *Anderson-Burdick* test necessarily failed to analyze the interplay between the socio-economic, political, and historical factors behind the law's implementation and mischaracterized the burdens on political competition.[32] The test allows states to devise post hoc justifications for laws that work to the personal and partisan benefit of the legislators writing them without significant judicial scrutiny.

One significant issue in election administration is for political motives to unduly influence statutory creation, resulting in the entrenchment of political parties and protection of incumbents. Such partisan-driven rules that dictate how elections operate are dangerous for democracy. These rules allow incumbents to entrench themselves in power, which undermines the competitiveness of our democratic system.[33] For elections to be free and fair, partisan advantage must not taint election administration or prevent voting. Indeed, Justice O'Connor noted the tension between election administration and partisan officials that oversee elections in *Clingman v. Beaver*:

> [I]t must be recognized that [the State] is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game. . . . Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe . . . there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.[34]

It is antithetical to democracy to defer to elected officials' partisan interests to structure elections to their political advantage. In election law, it is crucial for courts to consider the maxim that Justice O'Connor articulates—that the state is made up of partisan officials with potentially perverse incentives to craft election laws in their favor. Justice O'Connor recognized that election laws made by political actors should be highly scrutinized. Thus, for elections

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[32] *See id.*
[33] *See generally id.*
[34] Clingman v. Beaver, 544 U.S. 581, 603 (2005).

to be truly free and fair, courts must protect against partisan manipulation.

II. SECTION 2 OF THE VOTING RIGHTS ACT AND THE ADVANTAGES OF THE NINE SENATE FACTORS

Section 2 of the VRA provides plaintiffs with another way to challenge election laws.[35] Adopted as an enforcement mechanism for the Fifteenth Amendment,[36] Section 2 allows voters to seek judicial relief if a state or local law has denied or limited their right to vote on the basis of race, color, or language.[37] When evaluating claims under this law, courts have used the following Senate factors articulated in *Thornburg v. Gingles*:[38]

> 1. the history of official voting-related discrimination in the state or political subdivision;
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> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
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> 4. the exclusion of members of the minority group from candidate slating processes;
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> 5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
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> 6. the use of overt or subtle racial appeals in political campaigns;

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[35] "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 52 U.S.C. § 10301(a).

[36] U.S. CONST. amend. XV, §§1-2.

[37] *See* 52 U.S.C. § 10301(a). Specifically, Section 2 has given rise to "vote dilution" claims where minority challengers claim that their electoral power is diluted by the structure of the electoral process. *See Section 2 of the Voting Rights Act*, U.S. DEP'T. OF JUST., https://www.justice.gov/crt/section-2-voting-rights-act [https://perma.cc/6RH7-ZLS3] (last visited Oct. 22. 2022).

[38] 478 U.S. 30 (1986).

> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction;
>
> 8. whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members; and
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> 9. the tenuousness of state justifications.[39]

These factors offer a better framework for evaluating the constitutionality of election laws—especially as it relates to political competitiveness and the political power of minority groups. First, Section 2 challenges are evaluated through a "results-based" test, which allows courts to find a violation if the election structure results in the dilution of minority voting power.[40] This contrasts with claims brought under the Equal Protection Clause, which requires discriminatory intent to deem facially neutral laws unconstitutionally racially discriminatory.[41]

Second, the Senate factors address the historical context of a jurisdiction.[42] Notably, jurisdictions with a history of racially discriminatory election laws and practices are heavily scrutinized. Courts evaluating Section 2 claims can adopt the fact findings of prior court opinions, which creates a narrative regarding the political history.[43] While the *Anderson-Burdick* test permits courts to evaluate a law abstractly and in a historical vacuum, the Senate factors force courts to review claims in light of history.[44]

Third, these factors also consider how the lingering effects of racism cause socio-economic disparities among minority groups and how they affect access to political power.[45] This consideration has proven incredibly important, as burdens on the right to vote are much more likely to affect socio-economically disadvantaged

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[39] *Id.* at 36-38. The "Senate factors" take their name from the Senate Judiciary Committee's report concerning the 1982 VRA amendments to Section 2. *See* S. REP. NO. 97-417, at 28-29 (1982). This Article, however, does not address the three "preconditions" for challenges under Section 2.

[40] *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 442-43 (2015).

[41] *See, e.g.*, Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

[42] S. REP. NO. 97-417, at 28-29.

[43] *See* Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 425-25 (2014).

[44] *Cf.* Issacharoff & Pildes, *supra* note 22, at 671 (discussing Hawaii's ban on write-in voting upheld in *Burdick* in the context of the statutory scheme as a whole).

