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A Constitutional Right to Early Voting

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A CONSTITUTIONAL RIGHT TO EARLY VOTING

David Schultz*

Voting is a cost-benefit decision. Individuals are more likely to vote if the benefits of doing so outweigh the disadvantages. With early voting laws eased due to the COVID-19 pandemic, the 2020 election demonstrated that turnout increases when elected officials reduce voting costs. Despite all the benefits of early voting, there is no constitutional right, and it remains a privilege that state legislatures can revoke at will.

Since the 2020 election, state legislatures have proposed—and enacted—hundreds of bills to change voting rules. But with the intense partisan disagreement over voting, coupled with political polarization reaching an apex, these acts restricting early voting not only impact turnout, in general, but also have a more profound effect among women and people of color. While other scholarship has examined the effects of early voting regulations and called for laws to protect early voting, this Article contends that the right to vote should include a constitutional right to early voting—especially as more citizens are casting ballots before the prescribed day.

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INTRODUCTION

Political scientists tell us that, for many, voting is a cost-benefit decision.¹ Individuals are more likely to vote if the benefits of doing so outweigh the disadvantages.² For some, the calculus³ includes the political choices at hand: Do I like the candidate or

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¹ See, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260 (1957).

² See Lee Sigelman & William D. Berry, *Cost and the Calculus of Voting*, 4 *POL. BEHAV.* 419, 419–20 (1982).

³ *Why Are Millions of Citizens Not Registered to Vote?*, PEW CHARITABLE TRS. (June 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote> [https://perma.cc/87L3-UYTF].

party choices?⁴ Even if I do not like any candidates, are there some I dislike enough to vote against?⁵ Perhaps I do not like the policy positions of the candidates or wish there were other viable parties on the ballot.⁶

Yet, for others, the question of voting is a matter of convenience.⁷ Factors may include the difficulty of registering to vote,⁸ the location of the voting place,⁹ whether voting will require taking time off from work,¹⁰ or even gathering information necessary to make an informed choice.¹¹ But for some, timing and location are the biggest obstacles to voting.¹² Elections are generally held on a prescribed day. Federal and most state elections

⁴ Gustavo López & Antonio Flores, *Dislike of Candidates or Campaign Issues Was Most Common Reason for Not Voting in 2016*, PEW RSCH. CTR. (June 1, 2017), <https://www.pewresearch.org/fact-tank/2017/06/01/dislike-of-candidates-or-campaign-issues-was-most-common-reason-for-not-voting-in-2016> [<https://perma.cc/8XJH-SWM9>].

⁵ A.W. Geiger, *For Many Voters, It's Not Which Presidential Candidate They're for but Which They're Against*, PEW RSCH. CTR. (Sept. 2, 2016), <https://www.pewresearch.org/fact-tank/2016/09/02/for-many-voters-its-not-which-presidential-candidate-theyre-for-but-which-theyre-against> [<https://perma.cc/5TK8-WN8Y>].

⁶ Jeffrey M. Jones, *Support for Third U.S. Political Party at High Point*, GALLUP (Feb. 15, 2021), <https://news.gallup.com/poll/329639/support-third-political-party-high-point.aspx> [<https://perma.cc/2NWP-KHPY>].

⁷ Scot Schraufnagel et al., *Cost of Voting in the American States: 2022*, ELECTION L. J. 220, 223–26 (2022).

⁸ Leah Rodriguez, *5 Reasons People in the US Don't Vote*, GLOB. CITIZEN (Sept. 2, 2020), <https://www.globalcitizen.org/en/content/why-people-dont-vote> [<https://perma.cc/3S7Z-V3ZK>]; Joe McCarthy, *5 Voting Barriers Americans Face and How You Can Help*, GLOB. CITIZEN (Aug. 28, 2020), <https://www.globalcitizen.org/en/content/barriers-to-voting-in-the-us> [<https://perma.cc/QX2J-E3DM>].

⁹ Henry E. Brady & John E. McNulty, *Turning Out to Vote: The Costs of Finding and Getting to the Polling Place*, 105 AM. POL. SCI. REV. 115, 115–16 (2011); Matt Vasilogambros et al., *National Data Release Sheds Light on Past Polling Place Changes*, PEW CHARITABLE TRS. (Sept. 19, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/29/national-data-release-sheds-light-on-past-polling-place-changes> [<https://perma.cc/7PZH-W9S4>].

¹⁰ FRANCES FOX PIVEN, *WHY AMERICANS STILL DON'T VOTE: AND WHY POLITICIANS WANT IT THAT WAY* 33 (2000); Abigail Johnson Hess, *A Record 44% of US Employers Will Give Their Workers Paid Time Off to Vote This Year*, CNBC (Oct. 31, 2018, 12:52 PM), <https://www.cnn.com/2018/10/31/just-44percent-of-us-employers-give-their-workers-paid-time-off-to-vote.html> [<https://perma.cc/SY6J-576F>].

¹¹ André Blais et al., *What is the Cost of Voting?*, 59 ELECTORAL STUD. 145, 145–46 (2019); Jan Leighley & Johnathan Nagler, *Increase Turnout by Informing Voters about Policy Differences*, STAN. SOC. INNOVATION REV. (Mar. 14, 2016), https://ssir.org/articles/entry/increase_turnout_by_informing_voters_about_policy_differences [<https://perma.cc/YMU3-L4BG>].

