

**CONSTITUTIONAL CHALLENGES TO VOTER REGISTRATION DEADLINES:  
STATE CONSTITUTIONS AS A TOOL FOR VOTING REFORM**

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## INTRODUCTION

In twenty-nine states, residents are denied the right to vote on Election Day if they fail to preregister days—or even weeks—before the election.<sup>1</sup> Such denials are the result of state-imposed voter registration deadlines, which, by one estimate, prevented 3 to 4 million eligible voters from registering for the 2012 presidential election.<sup>2</sup> In many instances, disenfranchisement was the purpose of these policies—designed to keep Black, poor, and immigrant voters from participating in the democratic process.<sup>3</sup> Purposeful or not, the negative impact on voter participation is

- 1 See *Voter Registration Deadlines*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx> (last updated Oct. 2, 2020) (listing states that maintain voter registration deadlines and indicating that, while some of these states allow unregistered voters to participate in early voting, all twenty-nine deny unregistered voters the right to cast a ballot on Election Day). Since the majority of voters have historically cast their ballots on Election Day, this practice has a profound impact on the right to vote even when other means of voting are provided. See Nathaniel Rakich & Jasmine Mithani, *What Absentee Voting Looked Like in All 50 States*, FIVETHIRTYEIGHT (Feb. 9, 2021), <https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/> (showing that, before an unprecedented increase in mail-in voting during the 2020 election due to the COVID-19 pandemic, a significant majority of voters cast their ballots on Election Day). These twenty-nine states are listed *infra* in the Appendix.
- 2 Alex Street et al., *Estimating Voter Registration Deadline Effects with Web Search Data*, 23 POL. ANALYSIS 225, 238 (2015).
- 3 The leniency courts exhibit towards state legislative enactments of voter registration requirements, discussed *infra* throughout this Note, all but ignores the historical motives behind the enactment of many registration requirements. The sanitized language courts adopt discussing the reasonableness of registration schemes and the need for orderly administration of elections ignores the reality that registration deadlines were often enacted with the deliberate intent to disenfranchise certain populations—namely Black, poor, and immigrant individuals. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 65–66, 153–55 (2000); David Litt, *The Racist History of Voter Registration*, TIME (June 18, 2020), <https://time.com/5855885/voter-registration-history-race/>. Far from an exhaustive list, the following examples illustrate this troubled history. In the 1830s, proponents of registration deadlines in New York were clearly motivated by animus towards Irish Catholic immigrants. KEYSSAR, *supra*, at 65–66. In the 1880s, dismayed by their declining political power, Chicago's elite enacted a registration scheme designed to suppress voter participation. *Id.* at 153–55. In Texas, voter registration deadlines were implemented as a direct replacement for the state's Jim Crow era poll taxes, obviating any question as to their intended purpose. Litt, *supra*. While this Note focuses on the many textual reasons for courts to scrutinize voter registration deadlines more closely, courts should also consider this discriminatory history when assessing the necessity and justification for registration schemes. Federal courts generally do not consider such discriminatory history unless the original law is still in force or it can be shown that subsequent legislatures were motivated by similar animus, but state courts are not bound by this precedent when applying the protections found in their own state

significant: voter registration deadlines unnecessarily impede millions of eligible voters from exercising the most fundamental right in a democratic society.<sup>4</sup> Eliminating these deadlines and allowing voters to register at the polls on Election Day is one of the most effective ways to improve voter participation.<sup>5</sup> Not only is Election Day registration a good policy, but the texts of many state constitutions compel it.

Since the Federal Constitution does not provide an affirmative right to vote but, rather, only provides limited rights of negative implication, state constitutions offer the most robust constitutional protection of the right to vote. Courts have construed the federal right to vote narrowly, deferring to states and providing prospective voters with limited protections against unnecessarily restrictive state election administration schemes. This narrow construction has developed despite a long history of deliberate disenfranchisement through the imposition of overly onerous voting laws, including voter registration systems.<sup>6</sup> Unlike their federal counterpart, forty-nine state constitutions confer an affirmative right to vote. Advocates for access to the ballot should look to this explicit positive right enshrined in state constitutions as a tool for voting reform. This Note argues that the texts of many state constitutions provide compelling bases upon which to

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constitutions. *See* *Abbott v. Perez*, 138 S. Ct. 2305, 2326–27 (2018).

- 4 *See* Dale E. Ho, *Election Day Registration and the Limits of Litigation*, 129 YALE L.J. FORUM 185, 188 n.11 (2019) (summarizing the academic literature and concluding that voter registration deadlines have a significant impact on voter participation); Street, *supra* note 2, at 238.
- 5 Twenty-one states and the District of Columbia provide for Election Day registration or do not require registration at all. *Same Day Voter Registration*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> (last updated Oct. 6, 2020). Election Day registration increases voter participation while registration deadlines provide little, if any, practical value in the age of digital election administration. *See* Sean J. Young, *The Validity of Voter Registration Deadlines Under State Constitutions*, 66 SYRACUSE L. REV. 289, 289, 296 (2016) (“In the modern computer age, registration forms submitted on Election Day can be readily processed just like registration forms submitted prior to Election Day in a matter of hours, if not minutes.”). Election Day registration reduces the logistical burden of democratic participation, allows for the correction of registration errors, and allows voters to register at the height of campaign season when they are most likely to be engaged by candidates, issue organizations, or election officials. Ho, *supra* note 4, at 190–91. “Starting in the early 1990s, political-science research has consistently found a statistically significant relationship between [Election Day registration] and turnout, ranging from an increase of two percentage points to double-digits.” *Id.* at 188. Dale Ho, a leading expert on voting rights and election law, went as far as to say that “there is broader consensus among social scientists about the effect of [Election Day registration] on turnout than there is with respect to any other voting reform.” *Id.* at 185–86.
- 6 *See supra* note 3 and accompanying text.

challenge voter registration deadlines.

Building on Professor Joshua Douglas's writing on the positive right to vote found in state constitutions,<sup>7</sup> this Note considers the constitutionality of voter registration deadlines through the prism of the robust state constitutional voter protections for which Douglas advocates.<sup>8</sup> Part I outlines the narrow interpretation of the right to vote found in the Federal Constitution and the resulting lenient judicial scrutiny that federal courts apply to state election administration schemes. Part II explores the positive right to vote provided by state constitutions and argues that the right should be construed more broadly than the federal right. Part III highlights three different approaches to voter registration deadlines found in state constitutions, with each approach suggesting differing levels of judicial deference to the imposition of registration deadlines.

Surveying these differences, this Note concludes that the texts of many state constitutions demand heightened judicial scrutiny of voter registration deadlines far beyond what is applied under the lenient federal test. In doing so, this Note reinforces Douglas's conclusion that state constitutions provide a right to vote that is more protective than what the Federal Constitution provides and identifies the states where voting rights advocates have the most compelling textual support for constitutional challenges to voter registration deadlines.

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7 Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 144-49 (2014).

8 Douglas details the positive right to vote found in all but one state constitution and argues that "[a] renewed, independent focus on state constitutions and their explicit grant of the right to vote is textually faithful to both the U.S. and state constitutions and will restore the importance of the most foundational right in our democracy." *Id.* at 143.

