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YALE LAW & POLICY REVIEW

Voting Is Speech

By Armand Derfner* & J. Gerald Hebert**

INTRODUCTION

It seems like an obvious proposition that a citizen registering to vote or casting a ballot is engaging in free speech, a fundamental right entitled to full protection under the First Amendment to the United States Constitution. This simple proposition is especially fitting in light of the broad First Amendment protection extended to the dollars spent in political campaigns to influence votes. But the current Supreme Court rarely scrutinizes voting regulations as it does other speech regulations. The Court treats spending to influence voters in elections—by candidates, political parties, individuals, corporations, labor unions, and others, including anonymous contributors who might well be international terrorists—as free speech entitled to robust First Amendment protection against state and federal limitation. Any limitations on such speech are subjected to strict scrutiny. Registering and voting, on the other hand, are given short shrift by the Court. Burdens on voter registration and voting are not analyzed under strict First Amendment standards, and therefore the Court has allowed states excessive latitude to restrict voters' access to the ballot box. The Court should change course, fully acknowledge the expressive nature of voting, and

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grant voting the same First Amendment protections as the money spent to influence it.

Many commentators have written about this voting rights dilemma, typically observing that (a) the right to vote has been described as “fundamental,” by Congress and the Supreme Court,¹ but also that (b) the Supreme Court and other court decisions analyzing burdens on the right to vote do not give it the protection that fundamental rights ordinarily receive. The commentators propose various doctrinal solutions, such as fully recognizing the right to vote as fundamental, like the right to interstate travel,² or treating it as a fundamental right that is modified by a calibrated speech analysis,³ or locating the right within the Privileges or Immunities Clause of the Fourteenth Amendment.⁴

This Essay begins with the two premises underlying other scholarship—voting should be treated as a fundamental right, and it is not—and proposes that we find a source of constitutional protection for voting in the First Amendment. The First Amendment is a logical locus for voting protection for several reasons. One is that the casting of a vote, no matter how it has been parsed in doctrinal discussions, meets the ordinary and commonly understood definition of a speech act. Second, as discussed below, the Supreme Court has not foreclosed the First Amendment claim. The Court has routinely noted that the right to vote is the right to have a “voice” in elections and has already acknowledged the First Amendment implications of voter petitions.⁵ Therefore, taking the remaining step of ensuring full First Amendment protection for voting itself would be a markedly less dramatic doctrinal shift than remaking another clause of the Constitution. Likewise, First Amendment protection of voting fits within the Court’s jurisprudence, which has extended First Amendment protection to extraordinarily broad categories of expression.⁶

1. See e.g., National Voter Registration Act, 52 U.S.C. § 20501(a)(1) (West Supp. 2014); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Two hundred years ago, the Supreme Court called the right to vote in public elections “sacred.” *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 701 (1819).
2. Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 335-39 (1993).
3. Joshua A. Douglas, *Is the Right To Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL’Y 143 (2008).
4. James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*, 8 HARV. L. & POL’Y REV. 39 (2014).
5. See *infra* notes 96-108 and accompanying text.
6. A related idea is to locate the right to vote in the First Amendment’s Petitions Clause—the right “to petition the Government for a redress of grievances.” U.S. CONST. amend. I. Such treatment would be in line with the Court’s treatment of speech directed at the government or related to government functions as a special category of speech protected by the Petitions Clause. In *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011), the Supreme Court described the petition clause as similar to, but likely broader than, the speech clause. *Id.* at 388. Reviewing history

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This Essay consists of four parts. First, the real-life problem: the recent epidemic of state restrictions on voting, which the current constitutional jurisprudence does little to stem. Second, the doctrinal problem: the various standards of review the Supreme Court uses to analyze restrictions on different types of claimed rights—a process which is often outcome determinative. Third, the history: a review of voting rights doctrine, starting with strict scrutiny and then slipping to the lax review standard of the *Burdick v. Takushi* rule. Finally, the resolution: recognizing voting as speech would dramatically affect the level of scrutiny, the analysis, and, in many cases, the fate of attempts to restrict the right to vote.

I. HIGHLIGHTING THE PROBLEM: AN EPIDEMIC OF VOTING RESTRICTIONS

In the past few years, many states have enacted new obstacles to registering to vote or voting, reversing our Nation's long struggle to expand voter eligibility and participation. That trend became a veritable rush as the 2012 election year approached.

A recent survey finds that since 2010, twenty-two states have passed new voting restrictions.⁷ These restrictions have reduced the number of eligible voters overall and have specially burdened and winnowed down the number of minority and poor eligible voters in those jurisdictions.⁸ Several of the most common voting restrictions are described here.

A. Voter ID

Despite an absence of evidence that people try to commit voter fraud by impersonating other people, laws requiring registered voters to present additional forms of identification at the polls have proliferated in recent years. Such

since the time of Magna Carta, the Court called petitioning the essence of a citizen's participation "in the democratic process," *id.* at 399, and noted that petitions had often served as the equivalent of the franchise for people denied actual suffrage. *Id.* at 395-96.

7. *New Voting Restrictions in Place for 2016 Presidential Election*, BRENNAN CTR. FOR JUSTICE, <http://www.brennancenter.org/new-voting-restrictions-2010-election> (last visited June 15, 2016).
8. *See, e.g.,* KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION (July 2012), http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf; Reid Wilson, *Report: Voter ID Laws Reduce Turnout More Among African American and Younger Voters*, WASH. POST (Oct. 9, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/10/09/report-voter-id-laws-reduce-turnout-more-among-african-american-and-younger-voters/>.

laws have been passed in no fewer than thirty-six states.⁹ Many of these laws pick and choose which types of identification are acceptable, and in so doing they pick and choose which voters are favored and which are disfavored.

