ARTICLE

A STATUTORY RIGHT TO VOTE

MICHAEL MITCHELL*

ABSTRACT

The constitutional right to vote is in jeopardy. In theory, the Constitution implicitly protects the right to vote. In practice, this implied right rarely checks voter suppression or election subversion. And despite the platitude that the right to vote is fundamental, the Roberts Court's originalist turn threatens the right's foundations.

Many scholars have assumed that reinvigorating the right to vote requires amending the Constitution. Only an amendment, they suggest, can increase judicial scrutiny of measures that make it harder to vote or less likely that every vote will count. After all, the Supreme Court has held that Congress cannot compel courts to provide greater protection for constitutional rights. If these scholars are right, then securing a real right to vote requires an immense investment of limited political capital with dubious prospects of a return.

There is another way. This Article argues that Congress can create a statutory right to vote capable of performing the core functions of a right-to-vote amendment. Congress can sidestep the limits on its power to enforce constitutional rights by creating an independent right pursuant to its enumerated powers, as it has done with other civil rights laws. Fundamentally, the constitutional right to vote bars holding elections in an unjustifiably burdensome manner. The Elections Clause and Electors Clause grant Congress nearly plenary power over the manner of federal elections. And the Guarantee Clause provides the same power over state elections, plus the power to expand the electorate. With that power, Congress can guarantee all adult citizens the right to vote and subject burdensome measures to at least intermediate scrutiny.

A statutory right to vote could do nearly as much as a constitutional amendment to check voter suppression and election subversion. Beyond empowering voters, a statutory right to vote would help set our democracy on a more inclusive foundation and provide a model for reclaiming from the judiciary the power to secure our most fundamental rights.

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* Climenko Fellow and Lecturer on Law, Harvard Law School, 2024–2025 & 2026–2028. For generous inspiration, guidance, and support, I thank Guy-Uriel Charles, Zach Fisch, Justin Florence, Rachel Homer, Michael Klarman, Cerin Lindgrensavage, Adam Lioz, Genevieve Nadeau, Dessie Otachliska, Nicholas Stephanopoulos, Susannah Barton Tobin, Mengyi Wang, and Laura Williamson. For insightful editing, I thank everyone at the *Harvard Journal on Legislation*. All mistakes are my own.

I. Introduction

Two months into his second term, President Donald Trump issued an executive order that would make it harder to vote and less likely that every vote would be counted.[1] He directed the Election Assistance Commission ("EAC")—an independent agency charged with supporting election administration[2]—to require documentary proof of citizenship for voters to register by federal registration form.[3] He ordered federal agencies to confirm the citizenship of recipients of public assistance before providing them with registration forms.[4] He ramped up criminal voter fraud investigations.[5] He pressured states to remove voters from the rolls.[6] He barred states from counting ballots received after Election Day.[7] And he threatened to cut off federal funding to states that did not embrace these changes.[8]

Voters and voting rights organizations wasted no time challenging the executive order.[9] In their complaint, they denounced it as "an attempt to make it far more difficult for eligible U.S. citizens to exercise their fundamental right to vote."[10] The organizations warned that the order "would severely burden . . . their members' right to vote."[11] And they requested relief "to prevent further encroachments on Americans' access to the ballot."[12] So you might have expected their complaint to include a count asserting that the order violated the constitutional right to vote. But it didn't.[13]

Why wouldn't a voter suppression complaint include a voter suppression claim? Because at this point, a constitutional right-to-vote claim would not have done much good.

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[1] *See* Exec. Order No. 14,248, 90 Fed. Reg. 14005 (Mar. 25, 2025). For analysis of the order's likely effects, see Wendy R. Weiser, *The President's Executive Order on Elections*, Brennan Ctr. for Just. (Apr. 1, 2025), https://www.brennancenter.org/our-work/research-reports/presidents-executive-order-elections-explained [https://perma.cc/2NSV-TLWV]; Samara Angel, Jonathan Katz, & Peter W. Beck, *Trump's Executive Order Threatens to Undermine American Elections*, Brookings Inst. (Mar. 28, 2025), https://www.brookings.edu/articles/executive-order-threatens-to-undermine-american-elections/ [https://perma.cc/5GRD-F42H].

[2] For information on the Election Assistance Commission, see Hope C. Kashatus, *Ready to Roll: How the U.S. Election Assistance Commission Can Strengthen State Compliance with Federal Voter Roll Maintenance Requirements*, 73 Admin. L. Rev. 901, 910–13 (2021).

[3] *See* Exec. Order No. 14,248, *supra* note 1, at 14006.

[4] *Id.* at 14007.

[5] *See id.*

[6] *See id.*

[7] *See id.* at 14009.

[8] *See id.* at 14007.

[9] *See generally* Complaint, League of United Latin Am. Citizens v. Exec. Off. of the President, No. 25-0946 (D.D.C. Mar. 31, 2025).

[10] *Id.* ¶ 2.

[11] *Id.* ¶ 3.

[12] *Id.* ¶ 4.

[13] *See id.* ¶¶ 184–226 (bringing counts for violating the separation of powers, the Electors and Elections Clauses, the Uniformed and Overseas Citizens Absentee Voting Act, and the Administrative Procedure Act).

The Constitution does not expressly guarantee the right to vote to anyone.[14] Nevertheless, the Supreme Court has recognized that the Constitution includes an implied, fundamental right to vote.[15] Under the *Anderson-Burdick* doctrine, the First and Fourteenth Amendments together prohibit governments—local, state, and federal—from unduly burdening the exercise of that right.[16] In the first of the two leading cases, *Anderson v. Celebrezze*,[17] the Court struck down Ohio's unusually early deadline for a presidential candidate to secure a spot on the state's ballot.[18] *Anderson* recognized that ballot access restrictions, like other voting laws, may burden voters' and candidates' rights to associate with one another, as well as "the right of qualified voters . . . to cast their votes effectively."[19] The Court held that to evaluate the constitutionality of such measures, courts must weigh the significance of their burdens on these rights against the significance of states' interests in managing their elections.[20] Then, in *Burdick v. Takushi*,[21] the Court held that Hawaii's ban on write-in voting did not "impermissibly burden the right to vote."[22] *Burdick* emphasized that laws burdening the right to vote are not necessarily subject to strict scrutiny; rather, "the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."[23] As a result, today, any measure that impairs the ability to vote must be justified by a correspondingly strong governmental interest.[24] The constitutional doctrine is supposed to do the work the constitutional text does not.

Emphasis on "supposed to." For years now, the constitutional right to vote has not fulfilled its promise. As states and now President Trump have imposed significant voting restrictions, federal courts have proven reluctant to protect the right.[25] The Roberts Court has never struck down a state voting

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[14] *See* Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 Wm. & Mary Bill Rts. J. 11, 11 (2014); Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 Election L.J. 559, 559 (2004).

[15] *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)); *see also* Gerken, *supra* note 14, at 16.

[16] *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Burdick v. Takushi, 504 U.S. 428, 434 (1992). For applications to the federal government, see, e.g., Vote Forward v. DeJoy, 490 F. Supp. 3d 110, 121–25 (D.D.C. 2020); Richardson v. Trump, 496 F. Supp. 3d 165, 181–83 (D.D.C. 2020).

[17] 460 U.S. 780 (1983).

[18] *Id.* at 805–06.

[19] *Id.* at 786–87.

[20] *See id.* at 788–89.

[21] 504 U.S. 428 (1992).

[22] *Id.* at 430.

[23] *Id.* at 432–34.

[24] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190–91 (2008).

[25] *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 Election L.J. 263, 272–79 (2020); Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59, 64–72 (2021).

restriction as unconstitutional.[26] And lower federal courts have undermined *Anderson-Burdick* without formally repudiating it.[27]

In theory, *Anderson-Burdick* requires courts to carefully scrutinize measures that burden the right to vote.[28] In practice, courts often defer to the government.[29] When district courts have made detailed factual findings that election laws have impeded voting, courts of appeals have dismissed the burdens as mere inconveniences.[30] When states have justified restrictions by appealing to a vague, unsubstantiated interest in preventing voter fraud, courts have accepted the legitimacy and strength of the interest at face value and then declined to require states to show that the challenged restrictions even advance that interest.[31] In other cases, courts have circumvented the *Anderson-Burdick* inquiry by holding that burdens on particular methods of voting (mainly voting by mail) do not even implicate the constitutional right to vote.[32] And *Anderson-Burdick* has not even stopped states from disenfranchising some people outright, such as citizens convicted of felonies.[33] Millions of voters have paid the price, particularly voters of color, voters with disabilities, poor voters, senior voters, transgender voters, and young voters.[34] When courts permit states to abridge the right to vote, subject only to such deferential review, the doctrinal right to vote no longer functions as a right.

The Roberts Court's recent transformations of constitutional law have jeopardized what remains of the constitutional right to vote, condemning it to the margins, even if the Court ostensibly leaves it on the books.[35] The Court's originalists are unlikely to acknowledge that there is a constitutional right

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[26] *See* Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2018 Sup. Ct. Rev. 111, 116 (2019); *see also* Michele Goodwin, *Complicit Bias and the Supreme Court*, 136 Harv. L. Rev. F. 119, 123–24 (2022).

[27] *See infra* Part II.B.4.

[28] *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); *Burdick*, 504 U.S. at 434.

[29] *See infra* Part II.B.4.

[30] *See infra* Part II.B.4.

[31] *See infra* Part II.B.4.

[32] *See infra* Part II.B.4.

[33] *See* Richardson v. Ramirez, 418 U.S. 24, 54 (1974). *See generally* The Sentencing Project, Locked Out 2024: Four Million Denied Voting Rights Due to a Felony Conviction (2024), https://www.sentencingproject.org/app/uploads/2024/10/Locked-Out-2024-Four-Million-Denied-Voting-Rights-Due-to-a-Felony-Conviction.pdf [https://perma.cc/K89F-ZYNV].

[34] *See The Impact of Voter Suppression on Communities of Color*, Brennan Ctr. For Just. (Jan. 10, 2022), https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color [https://perma.cc/KTP4-3LJZ]; Human Rts. Watch, What Democracy Looks Like: Protecting Voting Rights in the U.S. During the COVID-19 Pandemic 2–3 (2020), https://www.hrw.org/sites/default/files/media_2020/09/us0920_web.pdf [https://perma.cc/VXF2-22WD]; *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU (Aug. 18, 2021), https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/ [https://perma.cc/AR2A-7CZE]; Dakota Strode, Tenaya Storm & Andrew R. Flores, *Transgender and Gender-Diverse People Disproportionately Report Problems While Trying to Vote Compared to Cisgender People*, 87 J. Pol. 1199 (2025).

[35] *See infra* Part IIB. 2.

to vote in the first place.[36] Even if there is, the *Anderson-Burdick* doctrine is at odds with the Court's aversion to balancing individual rights against state interests—leaving the Court loathe to deploy it.[37] The Court's repudiation of the right to an abortion in *Dobbs v. Jackson Women's Health Organization*[38] is distinctively threatening to the right to vote; the undue burden standard *Dobbs* denounced as unworkable was designed to mirror *Anderson-Burdick*.[39] Today's Court favors evaluating constitutional rights claims by reference to history and tradition.[40] What our history and tradition suggest about the constitutional right to vote is bleak: the government may severely constrain who may vote and make it onerous to cast a ballot.[41] Even if the Court refrains from outright erasing *Anderson-Burdick*, the Court is extremely unlikely to let it do any work for voters.

Many scholars have assumed that this constitutional problem demands a constitutional solution: a constitutional amendment guaranteeing the right to vote.[42] A right-to-vote amendment is supposed to help in two ways. First, an amendment would extend the right to vote to all adult citizens.[43] Second, an amendment would enhance the level of scrutiny courts apply to measures that impede the exercise of the right, preventing governments from making it harder to vote unless they can actually justify the burdens.[44]

Why do some scholars assume we have to amend the Constitution to achieve these two aims? Because the Supreme Court has held that Congress cannot stipulate the scope of a constitutional right or compel courts to increase

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[36] *See infra* Part II.B.2.a–b.

[37] *See infra* Part II.B.2.b–c.

[38] 597 U.S. 215 (2022).

[39] *See infra* Part II.B.2.c.

[40] *See infra* Part II.B.2.a.

[41] *See infra* Part II.B.2.a–b. Originalists have called on the Roberts Court to repudiate *Anderson-Burdick* and let states run elections as they please. *See, e.g.*, Kate Hardiman Rhodes, *Restoring the Proper Role of the Courts in Election Law: Toward a Reinvigoration of the Political Question Doctrine*, 20 Geo. J.L. & Pub. Pol'y 755, 771–78 (2022) (arguing that *Anderson-Burdick* claims are nonjusticiable political questions); Note, *"As the Legislature Has Prescribed": Removing Presidential Elections from the* Anderson-Burdick *Framework*, 135 Harv. L. Rev. 1082, 1103 (2022) ("[T]he Constitution does not require that Presidents be chosen by voters . . . [so] courts should cast aside the textually ungrounded *Anderson-Burdick* balancing test and instead defer to the states.").

[42] *See, e.g.*, Gilda R. Daniels, *Democracy's Distrust: The Supreme Court's Anti-Voter Decisions as a Threat to Democracy*, 134 Yale L.J.F. 1062, 1095–97 (2025); Maureen A. Edobor, *Brnovich: Extratextual Textualism*, 26 U. Pa. J. Const. L. 1495, 1551–56 (2024); Richard L. Hasen, A Real Right to Vote: How a Constitutional Amendment Can Safeguard American Democracy 6 (2024); John F. Kowal & Wilfred U. Codrington III, The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union 268–70 (2021); Douglas, *supra* note 25, at 85–88.

[43] *See, e.g.*, Edobor, *supra* note 42, at 1552, 1554; Hasen, *supra* note 42, at 57–58.

[44] The notion seems to be either that an amendment would expressly provide for more rigorous scrutiny of burdens on the right, or, alternatively, that the act of expressly, affirmatively guaranteeing the right would itself raise the level of judicial scrutiny from the status quo. *See, e.g.*, Daniels, *supra* note 42, at 1096–97; Edobor, *supra* note 42, at 1553, 1555; Hasen, *supra* note 42, at 12, 61–64.

their scrutiny of putative constitutional violations. The story begins with *Employment Division v. Smith*.[45] In *Smith*, the Supreme Court held that neutral, generally applicable laws that incidentally burden the First Amendment right to free exercise are subject only to rational basis review.[46] Congress thought strict scrutiny should apply instead. So, Congress enacted the Religious Freedom Restoration Act ("RFRA"), which directed courts to subject measures that substantially burden religious practice to strict scrutiny.[47] Congress's theory was that its power to enforce the Fourteenth Amendment included the power to tell courts how closely to scrutinize burdens on constitutional rights.[48] However, in *City of Boerne v. Flores*,[49] the Supreme Court rejected this theory and struck RFRA down as it applied to the states.[50] On *Boerne*'s account, the Fourteenth Amendment power to enforce the Constitution's guarantees does not include the power to define those guarantees or make judicial review more exacting.[51] If Congress cannot tell courts how vigorously to safeguard constitutional rights, it might seem like all we can do to protect the constitutional right to vote is try to amend our infamously unamendable Constitution.[52]

But *Boerne* was not the end of RFRA's story. To this day, RFRA binds the federal government.[53] The federal component of RFRA rests on a different legal theory, one the Supreme Court has endorsed: Congress can create a statutory right parallel to but stronger than the corresponding constitutional right, so long as Congress has enumerated power over the relevant domain.[54] Congress derives the power it needs to protect the free exercise of religion from federal action from whichever powers authorize the work of the agency whose action is challenged.[55]

RFRA is no outlier. In fact, statutory rights grounded in enumerated powers are an ordinary and important feature of civil rights law.[56] Many of our most significant civil rights statutes (like the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Religious Land Use and Institutionalized Persons Act) create rights parallel to but stronger than their constitutional correlates.[57]

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[45] 494 U.S. 872 (1990).
[46] *See id.* at 876–89.
[47] *See* Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 158–61 (1997).
[48] *See id.*
[49] 521 U.S. 507 (1997).
[50] *See id.* at 516–20.
[51] *See id.* at 519–20.
[52] *See* Gerken, *supra* note 14.
[53] *See* Burwell v. Hobby Lobby, 573 U.S. 682, 690 (2014); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 424 (2006).
[54] *See Hobby Lobby*, 573 U.S. at 695.
[55] *See id.*
[56] *See infra* Part III.B.
[57] *See infra* Part III.B.

This Article argues that Congress can do the same for the right to vote: create an express, affirmative, universal right to vote by ordinary legislation. The key is to circumvent the *Boerne* problem by eschewing the Fourteenth Amendment entirely.[58] Instead of commanding courts to better protect the constitutional right to vote (which *Boerne* seems to forbid), Congress can create a statutory right to vote, extend it to all adult citizens, and instruct courts to apply heightened scrutiny to burdens on that right. Think of it as RFRA for the right to vote. All Congress needs is enumerated power over the electoral domain.

Until now, scholars largely have overlooked the argument that the Constitution gives Congress the powers it needs to create a statutory right to vote. As to federal elections, the primary sources of authority are the Elections Clause and Electors Clause, which together grant Congress nearly plenary power to specify the time, place, and manner of federal elections.[59] Congress can wield that power to provide that federal elections must be held in a "manner" accessible to all eligible voters and subject measures that hinder voting to heightened scrutiny.

The Guarantee Clause enables Congress to achieve the rest of what a constitutional amendment would do: extend the same protection to state elections and expand the electorate to include all adult citizens. The Guarantee Clause commits the United States to ensuring that every state enjoys a "Republican Form of Government."[60] For over 150 years, the Supreme Court has held that it is up to Congress to decide what the Constitution's guarantee of a "republican form of government" means and how to enforce it.[61] The last time Congress exercised its power under the Guarantee Clause, it did so to expand the franchise to Black men.[62] Of course, the Roberts Court cannot be described as particularly respectful of precedent.[63] And it has been particularly quick to repudiate longstanding authority on congressional power to protect democracy.[64] But for now, at least, Congress can flex that power again to guarantee the right to vote to all citizens.

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[58] *See infra* Part II.A.

[59] *See infra* Part III.C; U.S. CONST. art. I, § 4; U.S. CONST. art. II, § 1; Arizona v. Inter Tribal Council of Ariz., 570 U.S. 1, 8–9 (2013); Franita Tolson, *Congressional Authority to Protect Voting Rights After* Shelby County *and* Arizona Inter Tribal, 13 ELECTION L.J. 322, 326 (2014).

[60] *See infra* Part III.D; U.S. CONST. art. IV, § 4.

[61] *See* Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. CMNT. 1, 41–44 (2021); Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 228–34 (2020).

[62] *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 781–82 (1994).

[63] *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 450, 470–78 (2024) (Kagan, J., dissenting); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 363–64, 387–90 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1511–17 (2024).

[64] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 318–19, 362–66 (2010); Shelby Cnty. v. Holder, 570 U.S. 529, 558–59 (2013); *see also* HASEN, *supra* note 42, at 33–34 (2024) ("It would be bad enough if the Supreme Court turned back Warren Court precedents that expand

A statutory right to vote could do more than scholars have yet appreciated to repair the damage to the constitutional right to vote.[65] Since states (and presidents) rarely have colorable reasons—let alone compelling ones—to make it harder to vote or easier to overturn elections, heightened scrutiny would help check voter suppression and election subversion.[66] Had Congress enacted a statutory right to vote, voters could have prevailed against the host of voter suppression and election subversion laws states have enacted in recent years—not to mention challenged President Trump's executive order for what it is.

