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## Technological Change, Voting Rights, and Strict Scrutiny

Henry L. Chambers, Jr.

*University of Richmond - School of Law*, [hchamber@richmond.edu](mailto:hchamber@richmond.edu)

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## TECHNOLOGICAL CHANGE, VOTING RIGHTS, AND STRICT SCRUTINY

HENRY L. CHAMBERS, JR.\*

### ABSTRACT

*When technology obviates the need for an election law that prevents some otherwise eligible voters from casting a ballot, a jurisdiction's retention of that law and refusal to adopt the technology should be deemed a serious infringement of the right to vote that triggers strict scrutiny under the Equal Protection Clause of the Constitution.*

### INTRODUCTION

When technological change and voting rights are mentioned together, the discussion often revolves around how ever more sophisticated software can be used to draw gerrymandered districts.<sup>1</sup> That use of technology harms and dilutes voting rights by grouping voters into districts where one party's candidates have little to no chance of winning (or losing) an election,<sup>2</sup> leaving the other party's voters virtually no chance of exercising the political power their numbers would suggest.<sup>3</sup> Given our recent history regarding technology and redistricting, the public could be excused for believing the primary use of technology in elections is to degrade voting rights and harm democracy.<sup>4</sup> However, contrary to its use to gerrymander, technology—including systems that help allow voters to register and vote on the Election Day—can

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\* Professor of Law, University of Richmond School of Law. Thank you to all of the participants in the Maryland Constitutional Law Schmooze for comments on the draft. Thank you to Brooke Throckmorton and Zanas Talley for their excellent research assistance and input.

1. See DAVID DALEY, *RATF\*\*KED: WHY YOUR VOTE DOES NOT COUNT* (2016); Vann R. Newkirk, II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/>.

2. For a recent example of racial gerrymandering, see *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

3. Proportional representation is not required under the Constitution. See Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1440 (2002). However, the intentional minimization of a political party's power through gerrymandering arguably is unconstitutional, but not justiciable. See *Vieth v. Jubilerer*, 541 U.S. 267, 281 (2004); *Davis v. Bandemer*, 478 U.S. 109, 118 (1986); see also *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018).

4. For a discussion of gerrymandering's effects, see Bertrall Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187 (2018).

be used to increase electoral fairness and enhance voting rights by making voting easier for individuals and making elections easier to manage.<sup>5</sup> The aggressive use of technology can allow election officials to complete administrative tasks more quickly and accurately,<sup>6</sup> eliminating the need for some election laws that delay a citizen's ability to register to vote or stop eligible voters from casting ballots.<sup>7</sup> When technology can make voting easier and more accessible, a state's refusal to adopt such technology or jettison laws that restrict a voter's ability to cast a ballot should trigger increasingly strict constitutional scrutiny.

The Constitution does not explicitly grant the right to vote.<sup>8</sup> However, the right to vote is protected as a fundamental right under the Fourteenth Amendment's Equal Protection Clause<sup>9</sup> through a bifurcated structure.<sup>10</sup> Denials of the right to vote and significant infringements on the right to vote tend to be subject to strict scrutiny, which requires that a state's law be passed to further a compelling state interest and be narrowly tailored to infringe the right to vote as little as possible.<sup>11</sup> Lesser infringements on the right to vote typically are subject to a balancing test that weighs the law's infringement against the state's interest in regulating elections or voting in general.<sup>12</sup>

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5. See NATALIE ADONA ET AL., STEWARDS OF DEMOCRACY: THE VIEWS OF AMERICAN LOCAL ELECTION OFFICIALS 32 (2019), [https://www.democracyfund.org/media/uploaded/2019\\_DemocracyFund\\_StewardsOfDemocracy.pdf](https://www.democracyfund.org/media/uploaded/2019_DemocracyFund_StewardsOfDemocracy.pdf) (“[Election officials] recognize that election reforms and technological changes, while creating short-term challenges, have improved the overall registration and voting experience—both for voters and for election officials themselves.”); U.S. ELECTION ASSISTANCE COMM’N, ELECTION ADMINISTRATION AND VOTING SURVEY: 2018 COMPREHENSIVE REPORT, A REPORT TO THE 116TH CONGRESS 19 (2019) [hereinafter EAC REPORT], [https://www.eac.gov/assets/1/6/2018\\_EAVS\\_Report.pdf](https://www.eac.gov/assets/1/6/2018_EAVS_Report.pdf) (noting use of electronic pollbooks for same-day voter registration and voting).

6. Completing tasks more quickly can help shorten lines at polling places. See Justin Levitt, “Fixing That”: Lines at the Polling Place, 28 J.L. & POL. 465, 470 (2013) (“The basic contours apply to lines at the polls just as they do to these other queues: . . . the longer each transaction, the longer the line.”).

7. Registration and voting have become easier over time. See ADONA, ET AL., *supra* note 5, at 5.

8. See Richard Briffault, *Three Questions for the “Right to Vote” Amendment*, 23 WM. & MARY BILL RTS. J. 27, 27 (2014) (noting lack of explicit right to vote in U.S. Constitution).

9. See Henry L. Chambers, Jr., *Dred Scott: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209, 222 (2007); see also Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139, 140 (2018) (“[T]he U.S. Constitution confers few affirmative rights directly . . .”).

10. See Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 777 (2016) (discussing use of balancing test or strict scrutiny depending on the level of infringement of the right to vote).

11. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). For a discussion of how strict scrutiny intersects with the right to vote in the context of redistricting, see *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017).

12. See *Burdick*, 504 U.S. at 434; *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190–91 (2008) (plurality opinion).

Though technology might appear relevant only to whether a law should survive whichever test a court chooses to apply, technology should also be deemed relevant to the choice of which test to apply. If technology adequately addresses the administrative problem that arguably justifies a law that limits the voter's ability to cast a ballot, the state's refusal to adopt that technology and to retain the law should be deemed an intentional and significant infringement on the right to vote that must survive strict scrutiny.

This Essay will proceed in three brief parts. Part I will discuss how the Constitution regulates election laws and voting laws. Part II will note three types of election laws whose need may be significantly lessened or completely eliminated through the use of technology. Part III will consider whether technology's ability to eliminate the need for a law that restricts a voter's ability to vote or cast a ballot should subject a state's continued use of the law to strict scrutiny rather than a balancing test.

## I. THE CONSTITUTIONAL REGULATION OF THE RIGHT TO VOTE

The right to vote is fundamental.<sup>13</sup> The Fourteenth Amendment prohibits states from restricting the right to vote absent significant justification.<sup>14</sup> The more significantly a state restricts the right to vote, the more substantial the state's justification for the restriction must be.<sup>15</sup> An explicit denial of the right to vote, such as a state's intentional and explicit exclusion of a voter from an electorate, will be subject to strict scrutiny.<sup>16</sup> Similarly, an election or voting law that significantly burdens a voter's right to vote generally must survive strict scrutiny.<sup>17</sup> Laws that impose modest burdens on voters and their right to vote receive lesser scrutiny, and need only survive a balancing test that weighs the state's interests in having the law against the burden the law places on the voter's ability to vote.<sup>18</sup> For example, a voter's temporary

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13. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966) (treating the right to vote as fundamental); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[Voting] is regarded as a fundamental . . . right, because [it is] preservative of all rights.”).

14. See *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

15. See *Burdick*, 504 U.S. at 428; Karlan, *supra* note 9, at 146 (“Only if the burdens [on the right to vote] are ‘severe’ must the restriction be ‘narrowly drawn to advance a state interest of compelling importance.’ Otherwise, a state’s “‘important regulatory interests are generally sufficient to justify’ the restrictions.” (footnote omitted) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992), and then quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983))).

16. See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (applying strict scrutiny to voter's exclusion from a school board electorate).

17. See *Burdick*, 504 U.S. at 434 (“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.’” (quoting *Reed*, 502 U.S. at 289)).