[45] S. REP. NO. 97-417, at 28-29.

groups and result in racially disparate impacts.[46] Many courts have acknowledged that lower socio-economic status hinders a minority group's ability to participate effectively in the political process.[47] Such an analysis of a challenged election law can benefit a court attempting to reveal the law's real-life impacts.

This mode of analysis should replace the *Anderson-Burdick* test for analyzing election structures. Indeed, the Senate factors provide critical considerations for courts when reviewing election laws, allowing them to examine the *actual* political impacts a law has on the political system.

III. REVISING THE SENATE FACTORS AND *ANDERSON-BURDICK* TO ADDRESS WEAKNESSES IN ANALYSIS OF ELECTION LAWS

Considering the inadequacy of the *Anderson-Burdick* test in addressing the impact of election laws on existing political dynamics, courts should utilize a flexible framework similar to the Senate factors to analyze the burdens created by laws. Accordingly, this Article proposes a new test which will add steps to the *Anderson-Burdick* framework. The test is as follows:

> 1. Plaintiffs must show that the challenged standard, process, procedure, or statutory scheme burdens the right to vote or access to the ballot under the First and Fourteenth Amendments.
>
> 2. The State must then offer justifications for burdening the right to vote and/or access to the ballot through the challenged standard, process, procedure, or statutory scheme.
>
> 3. Courts then analyze whether the burden of the challenged law interacts with social, economic, partisan, structural, or historical conditions to provide the political party in power or incumbents with imbalanced electoral advantages.
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> 4. If the reviewing court finds that the factors in step three show that the challenged law gives an electoral advantage to the political party in power or

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[46] The Supreme Court explained that the "essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47 (1986). *See also* Johnson v. DeGrandy, 512 U.S. 997 (1994).

[47] Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J. L. REFORM 643 (2006).

> incumbents generally, then it applies strict scrutiny to evaluate the law.

This analysis provides courts with a more flexible framework to determine if a law or regulation gives a systemic electoral advantage to the political party or incumbents in power. Specifically, courts should consider the following non-exclusive list of factors.

A. The History of Disenfranchisement and Politics in the Jurisdiction

First, courts must analyze the history of voter disenfranchisement and the politics of the jurisdiction from which the challenge originates. If, for example, the challenged regulation is at the county level, then a historical review should include the past practices of that jurisdiction—as well as those from the state—to provide an accurate context for the regulation. As with Section 2 challenges, courts should also take fact findings from previous rulings that have established whether past practices show a trend of voter disenfranchisement. If the court finds a history of voter disenfranchisement in the jurisdiction, it should review the regulation with more skepticism. This is especially important if concentrated disenfranchisement arises in constitutionally protected classes.

Furthermore, courts must consider the political history of the jurisdiction. Take New York, for example, a state known for its recent domination by the Democratic Party.[48] Even where control of the state government was split between Republicans and Democrats, the two parties have focused on preventing competition from primary challengers. As a result, New York State is notorious for cumbersome ballot access laws that make it difficult for challengers to get on the ballot.[49] Candidates not supported by the leadership in their respective parties find it much harder to challenge incumbents or party-endorsed candidates. Thus, for example, a court evaluating an action challenging a New York State ballot access law should consider this political history when evaluating whether the law is overly disadvantageous to insurgents, and therefore, potentially unconstitutional.

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[48] *See generally Party Control of New York State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_New_York_state_government [https://perma.cc/T2BQ-YQLA] (last visited Oct. 22, 2022).

[49] *See generally* Katherine E. Schuelke, Note, *A Call for Reform of New York State's Ballot Access Laws*, 64 N.Y.U. L. REV. 182 (1989). *See also* DeNora Getachew, *Understanding the Labyrinth: New York's Ballot Access Laws*, GOTHAM GAZETTE, https://www.gothamgazette.com/index.php/advertise/252-understanding-the-labyrinth-new-yorks-ballot-access-laws [https://perma.cc/VU56-SN6E] (last visited Oct. 23, 2022).

B. Partisanship and Incumbency Protection in the Creation and Implementation of Laws

The second factor that courts should examine is the political context of a law's creation and implementation. Laws are inherently suspect when they burden the right to vote for a certain subset of people because of their political affiliations. Without looking at the political impact of a law, a court cannot accurately assess how it might unfairly monopolize the electoral process for an already-dominant political party.

