

# Legacies of Segregation and Disenfranchisement: The Road from *Plessy* to *Frank* and Voter ID Laws in the United States



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*This article explores how voter ID laws further the dismantling of voting rights and the promises of full political engagement for racial minorities, especially African Americans. The authors highlight the racial politics that inform the emergence of these laws, and the racial intent and impact these laws have in diluting minority voting access and therefore political power. It begins with a short historical overview of voting rights since the eradication of slavery, then offers background on the current legal climate in which voter ID laws are situated. The essay concludes with an analysis of *Frank v. Walker* as a case study exposing the intent and impact of voter ID laws.*

**Keywords:** voter disenfranchisement, Voting Rights Act, voter IDs, *Frank v. Walker*

The eradication of race-based slavery brought America face to face with its first experiment with racial democracy. Decades of African American voting after 1865 would ultimately be undermined using barely sophisticated mechanisms that mocked and skirted constitutional protections of political engagement. Most notably, Black electoral participation was violently crushed by forces sympathetic to the South's commitment to White supremacy and Jim Crow segregation. Throughout the Black Freedom Struggle of the late nineteenth and twentieth centuries, restrictions on voting rights were routinely challenged. These challenges

culminated in important legal victories that stymied mechanisms to undermine access to voting during the Jim Crow era. By the 1960s, non-violent demonstrations and political organizing gave rise to the Voting Rights Act of 1965 (VRA), one of the key legislative victories in the fight for civil rights. The VRA ushered in dramatic changes to America's racial and political order, and stands as one of the most important pieces of legislation in American history.

The Voting Rights Act democratized American politics and political representation in profound ways. In response to its passage, attacks on the expanded political protections it pro-

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**Table 1.** Voter Identification Laws in Force in 2019

	Photo ID	Non-photo ID
Strict	Georgia <sup>a</sup>	Arizona <sup>a</sup>
	Indiana <sup>a</sup>	North Dakota <sup>a</sup>
	Kansas <sup>a</sup>	Ohio <sup>a</sup>
	Mississippi <sup>a</sup>	
	Tennessee <sup>a</sup>	
	Virginia <sup>a</sup>	
	Wisconsin <sup>a</sup>	
Nonstrict	Alabama <sup>a</sup>	Alaska
	Arkansas	Colorado
	Florida <sup>a</sup>	Connecticut
	Hawaii	Delaware
	Idaho <sup>a</sup>	Iowa <sup>a</sup>
	Louisiana <sup>a</sup>	Kentucky <sup>a</sup>
	Michigan <sup>a</sup>	Missouri <sup>a</sup>
	North Carolina <sup>a</sup>	Montana <sup>a</sup>
	Rhode Island	New Hampshire
	South Carolina <sup>a</sup>	Oklahoma <sup>a</sup>
	South Dakota <sup>a</sup>	Utah <sup>a</sup>
	Texas <sup>a</sup>	Washington
		West Virginia <sup>a</sup>

Source: Authors' tabulation based on NCSL 2020.

Note: This table refers to laws that are in effect in 2019; Pennsylvania also has enacted a strict photo voter ID law, but it has been struck down by state court and is not in effect. North Carolina also enacted a photo voter ID law that has been struck down by the courts. Therefore, these states are not included in this chart of in-force laws. Photo versus non-photo identification: Some states request or require voters to show an identification document that has a photo on it, such as a driver's license, state-issued identification card, military ID, tribal ID, and many other forms of ID. Other states accept non-photo identification such as a bank statement with name and address or other document that does not necessarily have a photo. Nonstrict: At least some voters without acceptable identification have an option to cast a ballot that will be counted without further action on the part of the voter. Strict: Voters without acceptable identification must vote on a provisional ballot and also take additional steps after Election Day for it to be counted.

<sup>a</sup> Denotes a Republican-majority legislature.

vides have been incessant. Since 2010, thirty-five states have laws requesting or requiring voters to show some form of identification (see table 1). The vast majority of these states (twenty-seven) have Republican-controlled state legislatures that have argued for stricter laws under the auspices of attempting to prevent voter-impersonation fraud and inspiring confidence in the state's electoral process.

These laws have in their intent and effect diluting minority votes and weakening minority political power. In their operation, voter ID laws are effective holdovers from the Jim Crow

era in their capacity to circumscribe political access, particularly for Black and Latino voters. Because of the burdens associated with costs prohibiting would-be voters, voter ID laws operate as modern-day poll taxes. Although current registered voters with IDs are not affected, voter ID laws include remnants of grandfather clauses of the Reconstruction and Jim Crow eras. Also, given that many of those affected by voter ID laws are urban Blacks and Latinos, the laws have equipped Republican legislatures with another weapon to weaken Democrat-leaning voters. These urban geographies have

long been sorted along racial and political lines. Separating the two is almost impossible.