¹² Brady & McNulty, *supra* note 9, at 128 (providing quantitative analysis to show that changes in polling location reduced turnout by “substantial” amount).

are held on the Tuesday after the first Monday in November.¹³ Since election days are generally not paid holidays, voting requires taking time off from work, traveling to a voting location, and casting a ballot.¹⁴ For many, this cost is not worth it.

As the 2020 elections demonstrate: reduce the cost of voting and turnout increases. While voter interest in the Trump-Biden election may have explained at least some of the increase in voter turnout, the easing of voting laws to make early voting more convenient and safe because of the COVID-19 pandemic led to the highest turnout in the United States in at least forty years.¹⁵

While other scholarship has examined the effects of early voting regulations and called for laws to protect this practice,¹⁶ this Article argues that the right to vote should include a constitutional right to early voting. For the purposes of this Article, early voting means “any system where voters can cast their ballot before the official Election Day.”¹⁷

I. THE TENUOUS RIGHT TO VOTE

There is no textually explicit right to vote in the United States Constitution. When the Framers drafted the Constitution, they did not include a right to the franchise.¹⁸ One possible reason

¹³ See 2 U.S.C. § 7 (“The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States . . . of Representatives . . . to the Congress.”); 3 U.S.C. § 1 (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”).

¹⁴ See generally Schraufnagel et al., *supra* note 7.

¹⁵ See Drew DeSilver, *Turnout Soared in 2020 as Nearly Two-thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president> [https://perma.cc/V9WL-93NP].

¹⁶ See generally Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015); Note, *It’s About Time (Place and Manner): Why and How Congress Must Act to Protect Access to Early Voting*, 128 HARV. L. REV. 1228 (2015); *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/CN7A-T22G]; Sarina Vij, *Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions*, A.B.A. (June 25, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout [https://perma.cc/5VS6-4HYJ].

¹⁷ Paul Gronke et al., *Early Voting and Turnout*, 40 PS: POL. SCI. & POLS. 639, 639 (2007).

¹⁸ See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000); DONALD GRIER

is that they did not trust the average person to make political decisions.¹⁹ Another possible explanation is that the Framers could not agree on who should be allowed to vote,²⁰ given the divides over slavery and representation.²¹ Whatever the reason, the question of the franchise was left out of the original Constitution, leaving it to the states to decide who could vote. Generally, this meant that franchise rights were relegated to white male property-owners who were at least twenty-one years old and often of some Protestant or Christian faith.²²

The original Constitution provided relatively little about federal elections. Article II, Section 2 provides for the Electoral College and for each state legislature to determine the selection of the president through electors—not by a popular vote.²³ Article I, Section 3, originally provided that U.S. Senators were to be chosen by state legislatures—not voters.²⁴ And under Article I, Section 2, members of the U.S. House of Representatives were to be chosen by whatever electorate states allowed for under their own laws.²⁵

A conventional reading of the Nation's history would declare that franchise rights gradually expanded.²⁶ The Fifteenth Amendment, adopted in 1870, declared that the right to vote could not be denied or abridged on account of race.²⁷ The Nineteenth Amendment in 1920 declared the same when it came to sex.²⁸ The Twenty-Sixth Amendment in 1971 did the same regarding age—by lowering the voting age to eighteen.²⁹ Other constitutional amendments also altered the rules regarding voting and nationalized standards. The Seventeenth Amendment, ratified in 1913, brought the Senate in line with the House by declaring that the people elect

STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW* (2004).

¹⁹ See James P. Pfiffner & Jason Hartke, *The Electoral College and the Framers' Distrust of Democracy*, 3 *WHITE HOUSE STUD.* 261, 262–63 (2003).

²⁰ See KEYSSAR, *supra* note 18, at 22–24; Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 *U.C. DAVIS L. REV.* 1081, 1082–83 (2018); ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 87–96 (7th ed. 1991).

²¹ See James Madison, *Proceedings of Convention, June 19–July 13*, in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 322, 486 (Max Farrand ed., 1911).

²² See KEYSSAR, *supra* note 18, at 22–30.

²³ U.S. CONST. art II, § 2.

²⁴ *Id.* art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof.”), *amended by* U.S. CONST. amend. XVII, § 1.

²⁵ *Id.* art. I, § 2.

²⁶ See generally KEYSSAR, *supra* note 18.

²⁷ U.S. CONST. amend. XV.

²⁸ *Id.* amend. XIX.

²⁹ *Id.* amend. XXVI.

senators.³⁰ And the Twenty-Fourth Amendment, ratified in 1964, barred poll taxes.³¹

These Amendments—along with legislation such as the Indian Citizenship Act of 1924,³² the Voting Rights Act of 1965,³³ the Voting Accessibility for the Elderly and Handicapped Act of 1984,³⁴ the Uniformed and Overseas Citizens Absentee Voting Act of 1986,³⁵ the voting provisions in the Americans with Disabilities Act of 1990,³⁶ the National Voter Registration Act of 1993,³⁷ and the Help America Vote Act of 2002³⁸—have potentially expanded the franchise or made it easier to vote. Yet none created a *right* to vote. Instead, they merely conveyed why individuals could not be prevented from voting, without affirmatively granting the right.