Of course, a statutory right to vote could not do everything a constitutional amendment could.[67] A federal law cannot prevent the enactment of subsequent federal laws. That is a serious shortcoming. But the greatest threats to the right to vote today do not come from Congress. Unlike a constitutional amendment, a statute would be subject to judicial review. But the precedents that counsel deference to Congress under the Elections Clause and the Guarantee Clause are over a century old.[68] We cannot rule out that the Roberts Court might overturn them, yet a Court that would strike down a statutory right to vote despite this firm legal foundation is a Court unlikely to apply a right-to-vote amendment faithfully anyway. And, whereas a constitutional amendment is not politically feasible for the foreseeable future, a statutory right to vote appears politically feasible soon. In 2022, a statutory right to vote in federal elections, dubbed the Right to Vote Act, passed the House and fell just two votes shy in the Senate.[69]

Beyond its practical power, a statutory right to vote would help reconstruct U.S. democracy on a more inclusive and egalitarian foundation. Until now, the people have tried to construct the right to vote by negation, bolting prohibitions of specific forms of discrimination onto what remains, at its foundation, a privilege.[70] By affirmatively guaranteeing the right to all citizens,

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voting rights for citizen, adult, resident nonfelons. But the court stands poised—and already has shown—it can do further damage to voting rights by reading Congress's broad voting-related lawmaking powers narrowly."); Michael J. Klarman, *The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 178–230 (2020).

[65] *See infra* Part III.

[66] *See, e.g.*, Klarman, *supra* note 64, at 48; JUSTIN LEVITT, BRENNAN CTR. FOR JUST., THE TRUTH ABOUT VOTER FRAUD (2007), https://www.brennancenter.org/media/179/download/Report_Truth-About-Voter-Fraud.pdf?inline=1 [https://perma.cc/JV7T-CZEB] (describing the extreme rarity of voter fraud, the ostensible problem contemporary voting restrictions are enacted to prevent).

[67] *See infra* Part V.B.

[68] *See, e.g.*, Ex parte Yarbrough, 110 U.S. 651, 663–66 (1884) (Elections Clause); White v. Hart, 80 U.S. (13 Wall.) 646, 649 (1871) (Guarantee Clause).

[69] *See* Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. §§ 3401–07 (2022); Marc Elias, *The New Voting Rights Bill Is the Law We Need Right Now*, DEMOCRACY DKT. (Jan. 13, 2022), https://www.democracydocket.com/opinion/the-new-voting-rights-bill-is-the-law-we-need-right-now/ [https://perma.cc/FN8S-6NM2].

[70] *See* HASEN, *supra* note 42, at 1 (observing that the Constitution "never has contained, and still does not contain, a general affirmative right to vote"); *id.* at 28 (explaining how the Fifteenth Amendment's prohibition of disenfranchisement on the basis of race provided the model for

a statutory right to vote would recognize that the right to vote is precisely that—a right—and predicate that right on the political equality of all citizens. Relatedly, until now, the breadth and power of the right to vote have been up to the judiciary.[71] What the courts give, the courts may take away (and are taking away). By starting anew on terms that Congress chooses, a statutory right to vote would reassert the power of the people to reconstruct our democracy.

This Article proceeds in four parts. In Part II, it describes the problems that make a statutory right to vote necessary: the degradation of the right to vote by voter suppression and election subversion and the degradation of the *Anderson-Burdick* doctrine. In Part III, it explains how a statutory right to vote is possible, that is, compatible with the Constitution. In Part IV, it discusses how to design an express, affirmative, universal statutory right to vote to achieve the twin aims of a right-to-vote amendment: expanding the franchise and increasing judicial protection of the right. In Part V, it compares a statutory right to vote to the alternatives. The Article aims to advance the nascent conversation among election law scholars and voting rights advocates about universalist, legislative pathways to democracy reform.[72]

II. Why a Statutory Right to Vote is Necessary

This Part describes the problems that make a statutory right to vote necessary. Today, the right to vote in the United States faces at least two threats. One is the degradation of the right to vote by voter suppression and election subversion. The other is the degradation of right-to-vote doctrine by the judiciary.

A. The Degradation of the Right to Vote

1. Voter Suppression

Since 2010, states have enacted more new restrictions on voting than at any time since Jim Crow.[73] These restrictions have included photo identification and proof of citizenship requirements, cutbacks to early and absentee

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negative rather than positive voting rights amendments); Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 McGeorge L. Rev. 917, 923 (2007) (explaining that "the constitutional right [to vote] remains, at its core, a negative right").

[71] *See* Bertrall L. Ross II, *Fundamental: How the Vote Became a Constitutional Right*, 109 Iowa L. Rev. 1703, 1715–20 (2024); Hasen, *supra* note 42, at 19–40.

[72] *See, e.g.*, Guy-Uriel E. Charles, Luis Fuentes-Rohwer & Farris Peale, *Reconstructing (The Law of) Democracy*, 114 Geo. L.J. (forthcoming) (manuscript at 1–8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5245339 [https://perma.cc/68F4-EMEC]; Richard L. Hasen, *The Stagnation, Retrogression, and Potential Pro-Voter Transformation of U.S. Election Law*, 134 Yale L.J. 1673, 1745–52 (2025); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Pathological Racism, Chronic Racism & Targeted Universalism*, 109 Calif. L. Rev. 1107, 1138–41 (2021).

[73] *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1569 (2019).

voting, new registration requirements, and shorter registration windows, along with more stringent criteria for remaining on the rolls, the elimination of polling places, and restrictions on voter registration drives and third-party ballot collection.[74]

The Supreme Court opened the door to this surge of voter suppression in *Shelby County v. Holder*.[75] The 2013 decision struck down the coverage formula for Voting Rights Act ("VRA") preclearance—the requirement that jurisdictions with histories of racial discrimination obtain permission from the Department of Justice or a federal court before changing their election laws—neutralizing the strongest legal check on discriminatory voting restrictions in the South.[76] In *Shelby County*'s wake, formerly covered jurisdictions have enacted a wave of restrictions targeting voters of color, particularly Black voters, "with almost surgical precision."[77] Today, the turnout gap between white and Black voters is five percentage points higher than it would have been otherwise and has grown nearly twice as fast in the jurisdictions formerly subject to preclearance as in the rest of the nation.[78] Nationwide, millions of people face new barriers to voting, and some have been prevented from voting entirely.[79]

The trend continues. In 2021 alone, Florida, Georgia, Iowa, Montana, and Texas enacted comprehensive voting restriction statutes.[80] As a class,

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[74] *See State Voting Laws Roundup: 2024 in Review*, Brennan Ctr. for Just. (Jan. 15, 2025), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2024-review [https://perma.cc/4GMC-KNNK]; *Block the Vote*, *supra* note 34; Brennan Ctr. for Just., New Voting Restrictions in America (2019), https://www.brennancenter.org/sites/default/files/2019-11/New Voting Restrictions.pdf [https://perma.cc/TZB8-N5SL].

[75] 570 U.S. 529 (2013). On *Shelby County*'s consequences, see, for example, Tomas Lopez, Brennan Ctr. for Just., Shelby County: One Year Later (2014), https://www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf [https://perma.cc/UAW9-MELV]; Wendy Weiser & Max Feldman, Brennan Ctr. for Just., The State of Voting 2018 (2018), https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf [https://perma.cc/2D4S-BP6E].

[76] The VRA's preclearance coverage formula identified which state and local governments had to preclear election law changes with the federal government before they could take effect, based on their histories of violating the voting rights of people of color. *See Shelby County*, 570 U.S. at 558–59; Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 Iowa L. Rev. 1389, 1391, 1424 (2015).

[77] N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

[78] *See* Kevin Morris & Coryn Grange, Brennan Ctr. for Just., Growing Racial Disparities in Voter Turnout, 2008–2022, at 3 (2024), https://www.brennancenter.org/media/12347/download/2024_02_Growing%20Racial_Disparities_in_Voter%20Turnout_Report.pdf?inline=1 [https://perma.cc/5D3J-TSEK].

[79] *See Block the Vote*, *supra* note 34; *New Voting Restrictions in America*, *supra* note 74.

[80] *See* Nick Corasaniti, *Georgia G.O.P. Passes Major Law to Limit Voting Amid Nationwide Push*, N.Y. Times (Apr. 3, 2021), https://www.nytimes.com/2021/03/25/us/politics/georgia-voting-law-republicans.html [https://perma.cc/42EQ-PJNN]; Nick Corasaniti & Reid J. Epstein, *The Texas House Presses Forward on a Sweeping Voting Bill after DeSantis Signs Voting Restrictions in Florida*, N.Y. Times (May 6, 2021), https://www.nytimes.com/2021/05/06/us/politics/desantis-florida-voting-law.html [https://perma.cc/HT94-8GZ2]; Stephen Gruber-Miller, *Gov. Kim Reynolds Signs Law Shortening Iowa's Early and Election Day Voting*, Des Moines Reg. (Mar. 8, 2021), https://www.desmoinesregister.com/story/news/politics/2021/03/08/iowa-governor-kim-reynolds-signs-law-shortening-early-voting-closing-polls-earlier-election-day/6869317002/ [https://perma.cc/KN4H-LH4V]; Sam Wilson, *Gov*

these voter suppression laws are distinguished from their predecessors by their focus on restricting the ways in which states and localities had made voting more accessible during the COVID-19 pandemic, like early voting, mail voting, curbside voting, and ballot drop-boxes.[81] States rung in the 2024 elections by passing more restrictions than in any year in the last decade, save for 2021.[82] Ten states (including swing states like Arizona, Georgia, North Carolina, and New Hampshire) participated in this crackdown, which focused on further restricting mail voting and requiring documentary proof of citizenship to register.[83]

In 2025, sixteen states enacted a total of twenty-nine additional voting restrictions, almost all of which would take effect before the 2026 midterms.[84] And, as the Brennan Center observes, "[t]he pace of democratic progress in many states has slowed just as democratic backsliding has accelerated in others."[85]

Also in 2025, these states gained an ally: the federal government. The U.S. House of Representatives passed a voter suppression bill, the Safeguard American Voter Eligibility Act ("SAVE") Act.[86] And as described above, President Trump joined this voter suppression effort.[87] So far, a federal district court has issued a preliminary injunction blocking the documentary proof of citizenship directives to the EAC and the federal voter registration agencies.[88]

Signs Bills Ending Election Day Registration, Tightening Voter ID Restrictions, Helena Indep. Rec. (Apr. 19, 2021), https://helenair.com/news/state-and-regional/govt-and-politics/gov-signs-bills-ending-election-day-registration-tightening-voter-id-restrictions/article_6e865885-2ce2-5690-813b-ba6cee4e3cba.html [https://perma.cc/7V77-2N83].

[81] *See* Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, Wash. Post (Mar. 11, 2021), https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/ [https://perma.cc/YD38-AGUE].

[82] *See State Voting Laws Roundup: 2024 in Review*, *supra* note 74.

[83] *See id.*

[84] *See State Voting Laws Roundup: October 2025*, Brennan Ctr. for Just. (Oct. 21, 2025), https://www.brennancenter.org/our-work/research-reports/state-voting-laws-roundup-october-2025 [https://perma.cc/L6QM-E6QS].

[85] *Id.*

[86] *See* Safeguard American Voter Eligibility Act, H.R. 22, 119th Cong. (2025); Michael Gold, *House Votes to Require Proof of Citizenship in Federal Elections*, N.Y. Times (Apr. 10, 2025), https://www.nytimes.com/2025/04/10/us/politics/house-citizenship-elections-save-act.html [https://perma.cc/4JNZ-6XN6]; Kevin Morris & Cora Henry, *The SAVE Act Would Hurt Americans Who Actively Participate in Elections*, Brennan Ctr. for Just. (Feb. 20, 2025), https://www.brennancenter.org/our-work/analysis-opinion/save-act-would-hurt-americans-who-actively-participate-elections [https://perma.cc/UXV8-5LJS]; Barbara Rodriguez, *House Passes Bill that Could Make It Harder for Married Women to Vote*, The 19th (Apr. 10, 2025), https://19thnews.org/2025/04/save-act-house-voting/ [https://perma.cc/XRM4-UP4R]; Owen Bacskai & Eliza Sweren-Becker, *House Bill Would Hurt American Voters*, Brennan Ctr. for Just. (Jan. 14, 2025), https://www.brennancenter.org/our-work/analysis-opinion/house-bill-would-hurt-american-voters [https://perma.cc/QH53-SZE7].

[87] *See supra* Introduction.

[88] *See* League of United Latin Am. Citizens v. Exec. Off. of the President, 780 F. Supp. 3d 135, 225 (D.D.C. 2025).

Whether the judiciary will ultimately permit the executive order to take effect remains to be seen.

2. Election Subversion

Since the 2020 elections, the United States has also experienced an increased threat of election subversion: the risk that "the purported outcome of the election would not reflect the choice of the voters."[89] Whereas voter suppression manipulates election results by changing who can vote, election subversion manipulates election results by changing whose votes—if any—decide the winner.

In 2022 alone, legislators in 33 states introduced 244 election subversion bills and enacted 24.[90] The means vary: empowering partisan actors to administer elections directly and even to overturn election results; requiring pretextual "audits" to manufacture a basis for exercising that power; and imposing unnecessary, disruptive, or dangerous requirements for election administrators and enforcing them with criminal penalties—like mandating that they count ballots by hand, which delays results and increases the likelihood of errors.[91] By each of these means, states are reducing the likelihood that the votes cast by every eligible voter will be counted, certified, and ultimately dispositive in the recognized results of an election.

The threat of election subversion is not theoretical; defeated candidates have tried to use the courts to overturn their losses. In 2024, the voters of North Carolina reelected Justice Allison Riggs to her seat on the North Carolina Supreme Court.[92] The margin was tight: 734 votes out of over 5.5 million cast.[93] But a win is a win. Riggs's defeated opponent, Judge Jefferson Griffin, felt otherwise. He sued in state court to have the results overturned.[94] His theory: tens of thousands of votes cast in compliance with the rules in place during the election were nevertheless invalid because those rules were unlawful.[95] The North Carolina state courts should have shut that case down.[96]

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[89] States United Democracy Ctr., Protect Democracy & Law Forward, A Democracy Crisis in the Making Report Update: 2022 Year-End Numbers 2 (2022), https://statesunited.org/wp-content/uploads/2022/12/DCITM-Dec.-2022-Report-.pdf [https://perma.cc/E5PC-9XGT].

[90] *See id.* at 11.

[91] *See id*. at 6, 10–11.

[92] *See* Griffin v. N.C. State Bd. of Elections, 781 F. Supp. 3d 411, 416 (E.D.N.C. 2025).

[93] *See id.*

[94] *See id.*

[95] *See id.* at 418–19.

[96] *See, e.g.*, Richard L. Hasen, *We're Getting Dangerously Close to a Losing North Carolina Candidate Being Declared the Winner*, Slate (Apr. 14, 2025), https://slate.com/news-and-politics/2025/04/bush-v-gore-supreme-court-ruling-north-carolina-election.html [https://perma.cc/B5JJ-75RY]; Richard Pildes, *The NC Judicial Election Litigation: Federal Due Process Prohibits All State Actors, Including State Courts, From Changing State Election Law and Practice After the Votes Have Been Cast*, Election L. Blog (Apr. 6, 2025), https://electionlawblog.org/?p=149341 [https://perma.cc/T6HZ-TDQN].

Instead, they permitted it to fester for nearly six months.[97] Ultimately, Riggs prevailed. The U.S. District Court for the Eastern District of North Carolina held that the state's attempts to retroactively and selectively change the rules of the election violated the U.S. Constitution's guarantees of equal protection and due process.[98] Griffin conceded.[99] Riggs was sworn in.[100] But future losers may be tempted to try their luck again.[101]

These election subversion efforts have taken place against the backdrop of the most overt attempt to subvert an election since the overthrow of Reconstruction: the insurrection at the U.S. Capitol on January 6, 2021, and President Trump's pardons of the convicted participants.[102]

B. The Degradation of Right-to-Vote Doctrine

The Constitution does not expressly, affirmatively guarantee the right to vote.[103] Several amendments refer to a "right to vote," but only to provide a negative right against government denial or abridgment of the right on the bases of race, sex, failure to pay a poll tax, and age over eighteen.[104]

Nevertheless, the Supreme Court has recognized that the right to vote is a "fundamental political right" that the Constitution implicitly protects.[105] On that ground, the Court has held that laws regulating the time, place, or manner of voting that unjustifiably burden the ability to vote are unconstitutional.[106]

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[97] *See Griffin*, 781 F. Supp. 3d at 416.

[98] *See id.* at 454.

[99] Eduardo Medina, *Republican Gives Up Fight to Overturn Defeat in N.C. Judicial Race*, N.Y. Times (May 7, 2025), https://www.nytimes.com/2025/05/07/us/politics/north-carolina-supreme-court-gop-concession.html [https://perma.cc/TC7J-4XKW].

[100] Luciana Perez Uribe Guinassi & Kyle Ingram, *Justice Allison Riggs Sworn in After Six-Month Election Battle with GOP Challenger*, The News & Observer (May 13, 2025), https://www.newsobserver.com/news/politics-government/article306250481.html [https://perma.cc/U9C5-QGYW].

[101] *See* Sam Levine, *Will a Disputed North Carolina Race Push Defeated Candidates to Contest Results?*, The Guardian (May 12, 2025), https://www.theguardian.com/us-news/2025/may/12/north-carolina-election-race [https://perma.cc/C9ZA-3MTD]; Mark Joseph Stern, *The Real Lesson of a Republican Judge's Just-Failed Attempt to Steal an Election*, Slate (May 6, 2025), https://slate.com/news-and-politics/2025/05/north-carolina-republican-judge-election-theft.html [https://perma.cc/27PR-8XTN].

[102] *See* Granting Pardons and Commutation of Sentences for Certain Offenses Relating to the Events at or Near the United States Capitol on January 6, 2021, Proclamation No. 10887, 90 Fed. Reg. 8331, 8331–32 (Jan. 29, 2025). *See generally* Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, H.R. Rep. No. 117-663 (2022).

[103] *See* Gerken, *supra* note 14, at 11; Raskin, *supra* note 14, at 559; Minor v. Happersett, 88 U.S. 162, 178 (1875) ("[T]he Constitution of the United States does not confer the right of suffrage upon any one."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973) ("[T]he right to vote, *per se*, is not a constitutionally protected right . . . .").

[104] *See* U.S. Const. amend. XIV, § 2, cl. 2; *id.* amend. XV, § 1; *id.* amend. XIX, cl. 1; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1.

[105] Reynolds v. Sims, 377 U.S. 533, 562 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)); *see also* Gerken, *supra* note 14, at 24.

[106] *See* Douglas, *supra* note 25, at 59–60, 77.

Today, this doctrine is known as *Anderson-Burdick*, for the two leading modern cases.[107]

The problem for voters and voting rights litigators is that many courts no longer robustly, consistently apply *Anderson-Burdick*, and the Supreme Court has cast doubt on its future. This Section explains the *Anderson-Burdick* doctrine, describes how independent changes in the Roberts Court's jurisprudence threaten *Anderson-Burdick*'s foundations, and examines several ways that *Anderson-Burdick* falls short.