Emblematic of this trend is the Texas voter ID law, which was enacted in 2011 and has been mired in litigation ever since. The law disfranchises more than 600,000 registered voters¹⁰ (about 4.5 percent of the state's registered voters¹¹) unless those voters obtain a qualifying ID—a far more onerous and expensive process than registering to vote.¹² This disfranchised group is disproportionately made up of African-American and Hispanic voters because the types of IDs chosen as “acceptable” under the law are those disproportionately held by non-minority voters.¹³ For example, concealed handgun permits and military IDs, common IDs among white or Anglo voters, are designated “acceptable,” while student IDs and civilian government employee IDs, more common among minority voters, are excluded.¹⁴ The District Court found the law had a discriminatory effect on voters, and a panel of the Fifth Circuit agreed (though the Fifth Circuit later granted rehearing *en banc*).¹⁵ The effects and magnitude described above are largely uncontroverted and by all accounts appear well known to legislators engaged in crafting these laws.¹⁶

B. Restrictions on Early Voting and Same-Day Registration

Legislators have also passed laws limiting or eliminating early voting and same-day registration—two voting practices that enhance voter turnout, especially among minority voters. In 2013, North Carolina passed legislation sharply

9. *Voter Identification Requirements | Voter ID Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, (Apr. 11, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

10. Proponents of voter ID laws have erroneously, and unsuccessfully, challenged these numbers. See Jennifer L. Clark, *Separating Fact from Fiction on Voter ID Statistics*, BRENNAN CTR. FOR JUSTICE (Nov. 25, 2014), <http://www.brennancenter.org/blog/separating-fact-fiction-voter-id-statistics>.

11. *Veasey v. Perry*, 71 F. Supp. 3d 627, 659 (S.D. Tex. 2014).

12. *Id.* at 667-77.

13. *Id.* at 658.

14. *Id.*

15. The District Court also found the law had a racially discriminatory purpose, a finding that the Fifth Circuit panel directed it to reconsider. *Veasey v. Abbott*, 796 F.3d 487, 493 (5th Cir. 2015). On March 9, 2016, the Fifth Circuit granted Texas's petition for rehearing *en banc*, vacating the panel decision. *Veasey v. Abbott*, 2016 WL 929405 (5th Cir. Mar. 9, 2016). The *en banc* Court heard oral arguments on May 24, 2016, and, based on an Order of the Supreme Court, see *Veasey v. Abbott*, 136 S. Ct. 1823 (2016), is expected to rule by July 20, 2016.

16. *Veasey*, 71 F. Supp. 3d at 687, 695, 701-03.

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reducing the length of the early voting period and abolishing same-day registration, significantly curbing minority voters' access to elections.¹⁷ In North Carolina in the 2008 and 2012 general elections, more than 70 percent of African American voters used early voting, compared with 50 percent of white voters.¹⁸ In the 2008 and 2010 primaries, African American same-day registration usage rates were approximately twice that of white voters.¹⁹

C. Restrictions on Voter Registration Drives

States have also imposed restrictions, including criminal penalties, on voter registration organizations, thereby suppressing voter registration efforts. For example, a 2011 Florida law provided for strict financial and criminal sanctions on voter registration organizations if they did not comply with a collection of onerous requirements, such as requiring each volunteer to swear to a vague but intimidating affidavit acknowledging possible harsh financial and criminal penalties for "false registration" and requiring all executed registration forms to be delivered (not mailed) to the registration office within forty-eight hours.²⁰

Federal judges have twice blocked the Florida law.²¹ In 2012, a federal court ruled that the forty-eight-hour window for delivering, not mailing, registration forms imposed an "onerous, perhaps virtually impossible burden."²² The court also found that requiring volunteers to sign an inaccurate and intimidating sworn statement regarding criminal penalties "could have no purpose other than to discourage voluntary participation" in "constitutionally protected activities."²³

17. 2013 N.C. Sess. Laws 381; *see also* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 245 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015) ("There can be no doubt that certain challenged measures in House Bill 589 disproportionately impact minority voters.").

18. Plaintiffs' Joint Proposed Findings of Fact and Conclusions of Law at 21, N.C. State Conference of the NAACP v. McCrory, No. 1:13-cv-658 (M.D.N.C. Aug. 17, 2015).

19. *Id.* at 30. Despite these demonstrable effects on minority voters, the District Court recently upheld these provisions, as well as other restrictions in the same law. N.C. State Conference of the NAACP v. McCrory, No. 1:13-cv-658, 2016 WL 1650774 (M.D.N.C. Apr. 25, 2016). This ruling is a textbook demonstration of the lowered scrutiny that voter restrictions now receive. The case is currently on appeal, and oral argument was heard at the Fourth Circuit on June 21, 2016.

20. FLA. STAT. § 97.0575 (2011).

21. *See* League of Women Voters of Fla. v. Browning, 863 F. Supp. 2d 1155 (N.D. Fla. 2012); *see also* League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) (holding that draconian fines created too great a risk for nonprofit organizations).

22. *League of Women Voters of Fla.*, 863 F. Supp. 2d at 1161.

23. *Id.* at 1164.

These voter registration restrictions go hand-in-hand with other efforts to suppress voter participation. Another feature of the North Carolina “monster”²⁴ voting law, which sharply limited early voting and same-day registration, was the elimination of pre-registration for sixteen and seventeen-year olds and high school voter registration drives.²⁵

These laws restricting access to registration and voting, and others like them, illustrate a famous political science axiom and legislators’ awareness of it: “[T]o a considerable extent, [electorates] can be political artifacts. Within limits, they can be constructed to a size and composition deemed desirable by those in power.”²⁶ In sum, these restrictions often appear to be nothing more than cynical attempts to “construct” the right electorate.

II. DIAGNOSING THE PROBLEM: AN INADEQUATE STANDARD OF REVIEW

The difference in treatment between voting rights and rights recognized as speech, such as political spending, lies in the Supreme Court’s selection of a standard of review, specifically deciding whether to subject the law to “strict scrutiny” or “rational basis” review.

A. *Strict Scrutiny*

When the Supreme Court classifies an activity as speech entitled to First Amendment protection, it subjects any law restricting or burdening that activity to the highest level of scrutiny. The law is viewed skeptically. The state has the burden of proof, and the Court will uphold the law only if the state can prove that the law advances an actual “compelling interest” and does so by the least restrictive means possible.²⁷ Because the Supreme Court has deemed the monetary transactions of political contributors and spenders to be speech covered by the First Amendment, their contributions receive “strict scrutiny” protection.²⁸

24. Ari Berman, *North Carolina’s ‘Monster’ Voting Law Challenged in Federal Court*, NATION (July 8, 2014), <http://www.thenation.com/article/north-carolinas-monster-voting-law-challenged-federal-court/>. As noted above, the District Court upheld all of the provisions of this “monster” law. *See supra* note 19.