In theory, the United States Supreme Court has declared voting a fundamental right. In *United States v. Classic*,³⁹ the Court held that the right to vote was “established and guaranteed by the Constitution.”⁴⁰ In *Reynolds v. Sims*⁴¹ and *Harper v. Virginia Board of Elections*,⁴² the Court situated the right to vote in state and local elections in the Fourteenth Amendment.⁴³ Yet, despite this so-called right to vote, the Court has allowed many restrictions on voting rights. For example, people previously convicted of felonies may be barred from voting.⁴⁴ The Court has also crafted the

³⁰ *Id.* amend. XVII.

³¹ *Id.* amend. XXIV.

³² Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1994)).

³³ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections at 52 U.S.C.).

³⁴ Pub. L. No. 98-435, 98 Stat. 1678 (codified as amended at 52 U.S.C. §§ 20101–20107) (requiring election officials to provide either an accessible polling place in federal elections or an alternative means of voting).

³⁵ Pub. L. No. 99-410, 100 Stat. 924 (codified as amended at 52 U.S.C. §§ 20301–20311) (allowing members of the armed services and their families to vote by absentee ballots when stationed overseas).

³⁶ Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101–12213).

³⁷ Pub. L. No. 103-31, 107 Stat. 77 (codified at 52 U.S.C. §§ 20501–20511).

³⁸ Pub. L. No. 107, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901–21145).

³⁹ 313 U.S. 299 (1941).

⁴⁰ *Id.* at 314–15.

⁴¹ 377 U.S. 533 (1964).

⁴² 383 U.S. 663 (1966).

⁴³ Some legal scholars have suggested that the First Amendment presents “an appropriate source of protection against the laws challenged in *Reynolds* and *Harper*.” Jan S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 457 U. PA. J. CONST. L. 457, 460 (2007). For example, Justice Brennan’s dissent in *Storer v. Brown* posited that the right to vote is derived from the First Amendment’s right of association. 415 U.S. 724, 756 (1974) (Brennan, J., dissenting).

⁴⁴ See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (ruling that convicted felons could be barred from voting without violating the Fourteenth Amendment).

Anderson-Burdick test,⁴⁵ indicating a difference between imposing “severe” burdens on voting and routine administrative regulation of the time, manner, and place of casting a ballot.⁴⁶ Such a distinction has permitted the imposition of voter identification laws to regulate purported voter fraud,⁴⁷ which can burden voters, particularly those of low-income and minority groups.⁴⁸

The point here is that the fundamental right to vote is, at best, tenuous. There is still no right to vote for president, and various restrictions may be imposed for all other state and federal elections.⁴⁹ As a result, many of these restrictions impact who votes, arguably contributing to a skewed electorate that favors white Americans who are more affluent, older, and better educated than the general population.⁵⁰ Those who are poor, younger, and of color are generally less likely to vote.⁵¹

The United States remains an anomaly compared to other democracies. Indeed, it is the only democracy without an explicit constitutional right to vote and has among the lowest voter turnout rates.⁵² Ideally, amending the Constitution is, or at least should be, a first step to improving turnout, but simply adopting textual language is not enough. As Parts II and III detail, voting needs to be easier and more convenient.

⁴⁵ This framework, commonly known as the *Anderson-Burdick* test, originates from two U.S. Supreme Court cases, *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). Specifically, the test balances a plaintiff’s First and Fourteenth Amendment rights against a state’s asserted interest in conducting elections. See Andrew Vazquez, *Updating Anderson-Burdick to Evaluate Partisan Election Manipulation*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 44, 45 (2022).

⁴⁶ See *Crawford v. Marion County Election Board*, 553 U.S. 181, 189–91 (2008).

⁴⁷ See Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CAL. L. REV. 2323, 2347–48 (2021).

⁴⁸ See Richard W. Trotter, *Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a Structural Right*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 516, 518–19 (2013).

⁴⁹ See *infra* Part II.

⁵⁰ See generally WARREN E. MILLER & J. MERRILL SHANKS, *THE NEW AMERICAN VOTER* (1996); MICHAEL S. LEWIS-BECK ET AL., *THE AMERICAN VOTER REVISITED* (2008) (discussing the profile of the “typical” voter).

⁵¹ See *Who Votes, Who Doesn’t, and Why*, PEW RSCH. CTR. (Oct. 18, 2006), <https://www.pewresearch.org/politics/2006/10/18/who-votes-who-doesnt-and-why/#voting-and-demographic-factors> [https://perma.cc/9ZK6-44GZ].

⁵² See Drew DeSilver, *Turnout in U.S. Has Soared in Recent Elections but by Some Measures Still Trails That of Many Other Countries*, PEW RSCH. CTR. (Nov. 1, 2022), <https://www.pewresearch.org/fact-tank/2022/11/01/turnout-in-u-s-has-soared-in-recent-elections-but-by-some-measures-still-trails-that-of-many-other-countries> [https://perma.cc/9ZK6-44GZ].