18. See *Celebrezze*, 460 U.S. at 789 (noting that a 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

exclusion from the electorate due to the enforcement of a voter registration deadline or a voter's inability to cast a ballot that is an incidental effect of a voter identification ("voter ID") law, may be deemed a mild infringement on a voter's right to vote.<sup>19</sup> Each may merely be subject to the aforementioned balancing test. The Constitution protects a voter's right to vote and opportunity to cast a ballot, but not absolutely against all restrictions.<sup>20</sup>

Fifty years ago, in *Kramer v. Union Free School District No. 15*,<sup>21</sup> the Supreme Court determined that strict scrutiny applies to clear and absolute denials of the right to vote, such as exclusions from an electorate. In *Kramer*, the Court reviewed a statute that barred the plaintiff, a bona fide resident of a school district, from voting in the school district election.<sup>22</sup> The law allowed only those district residents who owned or leased property in the school district, or were parents or guardians of children in the school district, to vote in the school district election.<sup>23</sup> The plaintiff was a childless bachelor who lived at his parents' house.<sup>24</sup> The State argued that the statute reasonably limited voting to those who were directly affected by school decisions: those who paid property taxes and those with children in the school system.<sup>25</sup> After applying strict scrutiny in reviewing the plaintiff's exclusion,<sup>26</sup> the Court rejected the state's arguments, ultimately ruling that even if the State's interest

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for the burden imposed by its rule"). However, when voting regulations that restrict the right to vote are not related to voter qualifications, they must be extremely well-justified. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008) (plurality opinion) ("Thus, under the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.").

19. Election laws invariably stop some voters from voting. See *Burdick*, 504 U.S. at 433 ("Election laws will invariably impose some burden upon individual voters.").

20. Compare *Anderson*, 460 U.S. at 788 (noting that in the context of election laws that somewhat limit voters' rights, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions"), with *Kramer*, 395 U.S. at 627 ("Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."). For a discussion of when the restrictions on limitations on the right to cast a ballot are very strict and when they are less strict, see Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143 (2008).

21. 395 U.S. 621 (1969).

22. For a fulsome discussion of *Kramer*, see Eugene D. Mazo, *The Right to Vote in Local Elections, The Story of Kramer v. Union Free School District No. 15*, in *ELECTION LAW STORIES* (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

23. *Kramer*, 395 U.S. at 622 ("The legislation provides that in certain New York school districts residents who are otherwise eligible to vote in state and federal elections may vote in the school district election only if they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools.").

24. *Id.* at 624.

25. *Id.* at 631.

26. The Court first considered "whether the exclusion is necessary to promote a compelling state interest," then concluded that the statute was "not sufficiently tailored to limiting the franchise

was compelling, the statute was not sufficiently narrowly tailored to serve the State's interest.<sup>27</sup> The law's restrictions were both overinclusive and underinclusive, because the law allowed some who did not appear to have a direct interest in the school board election—"uninterested unemployed young m[e]n who pay[] no state or federal taxes, but who rent[] an apartment in the district"—to vote, but excluded others who did appear to have a direct interest in the school board election—"one who] reside[d] with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions"—from the electorate.<sup>28</sup> The Court ruled the statute's limitations unconstitutional.<sup>29</sup>

The level of scrutiny a law will face depends on the harm the law inflicts on a voter's right to vote, not the type of law at issue. For example, *Dunn v. Blumstein*<sup>30</sup> and *Marston v. Lewis*<sup>31</sup> were decided a year apart and involved voter registration laws, but were decided quite differently. The Court applied strict scrutiny in *Dunn*, where the law stopped a bona fide resident from registering to vote.<sup>32</sup> The Court applied lesser scrutiny in *Marston*, where the law required bona fide residents to register to vote by a certain day but did not stop bona fide residents from registering to vote.<sup>33</sup>

In *Dunn*, the Court reviewed Tennessee's durational residency requirement for registering to vote. Tennessee required that to be eligible to register to vote a person must be a resident of Tennessee for a year and a resident of the county of registration for three months by the time of the ensuing election.<sup>34</sup> Simply, the law stopped some residents of Tennessee from joining the electorate. The Court subjected the state's durational residency requirement to strict scrutiny<sup>35</sup> and struck down the law.<sup>36</sup>

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to those 'primarily interested' in school affairs to justify the denial of the franchise to appellant and members of his class." *Id.* at 630, 633.

27. *Id.* at 632.

28. *Id.* at 632 n.15.

29. *Id.* at 622, 633.

30. 405 U.S. 330 (1972).

31. 410 U.S. 679 (1973) (per curiam).

32. 405 U.S. at 331. Tennessee prohibited those who had not been bona fide residents of the state for specific amount of time to register to vote. *Id.* at 334.

33. 410 U.S. at 681. Under the statutory structure, all who were eligible to vote at time of registration cutoff could register to vote. *Id.* at 680.

34. *Dunn*, 405 U.S. at 334. Tennessee's residency requirement was not at issue but could have survived strict scrutiny if necessary. *Id.* at 343–44 ("An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny."); *see also* *Carlington v. Rash*, 380 U.S. 89, 93–94 (1965) (noting a state may require bona fide residence for voting registration).

35. *Dunn*, 405 U.S. at 335 ("In the present case, . . . we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements.").

36. *Id.* at 360.

Tennessee claimed its dual desires to prevent fraud and to ensure knowledgeable voters justified its durational residency requirement.<sup>37</sup> The Court found avoiding fraud is a compelling state interest, but found the durational residency requirement unnecessary to further that interest.<sup>38</sup> Similarly, the Court found that even if having knowledgeable voters is a compelling state interest, the durational residency requirement was not sufficiently narrowly tailored to meet that interest.<sup>39</sup> Tennessee could require a person seeking to register to vote to be a bona fide resident of the state at the time of registration but could not require the person to be a bona fide resident for any period of time before registering.<sup>40</sup>

In *Marston*, the Court reviewed Arizona's voter registration law that closed voter registration fifty days prior to state elections. The registration scheme did not stop bona fide residents from registering to vote prior to the cut-off. However, the registration cut-off coupled with Arizona's residency requirement functionally created a fifty-day residency requirement for voting such that no one who had been a resident in Arizona for less than fifty days on Election Day could vote in Arizona state elections.<sup>41</sup> The Court applied a significantly less exacting level of scrutiny to Arizona's law than Tennessee's law.

Arizona's justification for its early state registration cut-off was based on its idiosyncratic system. Structured to make its registration process convenient for voters, Arizona used many volunteer deputy registrars.<sup>42</sup> However, those volunteers were prone to make a significant number of errors in the registration process.<sup>43</sup> In addition, the timing of Arizona's primaries required that county recorders delay checking and processing voter registration forms during a significant part of the fall.<sup>44</sup> Consequently, Arizona claimed its recorders needed fifty days to check and certify Arizona's voting rolls, hence the fifty-day voter registration deadline before state elections.<sup>45</sup>

The *Marston* Court applied little scrutiny to the law. The Court credited Arizona's explanation for why it needed so much time to review its voter rolls before its state elections without engaging in an independent analysis of

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37. *Id.* at 345.

38. *Id.* at 353 (deciding "that the waiting period is not the least restrictive means necessary for preventing fraud").

39. *Id.* at 357-58 (noting that *Kramer* had already decided that excluding residents from a school board electorate based on a lack of sufficient interest in an election's outcome was unconstitutional).

40. *Id.* at 360.

41. *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam).

42. *Id.*

43. *Id.* at 680-81.

44. *Id.* at 681.