Voter ID laws help fuel the quiet dismantling of the promises of full citizenship and political engagement. This article highlights both the racial politics that inform the emergence of these laws, and the racial intent and impact these laws have on diluting minority voting access and therefore political power.

### PROMISES OF FULL VOTER RIGHTS: A BRIEF HISTORY

The United States has a long political tradition of limiting the voting rights of the poor, ethnic and racial minorities, and those considered outside the privileges extended to elite White men. After the American Revolution, nearly all states restricted voting rights to property owners. Indeed, the first state-mandated literacy test was enacted in Connecticut in 1855 to deny voting rights to Irish immigrants. Native Americans endured voting rights restrictions well into the twentieth century, particularly in Arizona and New Mexico. Asian immigrants were ineligible for citizenship and voting rights until the Immigration and Naturalization Act of 1952. But efforts to deny African Americans voting rights would lead to a collection of mechanisms and explicit political violence that would forever mar the nation’s claims on democracy and continue to haunt the nation’s political process today.

As the guns of the Civil War fell silent in April 1865, nearly four million African Americans had long recognized that Union victory would bring an end to slavery. Yet, as Black people actualized their understandings of freedom and citizenship, these new social and political landscapes became heavily contested terrain. The end of the war and emancipation gave way to the passage of the Fourteenth and Fifteenth Amendments, which together “endowed all citizens with the right to vote free from racial discrimination. And both expressly gave Congress the power to enforce their guarantees through

legislation” (ACLU 2019a, 6). Immediately thereafter, the federal government provided assurances that Black males could exercise their newly granted rights without fear of violence, hostility, and intimidation. During Reconstruction, it became a federal crime to interfere with access to the ballot box using fraud, violence, or other forms of intimidation (ACLU 2019a; US-CCR 1968).

Federal intervention ended in 1876, however, which ultimately gave southern states the autonomy to create and implement policies of their own design. By the late nineteenth century, often in the language of progressive reform, southern states passed a wide array of voting restrictions including but not limited to “‘eight-box’ laws, registration acts, secret ballot laws, poll taxes, literacy and property tests, ‘understanding’ qualifications, and white primaries.”<sup>1</sup> Although these laws—alongside state-sanctioned violence and terror—sought to remove Black people from the political process, they also were part of the broader agenda of White supremacy to crush African American socioeconomic mobility. Indeed, “the effort to safeguard an elite monopoly over policy and governance arose as early as 1870 with the implementation of varied voter disenfranchisement tactics, all of which were grafted from an agenda working against blacks’ social mobility” (Kerrison 2009, 5).

By the 1880s, Jim Crow segregation had supplanted slavery as the system of White supremacy that emerged across the South in response to emancipation.<sup>2</sup> Indeed, Jim Crow was exhaustive in its reach. The system was codified by state law, recognized in the federal courts, and defended with pseudoscientific research. Scholars have concluded that Jim Crow extended beyond the South, particularly as Black southerners migrated out of the region.

Jim Crow is most notable as a system of legal segregation attributed to the infamous *Plessy v. Ferguson* decision and the codification of the “separate but equal” doctrine.<sup>3</sup> Yet Jim Crow Era

1. Brief for Amici Curiae of Historians and Other Scholars in Support of Petitioners, 6, *William Crawford, et al. v. Marion County Election Board et al.*, 553 U.S. 181 (2008).

2. *Civil Rights Cases*, 109 U.S. 3 (1883).

3. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

practices and policies also secured the economic subjugation of the masses of Black southerners by relegating them to jobs that reinforced White supremacy. Sharecropping and domestic work, two prime examples, were eerily reminiscent of slavery. Racial violence was used to maintain social, economic, and political dominance over Blacks, and became the extralegal instrument to order society along racial lines. Whites engineered race riots to destroy the socioeconomic and sociopolitical power Black towns and communities had amassed since Reconstruction. Some of the most notable tragedies occurred in Atlanta, Georgia (1906), Springfield, Illinois (1908), Chicago and East St. Louis, Illinois (1919), Tulsa, Oklahoma (1921), and Rosewood, Florida (1923). Because of the rising tide of White supremacy, by the late 1890s the majority of African American men had been removed from the electoral process leaving Black southerners no way of changing or even impacting law and policy governing the system.

As Jim Crow reached its zenith at the turn of the twentieth century, the full-scale disenfranchisement of African American southerners became another of the era's hallmarks. Gone, but not forgotten, were the political gains of Radical Reconstruction that witnessed Black congressmen, state legislators, and local officials across the South. This political insurgency became a prominent target for White southerners who countered with rancid violence aimed at Black politicians, White Republican sympathizers, and ultimately any Black person attempting to cast a vote.