A reviewing court should consider a variety of evidence surrounding the political circumstances of a statute's creation. One type of evidence to consider is the process of the law's passage—including its legislative record, the statements of party officials concerning its purpose or intent, and the partisan voting record. And even if this law passed in a bipartisan manner, courts should ask whether it intended to protect incumbents against challengers.

Courts should also consider the law's practical effect law on the electorate. If a law works to restrict one party or group from voting, then that may be evidence of partisan motivation. Moreover, courts should ask whether this policy exists in other states, and, if so, what the effects are on that state's electorate. Specifically, courts should consider which party implemented the law in those states, and whether any invidious intent sheds light on partisan motivations in the challenged jurisdictions.

Voter identification laws illustrate how this analytical framework might be applied to protect voting rights more effectively. A common critique of voter identification laws is partisanship motivates their implementation.[50] Indeed, several members of the Republican Party have stated that voter identification laws are intended to increase their chances of winning elections.[51]

The Supreme Court, however, barely acknowledged this reality in *Crawford v. Marion County Board of Elections*.[52] In a lower court decision, a dissenting judge in the Seventh Circuit characterized Indiana's voter identification law, at issue in *Crawford*, as "a not too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[53] Oddly, Justice Stevens, writing for the plurality, stated that partisan

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[50] *See* Pikor, *supra* note 13, at 497-98.

[51] Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html [https://perma.cc/ZWX2-RBX9].

[52] 553 U.S 181 (2008).

[53] Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

advantages are valid motivations for passing election laws so long as other motivations exist.[54] And while Justice Stevens's opinion declared that the prevention of voter fraud, in part, was a sufficient state justification, there was no evidence whatsoever of voter fraud in Indiana.[55]

In *Frank v. Walker*,[56] the Seventh Circuit reversed a district court's decision that Wisconsin's voter identification law violated both the Fourteenth Amendment and Section 2 of the VRA.[57] The challenged law required voters to present one of nine forms of photo identification to have their votes counted.[58] But the Seventh Circuit upheld the law as constitutional without any analysis of the political climate in Wisconsin.[59]

Instead, the court should have considered the partisanship behind the law's enactment. In the law's passage, Wisconsin legislators split along party lines. Republican legislators voted unanimously for the law; Democrats united against it.[60] This fact should certainly have been considered, taking such evidence into account when considering a state's proffered justifications because they may be suspect in light of this evidence. Instead, *Frank* is just one example of *Crawford's* effect of giving the green light to jurisdictions to implement—and entrench—partisan advantages.

C. The Importance of the Challenged Statute to the Competitiveness of Elections in the Jurisdiction

Another issue for courts is the importance of the challenged law or regulation to the overall administration of elections. Some processes and regulations bear more heavily and directly than others upon the right to vote. For example, the length of time that polls are open, the qualifications needed to vote, the process for counting votes, and subsequent challenges are all integral to the process. A process deemed critical should be subject to a heightened level of review and require more compelling governmental justifications. A court can determine how important a procedure is by its effect on overall voter turnout and electoral competitiveness.

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[54] "It is fair to infer that partisan considerations may have played a significant role in the decision to enact [the law]. If such considerations had provided the only justification for a photo identification requirement . . . [the law] would suffer the same fate as . . . poll tax[es]. . . . But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators." *Id.* at 203-04.

[55] *Id.* at 194-97.

[56] 768 F.3d 744, 755 (7th Cir. 2014).

[57] Frank v. Walker, 17 F. Supp. 3d 837, 863 (E.D. Wis. 2014).

[58] *Id.* at 842-43.

[59] *See Frank*, 768 F.3d at 751-53.

[60] *See* Pikor, *supra* note 13, at 467.

How critical a procedure is to elections in a particular jurisdiction can vary with its political context. Take the example provided by *Burdick* in Part I, where Hawaii law banned write-in voting.[61] While Justice White noted that write-ins have a "generalized expressive function,"[62] he failed to consider the political context of the state. Write-in voting served as the only potential option for voters to coalesce around an independent candidate against the Democratic Party's dominance over Hawaiian politics.[63] Because of Hawaii's political landscape, the write-in ballot served as a more critical procedure in the electoral process than in other states. Accordingly, the *Burdick* Court should have viewed the state's attempt to outlaw write-ins with more skepticism.

D. The Weight of the Burden on the Right to Vote and on Which Subset of People the Burden Falls

Another factor for courts to consider is the weight of the burden on the right to vote, and upon which subset of people the burden falls. This factor focuses a court's analysis on the burdens on the right to vote or access to the ballot on a jurisdiction's most marginalized populations. The Supreme Court has focused on the burden as it applies to the *entire* voting population in a jurisdiction; however, the focus should be narrowed to the population of voters most heavily burdened. If the Court adopted this approach, political motivations that led to these laws would be more likely to reveal themselves.