45. *Id.* at 680.

the explanation.<sup>46</sup> It ruled a state could end voter registration well before state elections to allow the state to finalize its voter records before an election.<sup>47</sup> The Court then endorsed Arizona's claim that it needed fifty days before state elections to check its voter rolls.<sup>48</sup> The Court so found even though states could end voter registration a maximum of thirty days before a presidential election under the Voting Rights Act,<sup>49</sup> a cutoff later reiterated in the National Voter Registration Act of 1993.<sup>50</sup> As important, the Court ignored Arizona's role in creating the problems that necessitated the early registration cut-off. Indeed, Justice Marshall noted in dissent that the volume of mistakes in Arizona voter registrations occurred because the state did not train its workers properly and refused to use additional resources to ensure the accuracy of its voter rolls.<sup>51</sup> Nonetheless, the Court agreed that Arizona needed, and could take, fifty days to check its voter rolls.<sup>52</sup>

The *Marston* Court's decision was somewhat unsurprising. Arizona's law allowed all bona fide residents to register as of the time voter registration closed. The state's need to prepare accurate rolls—not the desire to stop residents from voting—led to the registration cut-off that stopped the residents from casting ballots on Election Day. That justification can reasonably be subject to lesser scrutiny than a state's bald desire to stop bona fide residents from registering, as was the case in *Dunn*.

The *Marston* Court's application of a balancing approach was a precursor to the Court's explicit adoption of a balancing test in *Anderson v. Celebrezze*<sup>53</sup> and *Burdick v. Takushi*.<sup>54</sup> The *Anderson/Burdick* rule calibrates the level of scrutiny a law faces to the burden the law places on the right to vote.<sup>55</sup>

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46. *Id.* at 680 (“We accept that judgment [that 50 days is necessary to correct the voter rolls], particularly in light of the realities of Arizona’s registration and voting procedures.”).

47. *Id.* (“States have valid and sufficient interests in providing for *some* period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds.”).

48. *Id.* at 681 (“In the present case, we are confronted with a recent and amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State’s important interest in accurate voter lists.”).

49. *See Dunn v. Blumstein*, 405 U.S. 330, 354 (1972).

50. 52 U.S.C. §§ 20501–11 (2012).

51. *Marston*, 410 U.S. at 682–83 (Marshall, J., dissenting).

52. *Id.* at 681 (majority opinion) (“On the basis of the evidence before the District Court, it is clear that the State has demonstrated that the 50-day voter registration cutoff (for election of state and local officials) is necessary to permit preparation of accurate voter lists.”).

53. 460 U.S. 780 (1983).

54. 504 U.S. 428 (1992).

55. *Id.* at 432 (“Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.”); *Anderson*, 460 U.S. at 788 (“Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates’ eligibility for the ballot impose constitutionally suspect burdens on voters’ rights to associate or to choose among candidates.”).



It recognizes that election laws will limit the right to vote to some extent, possibly by limiting for whom a voter can vote or by limiting a voter's ability to cast a ballot.<sup>56</sup> However, different laws burden the right to vote differently. The more serious the burden on the right to vote, the more serious the scrutiny will be.<sup>57</sup> Severe restrictions trigger strict scrutiny; reasonable restrictions trigger a balancing test.<sup>58</sup> Consequently, under the *Anderson/Burdick* test, a court must first determine whether to use strict scrutiny or the balancing test.<sup>59</sup>

When applied, the balancing test weighs the strength of the state's interests against the severity of the statute's restrictions on the right to vote.<sup>60</sup> In neither *Anderson* nor *Burdick* were the burdens on the right to vote serious enough to trigger strict scrutiny. That was understandable. Both *Anderson* and *Burdick* involved laws that limited voters' ability to vote for their candidate of choice, rather than laws that stopped voters from casting a ballot. *Anderson* involved Ohio's statutory deadline for filing a statement of candidacy for the United States presidency.<sup>61</sup> *Burdick* involved Hawaii's limitation on write-in voting.<sup>62</sup> In both cases, voters were allowed to cast a ballot. They were merely limited in for whom they could vote. Those limitations were based on purely administrative rules that directly regulated the candidate and only indirectly limited the voter.

The balancing test led to different results in the two cases. The *Anderson* Court ruled that Ohio's desire for political stability expressed through its early deadline for declaring one's candidacy did not outweigh the limitation

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56. *Burdick*, 504 U.S. at 433 ("Election laws will invariably impose some burden upon individual voters."); see also *Anderson*, 460 U.S. at 788 ("Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.").

57. *Burdick*, 504 U.S. at 434 ("[T]he 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.").

58. See *id.*

59. This can lead to indeterminacy in constitutional election law jurisprudence. For a discussion of such indeterminacy, see Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836 (2013).

60. *Anderson*, 460 U.S. at 789 ("In passing judgment, the Court must not only determine the legitimacy and strength of each of [the state's] 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.").

61. *Id.* at 782.

62. *Burdick*, 504 U.S. at 430 ("The issue in this case is whether Hawaii's prohibition on write-in voting unreasonably infringes upon its citizens' rights under the First and Fourteenth Amendments.").

on a candidate's supporters' ability to vote for the candidate.<sup>63</sup> The *Burdick* Court determined that Hawaii's limitation on write-in voting was justified given its ballot access rules were reasonable.<sup>64</sup>

More than a decade later, the Court applied the *Anderson/Burdick* test in *Crawford v. Marion County Election Board*,<sup>65</sup> which involved a voter ID law that directly limited voters' ability to cast a ballot.<sup>66</sup> The voter ID law was considered an election integrity measure that incidentally limited a voter's right to cast a ballot, rather than an attempt to block a voter's right to vote.<sup>67</sup> *Crawford* involved a constitutional challenge to Indiana's voter photo identification ("photo ID") law, which required voters who voted in person at the polls on Election Day or in a clerk's office before Election Day to produce photo ID before voting.<sup>68</sup> The law limited acceptable forms of photo ID to those that included the voter's name and photograph and were issued by the United States or the State of Indiana.<sup>69</sup> A voter who did not bring acceptable identification to the polls could vote using a provisional ballot and have the ballot counted if the voter brought acceptable identification to the clerk's office within ten days of the election.<sup>70</sup> The law also included exceptions for some people who did not possess acceptable identification. For example, people who did not want to be photographed for identification cards or were too poor to pay the fees necessary to obtain acceptable identification

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63. *Anderson*, 460 U.S. at 805–06 ("We conclude that Ohio's March filing deadline for independent candidates for the office of President of the United States cannot be justified by the State's asserted interest in protecting political stability.").

64. *Burdick*, 504 U.S. at 441–42 ("We think that Hawaii's prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State's voters.").

65. 553 U.S. 181 (2008) (plurality opinion).

66. Those laws necessarily deny some voters the opportunity to cast a ballot. *See id.* at 197–98 (noting that burdens of photo ID might lead to a voter's inability to cast a ballot); Jack Citrin et al., *The Effects of Voter ID Notification on Voter Turnout: Results from a Large-Scale Field Experiment*, 13 *ELECTION L.J.* 228, 229 (2014) ("Many adult citizens, especially among putatively vulnerable groups, indeed lack accepted forms of identification, and obtaining identification may be time-consuming and confusing even in states that make voting IDs available for free."). Precisely how many voters are affected is unclear. *See* Michael Pitts, *Empirically Measuring the Impact of Photo ID over Time and Its Impact on Women*, 48 *IND. L. REV.* 605, 606 (2015) (noting the lack of substantial empirical research on precisely how many people are disfranchised by voter ID laws).

67. *See* Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification–Voter Turnout Debate*, 8 *ELECTION L.J.* 85, 86 (2009) (noting that voter ID laws were passed ostensibly "as anti-fraud, voter confidence, 'good government' reforms").

68. *See Crawford*, 553 U.S. at 185 (plurality opinion).

69. *Id.* at 211–12 n.3 (Souter, J., dissenting).

