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INTRODUCTION

Little dispute exists that no right is more fundamental than the right to vote. As the Supreme Court has emphasized: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."1 The right to vote is a fundamental constitutional right granted by the Fifteenth Amendment.2 Therefore, state action that infringes upon the right to vote must be strictly scrutinized.3 This Note argues that there also exists a right not to vote which derives from the Fifteenth Amendment right to vote and similarly deserves strict scrutiny protection.

Although the right to vote is granted by the Constitution,4 states often treat it as a privilege.5 The states' treatment of voting as a privilege rather than a right becomes apparent when voting is understood as an entire process as opposed to the mere act of pulling a lever.6 Exercising the right to vote requires more than going to the polls on election day and casting a ballot. Voting is a process that is intended to culminate with the selection of a particular candidate by an individual voter on election day.7 This process includes the burden of regis-

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3. See James, supra note 2, at 1619-20.
5. See, e.g., Burdick v. Takushi, 504 U.S. 428, 441-42 (1992) (holding that states are not required to have write-in voting as an option in elections if there exists reasonable access to the ballot); Rosario v. Rockefeller, 410 U.S. 752, 760-61 (1973) (upholding a statute requiring party registration at least eight months prior to a primary and eleven months prior to a general election); Pope v. Williams, 193 U.S. 621, 632 (1904) (affirming decision of board of registry refusing to register as a legal voter a person moving into the state who had not declared any intention to become citizen and resident of that state).
6. In many respects, voting has been considered a process rather than just a single act. The concept of voting as a process is crucial to this Note, which not only refers to different stages of the voting process, but argues also that the "choosing" stage deserves constitutional protection. See infra notes 37-47 and accompanying text (defining voting as a process).
7. See infra notes 37-42 and accompanying text.
tering to vote followed by a period of deliberation prior to the election. 8

As the process presently operates, a voter has the option to abstain if he supports no candidate. 9 A voter may view abstention as a vehicle for expressing dissatisfaction. 10 Protest nonvoting is consistent with the basic tenets of political behaviorist theory. 11

Most states, however, do not permit voters to exercise a right not to vote without penalty. 12 While no law deliberately intends to punish a voter for choosing not to vote in a given election, many states attempt to maintain accurate voter registration rolls and prevent election fraud by using voter purge statutes that remove voters from the registry who fail to vote in a certain number of elections. 13 This practice infringes upon a voter’s right not to vote and further discourages those already disenchanted with the political process. 14 Citizens should not be forced to reregister to vote unless they move out of the voting jurisdiction. Voting is a fundamental right that an individual should enjoy free from unnecessary governmental intervention. 15 The threat of being purged for failure to vote forces an individual either to go to the polls and vote for a candidate not of his or her choice or to reregister. Moreover, exercising the right not to vote may also deserve high tier constitutional protection because abstention involves a form of polit-

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9. This Note will use the term “voter” to describe a person involved in the electoral process, even those that register but do not vote.
10. See infra notes 56-58 and accompanying text.
11. See infra notes 27-28 and accompanying text.
12. See Steve Barber et al., Comment, The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act, 23 Harv. C.R.-C.L. L. Rev. 483, 499 (1988); see also H.R. Rep. No. 9, 103d Cong., 1st Sess. 30 (1993), reprinted in 1993 U.S.C.C.A.N. 105, 134 [hereinafter House Report]. There, the House Committee stated, Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contract all voters, [sic] but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under H.R. 2.
14. See infra part II.B (discussing how voter purge statutes violate the right not to vote); note 163 and accompanying text.
15. See Alexander Meiklejohn, The First Amendment is An Absolute, 1961 Sup. Ct. Rev. 245, 256 (stating that the freedom to vote “must be absolutely protected”).
ical expression protected under the First Amendment. Not only do voter purge statutes violate the right not to vote, they are also an inefficient means of preventing election fraud. Voter purge statutes fail to identify ineligible voters and wrongfully purge those who are still eligible.

Because almost all constitutional challenges to voter purge statutes have been unsuccessful, including the claim that such statutes violate

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16. In reference to the free speech implications concerning the right not to vote, the district court in Hoffman v. Maryland, 736 F. Supp. 83, 87-88 (D. Md. 1990), aff'd, 928 F.2d 646 (4th Cir. 1991), argued that the message sent by a registered voter who abstains is ambiguous. A protest nonvoter may seek to express his or her viewpoint by being counted among the reported percentage of registered voters who fail to vote. Regardless of the reason a registered voter abstains, the message is clearly one of dissatisfaction with the political system. Exercising the right not to vote could constitute political expression that is protected by the First Amendment. See Texas v. Johnson, 491 U.S. 397, 414-15 (1989) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion . . ."). Moreover, what the district court and court of appeals in Hoffman failed to realize is that the percentage of nonvoters who consciously abstain could be large enough to be a deciding factor in a particular election and, therefore, voter purge statutes infringe upon the free speech rights of these individuals by blocking an unambiguous message directed at the political system. See infra notes 26-28 and accompanying text. This message indicates that a controlling block of voters remain at home during the election because they are dissatisfied or unmotivated.