During Jim Crow, policies disenfranchising African Americans were unequivocally racist (Blessett 2015). An early example is the implementation of the grandfather clause, which "excused persons registered on or prior to January 1, 1866, and their descendants from having to comply with any literacy or property requirements for [voting] registration" (Contreras 2002, 59). Before 1866, Black people were not eligible to register and therefore were unable to cast a ballot, so their descendants would have been ineligible to vote based on the parameters

of the grandfather clause. Additionally, it was illegal for African Americans to learn to read and write, making literacy among the formerly enslaved population extremely limited.

Another race-conscious strategy was rooted in conceptions of criminality, which have resulted in Blacks being the target population for felony disenfranchisement policies (Loury 2008). "Alabama, for instance, included a provision in its Reconstruction Constitution that denied the right to vote to those convicted of crimes of 'moral turpitude,' a class of crimes in which African Americans are disproportionately represented" (Preuhs 2001, 736). The purposeful intent of marginalization was exemplified further by a delegate at the 1901 Alabama Constitutional convention when he stated "everybody knows that this Convention has done its best to disenfranchise the negro in Alabama" (Blessett 2015, 35).

By the turn to the twentieth century, White southerners had functionally crushed nearly all expressions of Black political access and power across the region. Indeed, all-White, Democratic primaries emphasized the reach of White political supremacy across the region. Once *Plessy* emerged as the undergirding legal justification for racial segregation, disenfranchisement provided political sustenance to the system. African Americans responded with decades of legal activism, earning victories in the courts over grandfather clauses in 1915, exclusion from the southern-based Democratic Party in 1927 and 1932, and all-White primaries in 1944. Nonetheless, although voting litigation challenged the system of disenfranchisement, no substantive changes in the Black electorate emerged until the 1960s.<sup>4</sup>

In broad terms, disenfranchisement would remain intact across the South until the civil rights legislative victories of the sixties, most notably the Civil Rights Act of 1964 and the Voting Rights Act of 1965 (VRA). The VRA led to immediate advances in Black electoral re-engagement in ways not witnessed since Reconstruction. It banned discriminatory voting practices and procedures. Section 2 of the act barred states and local jurisdictions from

4. *Guinn v. United States*, 238 U.S. 347 (1915); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Smith v. Allwright*, 321 U.S. 649 (1944).

adopting voting qualifications, prerequisites, standards, practices, or procedures that result in discriminatory outcomes. The VRA also permits the Department of Justice to supervise "the registration of voters and to certify election observers to help ensure compliance with federal laws." The VRA would ultimately permanently ban voting limitations such as literacy tests. The act also included Section 5 preclearance requirements that included a rigorous review process whereby jurisdictions must demonstrate that any changes to voting practices would not have the purpose or effect of denying the right to vote on account of race. States and jurisdictions with a history of disenfranchisement were accountable to Section 4b's coverage formula, which captured jurisdictions in which fewer than half of voting age residents had voted or were registered to vote prior to the act (ACLU 2019a). Because of the law's reach and protections, African American voting and elected officials increased substantially in the aftermath of its passage. Efforts to weaken the VRA emerged in its aftermath as well.

The efforts to roll back voter rights and protections are numerous, some more sophisticated than others. More recent attacks have been galvanized by the Supreme Court's landmark decision *Shelby County v. Holder*, in which the Court found the coverage formula in Section 4b outdated and therefore unconstitutional. The majority went so far as to suggest that problems with electoral access were in the past, stating that "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African Americans attained political office in record numbers."<sup>5</sup> However, throughout the 2012 election reports were consistent of long voting lines, challenges to voters based on "questionable" citizenship status, and inaccurate voter information distributed to language minorities, thus revealing the racially disproportionate effect voting obstacles continued to present (Agraharkar, Weiser, and Skaggs 2011). Immediately after the *Shelby v. Holder* decision, several states—Texas,

Florida, South Carolina, and North Carolina—that had been covered by the preclearance provision announced plans for new voting restrictions, the most common of which have been voter identification laws. By August 2013, an additional seventeen states had either proposed new voter ID laws or attempted to make their current laws stricter (NCSL 2013).

### THE NEW SELMA: VOTER DISENFRANCHISEMENT AND RACE-NEUTRAL POLICIES

Today's disenfranchisement, however, is only somewhat subtle and seemingly race neutral. In this regard, race-neutral or colorblind policies refers to procedures that do not explicitly identify or articulate a relationship to any specific racial or ethnic group, but instead produce racially disproportionate outcomes after implementation. Voter ID laws, provisional ballots, changes to voter registration procedures, and decreasing the number of early voting days have been adopted under race-neutral premises, but all minimize the minority voters (Kam 2012).