## I. THE RIGHT TO VOTE UNDER THE FEDERAL CONSTITUTION IS A LIMITED RIGHT OF NEGATIVE IMPLICATION

The Federal Constitution only provides limited, negative protections of the right to vote. The U.S. Supreme Court has stated “that the Constitution of the United States does not confer the right of suffrage upon any one”<sup>9</sup> and that “the right to vote, per se, is not a constitutionally protected right.”<sup>10</sup> The Federal Constitution mentions individual franchise seven times, but none of these references confer a positive individual right to vote.<sup>11</sup> These clauses provide limited protections by negative implication, prohibiting states from infringing upon the right in certain, specific ways but stopping short of conveying a broad positive right to vote. Section I.A explores the reasoning underlying federal court deference to state election administration and the development of the *Anderson-Burdick* test. Section I.B documents the difficulty of challenging voter registration deadlines under this deferential federal test.

### A. *Negative Protections Are the Source of the Federal Anderson-Burdick Test*

The current federal constitutional test applied to state voting regulations emerged from the Supreme Court’s rulings in *Anderson v. Celebrezze* and *Burdick v. Takushi*.<sup>12</sup> In *Anderson*, the Court considered a challenge to an Ohio statute requiring independent candidates for president to file a statement of candidacy in order to appear on the ballot.<sup>13</sup> The magnitude

9 *Minor v. Happersett*, 88 U.S. 162, 178 (1874).

10 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973).

11 *See* U.S. CONST. art. I, § II (“Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”); *id.* amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . .”); *id.* amend. XIV (penalizing states by a reduction in representation if they deny or abridge the right of male citizens to vote); *id.* amend. XV (prohibiting denial of the right to vote based on race); *id.* amend. XIX (prohibiting denial of the right to vote based on sex); *id.* amend. XXIV (prohibiting denial of the right to vote based on inability to pay a poll tax); *id.* amend. XXVI (prohibiting denial of the right to vote based on age for citizens over the age of eighteen); *see* Douglas, *supra* note 7, at 95–97. *But see* AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 188–89 (2012) (suggesting that the Fourteenth Amendment’s reduction in representation clause confers a positive right to vote).

12 *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also* Douglas, *supra* note 7, at 98 (discussing the combined implications of the *Anderson* and *Burdick* cases on the federal right to vote).

13 *Anderson*, 460 U.S. at 782–86.

of the plaintiff's First and Fourteenth Amendment interests were balanced against the state's asserted interest in safeguarding "political stability."<sup>14</sup> The Court struck down the statutory filing deadline, concluding that the burden on voters' rights "outweigh[ed] the State's minimal interest in imposing [the filing] deadline."<sup>15</sup> In *Burdick*, the Court heard a challenge to Hawaii's prohibition against writing in a candidate who did not appear on the ballot.<sup>16</sup> The Court upheld Hawaii's practice, declining to apply strict scrutiny to the law and holding that such scrutiny was only required when the law imposed a severe restriction on voters' rights.<sup>17</sup> A two-tiered approach to constitutional review emerged: strict scrutiny for laws that impose a severe burden on the right to vote and a permissive balancing test for those that impose a lesser burden.

If a state election law creates a severe burden on an individual's ability to vote, it is subject to strict scrutiny. *Burdick's* holding made clear that only election laws imposing severe restrictions on First and Fourteenth Amendment rights are required to be "narrowly drawn to advance a state interest of compelling importance."<sup>18</sup> Since "[e]lection laws will invariably impose some burden upon individual voters," the Court reasoned that "subject[ing] every voting regulation to strict scrutiny and . . . requir[ing] that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."<sup>19</sup> Therefore, if a plaintiff cannot demonstrate a severe burden, the court employs a permissive balancing test.<sup>20</sup> As suggested in *Anderson*, the Court balances the magnitude of the burden on First and Fourteenth Amendment rights against the state's asserted justification for the burden.<sup>21</sup> True to its promise not to tie the hands of states, this standard allows significant leeway to enact a range of election

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14 *Id.* at 806.

15 *Id.*

16 *Burdick*, 504 U.S. at 430–32.

17 *Id.* at 432–33, 441–42.

18 *Id.* at 434 (internal quotations omitted) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

19 *Id.* at 433.

20 *Id.* at 434; see also Douglas, *supra* note 7, at 98 (characterizing the *Anderson-Burdick* test as a "lenient balancing test").

21 *Burdick*, 504 U.S. at 434 ("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.'" (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))).

laws, including voter registration laws.<sup>22</sup>

*Anderson-Burdick's* deference to states is due in large part to the nature of the federal right it seeks to protect. The federal right is one of negative implication and has been construed to protect the electoral process, not individual voters. The *Burdick* Court characterized “the right to vote [as] the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.”<sup>23</sup> As one election law scholar characterized it,

[t]he underlying concerns that drive the Court's electoral mechanics interventions are not easy to decipher, nor are they likely to be unitary, but it is hard to make sense of the case law in conventional, individualistic terms. This body of law is not designed to enable the citizen or political organization that suffers a material burden to haul the state into court and make it provide a substantial justification for the imposition. The decisions are more readily understood as imperfect efforts to ensure that electoral systems manifest certain properties in the aggregate.<sup>24</sup>

Resolving the ambiguity of the federal right underlying the Court's election law jurisprudence is beyond the scope of this writing. However, it is important to emphasize that the deference of the *Anderson-Burdick* test is informed by considerations of the electoral process in aggregate, not the individual rights of voters. Federal jurisprudence simply does not focus on the impediments faced by individual voters. As this Note will show, this is in direct contrast to the right to vote established in state constitutions.

Furthermore, the Federal Constitution's delegation of the electoral process to the states underlies federal deference to state election administration. As the *Burdick* Court reasoned, “[t]he Constitution provides that States may prescribe ‘[t]he Times, Places and Manner of holding Elections for Senators and Representatives,’ and the Court therefore has recognized that States retain the power to regulate their own elections.”<sup>25</sup> This constitutional delegation of election management to states leaves federal courts cautious to intrude on that task. *Anderson-Burdick's* permissive view of state election law has resulted in the federal courts' acceptance of voter registration deadlines as constitutionally permissible election regulations.

22 See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 336 (2007) (suggesting the result of the Supreme Court's *Anderson-Burdick* standard is that “laws pertaining to electoral mechanics carry a strong presumption of constitutionality, even though they touch upon the fundamental rights of voting and political association”).

23 *Burdick*, 504 U.S. at 441–42.

24 Elmendorf, *supra* note 22, at 336.

25 *Burdick*, 504 U.S. at 433 (internal citation omitted) (quoting U.S. CONST. art. I, § 4, cl. 1).



B. *Under Anderson-Burdick's Permissive Lens, Voter Registration Deadlines Are Consistently Deemed Constitutional*

Federal courts have upheld state voter registration deadlines before and after the creation of the *Anderson-Burdick* test. Almost fifty years ago and more than ten years before *Anderson* and *Burdick* were decided, the Supreme Court justified voter registration deadlines as necessary to give election officials time to process voter registration applications and prevent fraud.<sup>26</sup> The Court's concern was more relevant at the time given the analog nature of election administration.<sup>27</sup> This justification has eroded as digital voter registration lists have been universally adopted and Election Day registration has become logistically feasible.<sup>28</sup> Despite the changing technological and administrative realities of election administration, federal courts have continued to uphold state registration deadlines under *Anderson-Burdick's* permissive lens.