II. EARLY VOTING AS A PRIVILEGE

There is no unconditional federal right to vote. Voting rights and voter rules and regulations largely remain a matter of state law. Indeed, while most states explicitly confer the right to vote in their state constitutions, state courts have underenforced the franchise right by too closely following federal court jurisprudence.⁵³ Across the United States, the pattern of regulations and restrictions is significant.⁵⁴

Yet faced with the threat of the COVID-19 pandemic in 2020, many states altered voting procedures, even if only temporarily.⁵⁵ Perhaps the scene of the Wisconsin primary in April 2020, where individuals risked their lives to vote in the face of COVID-19, prompted states to respond.⁵⁶ Some states, such as Washington and Oregon, already had universal voting by mail, making remote or early voting possible.⁵⁷ Other states already had early (no excuse) voting or absentee voting in place.⁵⁸ And other states made dropping ballots off easier during the pandemic.⁵⁹ A

⁵³ See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 90 VAND. L. REV. 89, 91 (2014); *Free and Equal Election Clauses in State Constitutions*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 4, 2019), <https://www.ncsl.org/redistricting-and-census/free-and-equal-election-clauses-in-state-constitutions> [<https://perma.cc/8RUD-FNDR>].

⁵⁴ See *infra* note 62 and accompanying text.

⁵⁵ See Matt Vasilogambros & Lindsey Van Ness, *States Expanded Voting Access for the Pandemic. The Changes Might Stick*, PEW CHARITABLE TRS. (Nov. 6, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/06/states-expanded-voting-access-for-the-pandemic-the-changes-might-stick> [<https://perma.cc/XZ7A-NPZV>].

⁵⁶ See Nick Corasaniti & Stephanie Saul, 'Your Health or the Right to Vote': A Battle in Wisconsin as Its Primary Nears, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2020/03/27/us/politics/wisconsin-primary-coronavirus.html> [<https://perma.cc/UT6S-FPN3>].

⁵⁷ See *Voting Outside the Polling Place Project, Table 18: States with All-Mail Elections*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 3, 2022), <https://www.ncsl.org/elections-and-campaigns/table-18-states-with-all-mail-elections> [<https://perma.cc/3GVM-U6MH>].

⁵⁸ See *Voting Outside the Polling Place Project, Table 1: States with No-Excuse Absentee Voting*, NAT'L CONF. OF STATE LEGISLATURES (July 12, 2022), <https://www.ncsl.org/elections-and-campaigns/table-1-states-with-no-excuse-absentee-voting> [<https://perma.cc/NX4T-FA58>]. As of July 2022, twenty-seven states and Washington, D.C., offer "no-excuse" absentee voting, which allows voters to request and cast a mail ballot without any excuse or reason necessary. See *id.*

⁵⁹ See Elaine S. Povich, *Rise in Use of Ballot Drop Boxes Sparks Partisan Battles*, PEW CHARITABLE TRS. (Oct. 16, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/10/16/rise-in-use-of-ballot-drop-boxes-sparks-partisan-battles> [<https://perma.cc/Y6EJ-KBTN>].

few states, like Virginia, went even further and declared election day a state holiday.⁶⁰ Overall, the options for casting a ballot expanded.

Yet none of this was a matter of constitutional right. While states may declare that voting is a right under their own laws or constitutions, the majority rule across the country is that absentee or early voting, or other mechanisms to vote beyond showing up in person on election day, are merely a privilege.⁶¹ As a privilege, the franchise can be revoked or altered by legislative will. And that is precisely what is now taking place, as several states have recently proposed and enacted legislation to make voting more restrictive.⁶²

These proposals and enactments are in response to the 2020 general election. In 2020, then-President Donald Trump received more votes than any sitting president had ever received.⁶³ But he received fewer votes than Democratic candidate Joseph Biden,⁶⁴ especially in the crucial swing states that ultimately determined the

⁶⁰ See, e.g., Paul LeBlanc, *Virginia Governor Makes Election Day a Holiday and Expands Early Voting*, CNN (Apr. 12, 2020, 3:57 PM), <https://www.cnn.com/2020/04/12/politics/virginia-election-day-holiday-early-voting/index.html> [https://perma.cc/A6GM-56DV].

⁶¹ See, e.g., *Hardin v. Montgomery*, 495 S.W.3d 686, 696 (Ky. 2016) (“The right to vote by absentee ballot is a special privilege granted by the legislature.” (citing *Ragan v. Burnett*, 305 S.W.2d 759, 760 (Ky. 1957))); *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 809 (1969) (noting that the state could “make voting easier for all concerned by extending absentee voting privileges . . . [but] [i]ts failure to do so” is not arbitrary); *Franks v. Hubbard*, 498 S.W.3d 862, 868 (Mo. Ct. App. 2016) (“[T]he opportunity to vote by absentee ballot is clearly a privilege and not a right.” (citing *Barks v. Turnbeau*, 573 S.W.2d 677, 681 (Mo. Ct. App. 1978))); *Sheehan v. Franken*, 767 N.W.2d 453, 462 (Minn. 2009) (explaining that voting by absentee ballot is a “privilege, rather than of a right . . . [because] the privilege of absentee voting is granted by the legislature, [and] the legislature may mandate the conditions and procedures for such voting.” (citing *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975))).