25. 2013 N.C. Sess. Laws 381. *See supra* note 19.

26. Stanley Kelley, Jr. et al., *Registration and Voting: Putting First Things First*, 61 AM. POL. SCI. REV. 359, 375 (1967).

27. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (holding that laws that burden political speech are “subject to strict scrutiny”). Protection of speech seems to have been strengthened even further in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015), which struck down an ordinance regulating the size, duration and location of certain categories of signs as a content-based restriction.

28. *Citizens United*, 558 U.S. 310; *Buckley v. Valeo*, 424 U.S. 1 (1976).

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Reviewed under strict scrutiny, restrictions on such spending have invariably been invalidated.²⁹

If voting were classified as speech, courts would analyze restrictions on it similarly—but, in practice, it is not. Instead, unless it is determined that a particular voting restriction is either too “severe” or “discriminatory” (defined quite restrictively), courts apply a more deferential standard of review.³⁰

B. Rational Basis

The default standard of review of government regulation, applied unless Supreme Court doctrine calls for a higher standard, is the relaxed standard of “rational basis” review. This standard of review places the burden of proof on the law’s challenger, not the state; the law is subjected to cursory review and is presumed valid if supported by any conceivable purpose. The question whether there are less restrictive means of achieving the state’s purpose is irrelevant.³¹ This “rational basis” review effectively means no review.³² As discussed below, the Supreme Court describes its review of voting restrictions as a balancing test that ostensibly acknowledges voters’ constitutional right to associate through voting and to cast an effective vote, but the standard, as it has been applied, most closely resembles the familiar “rational basis” review. Therefore, applying this standard, courts will uphold most governmental restrictions on the so-called “right.”

The level of scrutiny has been outcome determinative in many voting rights cases. In 2012, federal courts in Florida and Texas had opposing views about which level of scrutiny to apply in reviewing their respective states’ laws restricting voter registration drives. As a result, the courts in the two states reached opposite conclusions about the constitutionality of the two states’ laws.³³ Recog-

29. See, e.g., *Citizens United*, 558 U.S. at 359-60; see also *Az. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2811 (2011). When regulation does survive strict scrutiny, its life expectancy may be short. See *Mich. Chamber of Commerce v. Austin*, 494 U.S. 652 (1989), *overruled by Citizens United*, 558 U.S. 310.

30. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

31. *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980) (“In more recent years, however, the Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn.”); see also *New Orleans v. Dukes*, 427 U.S. 297, 303-06 (1976).

32. See, e.g., *U.S. R.R. Retirement Bd.*, 449 U.S. at 174-77, 179.

33. *Compare League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012) (granting a partial preliminary injunction against Florida law), *with Voting for Am. v. Andrade*, 488 F. App’x 890 (5th Cir. 2012) (staying District Court’s preliminary injunction against Texas law), *and Voting for Am. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013) (reversing previously stayed preliminary injunction against Texas law).

nizing voter registration drives as “core First Amendment activity,” the District Court in Florida applied a strict version of the *Anderson* balancing test (discussed further below) and thus correctly determined that the onerous restrictions on voter registration were likely unconstitutional.³⁴ Meanwhile, the Fifth Circuit characterized voter registration drives as non-expressive, applied rational basis scrutiny, and, unsurprisingly, upheld the onerous registration restrictions.³⁵ The Pennsylvania voter ID litigation captures the importance of the standard of review. In the court’s initial review, it did not apply strict scrutiny and therefore denied a preliminary injunction of a photo ID law (while indicating that it might have reached a different result if it applied strict scrutiny).³⁶ After a full trial, the court reversed course, applied strict scrutiny, and did indeed strike down the law.³⁷

The Supreme Court’s disparate treatment of state rationales for voting and political spending restrictions also illustrates the difference between the types of scrutiny. In *Crawford v. Marion County*, the Court applied a deferential standard of review to an Indiana voter ID law.³⁸ The state acknowledged that the law only protected against impersonation at the polls and did not address any other type of voter fraud. The Court readily accepted Indiana’s claim that it needed a photo ID requirement to prevent in-person impersonation at the polls even though—as the Court itself explained—there were *no* instances of voter impersonation in the history of Indiana.³⁹

By contrast, in *Arizona Free Enterprise Club v. Bennett*, as in other campaign finance cases, the Court employed strict scrutiny to review Arizona’s matching funds provision and, in doing so, swept aside the challenged campaign finance law’s purpose of preventing corruption. The Court stated, as a matter of law, that limits on “independent expenditures . . . cannot be supported by any anti-corruption interest.”⁴⁰ This statement is remarkable on its face. The Supreme

34. *League of Women Voters of Florida*, 863 F. Supp. 2d at 1158.

35. *Andrade*, 488 F. App’x at 899; *Steen*, 732 F.3d at 392.

36. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 3332376, at *29 (Pa. Commw. Ct. Aug. 15, 2012), *vacated and remanded*, 54 A.3d 1 (Pa. 2012). Following remand, the lower court enjoined the law for the 2012 election because there was so little time to implement the new law, leaving the merits for a later trial. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

37. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014).

38. 553 U.S. 181 (2008).

39. *Id.* at 194-96. The lack of evidentiary support for the Court’s decision is discussed further *infra* Part III.

40. *Az. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2827 (2011); *see also* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359-60 (2010) (limiting the definition of corruption that justifies regulation to only quid pro quo corruption). The nation’s growing, dismal experience with PAC money may well

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Court reached this conclusion by defining the concept of “corruption” to be limited to “quid pro quo” transactions⁴¹—*i.e.*, what is commonly called “graft.”⁴² Thus, according to Supreme Court precedent, First Amendment strict scrutiny allows no regulation whatsoever of political spending—no matter how large or anonymous—that is not spent in return for graft.⁴³ In a later case, the Montana Supreme Court contradicted the Supreme Court’s view that independent expenditures do not cause corruption or the appearance of corruption. That court said the evidence before it showed a connection between independent expenditures and corruption, as a matter of fact, and thus warranted some limited regulation.⁴⁴ The U.S. Supreme Court reversed *per curiam*, thus holding that its rule of law outranked any record of actual facts.⁴⁵

III. THE EVOLUTION OF THE PROBLEM: SCRUTINY SLOWLY SLIPPING AWAY

The limited constitutional protection that voters receive from the Supreme Court surprises many who are familiar with the frequent references by the Supreme Court and Congress to voting as a “fundamental right”⁴⁶ and therefore assume that restrictions on that fundamental right are subjected to strict scrutiny. However, that is not how the law is applied today. The divergent paths by which voters were left behind, while other First Amendment claims were honored, dates back to the 1970s.