1. Anderson-Burdick

Anderson-Burdick bars states from unduly burdening the right to vote in federal or state elections.[108] *Anderson-Burdick* is a balancing doctrine.[109] When a voter challenges a restriction, a court is supposed to weigh the severity of the restriction's burdens against the significance of the government's interests in the restriction, the magnitude of the threat to the government's interests, and how well the restriction serves those interests by addressing that threat.[110] The more the restriction burdens voters, the stronger the government's interest in the restriction must be, and the more closely tailored the restriction must be to serve that interest.[111] As the Court put it in *Burdick*,

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[112]

Laws that severely burden the right to vote, such as laws that expressly disenfranchise voters or discriminate against them, are subject to strict scrutiny.[113] But for any burdensome measure, "[h]owever slight that burden

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[107] *See* Andrew C. Maxfield, *Litigating the Line Drawers: Why Courts Should Apply* Anderson-Burdick *to Redistricting Commissions*, 87 U. Chi. L. Rev. 1845, 1863–67 (2020); Trane J. Robinson, *Speaking of Direct Democracy, Judicial Review of State Ballot Initiative Laws Under the First Amendment*, 89 U. Cin. L. Rev. 176, 178–79 (2020).

[108] *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Burdick v. Takushi, 504 U.S. 428, 434 (1992).

[109] *See* Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right to Vote*, 96 N.Y.U. L. Rev. 1127, 1141–43 (2021).

[110] *See Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434.

[111] *See Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434.

[112] *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

[113] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008).

may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation."[114]

2. The Erosion of Anderson-Burdick's Foundations

Recently, the Roberts Court has imperiled the premises of *Anderson-Burdick*. First, the Court's originalism casts a shadow over the existence of a constitutional right to vote. Second, the Court's skepticism about the propriety of weighing constitutional rights against state interests imperils *Anderson-Burdick*'s balancing test. Third, the Court's holding that the undue burden inquiry for the constitutionality of abortion restrictions was unworkable undermines *Anderson-Burdick*'s entitlement to stare decisis. And fourth, the Court's dismissive view of barriers to voting makes voter suppression hard to see for what it is.

a. Originalism

The Roberts Court is an originalist court.[115] True, not completely.[116] And not consistently.[117] Still, originalism is the Court's prevailing theory of constitutional interpretation: most justices maintain, roughly, that the public meaning of the Constitution was fixed at its ratification and that this original public meaning should inform or control the interpretation of the Constitution today.[118] Sometimes, the Court also looks to history and tradition.[119]

By the Court's originalist criteria, there may not be a constitutional right to vote. At the Founding, the Constitution did not guarantee anyone voting rights, nor did it provide eligible voters any right against undue burdens on their opportunity to cast a ballot.[120] Those permitted to vote did not have the

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[114] *Id*. at 191 (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)). For recent examples of how *Anderson-Burdick* is supposed to work, see generally *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020), and *Common Cause R.I. v. Gorbea*, 970 F.3d 11 (1st Cir. 2020).

[115] *See generally* United States v. Rahimi, 602 U.S. 680 (2024); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[116] *See generally* William Baude & Michael Stokes Paulsen, *Sweeping Section Three Under the Rug: A Comment on* Trump v. Anderson, 138 Harv. L. Rev. 676 (2025); Christine Kexel Chabot, Trump v. United States *and the Half-Originalist Presidency*, 58 U. Mich. J.L. Reform 653 (2025).

[117] *See generally* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 Tex. L. Rev. 221 (2023); Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 Wake Forest L. Rev. 617 (2019).

[118] For more on the Court's originalism, see, for example, Fallon, *supra* note 117, at 238–44, and Randy E. Barnett & Lawrence Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 436–39 (2023).

[119] *See* Barnett & Solum, *supra* note 118, at 455–78.

[120] *See generally* U.S. Const. (making no reference to a right to vote in the unamended text or first ten amendments); *see also* Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 37 (2009); Minor v. Happersett, 88 U.S. 162, 178 (1875).

right to vote at all, only the privilege of the franchise.[121] The Constitution did not even require popular elections for any federal office save the House of Representatives.[122] The Constitution made the House electorate a function of the state electorate: it conferred the privilege of voting for members of the House upon whomever each state permitted to vote for legislators in the state's largest house.[123] With few and fleeting exceptions, only white, male property owners could vote in state (and hence federal) elections.[124]

Reconstruction won some progress. The Fourteenth Amendment wrote the phrase "the right to vote" into the Constitution and provided for reducing the representation of states that denied the right to adult male citizens, except when they did so on the basis of a criminal conviction.[125] The Fifteenth Amendment prohibited the denial or abridgment of the right on the basis of race.[126] The Court recognized that the Constitution secured the right of those qualified to vote in their states to vote in House elections and, where states provided for popular presidential elections, to vote for president too.[127]

Still, Reconstruction did not change the fundamentals. The Reconstruction Framers failed to add an affirmative right to vote to the Constitution.[128] The Court reaffirmed that voting remained a state-conferred privilege, not a right of national or even state citizenship,[129] and that the Constitution required popular elections to the House only.[130] True, the Court spoke of the franchise as "a fundamental political right, because [it is] preservative of all rights."[131] However, the Court seems to have had in mind only the franchise conferred by state constitutions.[132] Moreover, the Court reiterated that no matter how important voting was, the ballot remained "a privilege merely conceded by society according to its will."[133] White supremacists soon overcame Reconstruction's most important gains and disenfranchised Black men again.[134] Subsequent voting rights amendments barred disenfranchisement on specific bases without affirmatively guaranteeing the right to vote.[135]

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[121] *See* KEYSSAR, *supra* note 120, at 45; Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
[122] *See* U.S. CONST. art. I, § 2; *id.* art. II, § 1; KEYSSAR, *supra* note 120, at 65–67.
[123] *See* U.S. CONST. art. I, § 2; KEYSSAR, *supra* note 120, at 62.
[124] *See* KEYSSAR, *supra* note 120, at 41–42, 67.
[125] *See* U.S. CONST. amend. XIV, § 2; KEYSSAR, *supra* note 120, at 157–59; ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 55–92 (2019).
[126] *See* U.S. CONST. amend. XV; KEYSSAR, *supra* note 120, at 163–77; Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039, 1043 (2024); FONER, *supra* note 125, at 93–124.
[127] *See, e.g.*, Ex parte Yarbrough, 110 U.S. at 663–66.
[128] *See* KEYSSAR, *supra* note 120, at 163–77; HASEN, *supra* note 42, at 7–8.
[129] *See* Minor v. Happersett, 88 U.S. 162, 178 (1875); United States v. Cruikshank, 92 U.S. 542, 555–56 (1875).
[130] *See* McPherson v. Blacker, 146 U.S. 1, 38–39 (1892).
[131] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
[132] *See id.* at 370–71.
[133] *Id.* at 370.
[134] *See* KEYSSAR, *supra* note 120, at 180–95; FONER, *supra* note 125, at 163–68.
[135] *See* U.S. CONST. amends. XIX, XXIV, XXVI.

The implied constitutional right to vote underlying *Anderson-Burdick* emerged piecemeal in a series of Warren and Burger Court decisions. Some of these cases provide that a right to vote arises from the First Amendment rights to speech and association as incorporated against the states by the Fourteenth Amendment.[136] An adjacent line of cases frames the right to vote as a fundamental right under the Equal Protection Clause.[137] Still other cases maintain that whether or not there is a constitutional right to vote, state restrictions on the state-conferred right to vote that are not sufficiently related to voter qualifications violate the Equal Protection Clause.[138] Today, the implied fundamental right to vote appears to rest on a synthesis of all three lines of cases, anchored in the First and Fourteenth Amendments.[139]

Notably, none of these cases is originalist.[140] One of the charges *Dobbs* leveled against abortion rights jurisprudence could be leveled against implied-right-to-vote jurisprudence: the cases suggest that the right "could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance."[141]

The right to vote seems unlikely to pass the Roberts Court's test for substantive due process rights either. The *Dobbs* Court held that the Due Process Clause's guarantee of "liberty" protects only two sets of rights: the rights secured by the first eight amendments and those unenumerated fundamental rights "essential to our Nation's 'scheme of ordered liberty'" that are "deeply rooted in [our] history and tradition."[142] The right to vote is not the former.[143] And the Roberts Court is unlikely to recognize the right to vote as the latter. Consider that the Court has never repudiated its 1959 holding that the Constitution permits states to impose literacy tests.[144] Or that to this day, the Court denies that there is a constitutional right to vote for president or vice president.[145] Judicial recognition of the right to vote is a break from our history and tradition that remains incompletely codified in our law.[146]

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[136] *See* Williams v. Rhodes, 393 U.S. 23, 30–34 (1968); Storer v. Brown, 415 U.S. 724, 728–30 (1974).

[137] *See* Reynolds v. Sims, 377 U.S. 533, 554–66 (1964); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 625–30 (1969).

[138] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008).

[139] *See* Anderson v. Celebrezze, 460 U.S. 780, 786–90 (1983); Burdick v. Takushi, 504 U.S. 428, 432–34 (1992); *Crawford*, 553 U.S. at 189–91.

[140] *Cf.* Joshua Sellers, *Originalism, Election Law, and Democratic Self-Government*, 76 Fla. L. Rev. 1613, 1633 (2024).

[141] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022).

[142] *Id.* at 237 (alteration in original) (quoting, inter alia, Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[143] *See* U.S. Const. amends. I–VIII.

[144] *See* Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 50–53 (1959); Hasen, *supra* note 42, at 50 (noting the Court has never repudiated *Lassiter*).

[145] *See* Bush v. Gore, 531 U.S. 98, 104 (2000).

[146] *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 U. Pa. J. Const. L. 1241, 1273 (2024) ("Given America's racial history, our narrowest

None of this is to cast doubt on whether the Constitution, properly understood, confers the right to vote. It does.[147] This discussion is only to caution that the right is vulnerable to our increasingly originalist Court.[148]

b. Balancing, Generally

Even if the Court recognizes the right to vote, the Court's aversion to balancing constitutional rights against government interests threatens the strength of the doctrine that is supposed to secure it.

Anderson-Burdick's balancing of the constitutional right to vote against the government's interests in regulating elections is one instance of a comparable balancing of rights and interests that appears across individual rights doctrines.[149] From the freedom of speech to equal protection, when plaintiffs assert that governments have violated their constitutional rights, courts evaluate their claims by comparing the magnitude of the burdens with the legitimacy and importance of the state's interests in the challenged measures.[150] Some balancing inquiries are flexible and scalar, with the degree of scrutiny accorded the state's interests increasing gradually with the magnitude of the burdens.[151] Other balancing inquiries operate in tiers or categories, like rational basis or strict scrutiny.[152] Either way, balancing is common.

Or was. In recent years, the Roberts Court has criticized—and in some contexts repudiated—rights-interests balancing as an inappropriate exercise of judicial power. First, the Court has asserted that whether and to what extent a right should be protected is a decision the people made categorically in the Constitution.[153] Once the people have decided to secure a right, judges do not have the power "to decide on a case-by-case basis whether the right is really worth insisting upon."[154] Second, the Court has observed that balancing requires judgments about the relative value of competing public interests.[155]

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understanding of racial equality will always be in the past and the greatest liberatory possibility will always be in the future.").

[147] *See* Ross, *supra* note 71, at 1762–63 (grounding the fundamental right to vote in the Guarantee Clause as liquidated by state practice); FONER, *supra* note 125, at 174–75; Charlie Martel, *Power for the People: Recognizing the Constitutional Right to Vote for President*, 45 CARDOZO L. REV. 1789, 1794 (2024).

[148] *See* HASEN, *supra* note 42, at 31–32.

[149] *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Shalev Gad Roisman, *Balancing Interests in the Separation of Powers*, 91 U. CHI. L. REV. 1331, 1340 (2024).

[150] *See* Roisman, *supra* note 149, at 1371.

[151] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

[152] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273–74 (2007); Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 40–41, 46–47 (2018).

[153] *See* Sherif Girgis, *Unfinished Liberties, Inevitable Balancing*, 125 COLUM. L. REV. 531, 542–43 (2025); William Baude, *Fear of Balancing*, 2024 SUP. CT. REV. 169, 175–78 (2025).

[154] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 23 (2022) (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

[155] *See* Girgis, *supra* note 153, at 543–44.

To the Court, those judgments are legislative, not judicial.[156] To permit judges to make them is to invite judges to impose their personal values on the public.[157]

For both reasons, the Court has steered its Second Amendment jurisprudence away from rights-interests balancing toward history and tradition.[158] On that approach, the government may not burden the right to keep and bear arms unless the challenged measure "is consistent with the principles that underpin our regulatory tradition."[159] What matters is whether the contemporary law is relevantly similar to a historically permissible analogue.[160]

Anderson-Burdick is vulnerable to both of the Court's objections to rights-interests balancing. First, *Anderson-Burdick* rests on the proposition that the Constitution does not determine in advance the precise scope and strength of the right to vote. The doctrine relies on the notion that the Constitution instead recognizes competing ends.[161] On the one hand, the Constitution guarantees the right to vote. On the other hand, the Constitution authorizes states and the federal government to regulate elections. Yet any election regulation impacts what it takes to cast a ballot. Accordingly, the right to vote is not "absolute."[162] Instead, courts must assess case by case how to reconcile securing the right to vote with enabling election administration. *Anderson-Burdick* is thus designed to facilitate the sort of accommodation the Roberts Court regards with skepticism.[163]

Second, *Anderson-Burdick* directs courts to evaluate the legitimacy and importance of policy judgments. A court is supposed to decide whether the government's asserted interests are "legitimate," "nondiscriminatory," "reasonable," and sufficiently important to justify a measure's burdens—the sort of assessments that the Roberts Court has increasingly denounced as legislative.[164]

Replacing rights-interests balancing with a history-and-tradition test would imperil the right to vote. Governments would have little difficulty finding historical analogues for contemporary laws that disenfranchise people outright, let alone for ones that make voting harder. Whereas the turn to history and tradition has led courts to provide the right to bear arms more protection than it enjoyed under rights-interests balancing,[165] a history-and-tradition test would have the opposite effect on the right to vote.

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[156] *See id.*

[157] *See id.* (citing United States v. Rahimi, 602 U.S. 680, 718 (2024) (Kavanaugh, J., concurring)).

[158] *See Rahimi*, 602 U.S. at 691–92; *Bruen*, 597 U.S. at 17–24.

[159] *Rahimi*, 602 U.S. at 692.

[160] *See id.*

[161] *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 788–90 (1983).

[162] *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992).

[163] *See id.*

[164] *See Anderson*, 460 U.S. at 788–89; Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008).

[165] *See* Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post*-Bruen*: An Empirical Assessment*, 110 Va. L. Rev. Online 20, 24 (2024).

c. Casey Balancing, Specifically

Even if balancing were appropriate in some form or under certain circumstances, *Dobbs* suggests that *Anderson-Burdick* balancing is distinctively unworkable. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[166] the Court held that an abortion regulation violated the substantive due process right to an abortion if the regulation "impose[d] an undue burden on a woman's ability to" end her pregnancy.[167] The inquiry aimed to balance the right to an abortion with what the Court regarded as the state's "important and legitimate interest[s]" in regulating public health and protecting potential life.[168]

The *Casey* Court designed the undue burden standard to resemble *Anderson-Burdick*:

> [N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote.[169]

"The abortion right is similar," the Court continued.[170] Only a state law that imposes an "undue burden" on the right violates the Constitution.[171] Thus, abortion rights doctrine mirrored voting rights doctrine.[172]

In *Dobbs*, the Court overruled *Casey*.[173] To determine whether to overrule it, the Court considered several stare decisis factors. Among them was whether its rules had proven workable.[174]

The *Dobbs* Court found the undue burden standard unworkable. First, the Court faulted the standard for its indeterminacy.[175] "[D]etermining whether a burden is due or undue is inherently standardless," the Court declared.[176] A "wide gray area" divides obviously impermissible "huge" burdens from plainly permissible "trivial" ones.[177] Drawing lines within that gray area is arbitrary.[178] And the rules that the Court had elaborated to channel that

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[166] 505 U.S. 833 (1992).
[167] *Id.* at 874.
[168] *Id.* at 875–76.
[169] *Id.* at 873–74 (citing *Anderson*, 460 U.S. at 788).
[170] *Id.* at 874.
[171] *Id.* at 876.
[172] For more on the connections between voting rights and abortion rights before *Dobbs*, see Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139 (2018). For more on these connections after *Dobbs*, see Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728 (2024).
[173] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).
[174] *Id.* at 268, 280–86.
[175] *See id.* at 281.
[176] *Id.*
[177] *Id.*
[178] *See id.*

balancing exercise turned on the application of what the *Dobbs* Court regarded as hopelessly vague terms.[179] One rule turned on whether the challenged law imposed a "substantial obstacle" to the procurement of an abortion, requiring courts to discern the difference between substantial and insubstantial barriers.[180] Another part of the inquiry concerned whether a regulation was "unnecessary" to protecting health.[181] Even the word "necessary" struck the Court as unworkably vague.[182] To the *Dobbs* Court, the indeterminacy of the undue burden standard left too much to judicial discretion.

Second, the Court faulted the undue burden standard for "call[ing] on courts to examine a law's effect on women" without specifying which effects on which women or how many.[183] "[A] regulation may have a very different impact on different women for a variety of reasons, including their place of residence, financial resources, family situations, work and personal obligations, . . . and the firmness of their desire to obtain abortions."[184] Yet no clear, discernible line divided a burden on intolerably many women from a burden on tolerably few or divided those whose burdens mattered from those whose did not.[185]

Third, the *Dobbs* Court found that judges applied the undue burden standard inconsistently.[186] Circuit splits apparently followed.[187] And so "[c]ontinued adherence to that standard would undermine, not advance, the 'evenhanded, predictable, and consistent development of legal principles.'"[188]

As the template for *Casey*, *Anderson-Burdick* is subject to the same critiques. First, *Anderson-Burdick* balancing is about as indeterminate. Just as *Casey* required courts to weigh the substantiality of burdens on the right to an abortion, *Anderson-Burdick* requires courts to "consider the character and magnitude" of burdens on the right to vote.[189] And, like *Casey*, *Anderson-Burdick* requires courts to assess the extent to which the state's legitimate interests justify those burdens, including "the extent to which those interests make [those burdens] necessary."[190] Second, *Anderson-Burdick* similarly requires courts to assess a regulation's burdens without specifying whose burdens matter or how much of the population must be burdened. Like the impacts of abortion regulations, the impacts of election laws vary with geography,

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[179] *See Dobbs*, 597 U.S. at 281–83.
[180] *Id.* at 282.
[181] *Id.*
[182] *Id.*
[183] *Id.* at 282–83.
[184] *Id.* at 282.
[185] *Dobbs*, 597 U.S. at 283.
[186] *Id.* at 283–85.
[187] *See id.* at nn.53–57. *But see id.* at 391–93 (Breyer, Sotomayor & Kagan, JJ., dissenting).
[188] *Id.* at 286.
[189] *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
[190] *See id.*

wealth, health, race, and other personal and community characteristics.[191] These disparities leave courts to make the same sorts of judgment calls that courts had to make under *Casey* about how to benchmark burdens. Third, courts applying *Anderson-Burdick* have reached similarly divergent results.[192] The *Dobbs* Court condemned the undue burden inquiry for the features that the *Casey* Court had borrowed from *Anderson-Burdick*. As a result, *Dobbs* implies that *Anderson-Burdick* is unworkable too.

The Court had designed *Casey*'s undue burden standard to mirror *Anderson-Burdick*. Now that the Court has condemned the former as unworkable for reasons that apply to the latter, *Anderson-Burdick* is on shaky ground.

d. Burdens

Even if the Court continues to recognize the right to vote, and even if the Court continues to tolerate some form of rights-interests balancing, the resulting inquiry likely would be permissive. The reason is that the Court is skeptical that contemporary forms of voter suppression burden the right at all.