In her analysis of voter law changes, Brandi Blessett finds that some states have passed disenfranchisement policies that are complex and multifaceted, thus having wide-ranging impacts on prospective voters. "While the diminished use of violence is a tremendous step in the right direction, the colorblind nature of disenfranchisement is just as dangerous and frightening based on its outward appearance that all laws are equally applied to all groups. In this regard, the colorblind nature for which these policies have emerged does not acknowledge the long-standing disparities that exist with regard to minorities being able to access the ballot and certainly does not recognize the role of state legislatures in their attempts to circumvent suffrage rights for racial and ethnic minorities" (2015, 37).

Additionally, all of the nine states that were required to request preclearance to change voting laws prior to Section 4b's being deemed un-

5. *Shelby County v. Holder*, 570 U.S. 529 (2013). The Supreme Court reviewed the constitutionality of two provisions of the Voting Rights Act: Section 5, which requires certain "covered" jurisdictions to obtain federal preclearance before implementing any changes to their voting practices or laws; and Section 4(b), which contains the coverage formula that determines which jurisdictions are subject to preclearance.

constitutional passed at least five disenfranchisement policies that included financial hardships, created confusion among voters, limited access to the ballot, diluted the vote geographically, and used subjective eligibility measures (Blessett 2015, 37). Voter ID laws, such as Wisconsin's, further exacerbate this foray of policies and have been accepted by the federal courts.

The partisan nature of these laws is well established (Rocha and Matsubayashi 2014; Benetele and O'Brien 2013). Most have been sponsored by Republican legislators and passed by states with Republican governors. They are more common in states with Republican legislative majorities. Their passage into law is tied to partisan competition at the state level: competitive states controlled by Republican legislatures are particularly likely to pass these laws, presumably to protect their slim electoral margins. In addition, studies find that racial demographic change also matters. Republican states where the non-White electorate is growing rapidly are also much more likely to see these laws proposed and passed.

In 2008, the Supreme Court handed down a ruling that gave rise to the current protections voter ID laws enjoy. A review of *Crawford v. Marion County* is therefore essential given the precedent set, and because of important particulars not broadly apparent at the time.<sup>6</sup> Indeed, the highly respected jurist, author, and law professor Richard Posner admitted that his opinion from the Seventh Circuit Court of Appeals was a mistake. Posner noted that voter ID laws like Indiana's are "now widely regarded as a means of voter suppression rather than fraud prevention" (Schwartz 2013).

Passed in 2005, Indiana's voter ID law, SEA 483, is race neutral and on its face politically neutral.<sup>7</sup> Indiana asserted that it was grounded in the state's interest to prevent voter fraud, particularly fraud that might occur because of

name discrepancies in its voter rolls and to protect public confidence in elections. Passed on a straight Republican party-line vote, the law requires voters in a primary or general election to present a government-issued photo ID. The law does not apply to absentee ballots, and exceptions are made for those living in state-licensed facilities such as nursing homes. Also, provisional ballots are available for the indigent, those who object to being photographed for religious reasons, and for voters without identification on election day. For provisional ballots to be counted, those in these circumstances have ten days to present identification to the circuit county clerk. Indiana does not require ID to register to vote and does offer free photo identification to qualified voters able to provide proof of residence and identity (*Harvard Law Review* 2007).

Two complaints were filed and consolidated in the Federal District Court for the Southern District of Indiana soon after SEA 483 was enacted.<sup>8</sup> The plaintiffs argued that the law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification.<sup>9</sup>

The district court was not convinced. Judge Sarah Evans Barker ruled in favor of Indiana, stating that the plaintiffs had not proven how the law will prevent residents from voting or how the right to vote will become unduly burdensome under the law. Judge Barker dismissed the plaintiff's expert witness, who claimed that SEA 483 would affect nearly a million Indiana voters. That Judge Barker found that nearly forty-three thousand residents were without valid state ID did not raise enough concern to strike down the law.

6. *Crawford v. Marion County Election Board*, 553 U.S.

7. Senate Enrolled Act No. 483, 2005 Ind. Acts at 2005.

8. Plaintiffs included William Crawford, Joseph Simpson, Concerned Clergy of Indianapolis, Indianapolis Resource Center for Independent Living, Indiana Coalition on Housing and Homeless Issues, Indianapolis Branch of the National Association for the Advancement of Colored People, and United Senior Action of Indiana.