70. *See id.* at 186 (plurality opinion).

could vote provisionally and sign an affidavit to have their provisional ballot counted.<sup>71</sup> The plurality found the law's burdens not severe.<sup>72</sup>

Using the *Anderson/Burdick* balancing approach to weigh the law's benefits against its harm to voters to determine its constitutionality, the Court upheld the law.<sup>73</sup> Indiana claimed the photo ID law protected multiple state interests: deterring and detecting voter fraud, modernizing election procedures, preventing voter fraud stemming from Indiana's bloated voting rolls, counting only legitimate votes, and protecting public confidence in elections.<sup>74</sup> Though Indiana did not prove the existence of voter fraud the law was supposed to address, the plurality found Indiana's interests significant.<sup>75</sup> The plurality deemed Indiana's interests in requiring government issued ID to vote to outweigh the statute's limitations on voters,<sup>76</sup> and Indiana's voter ID law survived.<sup>77</sup>

The Court's application of the *Anderson/Burdick* test in *Crawford* clarified the test somewhat. The burden on the right to vote is measured by the steps the law forces the voter to take to enable the voter to vote. The more onerous the steps, the heavier the burden on the right to vote and the more likely strict scrutiny will apply. The less onerous the steps, the lighter the burden on the right to vote and the more likely the balancing test will apply. Technological advances would appear irrelevant to that issue. However, how severely the right to vote is deemed to have been burdened should depend not

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71. *See id.*

72. *See id.* at 202–03 (“When we consider only the statute’s broad application to all Indiana voters we conclude that it ‘imposes only a limited burden on voters’ rights.” (quoting *Burdick v. Takushi*, 504 U.S. 428, 439 (1992))). Indeed, the plurality noted that obtaining a free Indiana photo identification card was no bigger burden than getting a driver’s license. *Id.* at 198. In suggesting that getting a voter identification card under Indiana law is not difficult, the concurrence noted that “nonsevere, nondiscriminatory restrictions” on the ability to vote should be judged on “a deferential, ‘important regulatory interests’ standard” with strict scrutiny being used only when the law “severely restrict[s] the right to vote.” *Id.* at 204 (quoting *Burdick*, 504 U.S. at 433–34); *see also* Pitts, *supra* note 66, at 617 (“[T]he amount of actual disfranchisement created by a photo identification law may well depend on the nature of the photo identification law adopted.”).

73. *Crawford*, 553 U.S. at 190 (plurality opinion) (“Rather than applying any ‘litmus test’ that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.”).

74. *Id.* at 191.

75. *Id.* at 196–97 (deeming potential voter fraud concerns important); *id.* at 197 (validating the state’s interest in bolstering public confidence in the state’s electoral system).

76. *Id.* at 204. The concurrence agreed with the plurality that the law’s overall burden is minimal and justified. *See id.* at 204–05 (Scalia, J., concurring). The dissenters argued Indiana’s interests are small, the law’s burdens are significant, and the proper frame is whether the interests Indiana claims outweigh the burdens placed on individuals who do not have the required identification and cannot cast a ballot as a result. *See, e.g., id.* at 209 (Souter, J., dissenting) (noting that many of those burdened by the law will be deterred by the law).

77. *Id.* at 204.

only on the voter's burden, but also on whether the state needs to restrict the right to vote at all. Technological advances would be relevant to that issue.

Limitations on the ability to cast a ballot do not appear, on their face, to involve the absolute denial of the right to vote or invidious discrimination. However, if the use of technology can solve the problems the state seeks to address—without limiting the voter's ability to cast a ballot—applying strict scrutiny to the law would be sensible. As technology obviates the state's reasons to deny a voter the ability to cast a ballot, the refusal to allow a voter to cast a ballot becomes an intentional refusal to allow a voter to vote. That should be deemed a severe burden on the right to vote even if the law does not force the voter to undertake onerous steps to vote. Of course, whether technology can eliminate the need for any particular law's limitation on a voter's ability to cast a ballot depends on the technology and the law at issue. The next Part considers how well technology can address a state's concerns that underlie common limitations on voters' ability to cast a ballot.

## II. VOTING AND ELECTION LAW AND TECHNOLOGY

Voting and election laws may prevent voters from casting ballots as a result of the state's need to structure its election processes efficiently.<sup>78</sup> Technology may help jurisdictions run their election processes just as efficiently, while allowing more voters to vote than the election laws would otherwise allow.<sup>79</sup> A jurisdiction's refusal to use such technology should be relevant to whether it has discharged its constitutional responsibility to protect the right to vote.<sup>80</sup> This Part briefly discusses three types of election laws that may limit a voter's ability to cast a ballot—voter registration deadlines, limits on out-of-precinct voting, and voter ID laws—and considers how easily technology may obviate the need for each type of law.<sup>81</sup>

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

79. See EAC REPORT, *supra* note 5, at ii (noting increased use of electronic pollbooks by jurisdictions from 2016 to 2018).

80. For a discussion of how legislative intent can trigger strict scrutiny, see Henry L. Chambers, Jr., *Retooling the Intent Requirement Under the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 611, 613–15 (2004).

81. Sometimes all of these laws arise in a single piece of legislation. See Karlan, *supra* note 9, at 152 (discussing N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016), *cert denied*, 137 S. Ct. 1399 (2017), which involved a “statute that imposed a photo ID requirement, cut back on early voting, and eliminated same-day registration during the early voting period, out-of-precinct voting on Election Day, and preregistration for sixteen- and seventeen-year-olds”).

### A. Voter Registration Deadlines and Same-Day Registration

The Constitution does not require states to allow voters to register and vote on the same day.<sup>82</sup> States may require voters register up to thirty days before an election to be eligible to vote in the election.<sup>83</sup> The Supreme Court concluded in 1972 that—based on technology then available—thirty days was sufficient time for states to check their rolls and ensure a voter’s eligibility.<sup>84</sup> Nonetheless, today, some states do not have a voter registration cut-off. North Dakota does not require voter registration,<sup>85</sup> and some states allow residents to register and vote on the same day (“same-day registration”).<sup>86</sup>

Though same-day registration has become common, many states retain pre-Election Day voter registration cutoffs.<sup>87</sup> States may have kept voter registration laws on the assumption they are necessary to help produce accurate voter rolls to be used during an election.<sup>88</sup> An accurate voter roll can produce myriad administrative benefits, including helping to shorten the lines at polling places on Election Day, as poll workers focus on checking voters in and getting them through the voting process.<sup>89</sup> However, the issue is how long is

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82. *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (“We recognized [in *Dunn v. Blumstein*, 405 U.S. 330 (1972)] that a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot.”).

83. For a list of voter registration cut-off dates for the 2018 election, see *Voter Registration Deadlines*, NONPROFIT VOTE, <https://www.nonprofitvote.org/voting-in-your-state/voter-registration-deadlines/> (last updated Apr. 30, 2019). Virginia requires registration twenty-two days before a general or primary election. See *How to Register*, VA DEP’T ELECTIONS, <https://www.elections.virginia.gov/registration/how-to-register/index.html> (last visited Oct. 30, 2019).

84. The Court thought checking much of the information relevant to voting registration was easy. See *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972) (“Objective information tendered as relevant to the question of bona fide residence under Tennessee law—places of dwelling, occupation, car registration, driver’s license, property owned, etc.—is easy to doublecheck, especially in light of modern communications.” (footnote omitted)); see also EAC REPORT, *supra* note 5, at iii (noting many states keep their voter registration files up to date by linking their voter registration databases with other government databases).

85. See *Voters*, N.D. SECRETARY OF ST., <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlhPKID=79&ptlPKID=7> (last visited July 30, 2019).

86. To see how states with same-day registration manage their processes, see *Same Day Voter Registration*, NAT’L CONF. ST. LEGISLATURES (June 28, 2019), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

87. Unfortunately, those laws have not always served a salutary purpose. See Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 456 (2008) (“Practically from their inception, voter registration lists have served a dual purpose. They have served the constructive role of ensuring that only eligible voters participate in elections and that they vote only once in each election. They have also served the less worthy end of allowing those in control of the administration of elections to impede their political opponents’ supporters from participating.” (footnote omitted)).

88. See *Marston v. Lewis*, 410 U.S. 679 (1973) (reviewing voter registration cutoff statute in place to ensure accuracy of voter rolls).