The heart of an *Anderson-Burdick* claim is that the state has unjustifiably burdened the right to vote. The inquiry presents a difficult baseline question: a "burden" relative to what?[193] To the law before the challenged measure? To some hypothetical alternative? The fact-sensitivity of these challenges motivated the development of a fact-intensive inquiry. From the inception of *Anderson-Burdick*, the Court emphasized the value of case-by-case adjudication and attention to consequences.[194] No "litmus-paper test" can "separate valid from invalid restrictions."[195] There is "no substitute for the hard judgments that must be made."[196]

Yet today, the Court does not regard as burdensome many prevalent means of making voting harder. In *Brnovich v. Democratic National Committee*,[197] the Court considered for the first time the circumstances under which a voting regulation violates Section 2 of the VRA.[198] Section 2 is the VRA's national ban on election practices that "result[] in a denial or abridgement of the right . . . to vote on account of race or color."[199] After the Court struck down preclearance in *Shelby County*, Section 2 became the most significant check

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[191] *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 199 (2008) (observing that a statute requiring eligible voters to present photo identification to vote would impose distinctive burdens on a subset of eligible voters).

[192] *See* Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1854–59 (2013).

[193] For an insightful examination of the burden problem, see generally Yasmin Dawood, *The Right to Vote: Baselines and Defaults*, 74 STAN. L. REV. ONLINE 37 (2022).

[194] *See Anderson*, 460 U.S. at 789.

[195] *Id.*

[196] Storer v. Brown, 415 U.S. 724, 730 (1974).

[197] 594 U.S. 647 (2021).

[198] *See id.* at 653.

[199] 52 U.S.C. § 10301.

on discriminatory election laws.[200] *Brnovich* presented a Section 2 challenge to two Arizona election laws: one that barred counting votes cast at the wrong polling place and another that criminally barred most people from collecting another person's mail-in ballot.[201]

At the outset of the opinion, the Court specified which factors courts should consider in assessing whether an election law disparately burdens the voting rights of people of color: the severity of the burden, the size of the resulting disparity, how much the measure departs from standard practice in 1982, how many other opportunities the state's election system provides for people to vote, and the strength of the state's interests in the challenged law.[202] None of these factors appears in the text of Section 2.[203] Yet to the majority, all were "important circumstances" with "logical bearing" on whether a state provides everyone an equal opportunity to vote.[204]

Then, the Court held that the Arizona laws did not violate Section 2 because they did not burden the right to vote.[205] In the Court's view, the provisions imposed only minor inconveniences, the resulting disparities were minimal, Arizona provided voters other ways to vote that were not available in 1982, and the laws served the state's interest in preventing voter fraud.[206]

Strictly speaking, *Brnovich* has nothing to do with *Anderson-Burdick*. The Court's interpretation of Section 2 is doctrinally independent of the constitutional right to vote. Nevertheless, the decision bodes ill for *Anderson-Burdick* in four ways. First, *Brnovich* sets a high bar for proving that an election law burdens the exercise of the right to vote. Justice Alito, writing for the majority, explained, "[E]very voting rule imposes a burden of some sort."[207] "[B]ecause voting necessarily requires some effort and compliance with some rules," voters have to "tolerate the usual burdens of voting": the travel it might take to reach a polling place or a mailbox, the time it might take to complete a ballot correctly, and the like.[208] "Mere inconvenience cannot be enough."[209]

Second, *Brnovich* answers the baseline question (burden relative to what?) on historical terms. Whether a measure burdens the right is in part a function of "the degree to which [the] challenged rule has a long pedigree," and particularly "the degree to which [it] departs from what was standard

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[200] *See* Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J.F. 799, 800–01 (2018).

[201] *See* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 661–62 (2021); *see also* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 999 (9th Cir. 2020), *rev'd*, 594 U.S. 647 (2020).

[202] *See Brnovich*, 594 U.S. at 669–74.

[203] *See* 52 U.S.C. §§ 10301–10314 (mentioning nothing of the sort); *Brnovich*, 594 U.S. at 710–12 (Kagan, J., dissenting); *see also* Edobor, *supra* note 42, at 1534–51.

[204] *See Brnovich*, 594 U.S. at 668–69.

[205] *See id.* at 678.

[206] *See id.* at 678–87.

[207] *Id.* at 669.

[208] *Id.* (citation modified).

[209] *Brnovich*, 594 U.S. at 669.

practice when § 2 was amended in 1982."[210] As the Court points out, voting in 1982 was harder than it is today.[211] For instance, back then, states "typically required nearly all voters to cast their ballots in person on election day."[212] Since generally it was harder to vote in the past than in the present, this historical baseline makes it difficult to show that making it harder to vote than it has been recently is making it harder to vote in any sense warranting judicial scrutiny.

Third, *Brnovich* takes a chary view of allegations of racial discrimination in voting. *Anderson-Burdick* purports to subject discriminatory election laws to heightened scrutiny.[213] By *Brnovich*'s lights, most facially neutral election laws are not discriminatory, even if they disproportionately make it harder for people of color to vote.[214]

Fourth, *Brnovich* tips the scales of the balancing inquiry against voters by holding that the state's interest in preventing voter fraud is categorically "strong and entirely legitimate"[215]—apparently regardless of the risk of fraud in the jurisdiction, the forms fraud might take, and the fit between the putative interest in fraud prevention and the challenged measures.

If *Anderson-Burdick* endures, *Brnovich* suggests that the Court might find that it gives states tremendous leeway to make voting harder.

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To the extent the constitutional right to vote can be reconciled with the Roberts Court's other commitments, the judicial inquiry into whether a law unconstitutionally burdens the right to vote likely would have the permissiveness of rational basis rather than the rigor of strict scrutiny. The Roberts Court and many lower courts have already started shifting the doctrine in that direction.

3. The Roberts Court's Degradation of Anderson-Burdick

The Roberts Court's few *Anderson-Burdick* right-to-vote cases have degraded the doctrine. The first, *Crawford v. Marion County Election Board*,[216] reaffirmed its letter while betraying its spirit. In the others, emergency or "shadow" docket cases during the 2020 elections, several justices cast doubt on the very existence of *Anderson-Burdick*.[217]

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[210] *Id.* at 669–71.
[211] *See id.*
[212] *Id.* at 670.
[213] *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
[214] *See Brnovich*, 594 U.S. at 671.
[215] *Id.* at 672.
[216] 553 U.S. 181 (2008).
[217] *See, e.g.*, Andino v. Middleton, 141 S. Ct. 9 (mem.) (2020); Democratic Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28 (mem.) (2020). On the shadow docket, see William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 3–5 (2015);

a. Crawford

In *Crawford*, a fractured Court upheld against a facial challenge an Indiana statute requiring voters to present photo identification to cast their ballots in person.[218] On the surface, *Crawford* reaffirmed *Anderson-Burdick* balancing. Justice Stevens's controlling opinion, joined by Chief Justice Roberts and Justice Kennedy, reiterated that "a court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule."[219] Justice Souter's dissent, joined by Justice Ginsburg, agreed with Justice Stevens on the legal standard, even as it disagreed on the application of that standard to the case at hand.[220] Justice Breyer endorsed a balancing inquiry as well, albeit with his own formulation.[221] Only three justices would have replaced the balancing inquiry.[222] These justices would have adopted a "two-track approach," subjecting severe or discriminatory restrictions to strict scrutiny but "nonsevere, nondiscriminatory restrictions" only to "a deferential 'important regulatory interests' standard," which they characterized as only modestly more exacting than rational basis.[223] The Supreme Court's last authoritative word on *Anderson-Burdick*, then, confirms that it is good law.

However, the Court's application of *Anderson-Burdick* to the case at hand sent a different message. Justice Stevens underscored that the Constitution required the state to justify the law's burdens by advancing "precise interests" of sufficient "legitimacy or importance" in the face of a "real threat to those interests" of sufficient "magnitude."[224] Yet he upheld the state's voter ID law mainly as a means of preventing in-person voter fraud, even as he conceded that there was "no evidence of any such fraud actually occurring in Indiana at any time in its history."[225]

Compounding the Court's deference to the state's assertions of its interests was the Court's skepticism of the plaintiffs' claims about the law's burdens. The Court repeatedly emphasized that because the plaintiffs had mounted a facial challenge, they bore "a heavy burden of persuasion."[226] To the Court, the record was not sufficient to meet that standard, for the plaintiffs had not established how many people would be burdened,[227] how significant

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Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 128–32 (2019).

[218] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 185–89 (2008).

[219] *Id*. at 190 (citation modified).

[220] *Id*. at 209–11.

[221] *Id*. at 237 (Breyer, J., dissenting).

[222] *Id*. at 204–05 (Scalia, J., concurring).

[223] *Id*. at 204–08 (Scalia, J., concurring).

[224] *Crawford*, 553 U.S. at 190–91, 196.

[225] *Id*. at 194–96, 204.

[226] *Id.* at 200.

[227] *Id.*

the burden would be,[228] or whether and to what extent the burden would fall disparately on particular subsets of the population.[229] Apparently, even though voting rights defendants do not have to substantiate their interests, voting rights plaintiffs have to substantiate the nature, weight, and distribution of their burdens.

To some extent, *Crawford*'s upshots were and remain unclear. The Court may well have let Indiana skate through without much of a justification because the Court felt that the plaintiffs had offered even less—putting little on either side of the balancing scales. Had the plaintiffs developed a stronger record on their burdens, the state probably would have had to develop a stronger record on the strength of its interest, the magnitude of the threat it faced, and the fit between the law and the problem.[230]

Yet *Crawford* seems to have hollowed out *Anderson-Burdick*. The doctrine is not much of a check on voter suppression if a state can justify making it harder to vote merely by asserting a generalized interest in preventing voter fraud, in the absence of any justification more "precise," any evidence of a "real threat," or any fit between the ostensible problem and the proposed solution. As this Article discusses below, many lower courts since *Crawford* have taken the hint.

b. The 2020 Cases

Crawford aside, the Roberts Court's only constitutional right-to-vote rulings are emergency docket decisions issued during the pandemic-affected 2020 elections. In these cases, Justices Gorsuch and Kavanaugh cast doubt on the scope, and even existence, of the fundamental right to vote and *Anderson-Burdick* doctrine.

Consider an example. A federal district court, applying *Anderson-Burdick*, enjoined South Carolina from requiring that every absentee ballot be witnessed by two people.[231] The Supreme Court granted the state's application to stay the injunction pending appeal.[232] Justice Kavanaugh published the only opinion that purported to explain the ruling. The district court, he claimed, had "enjoined South Carolina's witness requirement for absentee ballots because the court disagreed with the State's decision to retain that requirement during the COVID-19 pandemic."[233] The fact that the district court did so to vindicate the constitutional right to vote? Unmentioned.[234] Apparently, irrelevant.

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[228] *Id.* at 201–02.
[229] *Id.* at 202.
[230] *Cf.* Fish v. Schwab, 957 F.3d 1105, 1135–36 (10th Cir. 2020).
[231] Middleton v. Andino, 488 F. Supp. 3d 261, 294–302 (D.S.C. 2020).
[232] Andino v. Middleton, 141 S. Ct. 9, 9–10 (mem.) (2020).
[233] *Id.* at 9 (Kavanaugh, J., concurring in grant of application for stay).
[234] *Id.*

That case proved no anomaly. A few weeks later, the Court returned to the issue when a federal district court enjoined Wisconsin from enforcing its requirement that all absentee ballots be received by the last day of the election.[235] Applying *Anderson-Burdick*, the district court held that in light of the unique conditions of the pandemic and the concurrent problems with the United States Postal Service, enforcing the requirement likely would jeopardize upward of 100,000 properly cast ballots, severely burdening the right to vote.[236] To remedy that impending violation, the district court ordered Wisconsin to accept absentee ballots sent by Election Day but received up to six days later.[237] When the state appealed, however, the Seventh Circuit stayed that injunction.[238]

The Supreme Court denied voters' application to vacate the stay in a series of opinions ignoring or dismissing *Anderson-Burdick*.[239] Chief Justice Roberts said only that the district court's ruling was "improper."[240] Justice Gorsuch wrote as though *Anderson-Burdick* did not exist. On Justice Gorsuch's account, the district court had taken COVID-19 as a permission slip "to substitute its own election deadline for the State's" because it was "frustrated" with the status quo.[241] "Nothing in our founding document contemplates the kind of judicial intervention that took place here," he wrote, "nor is there precedent for it in 230 years of this Court's decisions."[242] Of course, there was precedent for it: *Anderson-Burdick*. Yet Justice Gorsuch did not acknowledge the district court's *Anderson-Burdick* rationale for the injunction, let alone rebut it. Justice Gorsuch cited *Burdick*, but only for the proposition that "government must play an active role in structuring elections."[243]

Justice Kavanaugh was nearly as dismissive.[244] On his account, the district court had "disregarded" the state legislature's judgments "simply because [it] believe[d] that later deadlines would be better."[245] Justice Kavanaugh at least acknowledged *Anderson-Burdick*.[246] But he denied "that we may conduct that kind of open-ended balancing test in this case," rejecting what he characterized as its "federal-judges-know-best vision of election administration."[247] There is another way to characterize that vision: a vision of a Constitution with a right to vote.

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[235] *See* Democratic Nat'l Comm. v. Wis. State Leg., 141 S. Ct. 28, 28 (mem.) (2020).
[236] Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 799–816 (W.D. Wis. 2020).
[237] *Id.* at 817–18.
[238] Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 643 (7th Cir. 2020).
[239] *Wis. State Leg.*, 141 S. Ct. at 28.
[240] *Id.* at 28 (Roberts, C.J., concurring in denial of application to vacate stay).
[241] *Id.* at 28, 30 (Gorsuch, J., concurring in denial of application to vacate stay).
[242] *Id.* at 29 (Gorsuch, J., concurring in denial of application to vacate stay).
[243] *Id.* at 28 (quoting Burdick v. Takushi, 504 U.S. 428, 438 (1992)).
[244] *Id.* at 30–40 (Kavanaugh, J., concurring in denial of application to vacate stay).
[245] *Wis. State Leg.*, 141 S. Ct. at 34.
[246] *Id.* at 33, 35.
[247] *Id.* at 35.

4. The Lower Courts' Degradation of Anderson-Burdick

Anderson-Burdick remains good law. But from the ways in which courts have adjudicated recent cases, you might have your doubts. Even as more states are imposing unjustified burdens on the right to vote, judicial scrutiny of these burdens is decreasing.[248] Particularly during and since the 2020 election, lower federal courts have upheld voter suppression measures without much scrutiny.[249]

Trivializing burdens: When plaintiffs allege that a measure unduly burdens their exercise of the right to vote, courts are supposed to engage in a fact-intensive inquiry concerning whether and to what extent the challenged measure makes it difficult for them to vote. Instead, some courts of appeals uphold restrictions on the basis of cursory conclusions that the restrictions impose de minimis burdens, disregarding contrary evidence.[250] This minimization of the burdens that voting restrictions impose on voters—particularly by courts of appeals, which are second-guessing the district courts closest to the evidence[251]—reduces the evidentiary burden that states have to bear to justify these measures. De minimis burdens demand only de minimis justifications.

Crediting vague, generalized interests: When courts find that a measure burdens the right to vote, they are supposed to require states to prove that the measure serves "precise interests" of sufficient "legitimacy and strength."[252] Instead, many courts uphold restrictions on the basis of the government's conclusory assertion of a vague, generalized interest—typically, preventing voter

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[248] *See* Douglas, *supra* note 25, at 64–72.

[249] *See id*.; Hasen, *supra* note 25, at 272–79.

[250] *See* Common Cause Ind. v. Lawson, 978 F.3d 1036, 1041 (7th Cir. 2020); Ariz. Democratic Party v. Hobbs, 976 F.3d 1081, 1085 (9th Cir. 2020); Vote.Org v. Callanen, 89 F.4th 459, 490–91 (5th Cir. 2025); Curling v. Raffensperger, 50 F.4th 1114, 1121–24 (11th Cir. 2022). *Compare* A. Philip Randolph Inst. v. LaRose, 831 F. App'x 188, 191 (6th Cir. 2020) (finding Ohio prohibition on any county having more than one ballot drop box imposed "at most an inconvenience to a subset of voters"), *with* A. Philip Randolph Inst. of Ohio v. LaRose, 493 F. Supp. 3d 596, 611–13 (N.D. Ohio 2020) (finding Ohio drop-box restriction "impose[d] a significant burden on Plaintiffs' fundamental right to vote" in light of grave dangers of COVID-19, USPS inability to guarantee timely delivery of mail ballots, unchallenged record evidence that 15 percent of the voting population in two major cities would have to travel over an hour and a half to reach their assigned drop box, and likelihood "massive traffic jam" would prevent voting); *compare* Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 144 (5th Cir. 2020) ("[O]ne strains to see how [Texas one-drop-box-per-county rule] burdens voting at all."), *with* Tex. League of United Latin Am. Citizens v. Abbott, 493 F. Supp. 3d 548, 562 (W.D. Tex. 2020) (finding drop-box restriction "already impacted voters or will impact voters by (1) creating voter confusion[,] (2) causing absentee voters to travel further distances, (3) causing absentee voters to wait in longer lines, (4) causing absentee voters to risk exposure to the coronavirus when they hand deliver their absentee ballots on Election Day, and (5) causing absentee voters, if they choose not to return their ballots in person to avoid exposure to Covid-19, to face the risk that their ballots will not be counted if the USPS is unable to timely deliver their ballot after its been requested or unable to timely return their completed ballot," burdens which would "fall disproportionately on voters who are elderly, disabled, or live in larger counties").

[251] *See* Douglas, *supra* note 25, at 81–82.

[252] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

fraud.[253] Construed charitably, the point these courts are attempting to make is that governments need not wait for rampant fraud to have an interest in preventing it.[254] But it is one thing to say that states can be proactive in preventing potential problems. It is another to say that states can establish an interest in preventing a potential problem without even attempting to prove that there is reason to fear that the problem will arise. These decisions send a message: governments can justify measures that make it harder to vote by appealing to interests in addressing problems that they do not bother to substantiate.

Disregarding tailoring: Courts often uphold challenged voting restrictions without requiring the state to demonstrate how the restrictions advance the interests that the state invokes to justify them,[255] erasing the tailoring requirement.[256] Once a state has asserted that it has an interest in preventing voter fraud, it need not make even a cursory showing that the challenged law serves that interest.[257] Unless courts scrutinize whether a policy advances the state's interests to an extent commensurate with the policy's burden on voters, a state can violate voters' rights simply by asserting interests disconnected from the policy at issue.

Narrowing the scope of the right: Finally, courts have declined to scrutinize certain measures that make it harder to vote on the ground that the restrictions do not even implicate the right. This maneuver has been common in cases concerning voting by mail.[258] The ostensible basis is the Supreme Court's holding in *McDonald v. Board of Elections Commissioners of Chicago*[259] that Illinois could limit incarcerated voters' access to absentee ballots unless those voters could show that they had no other way to vote.[260] Even though *McDonald* concerned only absentee voting from jail, judicial skepticism that voter suppression measures implicate the right is spreading

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[253] *See, e.g.*, Richardson v. Hughs, 978 F.3d 220, 239–40 (5th Cir. 2020) (reversing district court for "incorrectly suggest[ing] that Texas needed to provide evidence of voter fraud" and "forc[ing]" the state to bear the apparently heavy "burden of demonstrating empirically" that it had any good reason to make it harder to vote); *Tex. League of United Latin Am. Citizens*, 978 F.3d at 144, 146–47.