Numerous federal district courts have upheld state voter registration deadlines under *Anderson-Burdick*. In *ACORN v. Bysiewicz*, the District Court for the District of Connecticut heard a constitutional challenge to Connecticut's requirement that voters register seven days before Election Day.<sup>29</sup> The court upheld the law under the *Anderson-Burdick* test, concluding that it "d[id] not constitute a severe burden."<sup>30</sup> In *Diaz v. Cobb*, the District Court for the Southern District of Florida heard a constitutional challenge to Florida's requirement that voters register twenty-nine days before Election Day.<sup>31</sup> This court also applied the *Anderson-Burdick* test and found the deadline constitutional since it "d[id] not impose severe burdens."<sup>32</sup> Under *Anderson-Burdick's* permissive balancing, the court found the registration deadline "a reasonable, non-discriminatory restriction that advances an important state interest in the conduct of an honest, fair and orderly election."<sup>33</sup> In both cases, since strict scrutiny did not apply, the courts declined to examine whether a registration deadline was really necessary to effectuate the state's interest in orderly election administration. Thus, they did not engage with the compelling evidence that elections can be adequately administered using

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26 See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 348 n.19 (1972) (citing *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970)).

27 See *Ho*, *supra* note 4, at 196–97 (acknowledging the pre-digital age administrative burden of compiling paper registration forms into a statewide voter-registration lists).

28 See *supra* note 5 and accompanying text.

29 *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 146 (D. Conn. 2005).

30 *Id.* at 143 n.6, 145–46.

31 *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1333 (S.D. Fla. 2008).

32 See *id.* at 1329–30, 1333.

33 See *id.* at 1330, 1340.

Election Day registration.<sup>34</sup>

Absent significant change to Supreme Court election law jurisprudence, challenges to voter registration deadlines on federal constitutional grounds are unlikely to prevail. Instead, advocates should look to the states as state constitutional law provides a more promising avenue to challenge voter registration deadlines and expand voter access.

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34 See *id.* at 1329–41; *ACORN*, 413 F. Supp. 3d at 122–55; Young, *supra* note 5, at 296.

## II. THE RIGHT TO VOTE FOUND IN STATE CONSTITUTIONS IS AN INDIVIDUAL, POSITIVE RIGHT

An individual, affirmative state right to vote demands more robust protection than federal constitutional law presently affords. Section II.A discusses the affirmative right to vote provided by forty-nine state constitutions, a right different in kind from the negative protections afforded by the Federal Constitution.<sup>35</sup> These state constitutional clauses provide a compelling textual basis for a more protective standard of judicial review. Section II.B explores state court interpretations of the state right to vote. Some state courts have adopted the federal *Anderson-Burdick* test, “lockstepping” their analysis with that of the Supreme Court, while others have taken a more independent approach.<sup>36</sup> Lockstepping review of state election administration regulations is a mistake because it leaves the most fundamental right under-protected and is illogical given the text of state constitutions and the considerations that underlie the deferential federal test.

Section II.C argues that state courts should eschew the *Anderson-Burdick* test and adopt their own more searching test of state election administration laws. Uncritical adoption of federal constitutional standards does a disservice to the important independent role state constitutions and state courts play in the protection of individual rights. When viewed independently, it is clear that affirmative state constitutional voting rights are different in nature from the negative, amorphous federal right that led to *Anderson-Burdick*’s deferential standard.<sup>37</sup> Further, a key justification for *Anderson-Burdick*’s deference to state election laws is the Federal Constitution’s delegation of the electoral process to the states—a concern inapplicable to state court review of state election law.<sup>38</sup> These considerations all point state courts towards adopting a more protective standard of review than federal

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35 Douglas, *supra* note 7, at 130, 144–49 (providing a table of voting rights clauses in all state constitutions); *see also, e.g.*, KY. CONST. § 145 (providing that every prospective voter who meets certain conditions “shall be a voter in said precinct”); R.I. CONST. art. II, § 1 (providing that every prospective voter who meets certain conditions “shall have the right to vote”).

36 Lockstepping describes the practice of “state courts . . . diminish[ing] their constitutions by interpreting them in reflexive imitation of the federal courts’ interpretation of the Federal Constitution.” JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018). “[S]tate courts frequently handle [cases with similar state and federal constitutional claims] by considering the federal constitutional claim first, after which they summarily announce that the state provision means the same thing . . . .” *Id.* at 174. *See also* Douglas, *supra* note 7, at 106–10; *infra* Section II.B.

37 *Infra* Section II.C.ii.

38 *Infra* Section II.C.iii.

courts currently provide.

### A. *State Constitutions Confer a Positive Right to Vote*

Forty-nine state constitutions explicitly confer the right to vote upon some group of people.<sup>39</sup> They include phrases like “shall be entitled to vote,”<sup>40</sup> “any person may vote,”<sup>41</sup> “shall be deemed a qualified voter,”<sup>42</sup> or “shall be deemed a qualified elector.”<sup>43</sup> These clauses vary somewhat in their construction, but all convey the right to vote on some class of people. Many of these constitutions condition the right upon, among other things, citizenship,<sup>44</sup> age,<sup>45</sup> duration of residency,<sup>46</sup> or voter registration status.<sup>47</sup> Many state constitutions also grant state legislatures the power to establish rules for voter registration<sup>48</sup> or to take necessary steps to prevent voter fraud.<sup>49</sup> Ultimately, though, every state constitution but one—Arizona—conveys the right to vote in a positive form.<sup>50</sup> State courts must decide how to apply these positive constitutional protections to election regulations in their state.

39 See Douglas, *supra* note 7, at 101. For a complete list of state constitutional voter protection provisions, see *id.* at 144–49.

40 DEL. CONST. art. 5, § 2.

41 ARK. CONST. art. III, § 1(a).

42 TEX. CONST. art. VI, § 2(a).

43 KAN. CONST. art. V, § 1.

44 See, e.g., ARK. CONST. art. III, § 1 (“[A]ny person may vote in an election in this state who is . . . [a] citizen of the United States . . .”).

45 See, e.g., KAN. CONST. art. V, § 1 (“Every citizen of the United States who has attained the age of eighteen years . . . shall be deemed a qualified elector.”).

46 See, e.g., KY. CONST. § 145 (“Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct . . .”).

47 See, e.g., PA. CONST. art. VII, § 1 (“Every citizen . . . shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.”).

48 See, e.g., KY. CONST. § 147 (“The General Assembly shall provide by law for the registration of all persons entitled to vote . . .”).

49 See, e.g., DEL. CONST. art. V, § 1 (“[T]he General Assembly may by law prescribe the means, methods and instruments of voting so as best to . . . prevent fraud, corruption and intimidation thereat.”).

50 See Douglas, *supra* note 7, at 101 n.73.

## B. *State Court Interpretations of the Right to Vote Have Been Mixed*

In the 1832 case of *Capen v. Foster*, the Massachusetts Supreme Judicial Court considered the constitutionality of a voter registration system.<sup>51</sup> In a decision that set the foundation for future state voter registration laws, the Supreme Judicial Court upheld the law as a set of “reasonable and uniform regulations, in regard to the time and mode of exercising [the right to vote], which are designed to secure and facilitate the exercise of such right, in a prompt, orderly and convenient manner.”<sup>52</sup> However, the Supreme Judicial Court recognized that “[s]uch a construction would afford no warrant for such an exercise of legislative power, as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself.”<sup>53</sup> The *Capen* court articulated the same balancing of interests that the Supreme Court would grapple with in *Anderson-Burdick* over a century later.