The right to vote was treated as fundamental in a series of cases in the 1960s that struck down laws creating malapportioned election districts,⁴⁷ laws barring

bring the Supreme Court to reexamine and reject its startling theory that “independent” expenditures present no danger of corruption. A rejection of the currently prevailing theory would make regulation of “independent” expenditures constitutionally valid.

41. *Az. Free Enter. Club’s Freedom Club PAC*, 131 S. Ct. at 2826-27 (“The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of quid pro quo corruption with which our case law is concerned.”).
42. *See, e.g., Sabri v. United States*, 541 U.S. 600, 605 (2004) (“Congress has authority . . . to see to it that taxpayer dollars . . . are . . . not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.”).
43. *Az. Free Enter. Club’s Freedom Club PAC*, 131 S. Ct. at 2827.
44. *W. Tradition P’ship, Inc. v. Att’y Gen. of Mont.*, 271 P.3d 1, 7-10 (Mont. 2011), *rev’d by Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (*per curiam*).
45. *Am. Tradition P’ship, Inc.*, 132 S. Ct. 2490.
46. *E.g.*, 52 U.S.C. § 20101 (West Supp. 2014) (providing access for handicapped voters); National Voter Registration Act, 52 U.S.C. § 20501(a)(1) (West Supp. 2014); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
47. *E.g., Wesberry v. Sanders*, 376 U.S. 1 (1964).

certain categories of people from voting (such as non-property-owners⁴⁸ or military personnel stationed at their bases⁴⁹), and, most famously, the poll tax.⁵⁰ Each of these cases relied on the Equal Protection Clause, although some referenced the First Amendment implications.⁵¹ The high-water mark for this line of cases was *Dunn v. Blumstein*, which invalidated durational residence requirements for voters,⁵² called the right to vote “fundamental,”⁵³ and said “close scrutiny” must be applied.⁵⁴

Shortly thereafter, the arrival of four new Justices turned the voting cases in a different direction, as signaled by three cases in 1973 and 1974. In *Rosario v. Rockefeller*, the Court held that the strict scrutiny cases did not apply because the restriction challenged did not absolutely disfranchise any voter, but only limited the time for changing party registration.⁵⁵ In *San Antonio School District v. Rodriguez*, the Court held that only rights found explicitly or implicitly in the Constitution are “fundamental” and trigger strict scrutiny.⁵⁶ The Court specifically found that the right to vote is not a constitutionally protected right *per se*; rather, the Constitution only protects the right “to participate in . . . elections on an equal basis with other qualified voters.”⁵⁷ Finally, in *Storer v. Brown*, the Court held that “as a practical matter, there must be a substantial regulation of elections”⁵⁸ to ensure they are fair and orderly and indicated that restrictions would be upheld if they were not “invidious[ly]” discriminatory⁵⁹ or “excessively burdensome.”⁶⁰ This lenient approach to review of voting restrictions continues to prevail despite significant changes in the tenor and kind of voting

48. *E.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

49. *E.g.*, *Carrington v. Rash*, 380 U.S. 89 (1965).

50. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

51. *E.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968).

52. 405 U.S. 330 (1972).

53. *Id.* at 336.

54. *Id.* at 357; *see also Storer v. Brown*, 415 U.S. 724 (1974) (describing this “close scrutiny” standard as requiring that the government action at issue be tailored to its purpose and necessary to further a compelling state interest).

55. 410 U.S. 752 (1973) (upholding state’s early party-switching deadline).

56. 411 U.S. 1, 17 (1973) (denying challenge to school-financing system, not a voting issue).

57. *Id.* at 35 n.78; *see also id.* at 101 (Marshall, J., dissenting) (“Yet it is clear that whatever degree of importance has been attached to the state electoral process when unequally distributed, the right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee.”).

58. 415 U.S. 724, 730 (1974) (independent candidate restrictions).

59. *Id.*

60. *Id.* at 738.

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rights restrictions presented and doctrinal changes in the scope of the First Amendment.

There was a glimmer of hope in *Anderson v. Celebrezze*, in which the Supreme Court held that a voter's interests under the First Amendment required the Court to strike down a restrictive filing deadline in Ohio for independent candidates.⁶¹ However, this decision has had little practical effect because the Court has continued to apply a lenient balancing test, holding that the voter's interests have to be balanced against the state's interests in regulating elections to ensure elections are fair and orderly.⁶² Although *Anderson* did not precisely articulate which level of scrutiny it was applying, the decision suggests that courts should apply a form of intermediate-level scrutiny, something in-between rational basis and strict scrutiny. The Court explained that courts must consider the "character and magnitude of the asserted injury to the rights protected by the [Constitution]" and weigh those against the "legitimacy and strength" of each of the "precise interests" put forward by the state.⁶³ Ominously, however, the Court backtracked from this more stringent balancing test elsewhere in the Opinion, stating: "Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable and non-discriminatory restrictions."⁶⁴

Although *Anderson* is sometimes described as a freedom-of-association case,⁶⁵ that was not the only right recognized in that case. The Court's opinion several times referred to two rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."⁶⁶ The Court specifically said these were "two different, although overlapping, kinds of rights."⁶⁷ Therefore, by the Court's own reasoning, at minimum *Anderson*'s intermediate scrutiny test should apply to all restrictions on the right to vote.

A later series of three cases, involving the rights of political parties and deriving those rights from the rights of voters, provided more hope and suggested

61. 460 U.S. 780 (1983).

62. *Id.* at 786-90.

63. *Id.* at 789.

64. *Id.* at 788.