[254] *See Richardson*, 978 F.3d at 240.

[255] *See, e.g.*, New Ga. Project v. Raffensperger, 976 F.3d 1278, 1280–83 (11th Cir. 2020) ("The district court acknowledged that these interests are strong and important. And that should have been enough."); *Richardson*, 978 F.3d at 240–41 (holding that because the state was not obligated to satisfy a narrow-tailoring requirement, the state was not obligated to satisfy any tailoring requirement).

[256] *See Anderson*, 460 U.S. at 789; Burdick v. Takushi, 504 U.S. 428, 439 (1992).

[257] *See, e.g.*, *Tex. League of United Latin Am. Citizens*, 978 F.3d at 147 ("The Secretary is also likely to show that the district court erred in scrutinizing whether the proclamation furthered those interests.")

[258] *See, e.g.*, *id.* at 146; Tully v. Okeson, 977 F.3d 608, 611 (7th Cir. 2020); Common Cause Ind. v. Lawson, 977 F.3d 663, 644 (7th Cir. 2020); Org. for Black Struggle v. Ashcroft, 978 F.3d 603, 607–09 (8th Cir. 2020).

[259] 394 U.S. 802 (1969).

[260] *Id.* at 807–11.

beyond that case's confines.[261] At the very least, contemporary applications of *McDonald* suggest that states have leeway to make voting more difficult by arbitrarily restricting the safest, most accessible ways for many people to vote.[262] Other regulations that make it harder or impossible to vote have eluded *Anderson-Burdick* too.[263]

III. How a Statutory Right to Vote is Possible

In the previous Part, this Article examined two problems: the degradation of the right to vote by voter suppression and election subversion and the degradation of voting rights doctrine by the courts. The latter development has weakened the capacity of the *Anderson-Burdick* standard to check the former.

Some of the literature on these problems suggests that there is only one way to solve them: amending the Constitution to expressly guarantee the right to vote.[264] Two assumptions underlie scholarly advocacy for an amendment. First is the notion that only an amendment would compel courts to give the right to vote the respect that *Anderson-Burdick* was supposed to have secured.[265] Second is the notion that an amendment is the only lawful solution, anyway.[266] In *City of Boerne v. Flores*, the Court held that Congress may not wield its power to enforce the Fourteenth Amendment to provide a constitutional right more protection than the judiciary believes the right deserves.[267] Accordingly, Congress may not use its enforcement power to tell

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[261] *Tex. League of United Latin Am. Citizens*, 978 F.3d at 144 n.6 (asserting that "there is force to the argument that *McDonald* applies with equal rigor to early voting as it does to absentee voting").

[262] In the same spirit, but on different doctrinal grounds, when the Eleventh Circuit upheld Florida's requirement that people convicted of felonies pay fees and fines before the state would restore their right to vote, the court contended that the disenfranchisement of people convicted of crimes did not implicate the constitutional right to vote. *See* Jones v. Governor of Fla., 975 F.3d 1016, 1029 (11th Cir. 2020).

[263] *See, e.g.*, VoteAmerica v. Schwab, 121 F.4th 822, 838–43 (10th Cir. 2024) (holding ban on voting rights organizations partially pre-filling mail ballot applications does not implicate *Anderson-Burdick*); Borja v. Nago, 115 F.4th 971, 981 n.4 (9th Cir. 2024) (declining to apply *Anderson-Burdick* to denial of right to vote absentee in Hawaii to former residents of Hawaii living in Guam or the U.S. Virgin Islands); Lichtenstein v. Hargett, 83 F.4th 575, 589–94 (6th Cir. 2023) (holding ban on distribution of absentee ballot application forms to voters by voting rights organizations does not implicate *Anderson-Burdick*).

[264] *See, e.g.*, Edobor, *supra* note 42, at 1551–56; Kowal & Codrington, *supra* note 42, at 268–70; Hasen, *supra* note 42, at 6; Douglas, *supra* note 25, at 79–80, 85–88.

[265] *See* Hasen, *supra* note 42, at 6–8 (attributing the "lack of success in voting rights claims before the judiciary" to "the constitution itself"); Hasen, *supra* note 72, at 1750 (arguing an amendment is necessary to "temper courts' likely skepticism or even hostility to the expansion of voting rights by ordinary legislation"); Douglas, *supra* note 25, at 86.

[266] *See* Hasen, *supra* note 42, at 35 n.42, 65.

[267] *See* City of Boerne v. Flores, 521 U.S. 507, 516–20 (1997); *see also* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127, 1131–32 (2001).

courts to enhance their scrutiny of measures that burden the constitutional right to vote.[268]

That may be true as far as it goes. But it is not the end of the story. In this Part, this Article argues that the Constitution gives Congress another option: creating a statutory right to vote free from undue burdens and directing courts to apply heightened scrutiny to burdens on that right. Two insights drive this argument. The first is that Congress has the power to create statutory rights distinct from and parallel to constitutional rights, so long as Congress has enumerated power over the relevant domain. The second is that Congress has enumerated power over the domain that *Anderson-Burdick* covers. In practical terms, the *Anderson-Burdick* doctrine bars governments from holding elections in an unjustifiably restrictive, inaccessible, or otherwise onerous manner. The Elections Clause expressly empowers Congress to regulate the "manner" of congressional elections. The Electors Clause provides much the same authority over presidential elections, at least alongside the Necessary and Proper Clause. And the Guarantee Clause confers even greater power over state elections, including the power to expand the electorate. As a result, Congress can create a statutory right to vote free from undue burdens—a more voter-protective version of *Anderson-Burdick*—without invoking its remedial power to enforce the constitutional right to vote.

A. The Boerne *Problem*

Each of the Reconstruction Amendments ends with a clause authorizing Congress to "enforce" its substantive provisions "by appropriate legislation."[269] For decades, the Supreme Court held that in the exercise of that enforcement power, Congress had the discretion to provide greater protection to constitutional rights than courts otherwise would have.[270] On this basis, the Court upheld parts of the Voting Rights Act in 1966.[271]

Then, a conflict over congressional power to enforce the Free Exercise Clause led the Court to repudiate that discretion. The turn began with *Employment Division v. Smith*, where the Court held that neutral, generally applicable laws that incidentally burden religious practice are subject to rational basis review, not strict scrutiny.[272] In a bid to overturn *Smith* and reinstate a regime of strict scrutiny, Congress enacted RFRA.[273]

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[268] For an important revisionist argument that *Boerne*'s congruence and proportionality test should not apply to the right to vote, see Franita Tolson, *Enforcing the Political Constitution*, 74 Stan. L. Rev. Online 88 (2022).

[269] *See* U.S. Const. amends. XIII § 2, XIV § 5, XV § 2.

[270] *See* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10, 657–58 (1966); *see also* Christopher W. Schmidt, *Section 5's Forgotten Years: Congressional Power to Enforce the Fourteenth Amendment before* Katzenbach v. Morgan, 113 Nw. U. L. Rev. 47, 48–51 (2018).

[271] *See Morgan*, 384 U.S. at 657–58.

[272] *See* Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

[273] *See* McConnell, *supra* note 47, at 158–61. There is some doubt as to whether pre-*Smith* courts applied strict scrutiny. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1127–28 (1990).

In *City of Boerne*, the Court struck down RFRA as it applied to the states for exceeding congressional power to enforce the Fourteenth Amendment.[274] The Court acknowledged that Congress may exercise its enforcement powers to prohibit conduct that is not itself unconstitutional.[275] But the Court then held that the power to enforce the Fourteenth Amendment does not encompass the power to expand the rights it protects, nor "the power to determine what constitutes a constitutional violation."[276] To the contrary: "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[277] In short, *Boerne* limited congressional power to direct courts to scrutinize burdens on constitutional rights more closely than the courts otherwise would. Although *Boerne* hailed the Voting Rights Act as an archetypal example of permissible enforcement legislation,[278] the Court subsequently held in *Shelby County* that the VRA's preclearance formula exceeded congressional authority.[279]

The *Boerne* problem, then, is this: if Congress cannot direct courts to increase their scrutiny of burdens on constitutional rights, how can Congress enhance judicial protection of the right to vote?

B. The Enumerated Powers Solution

The answer is that Congress can create and protect a parallel, statutory right to vote free from undue burdens on its exercise, legally independent of the constitutional right to vote.

Congress can create statutory rights and causes of action to vindicate them whenever a constitutionally enumerated power authorizes it to legislate in the substantive field at issue.[280] This power is the legal foundation of many federal civil rights laws. There is Title VII of the Civil Rights Act of 1964, creating a right against employment discrimination on the basis of race, color, religion, sex, or national origin.[281] There is the Pregnancy Discrimination Act, creating a right against discrimination on the basis of pregnancy.[282] There is the Americans with Disabilities Act, creating a right against discrimination on the basis of disability in employment, public accommodations, transportation, and other domains.[283] And there are more.

Congress created each of these rights pursuant to its powers under the Commerce Clause.[284] Because the Commerce Clause grants Congress

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[274] City of Boerne v. Flores, 521 U.S. 507, 511, 536 (1997).
[275] *Id.* at 518.
[276] *Id.* at 519.
[277] *Id.* at 520.
[278] *Id.* at 518.
[279] Shelby Cnty. v. Holder, 570 U.S. 529, 555–57 (2013); Tolson, *supra* note 268, at 92–93.
[280] *See* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80 (1982); Davis v. Passman, 442 U.S. 228, 241 (1979).
[281] 42 U.S.C. § 2000e-2.
[282] 42 U.S.C. § 2000e(k).
[283] 42 U.S.C. §§ 12101–12213.
[284] *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 301–05 (1964).

extensive power over the national economy, Congress can exercise that power to create rights to inclusion and equal treatment in the economy.[285] Notably, Congress created many of these statutory rights even though the Supreme Court had already ruled that the Constitution did not protect them.[286]

Nor are statutory rights unique to the civil rights context. Congress has created other statutory rights on the basis of enumerated powers.[287] And the Court has been clear: when Congress may create a statutory right, it may also create a cause of action to vindicate that right and set the standards for judicial review.[288]

Ironically, RFRA underscores the breadth of congressional authority to create statutory rights pursuant to enumerated powers.[289] Even though the *Boerne* Court struck down RFRA in its application to the states for exceeding congressional power under the Fourteenth Amendment,[290] RFRA remains binding on the federal government.[291] As the Court recently noted, "[a]s applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work," whichever power that may be.[292]

The constitutionality of the federal element of RFRA confirms that Congress may wield its enumerated powers to create statutory rights parallel to but distinct from constitutional rights. What matters is how Congress proceeds. Congress may not directly modify the substance of a constitutional right.[293] Nor may Congress set the standard of review for an asserted violation of a constitutional right.[294] However, Congress may impose a new, parallel statutory duty on the target government not to engage in certain conduct, and it may authorize a private right of action against that government for violating that prohibition, so long as Congress has constitutional authority to bind that government in the relevant domain.[295]

As to most rights, Congress may not have such authority over the states. Having lost the fight to apply RFRA to the states through the Fourteenth Amendment, RFRA's proponents did not enact a new version applicable to the states based on a different enumerated power. So, today, RFRA is limited

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[285] *See id*.

[286] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 24 (1883) (no constitutional right against economic exclusion); Geduldig v. Aiello, 417 U.S. 484, 494–97 (1974) (no constitutional right against pregnancy discrimination).

[287] *See*, *e.g.,* the Freedom of Information Act, 5 U.S.C. § 552 (statutory right to certain agency records); McBurney v. Young, 569 U.S. 221, 232–34 (2013) (no constitutional right to same public records provided by FOIA laws).

[288] *See* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80 (1982); Davis v. Passman, 442 U.S. 228, 241 (1979).

[289] *See* 42 U.S.C. ch. 21B §§ 2000bb–2000bb-4 (2018).

[290] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[291] *See* Burwell v. Hobby Lobby, 573 U.S. 682, 688 (2014); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 424 (2006).

[292] *Hobby Lobby*, 573 U.S. at 695.

[293] *See City of Boerne*, 521 U.S. at 519, 529.

[294] *See id*. at 532.

[295] *See id*.

to the federal government. However, because the federal component of RFRA was not enacted pursuant to congressional power to enforce the Fourteenth Amendment, but rather stands on independent sources of legislative authority, it does not even implicate that amendment.

RFRA is not alone. Consider the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[296] Like RFRA, RLUIPA effectively subjects to strict scrutiny certain government actions that substantially burden religious exercise.[297] Unlike the original RFRA, which the Court struck down as to the states, RLUIPA does not purport to modify the scope of the Free Exercise Clause or to protect the same right; instead, it protects a parallel but broader statutory right of its own creation.[298] As the Court recently wrote with approval, "in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[299] Unlike RFRA, RLUIPA addresses a limited domain: land use and the rights of institutionalized people, including those incarcerated.[300] Unlike RFRA, RLUIPA binds both the federal government and state governments.[301] It is constitutional, the Court has indicated, "under the Spending and Commerce Clauses."[302]

Statutes from the Civil Rights Act of 1964 to RLUIPA confirm congressional power to create statutory rights and design causes of action to secure them—even rights parallel to underlying constitutional rights. All Congress needs is an enumerated power with the appropriate substantive scope and authority over the governments that Congress seeks to bind. When it comes to the right to vote, Congress has that authority.

C. The Elections Clause and the Electors Clause

Together, the Elections Clause and the Electors Clause provide Congress the power it needs to enact a statutory right to vote in federal elections. The Elections Clause grants Congress the power to "make" its own laws or "alter" state laws concerning the "Times, Places and Manner" of congressional elections.[303] The Electors Clause confers comparable power over presidential elections.[304] Congress has exercised these powers since before the

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[296] 42 U.S.C. ch. 21C § 2000cc–2000cc-5 (2018).
[297] *See* 42 U.S.C. ch. 21C § 2000cc(a) (2018); *Hobby Lobby*, 573 U.S. at 695–96.
[298] *See Hobby Lobby*, 573 U.S. at 696.
[299] *Id*. (internal citations omitted).
[300] *See id*. at 695.
[301] *See* Cutter v. Wilkinson, 544 U.S. 709, 715 (2005).
[302] *Id*.
[303] U.S. CONST. art. I, § 4.
[304] The text of the Electors Clause provides that Congress may specify the time and place of the selection of presidential electors. U.S. CONST. art. II, § 1. For nearly a century, the Supreme Court has construed the Electors Clause to confer upon Congress the same power over the manner of presidential elections as it enjoys over congressional elections. *See* Burroughs v. United

Civil War.[305] Since the First Reconstruction, Congress has used them at least a dozen times.[306]

The "substantive scope [of the Elections Clause] is broad"[307]: the phrase "Times, Places and Manner" covers nearly the entire field of federal elections. In 2013, the Supreme Court reaffirmed in *Arizona v. Inter Tribal Council of Arizona*[308] that the Elections Clause confers upon Congress the "authority to provide a complete code for [federal] elections."[309] There is only one exception: voter qualifications. Under the Qualifications Clause, states retain primary authority to determine who can vote.[310] From time to time, the Supreme Court has wrestled with the elusive distinction between "manner" laws and "qualifications" laws.[311] But otherwise, the Elections Clause grants Congress sweeping power over federal elections.

Within the domain of federal election regulation, congressional power is plenary. Congress may regulate federal elections "to any extent which it deems expedient."[312] Of course, Congress must comply with the rest of the Constitution. But the Elections Clause itself does not limit what Congress can do within the Clause's substantive scope.

Because the Elections Clause expressly authorizes Congress to supplant state law, Elections Clause legislation is not subject to independent federalism constraints.[313] Congressional authority is "paramount."[314] "The [Elections] Clause empowers Congress to pre-empt state regulations" of federal elections,

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States, 290 U.S. 534, 545 (1934); Stephanopoulos, *supra* note 61, at 54. This Article uses "the Elections Clause" in this section as shorthand for both clauses except where otherwise indicated.

[305] *See* Rucho v. Common Cause, 588 U.S. 684, 697–99 (2019); Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 1036 (2021).

[306] Postbellum statutes enacted pursuant to the Elections Clause, in whole or in part, include the Enforcement Act of May 31, 1870, 16 Stat. 140 (1870); the Force Act of February 28, 1871, 16 Stat. 433 (1871); the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13 (1871); the Civil Rights Act of 1957, Pub. L. No. 85-315, Part IV, § 131, 71 Stat. 634, 637 (1957); the Civil Rights Act of 1960, Pub. L. No. 86-449, tit. I, § 101, tit. III, § 301, tit. VI, § 601, 74 Stat. 86, 88, 90 (1960); the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970); the Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975); the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982); the Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986); the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511; the Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145.

[307] Arizona v. Inter Tribal Council of Ariz., 570 U.S. 1, 8 (2013).

[308] 570 U.S. 1 (2013).

[309] *Id*. at 8–9 (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)); *see also* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 Yale L.J.F. 171, 179–80 (2019).

[310] U.S. Const. art. I, § 2, cl. 1.

[311] *See* Tolson, *supra* note 309, at 176–78.

[312] *See Inter Tribal Council*, 570 U.S. at 9 (quoting Ex parte Siebold, 100 U.S. 371, 392 (1880)) (citation modified).

[313] Tolson, *supra* note 309, at 180.

[314] *Inter Tribal Council*, 570 U.S. at 9 (quoting *Siebold*, 100 U.S. at 392) (citation modified).

and Congress's powers "may be exercised at any time."[315] The Framers granted Congress this sweeping power over the states for an important reason: to ensure that Congress has the powers it needs to sustain its own existence.[316] Recent pillars of federal election law, like the National Voter Registration Act ("NVRA")[317] and the Help America Vote Act ("HAVA"),[318] rest on this foundation.[319]

The Supreme Court has long affirmed that the Elections Clause empowers Congress to protect the right to vote in federal elections from interference by states or their agents. As the Court wrote in *United States v. Classic*,[320] protecting the right to vote is at the heart of the Elections Clause: "[N]o member of the Court seems ever to have questioned it."[321] In *Smiley v. Holm*[322]—which the Supreme Court reaffirmed in *Arizona*[323]—the Court emphasized that the Elections Clause empowers Congress "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary" to protect the right to vote.[324] That includes the "protection of voters."[325] Moreover, the Elections Clause gives Congress the power to protect the right to vote against both private and public violations.[326] Indeed, the Elections Clause enables Congress to do whatever "it should find necessary to insure the freedom and integrity" of federal elections.[327] Congress has the power to ensure that the election of federal officials is "the free choice of all the electors."[328]

The Elections Clause enables Congress to determine how to enforce the requirements it enacts.[329] One option is creating statutory rights and directing federal courts to hear the claims of injured voters. For example, the "support or advocacy" clause of the Enforcement Act of 1870, which remains on the books, prohibits conspiracies to intimidate or retaliate against voters in federal elections and authorizes a private right of action against them.[330] Similarly, the modern NVRA includes a private right of action against states for violations of the statute's voter registration requirements.[331]

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[315] *Id.* at 8–9.
[316] *See id*. at 8 (citing THE FEDERALIST No. 59 362, 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
[317] 52 U.S.C. §§ 20501–20511 (2018).
[318] 52 U.S.C. §§ 20901–21145 (2018).
[319] *Inter Tribal Council*, 570 U.S. at 7–9.
[320] 313 U.S. 299 (1941).
[321] *Id*. at 323 (citing Ex parte Yarbrough, 110 U.S. 651 (1884)).
[322] 285 U.S. 355 (1932).
[323] *See Inter Tribal Council*, 570 U.S. at 8–9.
[324] *Smiley*, 285 U.S. at 366; *see also Classic*, 313 U.S. at 310, 314–15, 318.
[325] *Smiley*, 285 U.S. at 366.
[326] *See Classic*, 313 U.S. at 315.
[327] *Id*. at 319–20.
[328] Ex parte *Yarbrough,* 110 U.S. at 662.
[329] *See Smiley*, 285 U.S. at 366–67.
[330] 42 U.S.C. § 1985(3); *see also Yarbrough*, 110 U.S. at 655.
[331] 52 U.S.C. § 20510(b).