9. *Crawford*, 553 U.S. at 187.

The law was affirmed on appeal. A majority of the Seventh Circuit Court of Appeals agreed that the voter ID would not insert undue burdens on voters, accepting that some Democrats would be affected by the Republican-sponsored legislation. Writing for the majority, Judge Posner found “a sufficient need for the voter ID law” and discounted the complete absence of voter fraud throughout Indiana’s history. Posner blamed this absence on poor enforcement and the difficulties with apprehending voter impersonators. The majority also argued that the law would not be subject to strict scrutiny. Judge Evans dissented, calling for a higher standard of scrutiny and finding the law to indeed pose an undue burden in violation of the First and Fourteenth Amendments (*Harvard Law Review* 2007).

On appeal to the Supreme Court, a higher level of scrutiny was encouraged and especially articulated in key amicus briefs favoring striking down Indiana’s law. For example, the Mexican American Legal Defense and Education Fund (MALDEF) emphasized “the application of strict scrutiny is necessary to ensure that voter identification schemes ostensibly based on the need to police voting fraud are not a subterfuge for outright discrimination.”<sup>10</sup> MALDEF argued because it was “enacted amidst a racially-charged debate” and given its impact on Latino and Native American voters, Arizona’s voter ID law, Proposition 200, deserved strict scrutiny by the courts, and the same should be applied to Indiana’s law.

In another amicus, a team of “Historians and Other Scholars in Support of Petitioners” traced the history of poll taxes and other disenfranchising mechanisms and linked those to contemporary voter ID laws. The authors found that antifraud claims were central to nineteenth-century efforts to disenfranchise Black voters, much like claims of preventing fraud propel arguments supporting voter ID laws today. They also highlighted one other important historical parallel from the same era. The rhetoric of fraud prevention was also used to advance the passage of “immigrant registration laws.” The

authors stated that “numerous states placed new obstacles in the path of immigrant voters . . . justified on the grounds that they would reduce fraud. One such obstacle was to require naturalized citizens to present their naturalization papers to election officials before registering or voting. Although not unreasonable on its face, this requirement, as lawmakers knew, was a significant procedural hurdle for many immigrants, who might easily have lost their papers or been unaware of the requirement.”<sup>11</sup>

The Court ultimately found Indiana’s voter ID law constitutional even though it would clearly reduce voting access to the poor, racial minorities, recent immigrants, and other populations.

One specific development in Indiana that certainly propelled passage of SEA 483 was the tremendous growth in the state’s Latino population. As MALDEF warned, SEA 483 had indeed emerged amid a racially charged moment in the state’s history, which census data confirm. The Latino population was 98,601 in 1990. By 2000, it had grown to 217,326. By 2010, it had climbed to 391,487 (Strange 2013; U.S. Census Bureau 2020). That the growth is almost entirely absent from *Crawford* deliberations and documents is curious. The numbers alone, however, suggest that it was a key social factor during the time SEA 483 would have been under consideration by the legislature. These kinds of dramatic demographic trends typically cause any number of local debates and critiques. By the passage of Wisconsin’s 2011 voter ID law, Act 23, Latino immigrants would be directly named and scapegoated as the possible perpetrators of the kind of in-person voter fraud the Supreme Court upheld in *Crawford*.

#### ENTER FRANK V. WALKER

Although *Crawford* shaped the legal protections for voter ID laws, Wisconsin’s Act 23 nonetheless relied on the brand of racial scapegoating that defined Jim Crow era racial propaganda aimed at Blacks and immigrants. Like Indiana’s law, Act 23 emerged in a state undergoing significant growth in its Latino population. In the

10. Brief for Amicus Curiae of Mexican American Legal Defense and Educational Fund in Support of Petitioners, 2, *Crawford*, 553 U.S.

11. Brief for Amici Curiae of Historians And Other Scholars In Support Of Petitioners, 10, *Crawford*, 553 U.S.

state's most urban region, the Latino population grew by 213 percent. In 1990, Latinos made up 3.6 percent of the Milwaukee region, by 2015 more than 10 percent, totaling over 160,000 residents (Levine 2016). From the 1940s forward, the city's Black population had soared above 40 percent. In tandem, Blacks and Latinos make up a majority in a city that also leans heavily Democratic.