65. E.g., Matthew M. Mannix, Note, *Opening Ballot Access to Political Outsiders: How Third Parties Could Use Cook v. Gralike to Challenge the Dominance of America's Two-Party System*, 11 ROGER WILLIAMS. U. L. REV. 273, 284-85 (2005); Donald E. Daybell, Note, *Guarding the Treehouse: Are States "Qualified" to Restrict Ballot Access in Federal Elections?*, 80 B.U. L. REV. 289, 313 n.137 (2000); Jeanne M. Kaiser, Note, *Constitutional Law—First Amendment—No Constitutional Right to Vote for Donald Duck: The Supreme Court Upholds the Constitutionality of Write-In Voting Bans in Burdick v. Takushi*, 15 W. NEW ENG. L. REV. 129, 134 (1993).

66. *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

67. *Id.*

that the Court was moving toward a robust First Amendment jurisprudence for voting.⁶⁸ The first two cases, *Tashjian v. Republican Party of Connecticut* (striking down closed primary restrictions)⁶⁹ and *Eu v. San Francisco County Democratic Central Committee* (striking down a law banning political parties from endorsing candidates in primary elections),⁷⁰ held that strict scrutiny was required simply because those laws burdened citizens' right to associate through voting. The Court did not refer to the burdens as "severe." Then, in *Norman v. Reed*, the Court—while striking down certain ballot access requirements for political parties and upholding others—again held that restrictions that affect the First Amendment rights of voters to express their political preferences had to be narrowly drawn to "advance a state interest of compelling importance."⁷¹ This time, however, the Court added the word "severe" to describe the restriction that prompted strict scrutiny, citing no relevant authority.⁷²

Then, in June 1992, five months after the decision in *Norman v. Reed*, a majority of the Court in *Burdick v. Takushi* backtracked on the line of cases pointing toward robust First Amendment protection for voters. The Court majority held that only a "severe" burden triggers heightened scrutiny.⁷³ The opinion selectively quoted those portions of *Anderson* that emphasized the state's interest and minimized the voter's interest.⁷⁴ The opinion likewise quoted the restrictive portion of *Tashjian*.⁷⁵

Sustaining a Hawaii ban on write-in votes, the Court in *Burdick* quoted *Anderson*'s requirement that a state demonstrate how its "precise" interest justifies the restriction imposed on the voter.⁷⁶ Its actual analysis, however, split the state and the voters' interests apart. It found the state's interest in political party integrity was substantial and the burden on voters in being barred from casting write-in votes was slight.⁷⁷ But the Court failed to consider, as *Anderson* re-

68. See, e.g., *Eu v. S.F. Democratic Comm.*, 489 U.S. 214 (1989) (holding that a state law prohibiting political parties from endorsing primary candidates violated the First Amendment rights of political parties); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (finding that a state statute limiting eligibility to vote in a partisan primary violated the First Amendment rights of political parties).

69. *Tashjian*, 479 U.S. at 213-14.

70. *Eu*, 489 U.S. at 225.

71. 502 U.S. 279, 289 (1992).

72. *Norman* cited *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979), but the word "severe" does not appear on that page nor anywhere in *Socialist Workers Party*. *Norman*, 502 U.S. at 289.

73. 504 U.S. 428, 434 (1992).

74. *Id.* at 433-34, 441.

75. *Id.* at 433-34.

76. *Id.*

77. *Id.* at 439-40.

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quired, whether the state's interest required or justified the restriction. The question whether a narrower restriction could satisfy the state's concern was deemed irrelevant.⁷⁸ While the majority considered narrow tailoring unnecessary, it formed the principal basis of a dissent by Justice Kennedy.⁷⁹

The Court held that a more stringent rule would "tie the hands" of the state.⁸⁰ This deferential language is very different from what one would expect in a free speech case, or any case involving fundamental rights.⁸¹ While the *Anderson* "balancing test" was vague and left significant room for restrictions on voting, depending on its interpretation, *Burdick* further increased the task of those challenging voting restrictions and lowered the practical level of review to something akin to rational basis review.⁸²

The modified *Burdick* test was the linchpin of the *Crawford* photo ID decision, which further depressed the level of scrutiny given to voting restrictions and the protection for voters.⁸³ In *Crawford*, as in *Burdick*, there was no balancing or tailoring, as *Anderson* requires. The Court simply recognized the state's general interest in preventing fraud at the polls (plainly a legitimate interest) but made no effort to identify the "precise" state interest in the particular law's restriction, as articulated in *Anderson*.⁸⁴

A simple reading of the text of the *Crawford* majority opinion shows that the Court relied on a fallacy of both logic and grammar. The Supreme Court first recognized that the only type of fraud that a photo ID requirement pre-

78. *Id.* at 440 n.10. This footnote also made clear that the majority saw its level of review as "minimal." *Id.*

79. *See id.* at 447-50 (Kennedy, J., dissenting).

80. *Id.* at 434 (majority opinion).

81. The Court did, interestingly, refer to the voter's "expressive activity at the polls," *id.* at 438, a phrase it had used earlier, albeit in relation to freedom of association rather than freedom of speech in *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986).

82. It is worth noting that the Court addressed two aspects of the claim: the right to associate and the voter's claim that barring his write-in vote "discriminates against him based on the content of the message he seeks to convey." *Burdick*, 504 U.S. at 438. The Court clearly recognized the expressive function of voting. Nonetheless, the Court skirted the strict scrutiny standard by holding that the expressive function of voting is limited to selecting among the available choices, and that the state did not have to provide a means of giving vent to pique, personal quarrels or the like. *Id.* While this response addressed the question presented in *Burdick*, it does not explain why strict scrutiny is not applied in other voting cases that burden the expressive function of voting.

83. This Essay is not the place for us to join the national debate over whether photo ID laws in general or in particular are good policy, bad policy, constitutional, or unconstitutional, but the analysis of the issues in *Crawford* did not advance that debate.

84. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198-200 (2008).

vents is “in-person voter impersonation.”⁸⁵ The Court then acknowledged there was no evidence of any such fraud in Indiana’s history.⁸⁶

The Court then referred to examples of voter fraud in nine other states, but *every one* of these instances except for *one* voter in *one* state involved other types of voter fraud, ranging from absentee ballot fraud to registration by ineligible persons.⁸⁷ The other “evidence” of impersonation was one man’s tale of committing impersonation fraud during the Tammany Hall era in New York in the late nineteenth century, which involved the connivance of the polling official and probably predated the era of any voter registration whatsoever.⁸⁸

The Supreme Court referred to the cases it cited as “flagrant examples” of voter fraud. This would have been correct if the Court had said “flagrant examples of voter fraud in general,” but that statement would have been irrelevant to the justification for the voter ID requirement. However, the Court’s actual phrase was “flagrant examples of such fraud,”⁸⁹ and since the word “such” obviously meant in-person impersonation fraud, the Court’s statement was simply not so and provided no support for its holding.