One might worry that a statutory right to vote would cross the line from manner regulation (the domain in which the Elections Clause empowers Congress to act) into qualification regulation (the domain in which the Qualifications Clause gives primary power to the states). However, Congress's power to specify the manner of federal elections enables it to create a statutory right to vote free from undue burdens that could do much of the work of *Anderson-Burdick* without violating the Qualifications Clause. For one thing, there is some reason to think that Congress can specify the federal electorate via the Elections Clause.[332] In *Oregon v. Mitchell*,[333] the Court upheld a federal law that conferred the right to vote in federal elections on adults age eighteen to twenty-one, even though the Court struck down the same provision as applied to state elections.[334] The Roberts Court has called that holding into question but has not overruled it.[335] It may be, then, that the Elections Clause authorizes Congress to specify who may vote in federal elections. If so, Congress may use this power to confer upon all adult citizens the right to vote in federal elections.

But assume that "the Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them," as the Roberts Court has suggested.[336] Congress still could exercise this power to enact a statute conferring upon all qualified voters a right to cast their ballots and have them counted free from unjustifiable burdens—an affirmative right to an accessible federal voting process, with burdensome measures subject to heightened scrutiny. The reason is that prohibiting governments from conducting elections in an unjustifiably inaccessible way concerns the "manner" of federal elections, not the qualifications to vote in them. With the significant exceptions of disenfranchisement for a felony conviction and territorial disenfranchisement, much contemporary voter suppression operates by making it gratuitously hard for otherwise-qualified voters to vote, not by disqualifying potential voters.[337] Election subversion similarly does not rely on disqualifying voters but rather on reducing the odds that the votes of qualified voters count. These are the primary sorts of measures courts are failing to scrutinize properly under *Anderson-Burdick*.[338] Accordingly, even a relatively narrow statutory right to vote free from undue burdens would help check many of the most prevalent threats to the ballot. For those who are not qualified to vote, this right would be inert. But for those who are qualified to vote, this right would be transformative.

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[332] *See* Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. Rev. 317, 367–92 (2019).

[333] 400 U.S. 112 (1970).

[334] *See id.* at 117–18 (opinion of Black, J.); *id.* at 135, 140–44 (opinion of Douglas, J.); *id.* at 229–31, 239–81 (opinion of Brennan, White & Marshall, JJ.).

[335] *See* Arizona v. Inter Tribal Council of Ariz., 570 U.S. 1, 16 n.8 (2013).

[336] *Id.* at 16.

[337] *See supra* Part II.A.

[338] *See supra* Part II.A.

Relying solely on its power to regulate the manner of federal elections, while respecting the Qualifications Clause, Congress could create a statutory right to vote in federal elections that covers much of the ground that the constitutional right to vote is ostensibly supposed to cover. By invoking the Guarantee Clause, Congress could cover the rest.

D. The Guarantee Clause

The Guarantee Clause empowers Congress to enact a statutory right to vote in state elections and expand the electorate for all elections. The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[339] Whatever "a Republican Form of Government" may be (a question the Court has never squarely answered), it is a government "of the people, by the people, for the people,"[340] a government in which the people are sovereign.[341] Congress prominently wielded its Guarantee Clause power to restructure state democracy during the First Reconstruction.[342] It used that power to expand the franchise to Black men.[343]

Crucially, it is up to Congress to identify the Clause's scope and enforce its guarantee of popular government. As the Supreme Court has held for over 170 years and reiterated in 2019, Guarantee Clause claims are nonjusticiable.[344] Congress decides whether a state government is republican and what must be done to secure that status.[345] When Congress so decides, "[t]he action of Congress upon the subject cannot be inquired into."[346] Were Congress to enact a statutory right to vote in state elections predicated on the Guarantee Clause, the Court would be bound to defer to Congress.

The nonjusticiability of Guarantee Clause claims does not mean that the scope of congressional power under the Clause is boundless. It authorizes Congress to secure majority rule, not to pursue unrelated goals or to subvert that end.[347] Congress could not ground unrelated legislation in the Clause by stipulating that any arbitrary policy choice is integral to republican

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[339] U.S. Const. art. IV, § 4.

[340] Abraham Lincoln, Address at Gettysburg, Pennsylvania, *in* Abraham Lincoln: Speeches and Writings: 1859–1865, at 536 (Don E. Fehrenbacher ed., 1989).

[341] *See* Akhil Reed Amar, *The Central Meaning of the Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 749 (1994); Stephanopoulos, *supra* note 61, at 57.

[342] *See* Stephanopoulos, *supra* note 61, at 59.

[343] *See* An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 5, 14 Stat. 428, 429 (1867); An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of This Union, and for Other Purposes, ch. 114, §§ 1–2, 16 Stat. 140, 140 (1870).

[344] *See* Luther v. Borden, 48 U.S. 1, 2 (1849); Rucho v. Common Cause, 588 U.S. 684, 718 (2019).

[345] *Luther*, 48 U.S. at 42; *see also* Shapiro, *supra* note 61, at 228–34.

[346] White v. Hart, 80 U.S. 646, 649 (1871).

[347] *See* Amar, *supra* note 341, at 762–66, 771–73; Stephanopoulos, *supra* note 61, at 57–58.

government. Nor could Congress exercise its power under the Clause to reduce popular sovereignty by, say, prohibiting states from holding popular elections for president. What matters here, though, is that the Clause empowers Congress to secure popular sovereignty in the states and that the latitude to liquidate the meaning of popular sovereignty belongs to Congress too.

A statutory right to vote fits comfortably within these bounds. The Guarantee Clause enables Congress to extend a statutory right to vote beyond the scope permitted by the Elections Clause in two dimensions: to cover state elections and to directly specify who may vote. Authorizing citizens to vote and protecting that right against unjustified impediments facilitates rule by the people. Popular sovereignty, like other constitutional values, comes in degrees; a state government may be more or less republican. The fact that a state government may be republican in the rough sense that it generally affords the right to vote to most people does not imply that Congress may not exercise its Guarantee Clause power to enhance state democracy, any more than the fact that a state generally provides "the equal protection of the laws" does not prevent Congress from exercising its Fourteenth Amendment enforcement power to remedy specific forms of discrimination.[348] As noted, the Qualifications Clause predicates qualification to vote in federal elections on qualification to vote in the elections for a state's largest legislative house.[349] However, if Congress exercises its Guarantee Clause power to define the state electorate, then Congress would thereby indirectly define the federal electorate.[350] The Guarantee Clause, then, provides Congress the power to extend the franchise to all adult citizens.

* * *

A statutory right predicated on the Elections Clause, the Electors Clause, and the Guarantee Clause rather than on the Fourteenth Amendment's Enforcement Clause would sidestep the *Boerne* problem. When it comes to the right to vote, Congress has what it lacked with regard to the state element of RFRA: enumerated powers with the substantive scope to ground statutory rights good against the states. A statutory right to vote would be constitutional in much the same way that the federal element of RFRA is constitutional.

RLUIPA provides a helpful analogy. Like RLUIPA, a statutory right to vote rests on enumerated powers, controls government action in only a limited domain, and establishes a statutory right parallel to, but distinct from

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[348] *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (noting Congress may enforce the Equal Protection Clause's guarantee of racial equality by prohibiting states from engaging in specific forms of discrimination, like using literacy tests, even when using them is otherwise facially constitutional).

[349] U.S. CONST. art. I, § 2.

[350] This approach creates no conflict between the Qualifications Clause and the Guarantee Clause. The former makes the federal electorate a function of the state electorate; the latter, as used here, specifies the state electorate. Reconstruction precedent confirms that path is viable. *See* Stephanopoulos, *supra* note 61, at 59–60.

and more robust than, a constitutional right. Just as RLUIPA rests on the Spending and Commerce Clauses,[351] so a statutory right to vote would rest on the Elections Clause, Electors Clause, and Guarantee Clause. Just as RLUIPA addresses only land use and the rights of institutionalized people,[352] so a statutory right to vote would address only laws that burden the right to vote—that is, laws within the domain of those enumerated powers. And just as RLUIPA effectively enhances judicial protection of the right to free exercise by subjecting substantial burdens on the "exercise of religion," as the statute defines it, to strict scrutiny,[353] so would a statutory right to vote effectively enhance judicial protection of the right to vote, with the scope of that right defined by the statute, by subjecting burdensome measures to heightened scrutiny.

In affirming that a statutory right to vote would be constitutional, this Article does not mean to deny that a statutory right to vote would be novel. But what the Supreme Court wrote during the First Reconstruction bears repeating: "[I]t is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the states, refrained from the exercise of these powers that they are now doubted."[354] If now, "that body . . . finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they . . . are to be upheld."[355]

IV. Designing a Statutory Right to Vote

In the previous Part, this Article demonstrated how a statutory right to vote is possible. In this Part, it demonstrates that a statutory right to vote can be designed to achieve the two ends for which a constitutional amendment is supposedly required: expanding the franchise and increasing judicial scrutiny of burdensome election laws.

To illustrate, it analyzes a bill that has eluded scholarly attention. In the 117th Congress, congressional Democrats included a statutory right to vote in federal elections in the final version of their omnibus democracy reform legislation, the Freedom to Vote: John R. Lewis Act.[356] As part of that package, this statutory right to vote—dubbed the Right to Vote Act ("RTVA")—passed the House of Representatives and secured forty-eight votes in the Senate.[357]

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[351] Cutter v. Wilkinson, 544 U.S. 709, 715 (2005).
[352] *Id*. at 715–16.
[353] *See* 42 U.S.C. § 2000cc(a); 42 U.S.C. § 2000cc-5(7); *see also* Burwell v. Hobby Lobby, 573 U.S. 682, 695–96 (2014).
[354] Ex parte Yarbrough, 110 U.S. 651, 662 (1884).
[355] *Id.*
[356] Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. §§ 3401–3407 (2022); Elias, *supra* note 69.
[357] *See* H.R. 5746 §§ 3401–3407; 168 Cong. Rec. S347 (daily ed. Jan. 19, 2022).

The RTVA does not purport to exercise the full scope of congressional power to create a statutory right to vote. For instance, the RTVA applies only to federal elections.[358] Still, the RTVA's design models how a statutory right to vote can remedy the problems that plague *Anderson-Burdick*. The foundation of the bill is an express, affirmative guarantee to every adult citizen of the right to vote in federal elections and have their vote counted, free from undue burdens on the time, place, and manner of voting, language which parallels the scope of the Elections Clause.[359] From there, the RTVA would create a private right of action to enable voters to challenge any government measures that burden the right.[360] To ensure that courts recognize the right's full scope, the RTVA defines the right's contours capaciously.[361] To make the right robust, all measures that burden the right would face at least intermediate scrutiny.[362] And to ensure that governments cannot wave away voters' claims by asserting baseless or irrelevant interests, the RTVA would require governments to substantiate their justifications with significant evidence.[363] This Part concludes with four examples of how a statutory right to vote would operate, by reference to the RTVA.

A. Features

This section explains the key features of the RTVA and discusses how each feature would remedy a defect with constitutional right-to-vote doctrine and do some of the work of a right-to-vote amendment.

1. An Express, Affirmative, Universal Right

The RTVA would guarantee every adult citizen the right to cast a vote and have their vote counted, free from undue burdens on the time, place, or manner of voting.[364] This guarantee would transform the right to vote in three ways. First, the statutory right to vote is express; it is conferred on the face of the statute by its plain text.[365] By contrast, the constitutional right to vote is merely implied; it exists by virtue of judicial inferences.[366] Second, the statutory right to vote is affirmative, not merely negative. It is a right to vote and to have that vote counted, not merely a right against disenfranchisement on

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[358] *See* H.R. 5746, 117th Cong. § 3402(a) (2022).
[359] *See id*.
[360] *Id*. § 3403.
[361] *Id.* § 3404(5).
[362] *Id.* § 3403(b)(1)(B), (2)(B).
[363] *See id.*
[364] *See id.* § 3402(a).
[365] *See id.*
[366] *See supra* Part II.A.

certain grounds.[367] Third, the statutory right to vote is universal, not selective.[368] All adult citizens would enjoy the right by virtue of their equal citizenship.

By constructing an express, affirmative, universal right to vote, the RTVA would resemble the high-water mark of the constitutional right to vote. In the 1969 case *Kramer v. Union Free School District No. 15*,[369] the Supreme Court held that disenfranchising any of a jurisdiction's adult, citizen residents was presumptively unconstitutional.[370] According to the *Kramer* Court, the Constitution implicitly secured "the right of citizens to vote" in a "free and unimpaired manner."[371] By consequence, any statute that limited the right to vote had to face "exacting judicial scrutiny."[372] In other words, the *Kramer* Court held that the Constitution contained an implicit, affirmative right to vote free from undue burdens. In subsequent years, however, *Kramer*'s rigor gave way to the permissive balancing framework of *Anderson-Burdick*.[373] A statutory right to vote could restore *Kramer*'s promise.

That would make a difference. For instance, as of 2024, roughly four million citizens were disenfranchised for felony convictions.[374] The constitutional right to vote has failed to secure them the ballot.[375] An express, affirmative, universal statutory right to vote would restore their voting rights.[376]

2. Burdens

To secure this statutory right to vote, the RTVA would provide a private right of action and feature a burden-shifting framework like the ones that govern other statutory civil rights claims.[377] In the first stage of the inquiry, the plaintiff would have to demonstrate that the measure they challenge burdens their ability to vote or makes it less likely that their vote will be counted.[378]

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[367] On the distinction between an affirmative and negative right to vote, see HASEN, *supra* note 42, at 1, 28; Karlan, *supra* note 70, at 923.

[368] *Cf.* Charles & Fuentes-Rohwer, *supra* note 72, at 1140 ("[U]niversalism forces us to ask what the state owes its citizens, all of them, and demands the provision of social services adequate to meet the needs of all of its citizens.").

[369] 395 U.S. 621 (1969).

[370] *Id.* at 625–30.

[371] *Id.* at 626 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).

[372] *Id.* at 628.

[373] *See* Hasen, *supra* note 72, at 1688–91.

[374] *See* THE SENTENCING PROJECT, *supra* note 33, at 2, 17.

[375] *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 41–56 (1974) (holding disenfranchisement on the basis of a felony conviction is constitutional because it is expressly contemplated in Section 2 of the Fourteenth Amendment); Jones v. Governor of Fla., 975 F.3d 1016, 1029 (11th Cir. 2020).

[376] The version of the RTVA that passed the House contained a clause preventing the legislation from restoring voting rights to certain people disenfranchised on the basis of a felony conviction. *See* Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. § 3405(c) (2022). To construct a truly universal statutory right, Congress need only remove that caveat.

[377] *See* Stephanopoulos, *supra* note 73, at 1596–1600.

[378] *See* H.R. 5746, 117th Cong. § 3403(b)(1)(A), (2)(A) (2022).

The bill takes four steps to ensure that courts assess burdens appropriately. First, the bill guarantees the right to vote and have it counted free from *any* unjustified, non-trivial burden on the time, place, or manner of voting.[379] That expansive language directs courts to keep *Anderson-Burdick*'s promise that all burdens, "however slight," must be scrutinized and are unlawful if they are unjustified.[380]

Second, the RTVA constructs that right through two prohibitions: a ban on retrogression[381] and a ban on substantial impairment.[382] The first (retrogression) is a prohibition against making voting *harder*. The baseline for measuring the burden is chronological: in essence, the bill would establish a rebuttable presumption that any new measure that would make it harder to vote than it was in some benchmark year (in the RTVA's case, 2020) is unlawful.[383] The second (substantial impairment) is a prohibition against making voting *unjustifiably hard*. Regardless of when an election law was enacted, the law may not make it harder to vote or easier to overturn an election than there is an adequate reason for.[384] When it comes to substantial impairment, the baseline for measuring the burden would be not chronological but counterfactual: the hypothetical circumstance in which the challenged measure was never enacted.[385]

Together, these two prohibitions would transform the burden analysis from an unmoored, scalar inquiry into a manageable one. Under *Anderson-Burdick*, judgment calls about how burdensome a measure is and how closely to scrutinize it are significant and irreducible: courts must assess the "character and magnitude" of the burden in the abstract, without any baseline or comparator, and examine the burden with a corresponding (but similarly abstract) level of scrutiny.[386] Under the RTVA, the question would be comparative and bounded: if the law diminishes the ability to vote (for a retrogression claim) or impairs it (for a substantial burden claim), then the challenged measure faces the prescribed form of heightened scrutiny.[387]

Third, the RTVA specifies that plaintiffs need only demonstrate by a preponderance of the evidence that the measure they challenge is burdensome.[388] That moderate standard of evidence would give plaintiffs a fair shot to make their case.[389] And it would reduce judges' discretion to supplant the record with their own opinions.

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[379] *See id.* § 3402(a), (c).
[380] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008).
[381] *See* H.R. 5746, 117th Cong. § 3402(b).
[382] *See id.* § 3402(c).
[383] *See id.* §§ 3402(b), 3407(a).
[384] *See id.* §§ 3402(c), 3407(b).
[385] *See id.* § 3402(c)(2).
[386] *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
[387] *See* H.R. 5746, 117th Cong. § 3403(b)(1)–(2) (2022).
[388] *See id.* § 3403(b)(1)(A), (2)(A).
[389] On standards of evidence, see Neil Orloff & Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. Pa. L. Rev. 1159, 1173 n.36 (1983).

Fourth, the bill expressly rejects one reason that courts cite for refusing to recognize burdens: that a measure is not burdensome if voters were able to cast their ballots in spite of it.[390] Voters' success in overcoming a burden does not erase the burden.[391] It should be a credit to the voters, not to the government.

3. Interests

If the plaintiff proves that the measure that they challenge burdens their ability to vote, then the burden would shift to the government to justify the measure. In this second stage, the government would have to justify any burden with at least important interests, those interests would have to be "particularized" (that is, precise and relevant), and the government would have to establish the existence and strength of those important, particularized interests by clear and convincing evidence.[392]

Retrogressive election laws would face a hybrid form of heightened scrutiny: the government would have to demonstrate that the burden is necessary to significantly further an important, particularized interest.[393] Like strict scrutiny, this standard requires the government to prove that it has to burden the right to vote to advance its interests. But like intermediate scrutiny, this standard allows the government to appeal to merely important interests rather than solely compelling ones. If the government bears that burden, then the plaintiffs would have one more opportunity to establish their claim. If the plaintiffs can demonstrate by a preponderance of the evidence that the government could adopt a less restrictive means of furthering its particularized interests, then the measure is unlawful.[394] If a less burdensome alternative is available, then the government's approach is not necessary.

Laws that substantially impair the ability to vote would face a version of intermediate scrutiny. The government would have to demonstrate that the burden significantly furthers an important, particularized governmental interest.[395] Unlike the standard for retrogression claims, the standard for substantial impairment claims would not require the government to satisfy a least-restrictive-means test.

By requiring that the government offer a particularized interest, the RTVA would ensure that governments cannot invoke a vulnerability to one type of fraud as a basis for adopting a measure that would only prevent another, nor

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[390] *See* H.R. 5746, 117th Cong. § 3402(c)(2) (2022).