When Wisconsin's legislature passed Act 23 in 2011, requiring residents to produce a photo ID to vote, this law was nestled in a mix of barely colorblind policies intended to preserve the system of racial inequality for which the state is now infamous. The law also stood to greatly limit the impact of Black and Latino voters. In his 2014 *Frank* opinion, District Court Judge Lynn Adelman found that "the plaintiffs have shown that the disproportionate impact of the photo ID requirement results from the interaction of the requirement with the effects of past or present discrimination. Blacks and Latinos in Wisconsin are disproportionately likely to live in poverty."<sup>12</sup>

A few additional points provide important context for Wisconsin's law and the *Frank v. Walker* case. First, Wisconsin's Republican-controlled state legislature regularly passes measures that greatly exacerbate racial inequality to levels reminiscent of the Jim Crow era. Second, although Act 23 appears colorblind, its context and glaring impact force one to assume that it was passed with both politically charged and racially motivated intentions. Finally, as a deeper look into Judge Adelman's lower court opinion reveals, Act 23 includes built-in features that forced the plaintiff's legal team and even the casual observer to make clear connections to Jim Crow era efforts to disenfranchise Black voters.

Plaintiffs in the case argued that Wisconsin Act 23 violated the Fourteenth Amendment and Section 2 of the Voting Rights Act. Judge Adel-

man limited his opinion to whether Act 23 placed an unjustified burden on the right to vote and indeed violated Section 2.<sup>13</sup> Defendants, the State of Wisconsin, argued that Act 23 was necessary to the state's interest in "preventing and deterring fraud and ensuring the integrity of elections"<sup>14</sup> Appropriate identification under Act 23 includes a state driver's license, a state ID card, military ID, a U.S. passport, a naturalization certificate issued within the last two years, an unexpired receipt for a state ID card application, a recognized Native American tribe ID card, and an unexpired student university ID accompanied by proof of enrollment. Veterans ID cards and student ID cards from two-year technical colleges are not acceptable. Any accepted ID must be presented when voting.

To determine whether Act 23 imposed an unjustified burden on the right to vote, Adelman first evaluated the four arguments raised regarding state interest, which included the following: detecting and preventing in-person voter-impersonation fraud, detecting and deterring "other types of voter fraud," and promoting public confidence in the integrity of the electoral process. Regarding voter-impersonation fraud, the court transcript reveals and Adelman explained, "In the present case, no evidence suggests that voter-impersonation fraud will become a problem at any time in the foreseeable future. As the plaintiffs' unrebutted evidence shows, a person would have to be insane to commit voter impersonation fraud. The potential costs of perpetrating the fraud, which include a \$10,000 fine and three years of imprisonment, are extremely high in comparison to the potential benefits, which would be nothing more than one additional vote for a preferred candidate (or one fewer vote for an opposing candidate), a vote which is unlikely to change the election's outcome."<sup>15</sup>

12. *Ruthelle Frank et al. v. Scott Walker*, 17 F. Supp. 3d 837 (E.D. Wisc. 2014), 877.

13. "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301.

14. Transcript of Court Trial, vol. 1, 33, *Frank v. Walker*, 17 F. Supp. 3d.

15. *Frank v. Walker*, 17 F. Supp. 3d at 850.



Although the claim of preventing voter impersonation fraud seemed ridiculous to Adelman, the question of deterring “other types of voter fraud” played into the racial tropes that have lingered since the Jim Crow era. The defendants suggested that a convicted felon or noncitizen might somehow register to vote and attempt to cast a fraudulent ballot. Although this is equally ridiculous, in a state as committed to incarceration as Wisconsin is, felon and minority are virtually synonymous in the imagination of the Republican Party’s largely White base.

By 2011, Wisconsin led the nation in Black mass incarceration with almost 13 percent of all working-age Black men behind bars. From 1980 to 2016, the state’s prison population increased by 456 percent, to roughly 23,413 people. These numbers are largely attributed to the state’s Truth-in-Sentencing law, which included mandatory minimum sentences, abolished parole, and eliminated credit for good behavior. As of 2016, nearly sixty-five thousand people were on some form of community-based extended supervision in the state. One in eight Black men are under community supervision, and their freedom is tenuous given that they could be reincarcerated for technical violations even if they commit no new crimes (ACLU 2019b; Williams, Schiraldi, and Bradner 2019). Most people of color in the state’s carceral system are from Milwaukee. As of 2012, only 10 percent of African American men with incarceration records had a valid Wisconsin driver’s license and no recent suspensions or revocations (Pawasarat and Quinn 2013).