Some state courts have adopted the federal *Anderson-Burdick* test, lockstepping their analysis of state election administration schemes with the Supreme Court. These courts “narrowly analyze the state protection to be merely co-extensive with the U.S. Supreme Court’s rulings under federal law.”<sup>54</sup> Other courts have interpreted their state’s positive right to vote more expansively, affording independent protection beyond what is provided by the Federal Constitution.<sup>55</sup> For example, state supreme courts in Missouri and Arkansas have struck down voter identification laws that would have survived under *Anderson-Burdick*, expressly recognizing that their state constitutions provide broader protections of the right to vote.<sup>56</sup>

Where state constitutional challenges to voter registration deadlines have been considered, deference to state election administration has won out. In New Jersey, a state court upheld the state’s twenty-one-day voter registration deadline as “reasonable” under the *Anderson-Burdick* test.<sup>57</sup> The

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51 *Capen v. Foster*, 29 Mass. (12 Pick.) 485 (1832). For a discussion of the seminal importance of this case, see KEYSSAR, *supra* note 3, at 65, and Litt, *supra* note 3.

52 *Capen*, 29 Mass. (12 Pick.) at 494.

53 *Id.*

54 Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 14 (2016) (finding that some courts “broadly construe state constitutions as going beyond the federal constitution”).

55 *Id.* at 17–18.

56 *Weinschenk v. State*, 203 S.W.3d 201, 205, 211 (Mo. 2006) (“The express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart.”); *Martin v. Kohls*, 444 S.W.3d 844, 846, 850, 853 (Ark. 2014) (rejecting Supreme Court analysis of voter ID laws under *Anderson-Burdick* and stating that “we address the present issue solely under the Arkansas Constitution”); see also Douglas, *supra* note 54, at 19–21 (discussing state constitutional challenges to voter identification laws).

57 *Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections*, 141 A.3d 335, 343

Massachusetts Supreme Judicial Court took a more independent approach in *Chelsea Collaborative, Inc. v. Secretary of the Commonwealth*, eschewing the *Anderson-Burdick* test for a purportedly more protective standard, but finding the registration deadline constitutional nonetheless.<sup>58</sup> The Supreme Judicial Court held that if the law “significantly interferes with the fundamental right to vote,” it is subjected to the most stringent review, “strict scrutiny.”<sup>59</sup> Anything less, and the law is only subjected to “rational basis review,” giving significant deference to the legislature’s decision to enact the deadline.<sup>60</sup> Under this standard, the court concluded that “at least for the time being, an impartial lawmaker could logically believe that the voter registration deadline imposed twenty days prior to election day still serves legitimate public purposes that transcend the harm to those who may not vote.”<sup>61</sup> Importantly, the court recognized that the Massachusetts Constitution is more protective of the right to vote than the Federal Constitution, requiring only “a significant interference with the fundamental right to vote” before it would impose strict scrutiny instead of the “severe burden” required under *Anderson-Burdick*.<sup>62</sup>

Since the *Capen* decision, courts have accepted that registration systems can be constitutionally permissible if they are reasonable for the orderly administration of elections. But what is reasonable, and how closely courts should scrutinize legislative justifications for these laws, remains an important question. The cases above illustrate the importance of this standard of review adopted by state courts; it is often the dispositive question for litigation challenging voter registration deadlines. As this Note will argue, the texts of many state constitutions, if given their evident force, demand heightened scrutiny of voter registration deadlines beyond what is applied under the federal *Anderson-Burdick* test.

Federal case law suggests that lockstepping state constitutional voter protections with the *Anderson-Burdick* standard is likely to be fatal for plaintiffs challenging registration deadlines. As the Supreme Judicial Court’s decision in *Chelsea Collaborative* shows, independent interpretation of the state constitutional right to vote does not necessarily guarantee

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(N.J. Super. Ct. App. Div. 2016) (“After fully considering the appropriate legal principles, we conclude that New Jersey’s twenty-one-day advance registration requirement is the type of ‘reasonable, non-discriminatory restriction[ ]’ which warrants the application of the *Burdick* balancing test.” (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992))).

58 *See Chelsea Collaborative, Inc. v. Sec’y of Commonwealth*, 100 N.E.3d 326, 333, 340–41 (Mass. 2018).

59 *Id.* at 333.

60 *Id.*

61 *Id.* at 341.

62 *See id.* at 333–36.

success for registration deadline challengers. However, under heightened judicial scrutiny, such as strict scrutiny or a less deferential balancing of the interests test, challenges to voter registration deadlines are far more likely to succeed.<sup>63</sup> Thus, determining whether state courts will lockstep their analysis or apply a heightened level of scrutiny is a critical question in determining the constitutional viability of voter registration deadlines and the likelihood of mounting successful legal challenges against them.

C. *State Courts Should View Their Constitutional Protections Independently Instead of Lockstepping Their Analysis with the Federal Anderson-Burdick Test*

A state court's reflexive adoption of a federal standard as identical to their own state guarantee should be viewed critically. Nonetheless, it is a common interpretive approach utilized by state courts. "[M]ost state courts adopt federal constitutional law as their own. Bowing to the nationalization of constitutional discourse, they 'tend to follow whatever doctrinal vocabulary is used by the United States Supreme Court, discussed in the law reviews, and taught in the law schools.'"<sup>64</sup> The widespread use of lockstepping represents "[a] grave threat to independent state constitutions, and a key impediment to the role of state courts in contributing to the dialogue of American constitutional law."<sup>65</sup> As Justice Brennan famously argued, state constitutions are independent sources of rights that require state courts to "marshal[] the distinct state texts and histories and draw[] their own conclusions from them."<sup>66</sup> Without such independent thought, he argued, "the full realization of our liberties cannot be guaranteed."<sup>67</sup>

At times, state and federal rights may be equivalent. But state courts should judiciously examine the nature of their state constitutional rights to determine whether the Supreme Court's interpretation is adequate in light of the source and nature of the state guarantee. This is true when the constitutional text of the state and federal right is identical, but it is even more imperative when state constitutions are textually distinct from the

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63 See Young, *supra* note 5, at 299 ("For states whose constitutions do not explicitly provide a voter registration deadline, unnecessary deadlines essentially impose an additional qualification to voter eligibility in violation of that constitution.").

64 Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339 n.80 (2011) (quoting Hans A. Lind, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 186 (1984)).

65 SUTTON, *supra* note 36, at 174–75.

66 *Id.* at 177.

67 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

federal right at hand.

Lockstepping is particularly inappropriate in the case of state constitutional voter protections. Section II.C.i frames this argument, discussing the promises and limitations of state constitutions as independent sources of rights. Sections II.C.ii–iv argue that the positive nature of the state right, the place state constitutions occupy in our federalist structure, and the varying textual language used by state constitutions suggest a right different in kind from the limited federal right underlying the *Anderson-Burdick* test. These differences indicate that state constitutions provide far more stringent protection of the right to vote than the Federal Constitution.