[391] *See* Emily Rong Zhang, *Questioning Questions in the Law of Democracy: What the Debate Over Voter ID Laws' Effects Teaches About Asking the Right Questions*, 69 UCLA L. Rev. 1028, 1059–62 (2022) (explaining why the concept of voter suppression encompasses measures that burden "voters who, despite heightened costs to voting, cast a ballot anyway").

[392] *See* H.R. 5746, 117th Cong. § 3403(b)(1)(B), (b)(2)(B) (2022).

[393] *See id.* § 3403(b)(1)(B).

[394] *See id.* § 3403(b)(1)(C).

[395] *See id.* § 3403(b)(2)(B).

invoke a vague, generalized interest in fraud prevention to justify whatever they would like. And by requiring the government to substantiate that interest by clear and convincing evidence, the bill would ensure that the government may no longer assert an interest in preventing voter fraud and expect those magic words to win the case. Instead, the government would have to prove that it has a real interest in addressing a real problem. Because the most common threat states invoke to justify voter suppression—mass voter fraud—does not exist,[396] governments rarely would be able to justify the many restrictions founded on this phantom.

4. Tailoring

The RTVA's burden-shifting framework also would ensure that burdensome election laws are appropriately tailored to the government's interests. No longer could courts uphold a burdensome election law without due consideration of whether the law is appropriately tailored to the problem it purports to address.[397] Any law that impairs the ability to vote would have to significantly advance an important governmental interest.[398] And any law that makes it harder to vote would have to be the least burdensome way to advance such an interest.[399] On either track, the government bears the burden of proving fit by clear and convincing evidence. Even if the government could show that it faces a real threat of a particular form of voter fraud, that interest would justify the state only in taking measures that would address that problem. Nothing more.

5. Scope

In addition, the RTVA includes three elements that would minimize courts' discretion to deny that a restriction on a manner of voting implicates the right to vote. First, drawing on the definition of the right to vote in the VRA,[400] the bill defines "vote" to encompass "all actions necessary to make a vote effective" and specifies that this definition includes casting a ballot as well as any prerequisites to casting a ballot, like registering to vote.[401] Second, the bill defines the right to have one's vote counted to encompass all actions

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[396] *See, e.g.*, Philip Bump, *Despite GOP Rhetoric, There Have Been Fewer Than Two Dozen Charged Cases of Voter Fraud Since the Election*, Wash. Post (May 4, 2021), https://www.washingtonpost.com/politics/2021/05/04/despite-gop-rhetoric-there-have-been-fewer-than-two-dozen-charged-cases-voter-fraud-since-election/ [https://perma.cc/4VP7-NK64].

[397] *See, e.g.*, New Ga. Project v. Raffensperger, 976 F.3d 1278, 1280–83 (11th Cir. 2020); Richardson v. Hughs, 978 F.3d 220, 240–41 (5th Cir. 2020); Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 147–48 (5th Cir. 2020).

[398] *See* H.R. 5746, 117th Cong. § 3403(b)(2)(B) (2022).

[399] *See id.*

[400] *See* 52 U.S.C. § 10101(e) (2018).

[401] H.R. 5746, 117th Cong. § 3404(5) (2022).

necessary to have a vote included in the total of votes cast and reflected in the certified vote total.[402] Third, the bill's guarantee against any burden on the time, place, or manner of voting ensures that the bill reaches all means of casting a ballot and makes the availability of other means irrelevant.[403]

B. Examples

To see what a statutory right to vote so designed would achieve, consider four examples: a substantial impairment claim against a voter suppression law, a retrogression claim against a voter suppression law, and two retrogression claims against election subversion attempts.

1. Voter Suppression: Substantial Impairment

Requiring voters to register in advance makes voting significantly harder.[404] If you are not registered to vote on time, you cannot vote. If you were registered by the deadline but moved afterwards, you may have no recourse.[405] The same is true if you were wrongly purged from the rolls.[406] Advance registration requirements are what give states the ability and the incentive to purge voters: if you can register or correct your registration on the day you vote, you can overcome a purge. Depending on the state, advance registration laws are responsible for preventing between tens of thousands and hundreds of thousands of eligible voters from casting their ballots.[407]

Allowing voters to register on the same day they cast their ballots (known as same-day registration) makes voting more accessible.[408] On average, turnout increases by six percentage points.[409] What's more, same-day registration disproportionately benefits many of the eligible voters whom the election system otherwise disparately burdens: Black voters, poor voters, and younger voters.[410] Nevertheless, twenty-four states require voters to register to vote

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[402] *See id*. § 3404(3).

[403] *See id*. § 3402(a) (prohibiting any undue burden on the time, place, or manner of voting); *Tex. League of United Latin Am. Citizens*, 978 F.3d at 144–45 (holding law did not unduly burden the right to vote in part because burdened voters could have voted by other means).

[404] *See* Dale E. Ho, *Election Day Registration and the Limits of Litigation*, 129 YALE L.J.F. 185, 186 (2019).

[405] *See id.* at 190.

[406] *See id.*

[407] *See id.* at 196.

[408] *See id.* at 188–92.

[409] *See* Craig Leonard Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 170, 176–77 (2001).

[410] *See* Ho, *supra* note 404, at 189.

before Election Day.[411] With a few exceptions, those deadlines are between a week and a month in advance.[412]

Even though voter registration deadlines are among the most consequential and best documented voting restrictions on the books, *Anderson-Burdick* litigation to dislodge them has uniformly failed.[413] The courts that have heard these claims have dismissed the burdens as minimal, embraced states' asserted interest in preventing voter fraud, and refused to require the states to provide any evidence to justify their claims or show a close fit between their means and their ends.[414]

Courts have halted two attempts to eliminate same-day registration and impose new advance registration requirements.[415] One of those wins proved temporary. The ruling was stayed and ultimately vacated; the ensuing settlement did not include a restoration of same-day registration.[416] The other ultimately rested on discriminatory intent grounds, not on *Anderson-Burdick* grounds,[417] making the challenge hard to replicate. In any event, defensive claims to shield same-day registration are no substitute for offensive claims against advance registration requirements. It is one thing to protect same-day registration once legislatures have provided it; it is another to provide it where they have not.

By contrast, a statutory right to vote would empower voters to bring serious challenges to advance registration deadlines. Because advance registration laws have been on the books for decades, they would not be subject to retrogression challenges with the RTVA's 2020 baseline. They would, however, be subject to substantial impairment challenges. At the burdens stage, proving a substantial impairment is not particularly hard: all that plaintiffs need to do is show that advance registration deadlines make it non-trivially harder to vote than it would be without them. Plaintiffs could make that showing by pointing to what may be the most robustly documented burdens of any common voting requirement. In response, state defendants would have to prove that requiring voters to register in advance significantly furthers an important, particularized interest. In all likelihood, they would cite two interests: fraud prevention and election administrability. Courts probably will find those interests important. But they might not find that advance registration significantly furthers them. Insofar as advance registration requirements mitigate the risk of fraud, they

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[411] North Dakota does not require voters to register. Two states, Alaska and Rhode Island, allow same-day voter registration in presidential elections but no others. North Carolina allows voters to register during in-person early voting, but not on Election Day itself. *See Same Day Voter Registration*, Nat'l Conf. of State Legislatures (Sept. 21, 2022), https://www.ncsl.org/elections-and-campaigns/same-day-voter-registration [https://perma.cc/DV2K-JDZK].

[412] *See id.*

[413] *See* Ho, *supra* note 404, at 195–97.

[414] *See id*.

[415] *See id*. at 197–99.

[416] *See id*. at 198 n.60.

[417] *See id*. at 198 n.59.

do so through the registration requirement itself, not through the requirement that registration happen in advance. And because voter registration systems are overwhelmingly digital, advance registration may no longer do as much to advance administrative interests as it once might have.[418]

To be sure, substantial impairment claims would be harder to bring than retrogression claims, because the former would not trigger a least-restrictive-means requirement like the latter would. But intermediate scrutiny is still demanding. Voters would have far better odds than they have under *Anderson-Burdick*.

2. Voter Suppression: Retrogression

In 2021, Texas enacted a law requiring anyone voting by mail to include their driver's license number or partial Social Security number on their ballot.[419] But satisfying the requirement was not as simple as putting down either number. The voter had to know which one they had registered to vote with.[420] Not only did the statute, S.B. 1, provide no funding to educate voters about the new identification requirement, the statute also imposed vague restrictions on how election officials could communicate about voting by mail, deterring them from informing voters about what they had to do.[421] Making matters worse, the statute denied voters any reasonable opportunity to cure their ballots if they did not include the required information.[422] Texas barred voters from checking the status of their ballots online unless they had both their driver's license number and their partial Social Security number on file.[423] Nearly a million voters didn't.[424]

The law disenfranchised thousands. Sixteen counties together rejected more than twice as many ballots in the March 2022 primaries as the entire state of Texas rejected in the 2020 presidential election.[425] In several counties, the ballot rejection rate skyrocketed to around twenty percent; the ID rules were responsible for nearly all the rejections.[426]

You might think that S.B. 1 so burdens the right to vote that voters easily could win an *Anderson-Burdick* case against it. But at each stage of the inquiry, voters are likely to come up short. First, the court might trivialize the

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[418] *See id.* at 196–97.

[419] *See* Alexa Ura & Mandi Cai, *At Least 18,000 Texas Mail-In Votes Were Rejected in the First Election Under New GOP Voting Rules*, Tex. Trib. (Mar. 11, 2022), https://www.texastribune.org/2022/03/11/texas-mail-in-voting-lawsuit/ [https://perma.cc/7Y9U-XZ7J].

[420] *See* Michael G. Miller, Kevin T. Morris, Ian Shapiro & Coryn Grange, *The Disparate and Durable Effects of Mail Voting Restrictions: Evidence from Texas*, J. Pol. (forthcoming) (manuscript at 4), https://doi.org/10.1086/737439 [https://perma.cc/TA4Z-NW2U].

[421] *See* Ura & Cai, *supra* note 419.

[422] *See id.*

[423] *See id.*

[424] *See id.*

[425] *See id.*

[426] *See id.*

burdens. How hard is it, the court would ask, to write a few digits on a page? S.B. 1, the court would say, imposes nothing more than the ordinary inconveniences of voting. On top of that, Texas (nominally) gives (some) voters (some) opportunity to fix their mistakes. Even if the plaintiffs draw a judge who recognizes that a law disenfranchising thousands of people might be burdensome, the plaintiffs likely would lose in the next stage. The state would tell the court that S.B. 1 serves its interest in preventing voter fraud. Because that interest is important, the inquiry would end there. The court likely would not demand that the state show that the requirement is appropriately tailored to its interest. All of this assumes that the court would find that S.B. 1 implicates the right to vote in the first place. Since the statute concerns only voting by mail, the court might not. Plaintiffs have to run the table to win; state defendants need only prevail at any one stage.

By contrast, with a statutory right to vote, voters likely would prevail against this law. Because S.B. 1 was enacted after the 2020 elections, the statute would be subject to a retrogression challenge under the RTVA. Because the retrogression framework cabins the burden inquiry to the narrow, determinate question of whether S.B. 1's identification requirement makes it harder to vote than it was before, plaintiffs likely could make the showing. Because Texas then would have to prove that S.B. 1 is necessary to significantly further an important, particularized governmental interest, Texas could not succeed with a mere assertion that the challenged provision helps to prevent fraud. In all likelihood, the state would be hard-pressed to prove that it faced a credible threat of the sort of voter fraud that a driver's license number could prevent, let alone that imposing this requirement in this form is essential to preventing it.[427]

3. Election Subversion: Retrogression—Post-Election Litigation

Next, consider how the RTVA would handle election subversion claims. Two notes. First, to reiterate, election subversion is action that increases the risk that "the purported outcome of the election does not reflect the choice of

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[427] Four years after Texas enacted S.B. 1, a district court enjoined these provisions under the ADA. *See* La Unión del Pueblo Entero v. Abbott, 770 F. Supp. 3d 974, 989 (W.D. Tex. 2025). On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the district court's judgment and vacated the permanent injunction. *See* La Union Del Pueblo Entero v. Abbott, 151 F.4th 273, 283 (5th Cir. 2025). Because the remedy for an ADA claim is a reasonable accommodation, courts in ADA voting cases typically afford only limited relief tailored to the needs of the voters with disabilities—narrower relief than would be available under a statutory right to vote. *See, e.g.*, Merrill v. People First, 141 S. Ct. 25, 25 (2020) (mem.) (staying injunctive relief for voting rights claim under ADA); Johnson v. Callanen, 610 F. Supp. 3d 907, 918 (W.D. Tex. 2022) (holding ADA voting rights plaintiffs failed to state claim because they had not shown that modification they sought would be reasonable accommodation); Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 806 (W.D. Wis. 2020) (holding voters with disabilities not entitled to injunction against policy because injunction would not be proportional accommodation).

the voters."[428] Second, because it does not appear that any jurisdiction had a law from before the 2020 election that made it so easy to subvert an election that the measure could face a viable substantial impairment claim, this section will focus on retrogression claims.

Judge Griffin's attempt to overturn his defeat in the 2024 North Carolina Supreme Court election illustrates how a statutory right to have one's vote counted could help check election subversion.

Recall that after Judge Griffin lost the election to Justice Riggs, Griffin persuaded North Carolina's courts to order election officials not to count certain votes, even though voters cast those votes in compliance with the rules at the time of the election.[429] One group of voters who stood to have their votes discarded were "Never Residents."[430] "Never Residents" were children of North Carolinians residing overseas who checked a box on their ballot request forms indicating that they, unlike their parents, had never resided in the United States.[431] State law granted "Never Residents" the right to vote, so on Election Day, they had every reason to think that they were eligible.[432] However, during Griffin's post-election litigation, the state courts held that this statute violated the state constitution.[433] The courts then ordered the votes of all designated "Never Residents" excluded from the certified total.[434] The order did not afford the alleged "Never Residents" any opportunity to challenge their classification—that is, to show that they had inadvertently or incorrectly checked the "Never Resident" box.[435] As Riggs challenged the order, she produced evidence that around ten percent of designated "Never Residents" were actually eligible voters.[436] The federal district court held that the post-election prohibition on counting the votes of "Never Residents" violated procedural due process.[437]

However, because Griffin argued that *Anderson-Burdick* was the proper standard for adjudicating the claim, the court also discussed whether excluding these votes from the count violated the constitutional right to vote.[438] In this alternative rationale, the court concluded that if *Anderson-Burdick* applied, the order to exclude the votes of misclassified "Never Residents" violated their voting rights.[439] First, the court found that the "retroactive invalidation of

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[428] States United Democracy Ctr., *supra* note 89, at 4. For a narrower definition of election subversion, see Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 Yale L.J.F. 312, 322 (2022).
[429] *See supra* Part II.A.2.
[430] *See* Griffin v. N.C. State Bd. of Elections, 781 F. Supp. 3d 411, 417 (E.D.N.C. 2025).
[431] *See id.*
[432] *See id.*
[433] *See id.*
[434] *See id.*
[435] *See id.*
[436] *See id.* at 447.
[437] *See id.* at 448.
[438] *See id.* at 446, 448–49.
[439] *See id.* at 448–50.

one's vote" constituted a severe burden, at least as to those voters incorrectly classified as "Never Residents."[440] Second, the court acknowledged that the state had a compelling interest in counting only the votes of state residents.[441] Then, third, the court found that declining to count these votes after the election, without affording the voters any notice or opportunity to substantiate their status, was not the least restrictive means of achieving that interest.[442] The challenged orders were not appropriately tailored.[443] If *Anderson-Burdick* applied—a point the court doubted—the doctrine would bar Griffin's bid to subvert the election.[444]

Judge Griffin did not appeal the ruling. As a result, the court's application of *Anderson-Burdick* remains the alternative reasoning of a single judge. For our purposes, however, the court's *Anderson-Burdick* analysis matters because it illustrates how rigorous *Anderson-Burdick*-style review of an attempt to overturn the results of an election could be.

Imagine a future *Griffin*-type case wherein the loser of an election persuades a state court to order the exclusion of certain votes from the certified total. Impacted voters could file a retrogression claim in federal court asserting that this order violated their statutory right to have their vote counted. At the outset, the plaintiffs would have to prove that the order made it less likely their votes would be counted than it was before. In a case like *Griffin*, that would be straightforward: on its face, the order bars the state from counting their votes.

In response, the state would have to prove that retroactively excluding these votes from the count is necessary to significantly further an important, particularized government interest. That would be very difficult. Even if, as in *Griffin*, the state had compelling interests in excluding these votes before the election, it would be unlikely that refusing to count these votes after the election is the least burdensome means of advancing those interests, especially without affording the voters any opportunity to challenge their post-election disenfranchisement.

In sum, a statutory right to vote would validate the tentative *Anderson-Burdick* analysis of the *Griffin* court, streamlining future challenges to election subversion and helping ensure that every eligible vote is counted.

4. Election Subversion: Retrogression—Power-Shifting Legislation

Finally, consider how a statutory right to have one's vote counted would help check a different form of election subversion: the partisan takeover of election administration.

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[440] *Id.* at 449.
[441] *See id.*
[442] *See id.* at 449–50.
[443] *See id.*
[444] *See id.* at 446 n.24, 450.

Since the 2020 elections, states like Georgia, North Carolina, and Texas have passed laws that transfer the power to run elections—including the power to count the votes and certify the results—from local, nonpartisan, experienced experts to partisan, state-level political actors.[445] There is nothing inherently unconstitutional about changing who administers elections and how they do so.[446] Nevertheless, election law scholars have observed that "power-shifting legislation" may increase the risk of election subversion by putting the ostensibly ministerial responsibility of counting the votes and certifying the results in the hands of people with greater incentive and ability to reject the choice of the voters.[447]

Anderson-Burdick affords little recourse against these laws. It is not clear that election subversion claims against partisan takeover laws are cognizable. If these claims are cognizable, they have not succeeded. Many partisan takeover laws remain on the books, and none has ever fallen to an *Anderson-Burdick* challenge.[448]

By contrast, a statutory right to have one's vote counted would enable voters to challenge laws like these for retrogression. If election subversion scholars are right about power-shifting legislation, a plaintiff should be able to prove that a power-shifting statute makes it less likely their vote would be counted or, if counted, play the appropriate role in determining the winner of the election. The plaintiff could point to the inexperience or incompetence of the newly empowered officials, the increased risk of arbitrariness or unchecked discretion, the new actors' stated intentions, or ways in which comparable changes in other jurisdictions have resulted in less accurate counts or less reliable certifications.

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[445] For examples of partisan takeover laws, see, for example, S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021) (enacted); S.B. 382, 156th Gen Assemb., Reg. Sess. (N.C. 2024) (enacted); S.B. 1750, 88th Leg., Reg. Sess. (Tex. 2023) (enacted); S.B. 1933, 88th Leg., Reg. Sess. (Tex. 2023) (enacted). For analysis of this type of law, see Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 Wis. L. Rev. 1337, 1349–51 (2022); Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 Harv. L. Rev. F. 265, 292 (2022).

[446] *See* Bulman-Pozen & Seifter, *supra* note 445, at 1350 (noting that some takeover laws "may sound innocuous" because "centralization of administration can, in some circumstances, yield coordinated good-government ends").