⁶² See *Voting Laws Roundup: December 2022*, BRENNAN CTR. FOR JUST. (Feb. 1, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022> [https://perma.cc/B4ZL-KC75] (categorizing legislation as “restrictive” if the proposal “would make it harder for eligible Americans to register, stay on the voter rolls, and/or vote as compared to existing state law.”) [hereinafter *2022 Voting Laws Roundup*]; James J. Sample, *Voting Rights or Voting Entitlements?*, 60 HOUS. L. REV. 51, 88 (2022) (“Strict voter photo ID laws, elimination of early voting, voter intimidation, polling place relocations, failure to accept Native American tribal IDs, dramatic voter purging, a lack of language-accessible materials, and proof of citizenship laws are only some examples of thinly veiled voter-suppression tactics.”).

⁶³ Matthew Impelli, *Donald Trump’s 72 Million Popular Votes Is the Most for a Sitting President In U.S. History*, NEWSWEEK (Nov. 12, 2020, 11:16 AM), <https://www.newsweek.com/donald-trumps-72-million-popular-votes-most-sitting-president-us-history-1546930> [https://perma.cc/9J9K-AC5F].

⁶⁴ Ruth Igielnik et al., *Behind Biden’s 2020 Victory*, PEW RSCH. CTR. (June 30, 2021), <https://www.pewresearch.org/politics/2021/06/30/behind-bidens-2020-victory> [https://perma.cc/4984-AQCT].

Electoral College winner.⁶⁵ On Election Day, Trump appeared to lead Biden in the popular vote in these critical swing states, but once the absentee and early votes were received and tabulated, Trump's lead in places such as Arizona, Georgia, Pennsylvania, and Wisconsin faded.⁶⁶ In turn, Trump and his legal team falsely claimed widespread voter fraud and that elections were stolen.⁶⁷ The Trump Campaign's allegations never held up, however, losing more than sixty federal and state court challenges due to insufficient evidence.⁶⁸ As Rudy Giuliani, Trump's personal attorney, stated regarding voter fraud: "We've got lots of theories, we just don't have the evidence."⁶⁹

In the 2020 general election, more than 101 million⁷⁰ out of 154.6 million people—more than 65 percent of voters—voted early by mail or some other mechanism to cast a ballot other than showing up in person on Election Day.⁷¹ The national turnout in 2020 was the highest since at least 1980.⁷² Certainly, the interest in the presidential election, especially in the swing states, was a significant factor. Donald Trump himself was, of course, a mobilizing factor as well, encouraging both Democrats and Republicans to vote.⁷³ But if voting is a cost-benefit calculation,⁷⁴ loosening restrictions on

⁶⁵ In 2020, for example, Biden won Arizona, Georgia, and Wisconsin by 19,457, 11,779, and 20,682 votes respectively—or collectively by 42,918 votes. *2020 Presidential Election Results*, CNN, <https://www.cnn.com/election/2020/results/president> [<https://perma.cc/5BJW-VDT5>] (last visited Mar. 20, 2023).

⁶⁶ Tom Hamburger et al., *Election Officials Fear Counting Delays Will Help Fuel Claims of Fraud*, WASH. POST (Nov. 7, 2022, 6:00 AM), <https://www.washingtonpost.com/nation/2022/11/07/election-officials-fear-counting-delays-will-help-fuel-claims-fraud> [<https://perma.cc/4NGC-F8DM>].

⁶⁷ See Meredith McGraw, *Trump's Election Fraud Claims Were False. Here Are His Advisers Who Said So*, POLITICO (June 13, 2022, 8:49 PM), <https://www.politico.com/news/2022/06/13/trumps-election-fraud-claims-were-false-here-are-his-advisers-who-said-so-00039346> [<https://perma.cc/UXH2-CV3X>].

⁶⁸ See Jim Rutenberg et al., *Trump's Fraud Claims Died in Court, but the Myth of Stolen Elections Lives on*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> [<https://perma.cc/A96U-7STH>].

⁶⁹ H.R. REP. NO. 117-000, at 46, 288 (2022).

⁷⁰ Michael McDonald, *2020 General Election Early Vote Statistics*, U.S. ELECTIONS PROJECT, <https://electproject.github.io/Early-Vote-2020G/index.html> [<https://perma.cc/ZR32-Y9WC>] (last visited Mar. 20, 2023).

⁷¹ Press Release, U.S. CENSUS BUREAU, *Census Bureau Releases 2020 Presidential Election Voting Report* (Feb. 17, 2022), <https://www.census.gov/newsroom/press-releases/2022/2020-presidential-election-voting-report.html> [<https://perma.cc/3J7A-2CF4>].

⁷² DeSilver, *supra* note 15.

⁷³ See Nicholas Riccardi, *Referendum on Trump Shatters Turnout Records*, ASSOCIATED PRESS (Nov. 9, 2020), <https://apnews.com/article/referendum-on-trump-shatter-voter-record-c5c61a8d280123a1d340a3f633077800> [<https://perma.cc/F6RZ-H68Y>].