### i. State Constitutions Provide an Independent Source of Rights

State constitutions have always played an important role in our constitutional system. All of the individual rights enumerated in the Federal Constitution—free speech, free exercise of religion, separation of church and state, jury trial, the right to bear arms, prohibitions on unreasonable searches and seizures, prohibitions on the governmental taking of property, due process, no cruel and unusual punishment, equal protection, among others—originated in state constitutions.<sup>68</sup> Before the Federal Bill of Rights was incorporated against the states by the Fourteenth Amendment, it did not apply to the states.<sup>69</sup> Therefore, for the first 150 years of American constitutional law, the majority of individual rights claims were litigated in state courts under state constitutional law.<sup>70</sup>

As the Bill of Rights was incorporated against the states, particularly from the 1940s through the 1960s, litigants began to shift their focus to federal individual rights claims.<sup>71</sup> However, state law claims remain an important distinct source of rights.<sup>72</sup> As Justice Brennan stated in his seminal article on the topic, “the decisions of the [Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart

68 See SUTTON, *supra* note 36, at 8; Brennan, *supra* note 67, at 501 (“[E]ach of the rights eventually recognized in the Federal Bill of Rights had previously been protected in one or more state constitutions.”).

69 See *Barron v. City of Baltimore*, 32 U.S. 243 (1833) (holding that the Bill of Rights applied only to the federal government, not the states); see also SUTTON, *supra* note 36, at 12.

70 SUTTON, *supra* note 36, at 12–13.

71 The failure of the states to meaningfully enforce individual rights—most notably, but not exclusively, in the South—and the Warren Court’s willingness to step into that void and provide federal protection of individual rights made federal claims more advantageous for litigants at the time. See *id.* at 14–15.

72 *Id.*



provisions of state law.”<sup>73</sup> Some litigants heeded Justice Brennan’s call to bring claims in state courts, but often lawyers and courts have continued to focus on federal claims, at times to the detriment of independent state constitutional jurisprudence.<sup>74</sup>

State constitutions are not a panacea for all shortcomings of federal rights protection, but they can be an important tool when federal protections prove inadequate. State constitutional litigation cannot directly establish a nationwide right. This piecemeal approach can be costly for litigants, and success is sometimes reversed by state constitutional amendment.<sup>75</sup> As will become clear *infra* in Part III, challenges to voter registration deadlines are unlikely to succeed in some states. The most expedient path to national Election Day registration may be through Congress, however politically challenging such an approach would be.<sup>76</sup> But the protective treatment of voting rights by state constitutions suggests that, in many states, a powerful right lies dormant and under-litigated, even if it is not a solution in every state. Focusing solely on federal litigation leaves the right to vote under-protected by an inappropriately lenient federal test and ignores the rich and diverse tapestry of state constitutional protections.

State courts should look closely at their own constitutional texts to determine the nature and extent of the rights found therein. To quote Justice Brennan again,

state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.<sup>77</sup>

When one looks to those state constitutions, one sees how different the right to vote is from the one found in the Federal Constitution.

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73 Brennan, *supra* note 67, at 502.

74 SUTTON, *supra* note 36, at 8 (“[M]ost lawyers take one shot rather than two, and usually raise the federal claim rather than the state one.”).

75 See Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1699–1702 (2010).

76 Ho, *supra* note 4, at 186.

77 Brennan, *supra* note 67, at 491.

## ii. The Positive Right to Vote in State Constitutions Is Different in Kind from the Federal Right

The distinct nature of these rights makes the *Anderson-Burdick* test an inadequate protection of the state right to vote. A positive right to vote is unambiguously enumerated in forty-nine state constitutional texts,<sup>78</sup> while the federal right underlying the *Anderson-Burdick* test is one of negative implication. This difference should give state courts pause before adopting a federal standard derived from a completely distinct text. As discussed *supra* in Section I.A, the *Anderson-Burdick* test arose from rights of negative implication, resulting in a right to “electoral systems manifest[ing] certain properties in the aggregate.”<sup>79</sup> The Supreme Court has avowedly stated that “the right to vote, per se, is not a constitutionally protected right.”<sup>80</sup> In contrast, the affirmative state constitutional language creates an unambiguous individual right to vote conferred to every citizen who meets certain qualifications.<sup>81</sup> That distinction should not be rendered meaningless. This substantively different right deserves distinct consideration and should require state courts to apply more exacting scrutiny of election administration laws than is required by the federal test.<sup>82</sup>

## iii. The Federalism Discount Is Inapplicable in State Court

Respect for federalism was central to *Anderson-Burdick*'s deference to state election administration,<sup>83</sup> making that test inappropriately lenient when applied in state court. Article I, Section 2 is the only provision in the Federal Constitution that “actually tells us who may participate in our democracy.”<sup>84</sup> And, as discussed *supra* in Section II.A, it delegates that authority to the states. This express delegation of authority results in a hesitance to insert the federal judiciary into the states' exercise of this constitutionally delegated

78 *Supra* Section II.A.

79 Elmendorf, *supra* note 22, at 336.

80 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 n.78 (1973).

81 *See* Douglas, *supra* note 7, at 104–05 (“Unlike the U.S. Constitution, these state constitutional provisions explicitly grant the right to vote to all citizens who meet simple qualification rules.”).

82 *See id.* at 135 (concluding “*Burdick*'s severe burden formation [is] too deferential to state regulation of elections, as that test fails to recognize the explicit right of suffrage within state constitutions”).

83 *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (“[T]he Court . . . has recognized that States retain the power to regulate their own elections.”).

84 Douglas, *supra* note 7, at 101.

power.<sup>85</sup> Justifying deference to state administration of elections, Justice Scalia asserted that “detailed judicial supervision of the election process would flout the Constitution’s express commitment of the task to the States.”<sup>86</sup> It is illogically circular for state courts to refer back to a standard based on deference to their own authority. The “federalism discount” informing *Anderson-Burdick* has no applicability in a state court.<sup>87</sup>

*Anderson-Burdick*’s concern with the delicate balancing between protecting the right to the franchise and allowing for the orderly facilitation of elections is equally relevant in state court. But state courts should look to their own constitutions to determine the appropriate level of deference. Reflexively adopting the Supreme Court’s measured application of the Federal Constitution makes little sense given the federalism considerations motivating that standard.

#### iv. Unenumerated Conditions on the Right to Vote Deserve Heightened Judicial Scrutiny

The right to vote provided by state constitutions is not absolute. Some limited conditions are placed on that right.<sup>88</sup> Since state constitutions establish an affirmative right to vote and expressly articulate conditions on that right, they should be read to require heightened judicial scrutiny of unenumerated conditions imposed on the right to vote. “A contrary reading—that the legislature can override the explicit, mandatory nature of the right to vote—would make the constitutional grant of voting rights a nullity because it would be subject to unlimited legislative curtailment.”<sup>89</sup> Such a reading would render the positive right hollow and the enumerated conditions meaningless.

State constitutions strike a careful balance, giving state legislatures the freedom to impose some conditions on the right to vote, but not others. In some states, that includes conditioning the right to vote upon preregistration,

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85 See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring in the judgment).