89. See Levitt, *supra* note 6, at 471 (“Lines may bog down when voters’ names cannot easily be found on the pollbook—which may indicate a systematic registration problem causing outright disenfranchisement.”).

necessary to produce those rolls. Election officials may have required several weeks to produce an accurate voter roll in years past, but as states with same-day registration suggest, with today's technology, the time required to produce an accurate voter roll may be significantly shorter.<sup>90</sup>

Even if accurate voter rolls are critical, voter registration deadlines conflate the need to have accurate voter rolls with the need to stop those who have not registered to vote weeks before the election from voting. Those issues may be related, but they are distinct. Weeks before an election, a state can stop the flow of new registration information that will appear on Election Day voter rolls. However, the state need not refuse to accept new registrations in the last few weeks of an election cycle. That voter registration information can be verified but segregated from the voter rolls until after the election. On Election Day, the most recent registrants could be required to vote at voting centers rather than precincts if the precinct pollbooks would not contain the most recent registrants' voter information.<sup>91</sup>

Technology can even alleviate the need to treat the newest registrants differently from old registrants. If a state can verify the voter's information on the same day it receives the information, same-day registration is easy. Some voters might not have the documentation necessary to confirm their eligibility on the day they attempt to register. However, that would not necessarily justify a state's refusal to allow those who do have sufficient documentation to register and vote on Election Day. Moreover, even when the state cannot instantly verify an individual's eligibility, eligibility likely can be verified within a few days of the election.<sup>92</sup>

Technology exists to quickly cross-check the information eligible voters provide when registering to vote.<sup>93</sup> The information a state must check to verify voter registration status is not invariably overwhelming. For example,

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90. States that allow same-day registration presumably believe reasonably accurate voter rolls can be produced almost instantaneously.

91. Many states that allow same day registration and voting address such registration at locations other than precincts. See *Same Day Voter Registration*, *supra* note 86.

92. The combination of states linking their voting databases to other state databases coupled with real time updating of voting records suggests a state can produce relatively accurate voter rolls very quickly. See EAC REPORT, *supra* note 5, at iii (noting links between voter record databases and other state databases) and app. A at 135–36 (noting some states update their voter registration files in real time).

93. See Herbert Lin et al., *Increasing the Security of the U.S. Election Infrastructure*, in SECURING AMERICAN ELECTIONS: PRESCRIPTIONS FOR ENHANCING THE INTEGRITY AND INDEPENDENCE OF THE 2020 U.S. PRESIDENTIAL ELECTION AND BEYOND 23 (Michael McFaul ed., 2019), [https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/stanford\\_cyber\\_policy\\_center-securing\\_american\\_elections.pdf](https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/stanford_cyber_policy_center-securing_american_elections.pdf) (noting the interconnectedness of voter registration and other databases); Tokaji, *supra* note 87, at 500 (noting the requirement under the Help America Vote Act of 2002 (“HAVA”) that “statewide voter registration databases . . . must now be coordinated with state motor vehicle, criminal, and death records”).

the Commonwealth of Virginia's voter registration form requires the following information from a registrant: name, residence, social security number, citizenship status, date of birth, gender, felony status/rights restoration status, and signature.<sup>94</sup> Additional information requested includes military active-duty service status, additional address information if the residence address is insufficient for voting purposes, and the applicant's voter registration status in other states.

Checking voter registration information may be more onerous in states, like Virginia, with strict felon disenfranchisement laws. Those states might require a criminal records check.<sup>95</sup> With the possible cooperation of the federal government, checking criminal records—even from other states—should not be any more onerous than a firearms background check, which can be completed quickly.<sup>96</sup> A state that disenfranchises felons and former felons restricts the right to vote, so the burden should be on the state to check databases quickly to determine if a registrant is a felon whose rights have not been restored.<sup>97</sup> Given the information available in state and national databases, an applicant's social security number should allow the state to find the information it needs to verify the registrant's information quickly.<sup>98</sup> At the least, the voting rights of the many need not be narrowed due to an early voter registration deadline because the state might not be able to determine the eligibility of the few close to Election Day. Those who can be verified as valid voters could be registered and allowed to vote if the state wanted those citizens to vote.<sup>99</sup> A state may not wish to expend resources on same-day registration, but such a state is not unable to register voters accurately on the day of an election; it is merely unwilling to do so.

Though a state may argue that it needs time before an election to produce accurate rolls, the earlier the state sets its voter registration deadline, the less complete its voter rolls may be. Database information can become stale

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94. VIRGINIA VOTER REGISTRATION APPLICATION (July 2019), <https://www.elections.virginia.gov/media/formswarehouse/veris-voter-registration/applications/Voter-Registration-Application.pdf>. Many states require similar information. Michigan requires citizenship status; age; driver's license number or last four digits of Social Security number; name; residence; and an affirmation that the applicant will be eighteen by Election Day, will be a resident of the city/township for thirty days by Election Day, and is a citizen of the United States. STATE OF MICHIGAN VOTER REGISTRATION APPLICATION, (Feb. 2019), [https://www.michigan.gov/documents/MIVoterRegistration\\_97046\\_7.pdf](https://www.michigan.gov/documents/MIVoterRegistration_97046_7.pdf).

95. See EAC REPORT, *supra* note 5, at iii (noting that some states share information such that they can check their voter registration records against their prison records).

96. For a discussion of the potential speed of a criminal background check, see *National Instant Criminal Background Check System (NICS)*, FBI, <https://www.fbi.gov/services/cjis/nics> (last visited Oct. 9, 2019).

97. See EAC REPORT, *supra* note 5, at 149–52 (noting each state's criminal disenfranchisement laws).

98. See *supra* note 96 and accompanying text.

99. See Levitt, *supra* note 6, at 486.

if the database cannot be comprehensively updated after a certain date.<sup>100</sup> For example, a person who moves a few weeks before an election may be listed as a voter in a precinct even though the voter is no longer a resident in the precinct. The incorrect information may not render that individual unable to vote, but it is incorrect.<sup>101</sup> Closing voter registration and limiting voter-initiated changes to voter information provided well before the election may lead to less accurate rather than more accurate rolls.<sup>102</sup>

Even if a state has a legitimate concern about errors in its voter rolls, that concern does not justify refusing to allow valid voters to register and vote after the registration deadline. Database errors exist, but a database error does not negate the voter's right to vote.<sup>103</sup> Errors in a voter's voter registration application should not stop the voter from voting if the voter can be proven to be a qualified voter. Indeed, even errors in a voter's registration file should not disqualify a voter, though inaccurate information may confuse poll workers.<sup>104</sup>

Same-day registration and voting is possible and common. Technology exists that can accurately complete the voter verification process and update the state's voter rolls quickly.<sup>105</sup> States have multiple options to jettison their early voter registration deadlines.<sup>106</sup> They can shorten the registration deadlines from weeks to days before the election. They can allow same-day registration and voting if the registrant's information can be verified on Election Day. They can allow registrants to vote provisionally and count the votes if the registrant's voter information is verified within a few days of the election.<sup>107</sup> Each option allows more voting and more protection for the right to vote than an early registration deadline.

Once a technological fix exists to resolve a state's concerns with same-day registration and voting, the state's choice to have a registration cutoff

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100. Maintaining accurate voter registration information requires removing incorrect information from voting rolls as well. See EAC REPORT, *supra* note 5, at 40.

101. See Tokaji, *supra* note 87, at 469 (discussing the National Voter Registration Act of 1993 ("NVRA") provisions that allow voters who have changed addresses before Election Day without giving notice to election officials to vote under some circumstances).

102. Keeping voter rolls up to date may be facilitated by not having early voter registration cutoff dates, as same-day registration necessarily updates voter registration files in real time. See EAC REPORT, *supra* note 5, at 123–24 (discussing prevalence of same-day registration).