Adelman agreed that the state has an interest in protecting the public’s confidence in the integrity of its elections, but he was unmoved because the state failed to produce any evidence to support that a photo ID requirement would accomplish this. The expert witness for the plaintiff, however, showed “zero relationship between voter ID laws and a person’s level of trust or confidence in the electoral process.” In an interesting twist, Adelman questioned whether ID laws actually undermine the public’s confidence in the electoral process. Trial

experts confirmed that these laws create false perceptions that voter impersonation not only exists, but is also widespread, thus potentially damaging that desired integrity.<sup>16</sup>

Adelman found that Act 23 violated the Fourteenth Amendment and determined that “invalidating Act 23 is the only practicable way to remove the unjustified burdens placed on the substantial number of eligible voters who lack IDs.” The support used to reach this conclusion reads as a lesson in Milwaukee urban history. It is not necessary to move point by point through the opinion, but the evidence used to arrive at his conclusion is valuable. Adelman pinpointed the very socioeconomic realities supporting notions that the remnants of *Plessy* are still with us today, as evident in policies like Act 23. Indeed, the thin veneer of colorblindness nearly crumbles altogether under Adelman’s review.

However, it is fair to suggest that Act 23 was not only intended to negatively affect racial minorities. In many respects, the act includes the vestiges of grandfather clauses and poll taxes, which can disenfranchise the poor more broadly. Lessons from the Jim Crow South remind us that poor Whites remained on the margins of society even if they bought into the racial hierarchies of the day. Roughly three hundred thousand registered voters in Wisconsin, nearly 9 percent of the total, lacked a qualifying ID. “Thus, the number of registered voters who lack a qualifying ID is large enough to change the outcome of Wisconsin elections.” In Milwaukee County, 63,085 eligible voters lacked a qualifying ID at the time of the case.<sup>17</sup> Seen through the microcosm of Wisconsin politics, Act 23 can be interpreted as an attack on the state’s most diverse, most Democratic-leaning region.

Indeed, research on the effects of the voter ID in Wisconsin paints a bleak picture. For example, a study by Priorities USA compared turnout in states that adopted strict voter ID laws between 2012 and 2016, like Wisconsin, with turnout in states that did not (2017). States that did not implement changes to voting ID laws witnessed an average increase of

16. *Frank v. Walker*, 17 F. Supp. 3d at 851.

17. *Frank v. Walker*, 17 F. Supp. 3d at 854.

turnout of +1.3 percent from 2012 to 2016. Wisconsin dropped by -3.3 percent in that time. Moreover, the loss skewed more African American and Democratic. In a state where Donald Trump won by fewer than thirty thousand votes, this was a loss of more than two hundred thousand votes from Democratic voters.

Adelman, however, left no doubt that Act 23 placed significant burdens on residents without satisfactory identification, such as a birth certificate, on residents who cannot afford IDs, and on residents who simply do not have the time, resources, or daytime flexibility needed to obtain either. Those who already have appropriate identification are essentially grandfathered into the electoral process. Seniors, especially those from the rural South, or people born elsewhere may not be able to secure copies of birth certificates in order to then receive state-approved IDs. If so, such documentation may not be accurate for any number of reasons, injecting new, unforeseen burdens into the process.

Of the more than sixty-three thousand eligible voters without an approved ID in Milwaukee County, anywhere between twenty and forty thousand earn less than \$20,000 a year. Given costs associated with travel and fees, Act 23 then operates as a modern-day poll tax.<sup>18</sup> For many who face economic hardships in a post-industrial, rust-belt city such as Milwaukee, voting looks more like a luxury of those with means than a right and duty of citizenship. As Adelman summarized, “There is no way to determine exactly how many people Act 23 will prevent or deter from voting without considering the individual circumstances of each of the 300,000 plus citizens who lack an ID. But no matter how imprecise my estimate may be, it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes.”<sup>19</sup>

In determining that Act 23 violates Section 2, Adelman drew from a wide body of research on the socioeconomic realities facing Black and Latinos in Wisconsin, the great majority of

whom live in Milwaukee. This research led him to conclude that the voter ID law would unfairly affect Blacks and Latinos. Adelman writes,

Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing. Based on this evidence, I conclude that Act 23’s disproportionate impact results from the interaction of the photo ID requirement with the effects of past and present discrimination and is not merely a product of chance. Act 23 therefore produces a discriminatory result. . . . Accordingly, the photo ID requirement results in the denial or abridgment of the right of Black and Latino citizens to vote on account of race or color.<sup>20</sup>

Poverty, lack of education, limits on physical mobility, age, and unemployment are all known suppressors of political participation. The costs associated with voting directly reduce the turnout of economically struggling voters of all backgrounds. Pervasive racial disparities and racially based socioeconomic distress in Milwaukee and Wisconsin provide compelling evidence of the kinds of resource discrepancies likely to impede full and equal participation in the electoral process. When considered alongside Act 23, these conditions effectively establish a violation of Section 2.