For example, the varying opinions in *Crawford* addressed on whom the burden of Indiana's voter identification law fell.[64] There, the challenger argued that the Court should look at the subset of the population most burdened by the challenged law.[65] Justice Stevens rejected this argument, framing it as "a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute."[66] He emphasized that nothing in the record supported the claim that the law would burden indigent voters.[67]

To ignore the fact that voter identification laws affect a very specific subset of the population who are unlikely to vote for the Republican Party is to ignore political reality. Many studies have shown that the burden of voter identification laws falls disproportionately on minorities and the poor, two heavily

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[61] 504 U.S. 428, 430-31 (1992).
[62] *Id.* at 438.
[63] *See* Issacharoff & Pildes, *supra* note 22, at 672.
[64] *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 212 (2008) (Souter, J., dissenting).
[65] *Id.* at 200.
[66] *Id.*
[67] *Id.* at 203.

Democratic demographics.[68] Justice Souter, in dissent, noted that the burden would fall most heavily on the poor.[69] He did not, however, address the likely partisanship of this demographic.[70]

This failure to accurately evaluate upon whom the burden of the Indiana law fell constituted a deficient analysis. On the other hand, applying this Article's proposed framework would allow plaintiffs to present expert testimony about the likely socio-economic impact, showing that vulnerable populations may be prevented from voting or that the cost of voting would likely increase under the law. This would undoubtedly help courts focus on how an election law may adversely impact the political landscape in a particular jurisdiction.

E. The Challenged Statute's Interaction with Other Statutes

In her concurrence in *Clingman v. Beaver*,[71] Justice O'Connor articulated how the interplay of multiple statutes in election law is crucial to judicial analysis:

> A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms.[72]

As Justice O'Connor asserts, individual election laws may not by themselves fail to pass constitutional muster. The law's impact, however, can often only be assessed when related statutes are reviewed as well.

The *Burdick* case again provides an important lesson. Looking at the write-in ballot in a vacuum, a court could conclude that it serves merely a "generalized expressive function," as Justice

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[68] *See, e.g.*, Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POLITICS 363 (2017); *Fact Sheet: The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color [https://perma.cc/CA8V-F6J4].

[69] *Crawford*, 553 U.S. at 212 (Souter, J., dissenting) ("The need to travel . . . will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive . . . .").

[70] *Id.* at 216 ("[T]he travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.").

[71] 544 U.S. 581 (2005).

[72] *Id.* at 607-08.

White did.[73] In conjunction with Hawaii's panoply of election laws and the existing political landscape, however, the law banning write-in voting essentially acts as a barrier for candidates outside of the Democratic Party. This is much more burdensome on associational rights than Justice White' characterization and more of an accurate picture of the effect of the law.

F. The Tenuousness of State Justifications

As with the *Gingles* factors, "the tenuousness of the justification for a state policy [regarding an election law] may indicate that the policy is unfair."[74] In the context of Section 2 of the VRA, courts have found that a state's justifications for challenged laws are tenuous when they are (1) false, (2) impermissible, or (3) outweighed by other considerations.[75] States often attempt to justify election laws as either important for "political stability" or to prevent "party raiding" or "voter confusion."[76] Courts should thus look at such conclusory and often meaningless rationales with skepticism.

CONCLUSION

If a court finds that an election law provides an electoral advantage to the dominant party in the jurisdiction, then it should apply "strict scrutiny" to assess its constitutionality. Although strict scrutiny is usually applied to cases involving racially discriminatory government policies, it should be applied here as well because courts must similarly protect against partisan electoral manipulation. Protecting our democracy from election practices that benefit one party over another in the guise of administrative ease or neutrality is paramount to maintaining fair and meaningful elections. Only when such laws are genuinely justified by a compelling governmental interest and narrowly tailored to meet that interest should the court find them constitutional.

The manipulation of election laws to pursue partisan advantages poses the greatest threat to our democracy. Elected officials passing laws across the country that restrict the right to vote to maintain power threaten the future of democracy. The judiciary is only one institution designed to protect our democracy, but it must use the appropriate tools to do so.

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[73] *See* Burdick v. Takushi, 504 U.S. 428, 438 (1992).
[74] Katz, *supra* note 47, at 47.
[75] *Id.* at 48.
[76] *See* Issacharoff & Pildes, *supra* note 22, at 672-73.