86 *Id.*

87 See SUTTON, *supra* note 36, at 175 (“No state supreme court . . . has any reason to apply a ‘federalism discount’ to its decisions, making it odd for state courts to lean so heavily on the meaning of the Federal Constitution in construing their own.” (footnote omitted) (quoting Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1978–79 (2008))).

88 See, e.g., FLA. CONST. art. VI, § 2 (“Only a citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.”).

89 Douglas, *supra* note 7, at 141.

as discussed *infra* in Part III. These conditions give state legislatures some leeway to intrude on the right to vote in order to carry out orderly elections. As discussed *infra* in Part III, state constitutions vary significantly in the nature and scope of conditions they permit, providing unique contours to the right to vote in each state.

Flattening this constitutional diversity by applying the same deferential federal standard would be a disservice to these unique texts. When a state legislature strays outside constitutionally enumerated bounds and encroaches on the positive right to vote, courts should apply a heightened level of scrutiny. Others have wrestled with the precise nature of that test, and thorough examination of the topic is beyond the scope of this Note.<sup>90</sup> However, the texts of state constitutions and the importance of the right at hand suggest a stringent standard of review akin to strict scrutiny.<sup>91</sup> Setting the exact test aside, the critical question for state courts is whether to look beyond the permissive *Anderson-Burdick* test. When one considers voter registration deadlines specifically, the test of many state constitutions compel state courts to look beyond the federal test and apply heightened judicial scrutiny of registration schemes.

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90 Joshua Douglas compellingly argues that, as a result of the positive right to vote found in state constitutions, state courts should apply a two-step burden-shifting standard that would create a rebuttable presumption of invalidity for laws that impose unenumerated conditions on the right to vote. Douglas, *supra* note 7, at 137. This standard would require the plaintiff to demonstrate that the election law in question imposes an “additional qualification” on the right to vote. *Id.* If the plaintiff succeeds in showing that the law imposes a condition on voting, the burden shifts to the government to justify the imposition by “demonstrating how it is tied specifically to the legislature’s power” or “us[ing] specific evidence to justify [adding] a voting qualification beyond what the state constitution allows.” *Id.* at 141. “This formulation does not require widespread judicial oversight of elections, however, as states should be able to overcome the presumption of invalidity in most instances for run-of-the-mill election-administration laws.” *Id.* Douglas suggests “[t]his mode of analysis . . . adheres most closely to state constitutional text and structure.” *Id.* at 142.

Under Douglas’s model, a state would be required to justify the imposition of voter registration deadlines by pointing to their state constitutional text or providing specific evidence to support the practice. Given the strong evidence that voter registration deadlines are not necessary, *see* Young, *supra* note 5, at 299, this burden would be difficult for states to meet unless they could point to constitutional text providing the authority for a state legislature to impose such a qualification.

91 *See* Douglas, *supra* note 7, at 141. *But see* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 190 (2014) (arguing that the history of state constitutional interpretation of the right to vote supports application of *Anderson-Burdick*’s deferential standard, allowing “legislatures to impose reasonable regulations on the voting process”).

### III. STATE CONSTITUTIONS ADDRESS VOTER REGISTRATION DEADLINES IN DIFFERENT WAYS

The state constitutional provisions governing voter registration deadlines can be divided into three major categories that can help inform how state courts treat such policies in their respective states. Of the twenty-nine states that continue to employ voter registration deadlines,<sup>92</sup> nine allow the legislature to impose conditions or require a registration deadline, nine condition the right to vote on registration, and eleven grant a right unconditioned by registration. When one looks closely at state constitutional treatment of voter registration deadlines, a diverse quilt of constitutional federalism can be observed, with various nuanced approaches to protecting the right to vote. Flattening this constitutional variation under one federalized standard obliterates individual state approaches to the balancing of these important interests. In doing so, it eliminates the robust protection of the right to vote that many state constitutions clearly provide.

#### A. *Required Registration*

Nine state constitutions expressly require or provide the legislature the authority to enact a registration deadline.<sup>93</sup> For example, the Ohio Constitution establishes a thirty-day registration deadline, stating that citizens “registered to vote for thirty days” are “entitled to vote at all elections.”<sup>94</sup> The Missouri Constitution provides that “[a]ll citizens of the United States . . . [meeting certain conditions] are entitled to vote at all elections by the people, . . . if they are registered within the time prescribed by law.”<sup>95</sup> The New York Constitution reads, “registration shall be completed at least ten days before each election.”<sup>96</sup> The Oklahoma Constitution makes its positive right to vote “[s]ubject to such exceptions as the Legislature may prescribe.”<sup>97</sup> The scope of these provisions varies, with some granting the legislature broad authority to impose conditions on the right to vote, others expressly providing the legislature authority to impose a registration

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92 See *Voter Registration Deadlines*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx> (last updated Oct. 2, 2020), for a complete list of state voter registration deadline statutes. See also *infra* the Appendix.

93 See *infra* the Appendix (listing the relevant provisions in all nine state constitutions that expressly contemplate or require a registration deadline).

94 OHIO CONST. art. V, § 1.

95 MO. CONST. art. VIII, § 2.

96 N.Y. CONST. art. II, § 5.

97 OKLA. CONST. art. III, § 1.

deadline, and some setting out a specific timeframe for registration. All of these constitutions impose or provide legislatures with colorable grounds to impose a registration deadline as a condition upon the right to vote.

In many cases, this express constitutional authority forecloses the ability to seek abolition of the registration deadline on state constitutional grounds. Depending on the specific constitutional text, litigants may still be able to challenge the length of registration deadlines in some of these states. For example, there is pending litigation challenging the length of New York's twenty-five-day voter registration deadline despite the express constitutional requirement that voters register "at least ten days before each election."<sup>98</sup> However, outright challenges to registration deadlines in these states are unlikely to succeed given the strong textual basis for at least some form of registration deadline.

### B. *A Right Conditioned on Registration*

Nine states condition their positive right to vote on registration.<sup>99</sup> For example, the Alabama Constitution provides that "[e]very citizen . . . if registered as provided by law, shall have the right to vote."<sup>100</sup> In South Carolina, citizens are entitled to vote if they are "properly registered."<sup>101</sup> The Arkansas Constitution gives any person who is "[l]awfully registered to vote in the election" the right to do so.<sup>102</sup> These texts do not speak directly to the constitutionality of registration deadlines. However, because the right to vote is conditioned on registration, that right does not accrue until the voter is duly registered. This could lead courts to apply a less stringent test to laws infringing on the right to vote before registration occurs.

The challenge for litigants is persuading a court to apply a

98 N.Y. CONST. art. II, § 5; *see* League of Women Voters of N.Y. v. N.Y. Bd. of Elections, No. 160342/2018, at \*1 (N.Y. Sup. Ct. Oct. 4, 2019) (order denying the state's motion to dismiss a challenge to the length of New York's twenty-five-day voter registration deadline); League of Women Voters of N.Y. v. N.Y. Bd. of Elections, No. 160342/2018, at \*1–2 (N.Y. Sup. Ct. Sept. 25, 2020) (order denying plaintiff's motion for preliminary injunction).