⁷⁴ See DOWNS, *supra* note 1, at 260.

voting and making it easier to cast a ballot before Election Day might have also been a factor.⁷⁵ In fact, even before the 2020 election, an increasing number of voters were casting ballots before election day.⁷⁶ Clearly, the public likes the convenience of early voting.⁷⁷ While the turnout was not at the level of many other democracies, such as in Europe,⁷⁸ as the costs of voting decreased, turnout increased.

Despite a lack, if not total absence, of evidence, around 40 percent of the population still believes the election was stolen.⁷⁹ In 2022, more than 400 bills were proposed to alter state election rules, many aimed at weakening laws that made it easier to vote early.⁸⁰ Although evidence indicates a strong correlation between early voting and higher turnout,⁸¹ there is no guarantee that early voting is here to stay. It is, at best, a privilege built off a highly nuanced right to vote that is less fundamental than it seems.

III. THE CONSTITUTIONAL CASE FOR EARLY VOTING

This constitutional conundrum can be presented in the following way: How can we render early voting a right when the franchise right itself is tenuous?

Option one begins by taking seriously Supreme Court opinions such as *Classic* and *Harper*, where voting was declared a fundamental right.⁸² Notwithstanding the language of the Fifteenth,

⁷⁵ Riccardi, *supra* note 73; Miles Parks, *2020 Changed How America Votes. The Question Now is Whether Those Changes Stick*, NAT'L PUB. RADIO (Oct. 28, 2022, 5:00 AM), <https://www.npr.org/2022/10/28/1128695831/united-states-2022-patterns-mail-early-voting> [<https://perma.cc/F6F5-S8B9>].

⁷⁶ See Parks, *supra* note 75.

⁷⁷ See Nicole Willcoxon & Lydia Saad, *Eight in 10 Americans Favor Early Voting, Photo ID Laws*, GALLUP (Oct. 14, 2022), <https://news.gallup.com/poll/403052/eight-americans-favor-early-voting-photo-laws.aspx> [<https://perma.cc/94SY-STRE>] (noting that 78 percent of those surveyed favor or support early voting options).

⁷⁸ See DeSilver, *supra* note 52 (noting that the United States came in thirty-first in terms of voter turnout in an analysis of forty-nine nations that recently held elections).

⁷⁹ Giulia Carbonaro, *40% of Americans Think 2020 Election Was Stolen, Just Days Before Midterms*, NEWSWEEK (Nov. 2, 2022, 5:25 AM), <https://www.newsweek.com/40-americans-think-2020-election-stolen-days-before-midterms-1756218> [<https://perma.cc/TWN9-LPZJ>] (citing survey with 1,500 eligible voters, of which 24 percent “strongly agreed” that the election was stolen, while 16 percent “agreed.”).

⁸⁰ See *2022 Voting Laws Roundup*, *supra* note 62.

⁸¹ See Matt Grossman, *How Early Voting is Changing American Elections*, NISKANEN CTR. (Nov. 30, 2022), <https://www.niskanencenter.org/how-early-voting-is-changing-american-elections> [<https://perma.cc/R8AQ-YULX>] (looking at the relationship between voter turnout and the increased use of early voting mechanisms); Gronke et al., *supra* note 17, at 642–44.

⁸² See *supra* Part I.

Nineteenth, and Twenty-Sixth Amendments, which declare the conditions under which voting cannot be denied, several Supreme Court opinions assert a positive right to vote.⁸³ By taking voting rights seriously, this Article proposes using these precedents and giving full meaning to the right to vote.

In *Reynolds* and *Harper*, the Court began to “give real contents and contours to the right to vote.”⁸⁴ For example, in *Reynolds*, the Court used robust language concerning the right to vote, noting the importance of its ability to protect other liberties: “Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to [vote] . . . is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”⁸⁵ The *Reynolds* Court noted that the franchise right emanated from the “essence of a democratic society,”⁸⁶ citing a 1950 dissent by Justice Douglas:

There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted . . . [and] the right to have the vote counted at full value without dilution or discount.⁸⁷

In *Allen v. State Board of Elections*,⁸⁸ the Court reasserted the purpose of the Voting Rights Act, proclaiming that voting “include[s] all action[s] necessary to make a vote effective in any primary, special, or general election including, but not limited to, registration, listing . . . or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly.”⁸⁹

Further, in *Bush v. Gore*,⁹⁰ the Court stated that once a state grants the right to vote, states may not act inconsistent with the

⁸³ *See id.*

⁸⁴ Schacter, *supra* note 43, at 460.

⁸⁵ *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

⁸⁶ *Id.* at 556.

⁸⁷ *Id.* at 555 n.29 (citing *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

⁸⁸ 393 U.S. 544 (1969).

⁸⁹ *Id.* at 563.

⁹⁰ 531 U.S. 98, 104–05 (2000) (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966))).