Based on the virtual absence of in-person voter fraud,⁹⁰ and without balancing Indiana’s interest against the voters’ interests—*i.e.*, without determining whether this measure was needed to advance the state’s precise interest—the Supreme Court upheld Indiana’s photo ID law.⁹¹ The *Crawford* Court’s analysis

85. *Id.* at 194.

86. *Id.*

87. *Id.* at 195 n.12. The Brennan Center for Justice’s *amicus* brief in *Crawford* exhaustively catalogued the irrelevance of these examples. See Brief Of Brennan Ctr. For Justice At NYU School of Law As *Amicus Curiae* In Support Of Plaintiffs-Appellants And Reversal at 7-16, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

88. *Id.*

89. *Id.* at 195.

90. Studies have confirmed that in-person voter fraud is virtually non-existent. See LORI MINNITE & DAVID CALLAHAN, DEMOS, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD (2003), http://www.demos.org/sites/default/files/publications/EDR_-_Securing_the_Vote.pdf; see also Brief for United States at 4, *Veasey v. Abbott*, No. 14-41127 (5th Cir. Feb. 3, 2015) (“When this law was in effect—a period during which approximately 20 million votes were cast in general elections—only two cases of in-person voter impersonation were prosecuted to conviction in Texas.”) (internal citations omitted); *South Carolina v. United States*, 898 F. Supp. 2d 30, 44 (D.D.C. 2012) (noting the absence of recorded instances of in-person voter fraud in South Carolina); JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 7 (2007), <https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf>.

91. *Crawford*, 553 U.S. at 204. The Court found that Indiana had other legitimate interests supporting its law as well, but each was essentially a variation on the fraud theme. *Id.* at 192-97.

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might have sufficed under traditional “rational basis” review, which heavily favors the state, but its analysis did not balance the state and voters’ interests as called for by *Anderson* (and even *Burdick*).⁹²

Crawford illustrates how the current relaxed review of voting restrictions operates in practice.⁹³ *Burdick* and *Crawford*, together, underscore the low estate of the voter under the Supreme Court’s voting rights jurisprudence.

IV. FIXING THE PROBLEM: FINDING VOTING’S FIRST AMENDMENT PROTECTIONS

The Court’s relaxed review of voting restrictions would not be surprising if voting were not a fundamental right. But isn’t the right to vote fundamental, when it is “preservative of all rights”?⁹⁴ And shouldn’t voting be regarded as speech deserving of full First Amendment protection when it serves a clear expressive function?

One answer to these questions is that the Supreme Court has never said “No.” Despite the Court’s current jurisprudential confusion, the Supreme Court has never explicitly considered, much less rejected, the argument that voting is speech fully protected by the First Amendment. The Supreme Court in *Harper*, the poll tax case, specifically recognized and left open the question of the First Amendment’s application to restrictions on the right and proceeded to decide the case under the Equal Protection Clause.⁹⁵

Supreme Court case law supports a theory of First Amendment protection for voters. The Court has repeatedly characterized the fundamental right to vote in terms of “voice” and expression. In *Wesberry v. Sanders*, the Court explained: “[N]o right is more precious in a free country than that of having a voice in the

92. Justice Souter’s dissent, joined by Justice Ginsburg, referred to the *Anderson* balancing test as a sliding scale review. Systematically analyzing the components of the state’s interests and voters’ burdens, he would have held the latter outweighed the former. *Id.* at 209-10 (Souter, J., dissenting).

93. See also *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 7 (2014) (reversing the District Court’s holding that Wisconsin’s voter ID requirement was invalid under the *Anderson/Burdick* balancing analysis and upholding the photo ID law based on the Court’s decision in *Crawford*). *But see* *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) (reversing and remanding for the District Court to consider whether the photo ID requirement violated the Equal Protection Clause as applied to individual voters who would be unable to obtain qualifying ID with reasonable effort).

94. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

95. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (“It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee. We do not stop to canvass the relation between voting and political expression.”) (internal citation omitted).

election of those who make the laws.”⁹⁶ In *Reynolds v. Sims*, the Court held: “[E]ach citizen [must] have an equally effective voice in the election of members of his state legislature.”⁹⁷ In *Norman v. Reed*, the Court noted that voting gives “opportunities of all voters to express their own political preferences.”⁹⁸ Finally, in *Anderson*, the source of the current balancing test, the Court held that the interest at stake was the “interests of voters who chose to associate together to express their support for Anderson’s candidacy and the views he expressed.”⁹⁹ The list goes on at length.¹⁰⁰

A series of cases involving the role of petitions is also instructive. Starting with *Meyer v. Grant*,¹⁰¹ and most recently in *Doe v. Reed*,¹⁰² the Court has discussed the expressive nature of the political communication involved in voter petitions. In *Doe*, the Court rejected a request to keep petition signatures confi-

96. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

97. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

98. *Norman v. Reed*, 502 U.S. 279, 288 (1992).

99. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

100. In the following, virtually endless, list of voting rights Supreme Court voting cases since *Baker v. Carr*, voting is characterized as providing citizens with a “voice” in their democracy: *Clingman v. Beaver*, 544 U.S. 581, 599 (2005); *Miller v. Johnson*, 515 U.S. 900, 932, 937 (1995); *Shaw v. Reno*, 509 U.S. 630, 675 (1993); *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 460 (1992); *Burdick v. Takushi*, 504 U.S. 428, 441 (1992); *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Chisom v. Roemer*, 501 U.S. 380, 398 n.25 (1991); *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 693 (1989); *Davis v. Bandemer*, 478 U.S. 109, 166 (1986) (Powell, J., concurring in part and dissenting in part); *Rogers v. Lodge*, 458 U.S. 613, 649 (1982) (Stevens, J., dissenting); *Ball v. James*, 451 U.S. 355, 371 (1981); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 127, 134 (1981); *City of Rome v. United States*, 446 U.S. 156, 176 n.12 (1980); *City of Mobile v. Bolden*, 446 U.S. 55, 78 (1980); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 76 (1978); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 177 n.5 (1977); *City of Richmond v. United States*, 422 U.S. 358, 387 (1975); *Am. Party of Texas v. White*, 415 U.S. 767, 799 (1974); *Lubin v. Panish*, 415 U.S. 709, 721 n.* (1974); *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973); *Rosario v. Rockefeller*, 410 U.S. 752, 764 (1973); *Mahan v. Howell*, 410 U.S. 315, 321, 323 (1973); *Jenness v. Forston*, 403 U.S. 431, 442 (1971); *Whitcomb v. Chavis*, 403 U.S. 124, 141 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 134 (1970); *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969); *Hadnott v. Amos*, 393 U.S. 904, 906 (1968); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *Avery v. Midland County, Tex.*, 390 U.S. 474, 480 (1968); *Carrington v. Rash*, 380 U.S. 89 (1965); *Fortson v. Toombs*, 379 U.S. 621, 626 (1965) (Harlan, J., concurring in part and dissenting in part); *Roman v. Sincock*, 377 U.S. 695 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964); *Reynolds*, 377 U.S. at 576; *Wesberry*, 376 U.S. at 10, 17; *Gray v. Sanders*, 372 U.S. 368, 386 (1963).

101. 486 U.S. 414 (1988).

102. 561 U.S. 186 (2010).

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dential, but did so only after recognizing the petition signers' vital First Amendment rights and holding that disclosure did not violate those First Amendment rights. Chief Justice Roberts's majority opinion stated:

An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure [T]he expression of a political view implicates a First Amendment right. The State, having "cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles."¹⁰³

The Chief Justice's opinion acknowledged that signing a petition was part of a process leading to legal consequences under state law, and that "[t]o the extent a regulation concerns the legal effect of a particular activity in [the electoral] process, the government will be afforded substantial latitude to enforce that regulation."¹⁰⁴ That regulatory necessity, however, does not negate the First Amendment's protection: "But we do not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment. . . . Petition signing remains expressive even when it has legal effect in the electoral process."¹⁰⁵

Concurring opinions by Justices Stevens and Sotomayor gave narrower scope to the First Amendment interests of petition signers (or voters). Justice Stevens argued that the act of casting a ballot, like signing a petition, does not involve "interactive communication" and is not an individual expression of political sentiment; therefore, he concluded that limitations on these acts do not burden free speech.¹⁰⁶ Justice Sotomayor similarly suggested that "the expressive interests implicated by the act of petition signing are always modest."¹⁰⁷ She reiterated the rule allowing broad leeway to voting regulations in contrast to regulations of pure speech.

In this instance, the Chief Justice has the better argument. Voting and petition-signing plainly express a point of view and represent a decision to sign on to a particular idea in the marketplace of ideas or support a particular candidate who best represents the voters' political beliefs.¹⁰⁸

103. *Id.* at 194-95 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)).

104. *Id.* at 195-96 (citing *Burdick*, 504 U.S. at 433-34).

105. *Id.* at 195.

106. *Id.* at 216 (Stevens, J., concurring).

107. *Id.* at 215 (Sotomayor, J., concurring).

108. *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011), also has some intriguing reflections on the subject. In that case, the Supreme Court upheld a state ethics law barring legislators from voting when they have a conflict of interest. The legislator argued that his vote was speech, and Justice Alito agreed, arguing that this view was supported by *Doe v. Reed*, 561 U.S. 186 (2010). *Carrigan*, 131 S. Ct. at 2355 (Alito, J., concurring in part and concurring in the judgment). The majority, in an opinion by Justice Scalia, disagreed, but importantly, not on the basis that

While voting is typically secret or anonymous, that practice is neither universal nor dispositive. Voting for presidential candidates in the Iowa caucuses, for example, is not anonymous. Indeed, the secret ballot was not established in the United States until the late 1800s.¹⁰⁹ Moreover, the First Amendment has consistently given strong protection to anonymous speech.¹¹⁰ While individual votes are anonymous, votes in the aggregate are publicly announced and communicate the electorate's opinions of various candidates and political proposals.

The expressive interests implicated by voting are strong. By voting, citizens declare their *choice* to participate, express this in front of their neighbors and poll officials, and allow a public record of their choice. The expressive nature of the vote is present whether the vote is for a candidate in a primary or general election or for a ballot proposition, recall, referendum or anything else called a vote. Likewise, a vote is expressive regardless of whether it is decisive. Unlike some other countries,¹¹¹ the United States does not require citizens to vote. The choice to participate actively in our democratic system by casting a ballot may therefore constitute an expression of civic pride. This is certainly true for people like Congressman John Lewis, a leader in the protest that led to "Bloody Sunday" in Selma, Alabama. They risked their lives to obtain the meaningful opportunity to vote and fully understand what it means to be shut out of the political process.¹¹² The decision not to vote may also serve an expressive purpose and be intended to protest the unresponsiveness of the government ("What difference does it make?") or deny the legitimacy of the process or of a particular outcome.¹¹³ Voting is therefore both a means of *achieving a particular end* and of *expressing an opinion* as to both the process and the desired end.

votes are not speech; rather, the majority rested its judgment on the ground that legislators' votes are not personal to them, unlike individual voters, whose "franchise is a personal right." *Id.* at 2350.

109. Jill Lepore, *Rock, Paper, Scissors*, NEW YORKER (Oct. 13, 2008), <http://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors>.
110. See, e.g., *Talley v. California*, 362 U.S. 60, 65 (1960) ("[T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified.") (citing *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP ex rel. Patterson v. Alabama*, 357 U.S. 449 (1958)).
111. Laura Santhanam, *22 Countries Where Voting is Mandatory*, PBS NEWS HOUR (Nov. 3, 2014, 3:01 PM), <http://www.pbs.org/newshour/rundown/22-countries-voting-mandatory/> (listing Argentina, Australia, Belgium, Bolivia, Brazil, Congo, Costa Rica, the Dominican Republic, Ecuador, Egypt, Greece, Honduras, Lebanon, Luxembourg, Mexico, Nauru, Panama, Paraguay, Peru, Singapore, Thailand, and Uruguay as countries with compulsory voting).
112. John Lewis, *Why We Still Need the Voting Rights Act*, WASH. POST (Feb. 24, 2013), https://www.washingtonpost.com/opinions/why-we-still-need-the-voting-rights-act/2013/02/24/a70a930c-7d43-11e2-9a75-dab0201670da_story.html.
113. See, e.g., Elisée Reclus, *On Voting*, MARXISTS.ORG, <https://www.marxists.org/subject/anarchism/reclus/voting.htm> (last accessed June 15, 2016) ("So don't

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Ignoring the reality that voting is “expressive communication” contrasts with the strong First Amendment protections of money in politics. Isn’t signing an absentee ballot and putting the stamped envelope in the mailbox as expressive as signing a check to a candidate or political committee and putting the stamped envelope in the mailbox? Isn’t signing a poll list at the precinct and pulling levers next to your preferred candidates as much or more an expression of political view than funding an advertisement on a candidate’s behalf?