## CONCLUSION

The impact of the VRA cannot be overstated. Yet, although the United States from the beginning limited voting privileges to a narrow community of educated and economic elites, a wide array of legal and political jockeying since then has laid the groundwork for the momentous impact the VRA would ultimately have on electoral engagement after 1965. Once African Americans entered electoral politics during Reconstruction, they were met with a bevy of schemes intended to crush their electoral

18. *Frank v. Walker*, 17 F. Supp. 3d at 855.

19. *Frank v. Walker*, 17 F. Supp. 3d at 862.

20. *Frank v. Walker*, 17 F. Supp. 3d at 878–79.

power. In response, Black electoral activism took on many forms to challenge the various obstacles erected to preserve political power for edifice of White supremacy.

Because *Frank* is now overturned on appeal, there are several reasons to believe that Wisconsin’s voter ID law will present lasting barriers to political participation that disproportionately and deleteriously affect disadvantaged minority communities. The research on the costs of voting reveals that requirements ranging from advance registration to strict voter ID laws “do reduce voter turnout to some degree and that the impact seems to fall disproportionately on the least educated and the least wealthy” (Priorities USA 2017). Although the literature on the impact of voter ID laws on turnout is not vast, evidence suggests that requirements have indeed depressed turnout. The most extensive study, by Michael Alvarez, Delia Bailey, and Jonathan Katz, finds that stricter rules—the combination of having to present an ID and a signature match, and the photo ID requirement—did depress the turnout of registered voters relative to the requirement of stating one’s name at the polls. Although the study, which used individual-level CPS data, did not find a specific disproportionate racial effect of strict voter ID laws over four election cycles between 2000 and 2006 (controlling for socioeconomic status), it did find that “voters with lower levels of income of all racial/ethnic groups are less likely to vote the more restrictive the voter identification regime” (Alvarez, Bailey, and Katz 2007, 20).

Opening arguments by ACLU of Wisconsin Attorney Karyn Rotker spell out the significance of *Frank* and Act 23’s voter ID requirement. Rotker stated before the court,

The right to vote is sacred. For the State of Wisconsin to impose these unreasonable burdens in the near total absence . . . of any evidence that doing so will in any way reduce the problem of which defendants complain, and in the presence of substantial evidence that doing so will disenfranchise and burden many voters, disproportionately minority voters, violates the equal protection clause, im-

poses substantial costs that constitute poll taxes, and unreasonably and arbitrarily deprives voters of their voting rights in violation of the 14th Amendment and it does so in a manner that violates Section 2 of the Voting Rights Act. These restrictions cannot be allowed to stand.<sup>21</sup>

Nonetheless they do stand, and were upheld on appeal to the Seventh Circuit Court. As a result, more conservative-led state legislatures have anchored these laws into their political processes, presenting significant challenges to full and open participation by affected individuals and communities that could pose political challenges. Although *Plessy*’s “separate but equal” doctrine ended more than sixty years ago, its residue remains woven in the socioeconomic and sociopolitical landscapes of the nation, and has been revived again through voter ID laws and other mechanisms to disenfranchise American citizens.

#### EPILOGUE: DYING TO VOTE

On April 7, 2020, Wisconsin held the only in-person primary election in the month. The Wisconsin election crystallized what is expected to be a high-stakes, state-by-state legal fight over how citizens can safely cast their ballots if the coronavirus outbreak persists into the November 2020 general election. Over the course of three days, residents were informed first, that the election had been postponed by executive order of the governor; second, that this executive order was overturned by the Wisconsin state Supreme Court; and, third, that the U.S. Supreme Court had blocked the extension of absentee voting. This political gamesmanship sowed chaos and confusion.

A study using county-level data from the entire state of Wisconsin analyzed whether the election held in Wisconsin on April 7 was associated with the spread of COVID-19 (Cotti et al. 2020). The results confirm the Wisconsin Department of Health Services findings on the link between the spread of COVID-19 and in-person voting. The results also show that counties that had more in-person voting per voting location (all else equal) had a higher rate of

21. Transcript of Court Trial, vol. 1., 12, *Frank v. Walker*, 17 F. Supp. 3d.

positive COVID-19 tests than those with relatively fewer in-person voters.

In the face of the pandemic, Wisconsin residents faced an imminent threat and cruel quandary. Vote in person and risk their lives. Do not vote and lose the right to shape their political and socioeconomic futures. These circumstances are not unfamiliar to many Black Milwaukeeans, who have witnessed the state legislature cut hundreds of millions of dollars to public education even as millions are funneled into law enforcement and incarceration. Nonetheless, although this moment in Wisconsin and across the nation is reminiscent of the voting challenges that engulfed the Jim Crow era in the immediate aftermath of the *Plessy* decision, the state and nation are also in the midst of massive resistance to attacks on voting as citizens far and wide work to secure their right to vote.

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