Fourteenth Amendment's Equal Protection Clause.⁹¹ In reference to *Reynolds*, the Court noted that it “must be remembered that ‘the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.’”⁹²

Indeed, the Court has consistently recognized that either there is a right to vote under the Constitution, or that, once a voting right has been established, the conditions under which that right is exercised determine whether it is abridged. States cannot simply tell their citizens they have a right to vote and ignore the conditions under which they vote. Actions that burden the ability to vote can be as onerous or unconstitutional as efforts simply to deny the initial allocation of the franchise. Implicitly in these decisions and through establishing the *Anderson-Burdick* test, the Court has seemingly recognized that voting is a cost-benefit decision where burdens on the actual casting of a ballot must be considered.

Moreover, in *Crawford v. Marion County Election Board*,⁹³ the Court explicitly acknowledged that regulations can be so burdensome that they cross the line from mere regulation to an unconstitutional condition.⁹⁴ In evaluating constitutional challenges to election regulations, the *Crawford* Court cited *Anderson-Burdick*'s “flexible standard”: an evaluating court “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.’”⁹⁵ The key issue is the *severity* of the burden. In *Crawford* and other voting rights cases, the Court has repeatedly declared that unconstitutional conditions cannot be imposed on voting rights, even if the regulations are facially neutral.⁹⁶

Notably, the *Crawford* Court upheld the imposition of voter identification laws.⁹⁷ But the decision should not be taken as precedent that all voting regulations are constitutional. *Crawford* was a facial challenge. In applying the *Anderson-Burdick* test to assess whether regulations impose severe burdens on the right to vote, the *Crawford* plaintiffs failed to meet their evidentiary or empirical burden to show how the voter identification laws prevented them from voting. They lost because they offered a putative or speculative argument about the burden voter identification would have. In his majority opinion, Justice Stevens pointed out in a footnote that, perhaps, an as-applied challenge

⁹¹ *See id.*

⁹² *Id.* at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

⁹³ 553 U.S. 181 (2008).

⁹⁴ *See id.* at 202–04.

⁹⁵ *Id.* at 203 n.8.

⁹⁶ *See id.* at 185–89.

⁹⁷ *Id.* at 202–03 (finding that the state’s voter identification requirement did not impose a “substantial burden” because the state was applying it to all citizens).

documenting real burdens would yield a different result.⁹⁸ Again, this language suggests the Court's recognition that voting is a cost-benefit assessment by the voter, who likely considers the costs of casting a ballot.

For these reasons, it is possible to document empirical political science research supporting that the more costs associated with voting, the less likely one is to vote.⁹⁹ As discussed, these costs include taking time off from work, arranging child care, traveling to a voting location on a specific day, and the time it takes to vote.¹⁰⁰ For those who work second or third shifts, are ill, out of town for work, serving in the military or working for the government abroad, or otherwise unable to cast a ballot under these conditions, their ability to vote is jeopardized at the caprice of legislators who may grant or restrict early voting at whim.

It is also necessary to consider how a failure to provide for early voting or alternative means disproportionately impacts specific groups. Most notably, women, the elderly, and the ill are more likely to be affected by the inability to vote early and, if denied such an ability, prevented from casting a ballot altogether.¹⁰¹ Such denial could rise to an equal protection or First Amendment claim based on an outright denial of the ability to vote because of the inability to be physically present at the polls. Especially for women, this would be a form of intentional gender-based discrimination or a denial of the right to vote in state and local elections in violation of the First Amendment.

Additionally, since evidence demonstrates that people of color are particularly impacted by the lack or absence of early voting opportunities, it raises the question of whether early voting restrictions could similarly constitute a form of racial discrimination.¹⁰² The basis of such a claim would be an intentional singling out of people of color to deny them the right to vote. This kind of challenge could draw on evidence to argue that women, people of color, and other historically marginalized groups are hurt

⁹⁸ See *id.* at 216 n.20.

⁹⁹ See generally MEREDITH ROLFE, *VOTER TURNOUT: A SOCIAL THEORY OF POLITICAL PARTICIPATION* (2012).

¹⁰⁰ See *supra* text accompanying notes 8–14.

¹⁰¹ See Jeffrey M. Jones, *Early Voting Higher Than in Past U.S. Midterms*, GALLUP (Nov. 2, 2022), <https://news.gallup.com/poll/404558/early-voting-higher-past-midterms.aspx> [<https://perma.cc/Y2YT-CNVV>] (indicating how women and the elderly are more likely to use early voting compared to younger voters and men).

¹⁰² See, e.g., *The Impact of Voter Suppression on Communities of Color*, *supra* note 16; Vij, *supra* note 16.

when early voting is restricted¹⁰³—that efforts to limit this voting option are intentional voter suppression and therefore meet the Equal Protection Clause’s requirement of intentional discrimination to be actionable.¹⁰⁴

Finally, party and political polarization in the United States are at an apex.¹⁰⁵ Many states have political trifectas where one party controls both chambers of the legislature and the governor’s office.¹⁰⁶ Just as partisan gerrymandering targets voters on the basis of party or partisanship,¹⁰⁷ evidence shows that changes to voting laws have partisan effects or motives.¹⁰⁸ If so, then the decision to curtail early voting might rise to a First Amendment viewpoint- or content-based restriction.¹⁰⁹

Other legal scholars have argued that, in cases where something is a privilege, states may not place unconstitutional

¹⁰³ *The Impact of Voter Suppression on Communities of Color*, *supra* note 16; *Voter Suppression Targets Women, Youth and Communities of Color (Issue Advisory, Part One)*, NAT’L ORG. OF WOMEN (2014), <https://now.org/resource/voter-suppression-targets-women-youth-and-communities-of-color-issue-advisory-part-one> [<https://perma.cc/4W8W-PQV3>] (last visited Mar. 20, 2023); Leisa Mukai, *Voter Suppression Disproportionately Affects Women*, PEACE HOUSE (Sept. 28, 2020), <https://peacehouse.org/blog/voter-suppression-disproportionately-affects-women> [<https://perma.cc/5JET-CL67>].