103. See EAC REPORT, *supra* note 5, at 45 (noting more than 837,000 same-day registrations in the 2018 general election cycle).

104. See Levitt, *supra* note 6, at 486 (discussing technology that can find and allow poll workers to account for minor mistakes in voter registration files quickly).

105. *Id.* at 485–86.

106. See *Provisional Ballots*, NAT'L CONF. ST. LEGISLATURES (Oct. 15, 2018), <http://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx> (noting various ways states address out-of-precinct voting).

107. See Tokaji, *supra* note 87, at 500 (explaining that same day registration tends to eliminate the need for provisional ballots because registrations can be updated on Election Day).



weeks in advance of an election is no longer an administrative necessity or choice regarding how to run an election efficiently; it is a choice to prevent eligible voters from voting. The more easily a state can provide same-day registration and voting, the more clearly the registration cutoff appears to be a choice to impede residents from voting. A state's choice to cut off its voter registration weeks before an election appears to be a choice to decline to allow voters to join the electorate when no good reason exists to do so. That should be deemed an intentional choice to deny a voter's right to vote or a substantial limitation on the right to vote.<sup>108</sup> Either could trigger the application of strict scrutiny.

### B. Out-of-Precinct Voting

Some jurisdictions with precinct-based systems bar out-of-precinct voting on Election Day.<sup>109</sup> Precincts—physical polling places serving physical territory—are a staple of American elections, though some states and jurisdictions have abandoned them for vote-by-mail regimes.<sup>110</sup> Nonetheless, precincts are unlikely to be abandoned wholesale by American jurisdictions soon, so bans on out-of-precinct voting are unlikely to be eliminated in the near future. This is so even though bans on out-of-precinct voting stop eligible, registered voters from voting, a result that might appear to be a substantial limitation on the right to vote that could trigger strict scrutiny.<sup>111</sup>

Though precinct-based systems can trigger problems, they can be sensible and convenient. This is so when precinct lines correspond to voting district lines. For example, consider a city with a mayor and five-member city council that divides into five precincts. Each ballot in each precinct would contain two races, one for the mayor's race and one for the precinct's city council race. That makes Election Day balloting and vote counting as easy as possible. The vote totals from a precinct would determine that precinct's city council member. The vote totals from all five precincts would be aggregated to determine the winner of the mayor's race. The convenience of

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108. The use of voter registration to limit voting is not without historical precedent. See Tokaji, *supra* note 87, at 506 (“What we *do* know is that, throughout its history, registration has served both the laudable purpose of promoting the integrity of the electoral process and the less worthy purpose of excluding eligible voters.”).

109. See, e.g., *Feldman v. Ariz. Sec’y of State’s Office*, 842 F.3d 613, 616–17 (9th Cir. 2016), *reh’g granted en banc*, 840 F.3d 1164 (9th Cir. 2016) (discussing Arizona’s bar on out-of-precinct voting on Election Day).

110. Some jurisdictions do not need to worry about out-of-precinct voting because they do not have precinct-based voting systems. See Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1643–46 (2019) (discussing all-mail voting systems).

111. Jurisdictions address out-of-precinct voting in a variety of fashions. See EAC REPORT, *supra* note 5, at 146–47 (indicating how states treat provisional ballots cast in the wrong precinct).

precinct-based voting and benefits stemming from it make bans on Election Day out-of-precinct voting appear reasonable.

Prohibiting out-of-precinct voting appears practical for at least two reasons.<sup>112</sup> First, in some circumstances, voting outside of one's precinct might cause a voter to vote on the wrong ballot. In the example above, a voter voting outside of their precinct would necessarily vote in a race in which they should not vote—the city council race in a precinct in which they do not live. However, the wrong ballot problem will not arise in every election. In some elections, many precincts will use the same ballot. In a large city, each city council district may contain many precincts that use the same ballot. A voter would be given the same ballot in any precinct in their district. The same might occur when a small number of large races are on a ballot. For example, some states hold state elections in different years than federal elections.<sup>113</sup> Consequently, during a federal election, when the races on the ballot may be limited to a House of Representatives race and a U.S. Senate race, many precincts will use the same ballot. A voter who votes out of precinct, but in their congressional district, will receive the same ballot they would have had they voted in their precinct. Nonetheless, the wrong ballot problem can be an issue in other elections.

Out-of-precinct voting may trigger a second concern: double voting. Some jurisdictions use precinct-based paper pollbooks that contain a list of registered voters in the precinct.<sup>114</sup> A voter who votes out of precinct may not be marked as having voted in her assigned precinct's pollbook. That voter might be able to vote again—either in her precinct or another precinct—before being marked as having voted. That problem could be solved in a low-tech manner by requiring out-of-precinct voters to vote on provisional ballots that would only be counted if the voter did not also vote in her assigned precinct.<sup>115</sup> Nonetheless, the concern may exist.

The wrong ballot and double voting problems are legitimate concerns, but each may be lessened or resolved with technology. The wrong ballot problem can be resolved through the use of electronic pollbooks. Electronic

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112. To see how some states that allow out-of-precinct voting address problems, see *Provisional Ballots*, *supra* note 107.

113. Various states hold state elections in odd-numbered years. See Karl Kirtz, *Why do Four States Have Odd-Year Elections?*, THE THICKET AT ST. LEGISLATURES (Aug. 25, 2011, 2:34 PM), [https://ncsl.typepad.com/the\\_thicket/2011/08/why-do-four-states-have-odd-year-elections.html](https://ncsl.typepad.com/the_thicket/2011/08/why-do-four-states-have-odd-year-elections.html) (discussing elections in Virginia, New Jersey, Louisiana, and Mississippi).

114. See EAC REPORT, *supra* note 5, at 40 (“Voter registration also serves to assign each voter to a precinct—a bounded geographic area to which voters are assigned according to their residential address as listed in their voter registration record—so that voters receive the correct ballot in the election.”).

115. That is the solution when a voter who is not on the registration rolls attempts to vote. See EAC REPORT, *supra* note 5, at 3; Tokaji, *supra* note 87, at 472 (noting HAVA requires states provide provisional ballots if voter's name is not on registration list when voter arrives at polling place).

pollbooks can identify a voter's assigned precinct.<sup>116</sup> A state or jurisdiction could provide electronic copies of ballots for every precinct in the state. The correct ballot could be printed for the out-of-precinct voter and voted provisionally at any precinct or polling place.<sup>117</sup> Alternatively, the out-of-precinct voter could be allowed to vote in whatever races appeared both on the ballot at the precinct where the voter appeared and on the ballot from the voter's assigned precinct.<sup>118</sup> If the state declined to provide an electronic sample ballot from the out-of-precinct voter's assigned precinct in any form, the out-of-precinct voter could be allowed to vote in statewide races, for example, U.S. President/U.S. Senator races or state governor races, using whatever ballot was available at the polling place where the voter happened to be.<sup>119</sup> The use of technology might be a bother for the state, but its use would allow an out-of-precinct voter to exercise her right to vote, even if in a limited manner.

The double voting problem can be lessened or solved easily as well. Electronic pollbooks "allow[] poll workers to look up voters from the entire county or state[,] . . . [and] receive immediate updates on who has voted in other voting centers."<sup>120</sup> Access to whether the voter has already voted should eliminate the concern about double voting.<sup>121</sup> Lingering concerns about double voting could be resolved by using provisional ballots for out-of-precinct voting.

Out-of-precinct voting may trigger another practical problem. Allowing out-of-precinct voting could lengthen polling place lines, as more convenient precincts could become a magnet for out-of-precinct voters.<sup>122</sup> In addition, the use of technology creates the opportunity for technological failure and possible chaos, also possibly creating longer lines at the polls. Sending out-of-precinct voters to the correct precinct will usually be easier for the state and for poll workers than serving out-of-precinct voters. However, conven-

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116. See EAC REPORT, *supra* note 5, at 19 (discussing how jurisdictions use e-pollbooks).