99 *See, e.g.*, FLA. CONST. art. VI, § 2 ("Only a citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, *if registered as provided by law*, shall be an elector of the county where registered." (emphasis added)); S.C. CONST. art. II, § 4 ("Every citizen of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote as provided by law."); *see also infra* the Appendix (listing the relevant provisions in all nine state constitutions that condition the right to vote on registration).

100 ALA. CONST. art. VIII, § 177(a).

101 S.C. CONST. art. II, § 4.

102 ARK. CONST. art. III, § 1.

heightened level of scrutiny on a registration deadline in these states. Since the positive right is conditioned on registration, an otherwise eligible unregistered person turned away from the polls would not benefit from this positive right to vote conferred by the state constitution. Using Alabama's constitution to illustrate the point, a prospective voter not "registered as provided by law" would not be guaranteed "the right to vote" under the Alabama Constitution.<sup>103</sup> Without the expressly granted positive right to vote, a litigant's case for heightened scrutiny of the election law is weakened. The door is not completely shut on litigants in these states, but the argument is much weaker than it would be if the positive right to vote was conferred upon all regardless of registration status.

### C. *A Right Unconditioned by Registration*

Eleven states grant a positive right to vote unconditioned by voter registration.<sup>104</sup> In these states, the right to vote is conferred on all citizens who meet certain conditions irrespective of whether they are registered to vote. For example, in Kentucky, a citizen meeting certain conditions is entitled to "be a voter."<sup>105</sup> The West Virginia Constitution provides that "[t]he citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside."<sup>106</sup> In Indiana, citizens meeting certain requirements "may vote."<sup>107</sup> Many of these state constitutions grant the state legislature the power to provide for a voter registration process.<sup>108</sup> However, the positive right to vote is not conditioned on the completion of that registration process.

These state constitutions provide the strongest justification for heightened judicial scrutiny of registration deadlines. In these states, otherwise qualified voters are denied the right to vote for failing to preregister before Election Day. The imposition of this condition infringes upon their constitutionally protected right to vote. Given the infringement

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103 ALA. CONST. art. VIII, § 177(a).

104 See, e.g., KAN. CONST. art. V, § 1 ("Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector."); see also *infra* the Appendix (listing the relevant provisions in all eleven state constitutions that provide a positive right to vote unconditioned on registration).

105 KY. CONST. § 145.

106 W. VA. CONST. art. IV, § 1.

107 IND. CONST. art. II, § 2.

108 See, e.g., W. VA. CONST. art. IV, § 12 ("The Legislature shall enact proper laws for the registration of all qualified voters in this state."); IND. CONST. art. II, § 14(c) ("The General Assembly shall provide for the registration of all persons entitled to vote.").

upon the most fundamental of rights, courts should judiciously review the necessity of these requirements. Even where state constitutions provide for legislatively enacted registration processes, the process should not be permitted to unnecessarily inhibit access to the ballot. For example, West Virginia's constitution provides that "[t]he Legislature shall enact proper laws for the registration of all qualified voters in this state."<sup>109</sup> Yet the state's highest court held that "this authority to require registration of voters[] does not empower the Legislature to nullify or modify the constitutional right of a citizen to vote. Hence, registration laws must be framed with great caution, and construed liberally and favorably toward the right to vote."<sup>110</sup> Failure to provide this searching judicial review would render the positive right to vote an empty promise.

This range of approaches is an illustration of constitutional federalism in practice. Each constitution demonstrates a nuanced attempt to balance the protection of democracy's most fundamental right with the practical needs of election administration. Some states chose to require or grant their legislatures the authority to enact registration deadlines. Others chose to condition the right to vote on registration, providing legislators more leeway to burden voters before granting them an expansive right. But eleven states take a textually distinct approach in their constitutions. These states grant a positive right unconditioned by registration.

This textual difference suggests a recognition that the right to vote is fundamental and deserves rigorous constitutional protection from unnecessary burdens that the voter registration process might impose. If these states wanted to constitutionally require registration deadlines or give their legislatures wide discretion to do so, they could have adopted the first or second constitutional approach. Instead, these states provided an expansive, positive right to vote. The presence of some conditions makes the conspicuous absence of a condition of registration all the more telling. The texts of these constitutions provide a positive right to vote that applies to registration requirements. State courts should apply their constitutional texts as such and carefully examine voter registration requirements to ensure their legislatures do not unconstitutionally burden the right to vote.

Examination of these constitutional texts further illustrates the inapplicability of the deferential *Anderson-Burdick* test. As discussed *supra* in Part I, the nature of the federal right to vote and the Federal Constitution's delegation of the electoral process to the states leave little reason to apply that test in state court. The states' positive right to vote suggests *Anderson-*

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109 W. VA. CONST. art. IV, § 12.

110 *Funkhouser v. Landfried*, 22 S.E.2d 353, 356 (W. Va. 1942).



*Burdick's* inadequacy generally, but it would be particularly inadequate as applied to voter registration deadlines in these eleven states. As the Court reasoned in *Anderson*,

[w]e have recognized that, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” . . . [T]he State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.<sup>111</sup>

These state constitutions recognize this same practical consideration, but they strike a different balance. States have built many of these practical election administration considerations into their constitutional structure, and registration deadlines are no exception. These eleven states chose a textual construction of the right to vote that should—if they are to have meaning at all—limit the burdens that voter registration schemes can impose on that right. Courts in these states should recognize this distinction and employ heightened judicial scrutiny of voter registration schemes that impede this fundamental right.

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111 *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

## CONCLUSION

The right to vote is fundamental to a democratic society and deserves robust protection. The protection afforded by the Federal Constitution is limited, reflecting the negative nature of the right and the delegation of the electoral process to the states. When one looks to state constitutions, they provide robust affirmative protection of the right to vote. State courts should recognize this positive right and employ more stringent judicial scrutiny of election administration schemes that limit access to the ballot. State constitutions take a range of approaches when contemplating voter registration systems, balancing the protection of the right to vote with the need for the orderly administration of elections. Some state constitutions require or give legislatures significant freedom to implement registration deadlines. Others are more protective of the right to vote. This exercise of constitutional balancing should not amount to a distinction without a difference. Where the text of state constitutions takes a more protective bent, state courts should honor this choice and employ heightened scrutiny of voter registration schemes to provide this fundamental right its deserved protection.

APPENDIX: STATE CONSTITUTIONAL PROVISIONS ADDRESSING VOTER  
REGISTRATION DEADLINES

STATES THAT ALLOW LEGISLATIVE CONDITIONS OR REQUIRE VOTER REGISTRATION DEADLINES	
STATE	RELEVANT CONSTITUTIONAL CLAUSE(S)
DELAWARE	“There shall be at least two registration days in a period . . . ending not . . . less than ten days before, each General Election, on which registration days persons whose names are not on the list of registered voters established by law for such election, may apply for registration . . . .” <sup>112</sup>
MISSOURI	“All citizens of the United States . . . over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people, . . . if they are registered within the time prescribed by law . . . .” <sup>113</sup>
NEW YORK	“Every citizen shall be entitled to vote . . . provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.” <sup>114</sup>  “Laws shall be made for . . . the registration of voters; which registration shall be completed at least ten days before each election.” <sup>115</sup>
OHIO	“Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections.” <sup>116</sup>
OKLAHOMA	“Subject to such exceptions as the Legislature may prescribe, all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state, are qualified electors of this state.” <sup>117</sup>

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112 DEL. CONST. art. 5, § 4.