[447] *See id.* at 1349 (defining and warning against "power-shifting laws"); *see also* Grace Gordon, Matthew Weil, Al Vanderklipp & Kevin Johnson, *The Dangers of Partisan Incentives for Election Officials*, Bipartisan Pol'y Ctr. (Apr. 6, 2022), https://bipartisanpolicy.org/report/the-dangers-of-partisan-incentives-for-election-officials/ [https://perma.cc/YXA4-YZ28].

[448] *See, e.g.*, Coal. for Good Governance v. Kemp, No. 21-2070-JPB, 2025 WL 848462, at *5–7 (N.D. Ga. Mar. 18, 2025) (granting summary judgment for defendants on challenge to power-shifting provisions of Georgia S.B. 202); Stein v. Berger, 915 S.E.2d 146, 149 (N.C. 2025) (holding North Carolina Court of Appeals likely did not err in staying order barring enforcement of power-shifting provisions of North Carolina S.B. 382); *Texas Harris County Election Administration Challenge*, Democracy Dkt. (Nov. 29, 2023), https://www.democracydocket.com/cases/texas-harris-county-election-administration-challenge/ [https://perma.cc/VT3A-9JK5] (noting voluntary dismissal of sole lawsuit against Texas S.B. 1750).

If the plaintiff carries this threshold burden, the state would have to prove that transferring power over elections is necessary to significantly further an important, particularized interest. Here, too, context will matter. Sometimes, local election offices suffer real and persistent administrative problems that may warrant intervention.[449] But the state would have to make that case. If the state were to carry its burden, the plaintiff would have the opportunity to show that the government could further that end by a means that poses less of a threat to the count.

A statutory right to have one's vote counted would not guarantee that challenges to partisan takeover laws succeed. Whether laws like these constitute election subversion depends on the facts. What a statutory right would do is give due weight to each voter's interest in having their vote counted and focus litigation on the right questions: whether, as a matter of fact, a takeover law makes it less likely that each vote will be counted, and whether that risk is a justified means of realizing appropriately significant government interests.

V. How a Statutory Right to Vote Compares

How else could we restore the right to vote? As this Article has discussed, the leading scholarly proposal is a constitutional amendment guaranteeing it. This Part compares a statutory right to vote with the constitutional alternative. Then, it compares a statutory right to vote with two alternative statutory strategies: mandating specific changes to the voting process and restoring preclearance.

A. The Constitutional Alternative

One leading strategy for enhancing judicial protection of the right to vote is to amend the Constitution to guarantee the right.[450] The proposed amendments vary, but all center the core feature of the statute proposed here: guaranteeing the right to vote to all adult citizens.[451]

Over the last two Parts, this Article has challenged two assumptions underlying pro-amendment scholarship. Part II showed that a constitutional amendment is not the only option; the Constitution authorizes Congress to enact a statutory right to vote free from undue burdens. Part III showed that a statutory right can be designed to achieve the two legal aims of a constitutional amendment: subjecting burdens on the right to vote to heightened

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[449] *See, e.g.*, Sarah Blaskey & Carli Teproff, *Behind the Curtain of the Most Controversial Elections Department in South Florida*, Mia. Herald (Nov. 2, 2018), https://www.miamiherald.com/news/local/community/broward/article220841135.html [https://perma.cc/T25D-Q8WN].

[450] *See* Daniels, *supra* note 42, at 1095–97; Edobor, *supra* note 42, at 1551–56; Hasen, *supra* note 42, at 153–58; Douglas, *supra* note 25, at 86–89; Raskin, *supra* note 14, at 560.

[451] *See, e.g.*, Hasen, *supra* note 42, at 153; Edobor, *supra* note 42, at 1552–53.

scrutiny and expanding the franchise. Now, this Article discusses one caveat to each of the prior points.

First, although a statutory right to vote could do most of the work of an amendment, it could not preclude subsequent federal legislation, whether a federal voter suppression law or the repeal of the statutory right itself. Most scholars agree that earlier federal legislation cannot block later legislation.[452] This is a grave limitation on a legislative approach—a substantial reason to support an amendment in addition to a statute. Still, for most of our history, Congress has exercised its electoral power to expand the franchise, not to constrain it.[453] The SAVE Act (the most recent federal voter suppression bill to garner significant legislative support) has stalled in the Senate, albeit because of the filibuster, the same barrier that blocked the RTVA.[454]

Second, a statutory right to vote would be subject to judicial review. An amendment, of course, would not. This, too, weighs in favor of an amendment. The problem is serious. Still, it does not favor an amendment as much as it might seem to. Because, as this Article has contended, a statutory right to vote is well within the ambit of congressional power, there is no sound argument for striking one down.

Of course, the Supreme Court might strike one down anyway. But more to the point, a judiciary that would strike down a statutory right to vote and eviscerate over a century of precedent is not a judiciary that would give full effect to a right-to-vote amendment anyway. That matters. Unless a right-to-vote amendment is written in as much detail as the statute proposed here, there would be two ways to distill its meaning and realize its aims. One is for the courts to apply the amendment directly. On the assumption that the judiciary remains voter-hostile, an amendment might not make much of a difference.[455] The other way to determine the meaning of an amendment is for Congress to enact implementing legislation. That legislation may well look like the proposed statutory right to vote. The main contribution of an amendment, then, would be to provide a constitutional basis for that legislation. Courts still would have the power to review and interpret the legislation, with all the risks that involves. All of which is to say that realizing the promise of a constitutional amendment would involve many of the same challenges as realizing the promise of a statutory right to vote.

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[452] *See* Michael Doran, *Legislative Entrenchment and Federal Fiscal Policy*, 81 L. & CONTEMP. PROBS. 27, 27–28, 28 n.4 (2018).

[453] *See* Stephanopoulos, *supra* note 61, at 5.

[454] *See* Yunior Rivas, *Anti-Voting Activists Have a Plan to Pass the SAVE Act*, DEMOCRACY DKT. (July 1, 2025), https://www.democracydocket.com/news-alerts/anti-voting-activists-have-a-plan-to-pass-the-save-act/ [https://perma.cc/DD27-Z3LH].

[455] *See* Gerken, *supra* note 14, at 12.

In any case, a Congress with the reasonable concern that the Supreme Court would strike down a statutory right to vote could strip the Court of jurisdiction to review its constitutionality.[456]

So, a statutory right to vote has real limitations relative to a constitutional one. Yet the gap is not so great that an amendment is the only path worth treading. A statute would make a difference.

Here are a few additional points of comparison. A statutory right to vote would advance the values that scholars invoke in favor of a constitutional amendment. It would advance political equality by increasing the accessibility of this fundamental democratic right.[457] It would help streamline election litigation by shifting the burden of justifying election restrictions to governments.[458] And it would help protect the value of the right by preventing election subversion.[459] A statutory right to vote would confirm that because every citizen has the right to vote, the government has the duty to ensure that exercising that right is no harder than it has to be.

Then there is the main reason to favor a statute, or at least to start with one: a statutory right to vote is much more politically feasible than a constitutional one. If the 117th Congress is any indication, a statutory right to vote is politically feasible in the near term.[460] A constitutional right to vote is not. At the very least, we could create a statutory right to vote for a far lower political price than a constitutional amendment.[461]

For the same reason, a statutory right to vote likely would be more rigorous in its domain than a constitutional one; the more support a voting rights measure would need to become law, the vaguer and less effective the measure likely would be.[462] To the extent political capital for democracy reform is scarce, pursuing a statutory path rather than a constitutional one leaves more room for the rest of a democracy agenda.[463]

Perhaps the most important point, though, is that the statutory approach and the constitutional approach are complementary, not rivalrous.[464]

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[456] *See* U.S. Const. art. III, § 2, cl. 2; Richard H. Fallon, Jr., *Jurisdiction Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1087–89 (2013); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. Rev. 1778, 1808–10 (2020).

[457] *See* Hasen, *supra* note 42, at 41–66.

[458] *See id.* at 91–111.

[459] *See id.* at 112–31.

[460] *See supra* note 357 and accompanying text.

[461] On the difficulty of amending the Constitution to incorporate a right to vote, see Richard Briffault, *Three Questions for the "Right to Vote" Amendment*, 23 Wm. & Mary Bill Rts. J. 27, 27 (2014); Gerken, *supra* note 14, at 12–13.

[462] *See* Briffault, *supra* note 461, at 45–46; Gerken, *supra* note 14, at 13–15; Hasen, *supra* note 42, at 137–44.

[463] *See* Corey L. Brettschneider & Aidan G. Calvelli, *Democracy Reform for Donald Trump's America: A Review Article*, Pol. Sci. Q. (forthcoming) (manuscript at 1, 3), https://doi.org/10.1093/psquar/qqaf003 [https://perma.cc/PUY6-LXFK] (arguing that in light of the range of threats to our democracy, "democracy reform must be more than election reform").

[464] *But see* Hasen, *supra* note 42, at 144 (arguing in the other direction that a movement for an amendment might motivate legislative change).

By expanding and empowering the electorate, enacting a statutory right to vote now can help facilitate the ratification of a constitutional one later. Just as enhancing democracy in the states can serve as a springboard to enhancing democracy nationwide, so too can a statutory right to vote serve as a springboard for a constitutional successor.[465] Plus, if Congress were to enact a statutory right to vote and the Court were to strike it down, the movement for an amendment might benefit from the revelation that the Court has left the nation with little other choice.

A right-to-vote amendment would be a transformative addition to our Constitution. Nevertheless, a statutory right to vote like the one proposed here would achieve much of what an amendment would at a far lower price, while facilitating an amendment down the road.

B. The Statutory Alternatives

There are other statutory strategies, too: targeted reforms and renewed preclearance. A statutory right to vote would complement them.

The first half of the Freedom to Vote: John R. Lewis Act originated as a bill designated H.R. 1.[466] H.R. 1 featured a slew of provisions that would help increase access to the ballot, from establishing automatic voter registration to banning secret voter purges.[467] Generally speaking, the provisions of the Freedom to Vote: John R. Lewis Act that originated in H.R. 1 would make two types of reforms: prohibiting specific obstacles to voting and mandating specific best practices.

This approach has limits. First, H.R. 1 would not have prohibited everything that states were already doing to suppress the right to vote and subvert elections.[468] Second, Congress cannot foresee every voter suppression or election subversion measure that governments might devise. Congress should neither underestimate states' (or presidents') creativity nor overestimate its own capacity to react nimbly. Our history is clear: when governments are determined to suppress the right to vote, they will engage in "unremitting and

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[465] *Cf.* Wilfred U. Codrington III, *Springboard to Article V (or Electoral Democracy and the End of Constitutional Amendment in the Nation and States)*, 19 HARV. L. & POL'Y REV. 1, 43 (2025) (defining a "springboard amendment" as "a reform to a subordinate constitution that can influence like change in a superordinate constitution" and arguing that springboard amendments to enhance democracy in the states can advance amendments to enhance democracy in the federal government).

[466] H.R. 1, 117th Cong. (2021); *see also* Nicholas Fandos, *Targeting State Restrictions, House Passes Landmark Voting Rights Expansion*, N.Y. TIMES (June 1, 2021), https://www.nytimes.com/2021/03/03/us/politics/house-voting-rights-bill.html [https://perma.cc/BND9-D4ZR].

[467] *See Annotated Guide to the For the People Act of 2021*, BRENNAN CTR. FOR JUST. (Mar. 18, 2021), https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-people-act-2021 [https://perma.cc/5FQH-P68Q].

[468] *See* Kevin Morris, Coryn Grange & Zoe Merriman, *Impacts of Restrictive Voting Legislation Since the 2020 Election*, BRENNAN CTR. FOR JUST. (Mar. 10, 2023), https://www.brennancenter.org/our-work/research-reports/impact-restrictive-voting-legislation [https://perma.cc/54XY-F5NF].

ingenious defiance of the Constitution."[469] Prohibit one voting restriction, and governments may come up with another.

That is exactly what happened during the 117th Congress. For example: after the U.S. House of Representatives passed H.R. 1, Georgia passed a law prohibiting mobile voting centers, authorizing the transfer of power from nonpartisan local election administrations to the partisan state legislature, and criminalizing providing free food or water to people waiting in line to vote.[470] Shortly thereafter, Florida adopted its own version of that last restriction.[471] H.R. 1 would not have stood in their way. In contrast, a statutory right to vote would have enabled voters to challenge them. It is hard to imagine how Florida and Georgia could prove that dehydrating voters is necessary to preventing mass voter fraud.

It might seem like the second half of the Freedom to Vote: John R. Lewis Act—the John Lewis Voting Rights Advancement Act—supplies the backstop that the rest of the bill lacks.[472] This component of the bill, originally introduced as H.R. 4, would renew Section 5 of the VRA—the preclearance requirement—by adopting a new coverage formula to replace the one that the Court struck down in *Shelby County*.[473] Like a statutory right to vote, preclearance can prevent states from enacting a wide range of burdensome voting laws. Preclearance has the further advantage of categorically barring discriminatory election laws from taking effect; by contrast, a statutory right to vote only empowers voters to challenge burdensome laws afterwards. So, restoring preclearance is vital.

Nevertheless, preclearance would not obviate the need for a statutory right to vote. First, a statutory right to vote would apply nationwide, while the form of preclearance proposed in H.R. 4 would apply only to covered jurisdictions.[474] Fewer than a quarter of states would have to comply.[475]

Second, the conditions that trigger coverage limit preclearance from reaching more jurisdictions. Coverage would be predicated on a judicial determination that a jurisdiction enacted racially discriminatory election laws

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[469] South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

[470] *See* S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

[471] *See* Amy Gardner & Lori Rozsa, *Florida's DeSantis Signs New Voting Restrictions into Law as Republicans Rush to Align with Trump's False Claims of Fraud*, Wash. Post (May 6, 2021), https://www.washingtonpost.com/politics/florida-voting-law/2021/05/06/f2bd20b6-ae0f-11eb-ab4c-986555a1c511_story.html [https://perma.cc/C7TY-PPMP].

[472] *See* Myrna Pérez & Tim Lau, *How to Restore and Strengthen the Voting Rights Act*, Brennan Ctr. for Just. (Jan. 28, 2021), https://www.brennancenter.org/our-work/research-reports/how-to-restore-and-strengthen-voting-rights-act [https://perma.cc/5XK7-S6UN].

[473] *See id.*

[474] *See id.*

[475] *See* H.R. 4, 116th Cong. §§ 3, 4 (2020); Benjamin Barber, *The States Facing Federal Preclearance Under Proposed Voting Rights Act Fix*, Facing South (Mar. 13, 2019), https://www.facingsouth.org/2019/03/states-facing-federal-preclearance-under-proposed-voting-rights-act-fix [https://perma.cc/6XPQ-6YQS].

in violation of the Constitution or the VRA.[476] Courts may be reluctant to make these findings; the Roberts Court is.[477]

Third, preclearance addresses only racially discriminatory election laws, whereas a statutory right to vote heightens judicial scrutiny of all burdensome election laws.[478] It may be easier to prove that a law is burdensome than that a law is discriminatory.

Fourth, preclearance blocks only retrogression: election laws that make voting harder than it was before their enactment.[479] By contrast, a statutory right to vote also would target laws that are burdensome on absolute terms: laws that make voting unjustifiably hard. Consequently, whereas preclearance would prevent the status quo from getting worse, a statutory right to vote would empower voters to improve the status quo, too. Fifth, and relatedly, because preclearance can block only new restrictions, it cannot repair the damage of the last fifteen years.[480] A statutory right can.

Sixth, preclearance is only as powerful as the Justice Department is willing to make it. A DOJ hostile to the VRA and its aims could approve discriminatory election laws. By contrast, because any injured voter could bring a statutory right-to-vote claim, a hostile administration could not simply turn off the right.

Finally, it is doubtful that the Roberts Court would uphold a new preclearance formula anyway.[481]

Others might worry that a statutory right to vote demands too much. Governments make countless decisions about election administration, and some reasonable decisions might impose minor burdens on voters without significantly furthering any important interest. That may be a good reason not to require strict scrutiny across the board. But it is not a reason that a statutory right to vote would prove too demanding. Most marginally burdensome measures will be justified by correspondingly strong state interests or else be trivial enough that denying states and counties the ability to make them would not be a real loss. Plus, the time and money costs of election litigation may

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[476] *See* H.R. 4, 116th Cong. § 2 (2020).

[477] Courts may be even more reluctant to find that a state engaged in racially discriminatory voter suppression than they are to find that a state engaged in race-neutral voter suppression. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Abbott v. Perez*, Race, and the Immodesty of the Roberts Court*, Harv. L. Rev. Blog (July 31, 2018), https://harvardlawreview.org/blog/2018/07/abbott-v-perez-race-and-the-immodesty-of-the-roberts-court/ [https://perma.cc/XEW8-38TJ] (observing that "the Roberts Court is skeptical of, if not hostile to, claims that the states are engaged in racial discrimination in the political process," in part because it is "unwilling to entertain evidence of racism unless the evidence is unequivocal and indicative of a state's present behavior"); Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 Harv. L. Rev. 23, 120–31 (2022).

[478] *See* H.R. 4, 116th Cong. § 2 (2020).

[479] *See id.* § 4.

[480] *See id.*

[481] *See* Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade*, 68 Stan. L. Rev. 1597, 1627 (2016).

limit frivolous cases.[482] Even if the statute were to result in states and subdivisions having less discretion to make these choices, that is a reasonable price to pay to secure the right to vote. In a democratic society of political equals, the government should bear the burden of justifying making it any harder to vote than it has to be.[483]

VI. Conclusion

The United States has never expressly, affirmatively, universally guaranteed the right to vote. Not in the Constitution. Not by statute. With judicial protection for the right to vote ebbing, the costs of that failure grow clearer. A statutory right to vote could change that, enfranchising all adult citizens and increasing judicial scrutiny of measures that impair the ability to vote. A statute could not close the gap as completely or securely as a constitutional amendment. But a statute could come close. And a statute is possible soon. By enacting a statutory right to vote, Congress could begin to replace the paradigm of voting as a selective privilege secured by negative rights with a paradigm of voting as an affirmative right of citizenship.[484] In doing so, Congress also could reduce our dependence on judges as the guardians of our most fundamental rights.[485] Perhaps the right to vote will be one of many rights that we reconstruct by statute.[486]

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[482] *See* Nicholas O. Stephanopoulos, *The South After Shelby County*, 2012 Sup. Ct. Rev. 55, 57–58, 65 (2013) (describing the costs and challenges of case-by-case voting rights litigation).

[483] *See* Derrick Darby, A Realistic Blacktopia: Why We Must Unite to Fight 189–207 (2022); *see also* Daniels, *supra* note 42, at 1066–67 ("In a healthy democracy, the perspectives of both voters and candidates should presumably be oriented toward the same goals: allowing those entitled to vote to do so, and counting each vote fairly.").

[484] *Cf.* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation*, 62 How. L.J. 809, 853 (2019) ("[W]e might find the only available path is one in which we view voting and political participation as a positive and universal right.").

[485] As this Article was going to press, the Supreme Court decided *Louisiana v. Callais*, No. 24–109 (Apr. 29, 2026), all but eliminating the protections Section 2 of the Voting Rights Act provides against racial vote dilution. The decision's betrayal of the statute's text, history, precedent, and purpose confirms that democracy reform—whether constitutional or statutory—will require Supreme Court reform. It also suggests that a statutory right to vote should expressly prohibit courts from treating partisan aims and incumbent protection as legitimate state interests, lest courts follow *Callais* in treating them as reasons to disregard voters' rights.

[486] *See, e.g.*, Carliss Chatman, *We Shouldn't Need Roe*, 29 UCLA J. Gender & L. 81, 100–02 (2022) (describing a proposed statutory right to abortion).