117. That would turn every polling place into a vote center. See *id.* at 129 (discussing vote centers).

118. See EAC REPORT, *supra* note 5, at 130 n.29 (noting Alaska partially counts provisional ballots voted out-of-precinct).

119. A voter could also be allowed to vote in a jurisdiction-wide race, for example, a city-wide mayoral race, when the electronic pollbook shows the voter lives in the jurisdiction.

120. *Electronic Poll Books*, NAT'L CONF. ST. LEGISLATURES, (Oct. 25, 2019), <http://www.ncsl.org/research/elections-and-campaigns/electronic-pollbooks.aspx> (discussing the capabilities of electronic pollbooks).

121. Some states connect precinct e-pollbooks to state voter databases, while others prohibit the connection of e-pollbooks to the state voter database system. See *id.* ("E-poll books in some states (Maryland and Indiana, for example) are networked and receive immediate updates on who has voted in other voting centers. Other states (Minnesota and Michigan, for example) specify that e-poll books may not be connected to the network.")

122. Concerns about long lines can be addressed with separate check-in for out-of-precinct voters, as can be done with same-day registrants. See Levitt, *supra* note 6, at 486.

ience is the main justification. As technology resolves the problems surrounding out-of-precinct voting, retaining a ban on out-of-precinct voting appears to rest on how convenient the ban is for the state rather than on the state's need to use the law to run elections efficiently.

If technology can be used to determine that the voter who is standing in the incorrect precinct is a registered voter who can vote on the same ballot they would use were they in their assigned precinct, the voter should probably be allowed to vote in the wrong precinct instead of being forced to go to her assigned precinct. The decision to force the voter to go to the proper precinct to vote is less an administrative decision than a choice to stop a voter from voting. This is so particularly if a poll worker with an electronic pollbook can immediately determine whether a voter in the wrong precinct has voted and stop the voter from double voting. The state should be required to have a very good reason for forcing the voter to go to another precinct to vote. As technology obviates the need for a ban on out-of-precinct voting, the justification for the ban should be very substantial, arguably so substantial that it could survive strict scrutiny.

### C. Voter ID

Some states require a voter to produce identification before voting in person.<sup>123</sup> States can reasonably require that the person who is seeking to vote prove they are who they claim to be, even if there is little to no reason to believe voter impersonation fraud exists.<sup>124</sup> Consequently, a state may require a voter provide some form of identification that reasonably proves to the state the voter is who the voter says they are. Unfortunately, when the voter must produce a specific form of identification the state limits how a voter may reasonably prove identity.<sup>125</sup> Taking reasonable proof of identity—rather than possession of a specific form of identification—as the real issue, if technology can provide reasonable proof of identity, the voter arguably should not be required to show a specific form of ID or possibly any ID at all to vote.

Technology can solve the problem of reasonably identifying the voter. Proof the voter is who they say they are can come in the form of cutting-edge biometric or facial recognition technology, but more mundane technology is

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123. See, e.g., VA. CODE ANN. § 24.2-643B (2018) (requiring a voter to present one of several forms of identification, including a driver's license, passport, government-issued photo identification, student photo identification from an in-state college, or an employment photo identification card).

124. For a discussion of voter identification law in Virginia, see Henry L. Chambers, Jr., *State and Local Officials and Voter ID*, 15 ELECTION L.J. 234 (2016).

125. Under some state laws, producing one form of required identification is the only way a voter can prove identity to vote. See, e.g., VA. CODE ANN. § 24.2-643B.

sufficient. Electronic pollbooks allow poll workers to link to state databases, such as parts of a state's Department of Motor Vehicles, that contain the voter's photo and other identifying information.<sup>126</sup> Based on that information—which is the same information that would be on a driver's license—the voter could be identified and allowed to vote without ID. Some voters may object to poll workers having access to DMV records, even if the poll workers are limited to the information that would be contained on the voter's driver's license. Those objectors could be provided the latitude to opt out and provide any other form of sufficient identification. However, the issue is not whether objectors may object or opt out, it is whether the state should be encouraged to use technology or forced to justify not using technology that would allow individuals to vote without a specific form of qualifying identification.

Currently, the Supreme Court views voter ID rules as limitations on the right to cast a ballot that are subject to rules regarding reasonableness.<sup>127</sup> If technology eliminates the need for the state to require a voter to produce a physical ID when they seek to cast a ballot, the state's demand that the voter do so is a serious and pointless limitation on the voter's right to vote. That limitation should trigger strict scrutiny, which requires a more searching inquiry regarding why the state requires its law.

### III. TECHNOLOGICAL CHANGE AND STRICT SCRUTINY

This Essay posits that technological advances should change the level of scrutiny an election law faces when subject to constitutional challenge. It suggests that a law now subject to a balancing test should, because technology eliminates the need for the law, be subject to strict scrutiny in the future. Why and how such a move might occur merits a brief discussion. That discussion starts with strict scrutiny doctrine and ends with the promise of protecting fundamental rights under the Constitution.

The Supreme Court has provided a structure for assessing laws that burden the right to vote. The Court recognizes that states must run elections, and election laws may infringe on a voter's right to vote or ability to cast a ballot. That recognition is the impetus for the Court's two-track system that subjects incidental infringements on the right to vote that are triggered by the state's need to manage elections to a balancing test and subjects more substantial infringements on the right to vote to strict scrutiny.<sup>128</sup> Of course,

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126. See *Electronic Poll Books*, *supra* note 121.

127. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–90 (2008).

128. See *supra* Part I.

there is gray area regarding how a law should be categorized. It is that question of categorization and how technology can change the categorization that is at issue.

The three types of law discussed above—voter registration deadlines, bans on out-of-precinct voting, and voter ID laws—can all be considered election administration laws that incidentally infringe the right to vote. Voter registration deadlines allow states to identify who is included in the electorate on Election Day, but also stop bona fide residents from voting. Bans on out-of-precinct voting may lessen Election Day confusion by stopping every polling place from becoming a provisional voting center for anyone who wishes to vote wherever they like, but those bans also stop bona fide residents from voting on Election Day. Voter ID laws arguably allow poll workers to accurately identify voters, but also stop registered voters in their correct precinct from voting. Each has an election administration justification. However, technology may eliminate each justification. If technology eliminates the justifications for a law that restricts a voter’s ability to vote, the law should be categorized as a serious infringement on the right to vote that should need to survive strict scrutiny.

This may seem controversial to those who would argue that technology cannot change the nature of a law or the constitutional inquiry regarding the law.<sup>129</sup> However, technology can change the nature of a constitutional problem. For example, cell phone technology and data collection have changed the nature of the third-party doctrine under the Fourth Amendment. The third-party doctrine holds that a person has no general expectation of privacy in information the person has provided to a third party, with government acquisition of the information not to be deemed a search.<sup>130</sup> However, Fourth Amendment doctrine was updated in *Carpenter v. United States*<sup>131</sup> to accommodate a new technological reality.<sup>132</sup> “[T]he Government[] acquisition of wireless carrier cell-site records revealing the location of [defendant]’s cell phone whenever it made or received calls”<sup>133</sup>—cell phone company business records in the hands of a third party—was deemed a search even though third-party doctrine would seem to deem such acquisition a non-search.<sup>134</sup> The

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129. Under some circumstances, technology may change the nature of the item to be analyzed but may not change the nature of the constitutional inquiry. See *Carpenter v. United States*, 138 S. Ct. 2206, 2219–21 (2018) (discussing when the nature of information changes or nature of the doctrine to be applied changes or both).

130. See *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

131. 138 S. Ct. 2206 (2018).

132. *Id.* at 2216 (“The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person’s past movements through the record of his cell phone signals.”).

133. *Id.* at 2214.

134. *Id.* at 2223.