The honored treatment of the right to spend money in politics is, in fact, derived from the right of the voter. The Supreme Court stated in the seminal First Amendment “money is speech” case that “[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”¹¹⁴ Voters take the information that is put into the marketplace of ideas and ultimately make a decision about which view to adopt and which candidate or political party best represents it. The voter then expresses that decision by actually going to the polling place, entering the voting booth, and selecting the candidate of his or her choice. As Justice Holmes wrote of the First Amendment, the “best test of truth is the power of the thought to get itself accepted in the competition of the market,”¹¹⁵ and there can be no better “test” than the canvass of votes cast by voters. As the Supreme Court said in *Buckley v. Valeo*, the “central purpose” of the First Amendment is to ensure that “healthy representative democracy [can] flourish.”¹¹⁶ That is what votes are for.

But while the right to vote has been languishing, the Supreme Court has been expanding the scope of the First Amendment, protecting far-reaching forms of speech such as commercial advertising,¹¹⁷ flag burning,¹¹⁸ forms of hate speech,¹¹⁹ and, perhaps most remotely, the right of insurance companies to buy prescription data from drug stores.¹²⁰ The Court has also protected speech that has a real capacity for harm by, for example, striking down abortion clinic “buffer zones” designed to protect vulnerable women from intimidation¹²¹ and allowing hateful speech by protesters outside the funeral of a military service

abdicate, don’t place your fate in the hands of men who are necessarily lacking in capability and future traitors. Don’t vote!”) (reprinting Eliséé Reclus, *LE RÉVOLTÉ* (Oct. 11, 1885)).

114. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

115. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

116. *Buckley*, 424 U.S. at 93 n.127 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

117. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

118. *See Texas v. Johnson*, 491 U.S. 397 (1989).

119. *Virginia v. Black*, 538 U.S. 343 (2003) (protecting cross-burning absent affirmative evidence of intent to intimidate); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (protecting expression, including cross burning, of the Ku Klux Klan).

120. *See, e.g., Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

121. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

member.¹²² The fact that voting is part of a critical governmental process would seem to warrant more careful judicial scrutiny of regulations, not less. But up until this point, the right to vote itself has been left out of this doctrinal revolution. The Supreme Court's primary reason for denying voters strict scrutiny protection is the uncontroversial fact that elections have to be regulated to ensure that the process is fair and orderly. While it is true that states need the power to regulate elections, the necessity of regulation does not negate the fundamental nature of the right to vote and its concomitant need for strict scrutiny protection.

Treating voting as speech would not undermine appropriate regulation. If voting restrictions were reviewed under strict scrutiny, as are other speech restrictions, the need to ensure orderly elections would simply be recognized as a "compelling interest" and the state would have to prove that any restriction or burden on the right to vote was narrowly tailored to meet that goal. Once voting is brought under the full protection of the First Amendment, the Court could develop a doctrinal framework to analyze ordinary voting regulations necessary for orderly elections, such as the rearranging of polling locations. The Court has developed a nuanced framework for analyzing "time, place, and manner" restrictions of speech that allows for necessary and useful public regulation but also stringently protects free speech. There is no reason the Court could not analyze voting regulations in a similar manner,¹²³ especially since the Constitution already uses the same wording ("times, places and manner") in the Elections Clause.¹²⁴ Therefore, recognizing voting as a fundamental expressive act will not cause elections to grind to a halt. It will merely ensure that the courts value the rights of voters.

The Court should correct its course deviation and place the right to vote at the top of the pantheon of rights protected by the First Amendment. The right

122. *Snyder v. Phelps*, 562 U.S. 443 (2011).

123. Indeed, a strict interpretation of the balancing test in *Anderson v. Celebrezze*, which is still good law, might serve exactly this function. *Anderson* recognized the First Amendment rights at stake and held that a court must "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" and weigh them against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). As discussed, this balancing test has been watered down by applications that fail to acknowledge the strong First Amendment rights at stake and overstate the state interests by according them undue deference at this level of scrutiny. Courts can reverse course now, under *Anderson*, by acknowledging the strong First Amendment speech implications of voting on the injury side of the balancing test and requiring states to demonstrate both that their interests are significant and that the regulation in question is narrowly tailored to serve them. See *supra* text accompanying notes 33-34 (discussing *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012)).

124. U.S. CONST. art. I § 4.

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to vote is both fundamental to our democratic society and fundamentally expressive; it should be properly protected by strict scrutiny alongside other fundamental rights.

CONCLUSION

If the last few years are any guide, voters face the prospect of widespread and significant restrictions on the franchise. *Burdick* should be rolled back and *Anderson's* vague balancing test tightened by applying strict scrutiny and requiring narrow tailoring. Recognizing that voting is speech would not undermine legitimate state interests and would not lead to the wholesale invalidation of state restrictions on voters. State interests would not be discounted; rather, the votes that they seek to regulate would be fully valued, and the states' claimed interests supporting regulation would have to be justified, not simply asserted.

Categories of expression whose contributions to the marketplace of ideas are less obvious are given strict scrutiny protection,¹²⁵ so why not the right which President Reagan called "the crown jewel of American liberties"?¹²⁶

125. *E.g.*, *United States v. Stevens*, 559 U.S. 460 (2010) (holding that a statute punishing depictions of animal cruelty violates the First Amendment).

126. Ronald Reagan, Statement About Extension of the Voting Rights Act (Nov. 6, 1981), *reprinted at* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds.), <http://www.presidency.ucsb.edu/ws/?pid=43215> (last visited June 15, 2016).