113 MO. CONST. art. VIII, § 2.

114 N.Y. CONST. art. II, § 1.

115 *Id.* § 5.

116 OHIO CONST. art. V, § 1.

117 OKLA. CONST. art. III, § 1.

PENNSYLVANIA	“Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.” <sup>118</sup>
RHODE ISLAND	“Every citizen of the United States of the age of eighteen years or over who has had residence and home in this state for thirty days next preceding the time of voting, who has resided thirty days in the town or city from which such citizen desires to vote, and whose name shall be registered at least thirty days next preceding the time of voting as provided by law, shall have the right to vote . . . .” <sup>119</sup>
TENNESSEE	“Every person, being eighteen years of age, being a citizen of the United States, being a resident of the State for a period of time as prescribed by the General Assembly, and being duly registered in the county of residence for a period of time prior to the day of any election as prescribed by the General Assembly, shall be entitled to vote in all federal, state, and local elections held in the county or district in which such person resides.” <sup>120</sup>
VIRGINIA	<p>“That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage . . . .”<sup>121</sup></p> <p>“The General Assembly shall provide by law for the registration of all persons otherwise qualified to vote who have met the residence requirements contained in this article, and shall ensure that the opportunity to register is made available. . . . The registration records shall not be closed to new or transferred registrations more than thirty days before the election in which they are to be used.”<sup>122</sup></p>

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118 PA. CONST. art. VII, § 1.

119 R.I. CONST. art. II, § 1.

120 TENN. CONST. art. IV, § 1.

121 VA. CONST. art. I, § 6.

122 *Id.* art. II, § 2.

STATES CONDITIONING THE RIGHT TO VOTE ON REGISTRATION	
STATE	RELEVANT CONSTITUTIONAL CLAUSE(S)
ALABAMA	“Every citizen . . . if registered as provided by law, shall have the right to vote in the county of his or her residence. The Legislature may prescribe reasonable and nondiscriminatory requirements as prerequisites to registration for voting.” <sup>123</sup>
ARKANSAS	“Except as otherwise provided by this Constitution, any person may vote in an election in this state who is . . . [l]awfully registered to vote in the election.” <sup>124</sup>
FLORIDA	“Only a citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.” <sup>125</sup>
LOUISIANA	“Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote . . . .” <sup>126</sup>
MISSISSIPPI	<p>“Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, . . . is declared to be a qualified elector . . . .”<sup>127</sup></p> <p>“The Legislature shall have the power to prescribe and enforce by appropriate legislation qualifications to be required of persons to vote and to register to vote in addition to those set forth in this Constitution.”<sup>128</sup></p>

123 ALA. CONST. art. VIII, § 177(a).

124 ARK. CONST. art. III, § 1(a).

125 FLA. CONST. art. VI, § 2.

126 LA. CONST. art. I, § 10(A).

127 MISS. CONST. art. XII, § 241.

128 *Id.* § 244A.

NORTH CAROLINA	<p>“Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.”<sup>129</sup></p> <p>“Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.”<sup>130</sup></p>
OREGON	<p>“Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen . . . [i]s registered not less than 20 calendar days immediately preceding any election in the manner provided by law.”<sup>131</sup></p>
SOUTH CAROLINA	<p>“All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.”<sup>132</sup></p> <p>“Every citizen of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote as provided by law.”<sup>133</sup></p> <p>“The General Assembly shall provide for the registration of voters for periods not less than ten years in duration.”<sup>134</sup></p>
SOUTH DAKOTA	<p>“Every United States citizen eighteen years of age or older who has met all residency and registration requirements shall be entitled to vote . . . . The Legislature may by law establish reasonable requirements to insure the integrity of the vote.”<sup>135</sup></p>

129 N.C. CONST. art. VI, § 1.

130 *Id.* § 3(1).

131 OR. CONST. art. II, § 2(1)(c).

132 S.C. CONST. art. I, § 5.

133 *Id.* art. II, § 4.

134 *Id.* § 8.

135 S.D. CONST. art. VII, § 2.

STATES GRANTING A POSITIVE RIGHT TO VOTE UNCONDITIONED BY REGISTRATION	
STATE	RELEVANT CONSTITUTIONAL CLAUSE(S)
ALASKA	“Every citizen of the United States . . . who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election.” <sup>136</sup>
ARIZONA <sup>137</sup>	“There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.” <sup>138</sup>  “All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” <sup>139</sup>
GEORGIA	“Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people. The General Assembly shall provide by law for the registration of electors.” <sup>140</sup>
INDIANA	“A citizen of the United States, who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election.” <sup>141</sup>  “The General Assembly shall provide for the registration of all persons entitled to vote.” <sup>142</sup>

136 ALASKA CONST. art. V, § 1.

137 Arizona is the one state that does not provide an explicit positive right to vote, therefore it does not fit neatly into this categorization. Since a positive right to vote could arguably be derived from the “free and equal” clause, it fits most appropriately into this category. See Douglas, *supra* note 7, at 102–03.

138 ARIZ. CONST. art. VII, § 12.

139 *Id.* art. II, § 21.

140 GA. CONST. art. II, § 1, para. II.

141 IND. CONST. art. II, § 2(a).

142 *Id.* § 14(c).

KANSAS	<p>“Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector.”<sup>143</sup></p> <p>“The legislature shall provide by law for proper proofs of the right of suffrage.”<sup>144</sup></p>
KENTUCKY	<p>“All elections shall be free and equal.”<sup>145</sup></p> <p>“Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct and not elsewhere . . . .”<sup>146</sup></p>
MASSACHUSETTS	<p>“All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.”<sup>147</sup></p>
NEBRASKA	<p>“All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise.”<sup>148</sup></p> <p>“Every citizen of the United States who has attained the age of eighteen years on or before the first Tuesday after the first Monday in November and has resided within the state and the county and voting precinct for the terms provided by law shall, except as provided in section 2 of this article, be an elector for the calendar year in which such citizen has attained the age of eighteen years and for all succeeding calendar years.”<sup>149</sup></p>
NEW JERSEY	<p>“Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote . . . .”<sup>150</sup></p>

143 KAN. CONST. art. V, § 1.

144 *Id.* § 4.

145 KY. CONST. § 6.

146 *Id.* § 145.

147 MASS. CONST. pt. 1, art. IX.

148 NEB. CONST. art. I, § 22.

149 *Id.* art. VI, § 1.

150 N.J. CONST. art. II, § 1, para. 3(a).



TEXAS	“Every person subject to none of the disqualifications provided by Section 1 of this article or by a law enacted under that section who is a citizen of the United States and who is a resident of this state shall be deemed a qualified voter; provided, however, that before offering to vote at an election a voter shall have registered, but such requirement for registration shall not be considered a qualification of a voter within the meaning of the term ‘qualified voter’ as used in any other Article of this Constitution in respect to any matter except qualification and eligibility to vote at an election.” <sup>151</sup>
WEST VIRGINIA	“The citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside.” <sup>152</sup>  “The Legislature shall enact proper laws for the registration of all qualified voters in this state.” <sup>153</sup>

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151 TEX. CONST. art. VI, § 2(a).

152 W. VA. CONST. art. IV, § 1.

153 *Id.* § 12.