Court held that the information at issue was subject to an expectation of privacy though it was in the hands of a third party.<sup>135</sup> The third party's possession of the information was deemed consistent with an expectation of privacy, in part, because the information was collected by the third party, not affirmatively given to the third party by the defendant.<sup>136</sup> The technology that passively collected the information made that distinction more relevant. Whether the third-party doctrine is dead or has merely been restricted remains to be seen, but it will likely never be quite the same.<sup>137</sup>

Similarly, technology arguably has changed the nature of the election laws discussed above because they cannot be defended in their current broad form. As noted above, the shortened length of time necessary to check whether a person is a valid voter obviates the need for a voter registration deadline weeks before an election. Technological advances make bans on voting out-of-precinct far broader than necessary to serve the bans' purposes. Requiring a voter present specific types of identification to vote, as the only method for a voter to prove the voter's identity, is unnecessary given the state of technology. Once the need for the law—in its current form—vanishes, the nature of the law and the reasons for retaining it change. With advancing technology, the laws functionally cease to be election administration laws. They become laws that merely stop qualified voters from voting. Such laws significantly affect a voter's right to vote and should trigger strict scrutiny.

Subjecting these election laws to strict scrutiny is sensible. Doing so changes the focus from the state's administrative necessity to the state's infringement of the right to vote. That distinction mirrors the bifurcated structure the Supreme Court created to review election laws. The *Anderson/Burdick* balancing test is meant to give the state the latitude it needs to address administrative problems that do not suggest the desire to infringe on the right to vote. Conversely, strict scrutiny forces the state to protect fundamental rights unless those rights must necessarily be infringed.<sup>138</sup> Requiring strict scrutiny under these circumstances can have multiple positive effects. First, it will allow more voters to vote.<sup>139</sup> Second, it should provide voters more

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135. *Id.* at 2219.

136. *Id.* at 2220.

137. *Id.* (noting that the decision is a narrow one not meant to destroy the principles underlying the third-party doctrine).

138. That is the effect of narrow tailoring. See Michael A. Helfand, *How the Diversity Rationale Lays the Groundwork for New Discrimination: Examining the Trajectory of Equal Protection Doctrine*, 17 WM. & MARY BILL RTS. J. 607, 630–31 (2009) (discussing received wisdom of purpose of narrow tailoring).

139. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

confidence that the election process is working by making voting easier.<sup>140</sup> Third, it encourages jurisdictions to think hard about why they have the election rules they have and whether such laws are necessary.<sup>141</sup>

The application of strict scrutiny does not guarantee that the laws at issue will be invalidated. However, they will need to be justified. The state will need to argue it had little choice but to retain a law to protect electoral integrity, or another compelling interest, and infringing the right to vote as narrowly as possible. If so, the law will survive.<sup>142</sup>

During the strict scrutiny review, a state may present all arguments in favor of the laws and against implementing available technology. For example, technology is not perfect.<sup>143</sup> Voting technology can be susceptible to hacking and other problems.<sup>144</sup> Consequently, a state may not be acting unreasonably when it declines to purchase insufficiently tested technology, even if that technology could be used to help with same-day registration, out-of-precinct voting or voter ID issues. However, when states are working in the shadow of advanced technology that has been fully tested, a refusal to procure that technology should be strictly scrutinized when that refusal alone stops bona fide residents from voting. The refusal to purchase technology that would allow a voter to register days before an election rather than weeks before an election is a denial of the right to vote. It is not merely the result of a neutral election law. If the state wants to make its choice, it should be forced to defend that choice strenuously under a heightened standard.

Cost could also be relevant to a state's decision to decline to adopt new technology.<sup>145</sup> Resource limitations matter. A cost-benefit analysis may dovetail with the state's consideration of whether the available technology is reliable enough to buy. Though cost may be a factor, it should not be the only factor. A state's desire to save money may be relevant, but a state's

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140. Confidence in electoral process is an important state interest. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008).

141. Legislatures must think deeply about restrictions on fundamental rights to narrowly tailor their laws sufficiently to survive strict scrutiny.

142. *See Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (discussing when laws survive strict scrutiny).

143. *See ADONA ET AL.*, *supra* note 5, at 27 (noting that some election officials prefer to delay adopting technology "until 'all the bugs have been worked out'"); Levitt, *supra* note 6, at 486 (noting that when technology fails, the resulting problems can be very serious).

144. *See ADONA ET AL.*, *supra* note 5, at 19; Lin et al., *supra* note 93, at 18 (discussing attacks on voting systems in 2016 elections).

145. Cost includes the cost of training poll workers to use the new technology. *See ADONA ET AL.*, *supra* note 5, at 5, 29 ("[Local election officials] articulated, in their words, the need to increase funding and resources, especially staff and poll workers, new technology, and training.").



desire to run elections on the cheap should not immunize it from its constitutional obligations.<sup>146</sup>

Some may argue that if technology truly eliminates any reason for the state to retain the law at issue, a court could reach the same conclusion regarding the law's validity under the *Anderson/Burdick* balancing test as under strict scrutiny. However, given how easily a balancing test may be met with appeals to administrative convenience, a court is much more likely to find that a law survives a balancing test than strict scrutiny.<sup>147</sup> As important, the specter of strict scrutiny may change a jurisdiction's mindset regarding election law. Instead of focusing on whether a law is convenient for running elections and weighing the equities, the state might begin to focus squarely on whether the law is necessary. In this era of neo-vote suppression, a state's change in attitude may be as important as this Essay's suggested change in doctrine.<sup>148</sup>

#### IV. CONCLUSION

This Essay suggests technology should drive constitutional doctrine in some circumstances. That might be controversial to some, as it posits that the Constitution's meaning and application may change, even when its language does not, in part because of technological advances.<sup>149</sup> However, the project does not change the Constitution's meaning or application. It merely explains how strict scrutiny obligates the state to do what it can to protect fundamental rights. As technology advances, technology may eliminate the need for some laws that impinge on fundamental rights. Once all justifications for such impingement fade, all that remains is the impingement.

Once technology addresses and solves all of the justifications that undergird a law that impinges on a voter's ability to cast a ballot, a jurisdiction's decision to retain the law should be deemed a direct and substantial limitation on a voter's right to vote. If so, the level of scrutiny the jurisdiction's law should face increases. Rather than merely meeting the *Anderson/Burdick*

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146. School funding fights have persisted for decades. See John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351 (2004). The same is true of prison funding litigation. See Janice C. Griffith, *Judicial Funding and Taxation Mandates: Will Missouri v. Jenkins Survive under the New Federalism Restraints?*, 61 OHIO ST. L.J. 483, 570-71 (2000) (discussing the role of cost in remedying prison conditions cases).

147. See Karlan, *supra* note 9, at 140 (noting the Supreme Court's ratcheting up and ratcheting down scrutiny of infringements on the right to vote).

148. See *id.* at 146 (discussing the "new vote denial"); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 718-720 (2006) (discussing then new practices designed to keep minorities from participating in "the electoral process").

149. This is somewhat different than the Fourth Amendment context because it arguably suggests the application of a different constitutional rule, not merely a different interpretation of the same constitutional rule.

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balancing test, the law would need to survive strict scrutiny. The switch to strict scrutiny would be substantive and symbolic. It would be a recognition that a state's obligation with respect to the right to vote is to do all it can—including adopting appropriate technology or jettisoning unnecessary laws—to make sure those who are eligible to vote can vote in elections. That is how to protect and respect a fundamental right.

This brief Essay is designed to be a conversation starter, not a conversation ender. It leaves many questions unanswered. Some include: How proven and reliable should technology be before a court can assert that its use would obviate the need for a state's law? How long should a state be allowed to study emerging technology before its refusal to adopt the technology is considered a preference for administrative convenience over the protection of the right to vote? What role should the cost of adopting new technology play in determining whether a state's retention of its law should be subject to strict scrutiny? These questions will be explored and resolved in time. For now, this Essay attempts to explain why courts and states should start asking these questions about how technology interacts with laws that limit a voter's ability to cast a ballot.