¹⁰⁴ *See, e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁰⁵ *See generally* EZRA KLEIN, *WHY WE’RE POLARIZED* (2020); ZOLTAN L. HAJINAL, *DANGEROUSLY DIVIDED: HOW RACE AND CLASS SHAPE WINNING AND LOSING IN AMERICAN POLITICS* (2020); RYAN D. ENOS, *THE SPACE BETWEEN US: SOCIAL GEOGRAPHY AND POLITICS* (2017); MORGAN MARIETTA & DAVID C. BARKER, *ONE NATION, TWO REALITIES: DUELING FACTS IN AMERICAN DEMOCRACY* (2019); SARAH BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* (2003); JACOB HACKER & PAUL PIERSON, *WINNER TAKE ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); THOMAS MANN & NORMAN ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012); NOLAN MCCARTHY, *POLARIZATION: WHAT EVERYONE NEEDS TO KNOW* (2019).

¹⁰⁶ *See State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas [<https://perma.cc/9VNK-D8QZ>] (last visited Mar. 20, 2023) (noting that thirty-nine states have a one-party rule).

¹⁰⁷ *See generally* Bertrall Ross, *Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187 (2018).

¹⁰⁸ *See generally* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014); Philip Ewing, *Voting and Elections Divide Republicans and Democrats Like Little Else. Here’s Why*, NAT’L PUB. RADIO (June 12, 2020, 5:03 AM), <https://www.npr.org/2020/06/12/873878423/voting-and-elections-divide-republicans-and-democrats-like-little-else-heres-why> [<https://perma.cc/JSR2-KHE9>].

¹⁰⁹ *See, e.g.*, *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 675-78 (1996) (holding that considerations of party affiliation in the hiring, firing, and awarding of government contracts violated the First Amendment). *See generally* *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

conditions upon that privilege.¹¹⁰ Even though voting is theoretically a right, the *Anderson-Burdick* test effectively treats it like a privilege—one that states may limit or regulate as, for example, by prohibiting early voting. The Court once imposed a right-privilege distinction, contending that if something were the latter, the government could regulate or condition it by any means.¹¹¹ But this distinction is no longer accepted in the law.¹¹²

This suggests that even if states can impose conditions on voting, those conditions must still be constitutional. Efforts to limit or prevent early voting might implicitly raise equal protection concerns by targeting specific groups of people. They also might present due process or First Amendment concerns if they are arbitrary or target specific persons or viewpoints.¹¹³ The intentional or unintentional burdens placed upon those who cannot vote in person on election day might be so significant that we should treat these burdens as unconstitutional conditions on early voting.

CONCLUSION

In 2020, more than 65 percent of voters participated in early voting.¹¹⁴ It may be no coincidence that this turnout was both the highest percentage for early turnout in United States history and the highest voter turnout since at least the 1980s.¹¹⁵ The increase in turnout between 2016 and 2020 was the largest ever, and a record increase in early voting accompanied it.¹¹⁶

It is impossible to know how many people might have actually voted had early voting not been permitted. We also do not know with certainty who might have won many critical elections across the Nation had states not expanded options to vote before Election Day. But the decision to allow 101 million citizens to vote early under current law is merely considered a privilege. If voting is a right, however, then allowing state legislatures unrestricted discretion to decide at whim whether someone can vote early mocks

¹¹⁰ See generally DANIEL C. KRAMER, *THE PRICE OF RIGHTS: THE COURTS, GOVERNMENT LARGESSE, AND FUNDAMENTAL LIBERTIES* (2004); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

¹¹¹ See Van Alstyne, *supra* note 110, at 1440–42.

¹¹² See generally Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982).

¹¹³ See, e.g., *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015) (holding that a due process claim may be raised in some cases of gerrymandering). In terms of efforts to limit early voting, decisions when or how to allow early voting may be an arbitrary decision aimed at impacting specific voters.

¹¹⁴ See *supra* notes 70–72 and accompanying text.

¹¹⁵ See DeSilver, *supra* note 15.

¹¹⁶ See *id.*

this right. It sets up the potential to rig the electorate to favor one party or another and treats the right to vote as less than fundamental, doing a disservice to the Nation's legitimacy as a representative democracy.

In sum, if the right to vote means anything, early voting should not be considered a privilege that can be restricted at whim. The right to vote includes a right to vote early. What precisely that right means is beyond the scope or purpose of this Article. Yet, at the very least, it means an alternative to the traditional casting of a ballot in person on election day.