The Fourth Circuit admitted in Hoffman that the right not to vote does involve a combination of elements of "speech" and "nonspeech" and cited United States v. O'Brien, 391 U.S. 367, 376 (1968), in which the plaintiff argued that burning his draft card was his form of political expression. Hoffman, 928 F.2d at 648. In O'Brien, the state countered the defendant's assertion by arguing that while preventing such conduct did stifle political expression, such a prohibition had a regulatory purpose. 391 U.S. at 377-78. The Supreme Court held that when those "elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Id. at 376. The Hoffman court applied this less demanding standard of O'Brien, which examines whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377. The Hoffman court rejected the more rigorous standard of strict scrutiny that the Supreme Court used in Texas v. Johnson, 491 U.S. 397, 420 (1989), in which it held that government may not restrict particular conduct that has expressive elements. Hoffman, 928 F.2d at 648-49.

Voter purge statutes systematically infringe upon the rights of an individual who chooses not to vote as a form of expressive conduct. Arguably the court in Hoffman incorrectly applied O'Brien because even if the state's interest in preventing election fraud is sufficiently important, the means the state used are so inefficient and ineffective that it does not reach the level of justification necessary for incidental limitations on First Amendment rights. See infra part II.D (discussing the inefficiency and ineffectiveness of voter purge statutes in achieving the legitimate state interest of preventing election fraud). Any further discussion of the possible First Amendment protection of the right not to vote is beyond the scope of this Note which seeks to establish the right itself.

17. Barber et al., supra note 12, at 493-95.

the right not to vote.\textsuperscript{19} Congress had to legislate to protect the right not to vote. The Senate Committee on Rules and Administration viewed the right not to vote as equal to the right to vote,\textsuperscript{20} so Congress enacted the National Voter Registration Act ("NVRA"),\textsuperscript{21} a statute designed to standardize voter registration nationally. The NVRA explicitly prohibits purging for failure to vote in federal elections.\textsuperscript{22} By enacting the NVRA, Congress hoped to increase the number of registered voters and thus preserve the fundamental right to vote. Among other things, the NVRA provides new procedures for registration and for maintaining accurate voter rolls.\textsuperscript{23}

This Note argues that the right not to vote is an undervalued right associated with the process of voting which deserves strict scrutiny protection.\textsuperscript{24} This Note then examines how voter purge statutes operate and infringe upon the right not to vote, resulting in needless penalization of voters for electing not to vote while failing to maintain the integrity of the electoral process.\textsuperscript{25} In particular, this Note considers

\textsuperscript{19} Hoffman, 928 F.2d at 648.
\textsuperscript{22} 42 U.S.C. § 1973gg-6(d).
\textsuperscript{24} This right has been recognized in the Senate Committee Report describing the National Voter Registration Act of 1993. See Senate Report, supra note 20, at 17. Previously, the Fourth Circuit Court of Appeals affirmed a district court decision which indicated that the right to vote includes the right not to vote. Hoffman v. Maryland, 928 F.2d 646, 648 (4th Cir. 1991). The district court had compared the right not to vote with the right to have one's write-in vote reported which was given strict scrutiny protection by the Fourth Circuit. See Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 782 (4th Cir. 1989) (discussing the right to cast a write-in vote for a "nonexistent or fictional person" and concluding that "the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable"); see also infra part III.C (discussing the application of strict scrutiny to fundamental constitutional rights). While the Fourth Circuit protected the right not to vote in Dixon, 878 F.2d at 782, it refused in Hoffman to comment on the correctness of the comparison made by the district court. Hoffman, 928 F.2d at 648.

\textsuperscript{25} See Arnold I. Menchel, Election Laws: The Purge for Failure to Vote, 7 Conn. L. Rev. 372, 373 (1975) (describing how voter purge statutes operate).
the inefficient nature of voter purge statutes and how they fail to identify ineligible voters, thus permitting election fraud to persist.

Part I asserts that there is a fundamental right not to vote and examines not only the political behavioral theories that ground such a right, but also various other forms of recognition of that right. Part II discusses state voter purge statutes and how they systematically infringe upon the right not to vote while failing to prevent election fraud. Part III argues that strict scrutiny protection should be given to the right not to vote. This part then applies all three standards of judicial review—strict scrutiny, intermediate scrutiny, and rational basis—to voter purge statutes and shows how such statutes fail to pass each standard. The Note concludes that the right not to vote deserves the same constitutional protection as the right to vote and that voter purge statutes unconstitutionally infringe upon the right not to vote by penalizing voters for not voting while failing to prevent election fraud.

I. THE RIGHT NOT TO VOTE IS FUNDAMENTAL

Voter apathy has been identified as an important factor contributing to low voter turnout.\(^2^6\) It does not, however, completely explain the number of registered voters who do not participate in an election.\(^2^7\) If a nonvoter is not apathetic, then the choice not to vote is consciously made. Individuals who register to vote have clearly exhibited some desire to participate in the electoral process. In fact, while voters may feel alienated, helpless, or dissatisfied, this in no way indicates that their subsequent failure to vote did not result from a conscious decision.

Willful abstention could result from various factors, including some beyond the voter’s control. Yet voters often abstain after balancing the costs versus the benefits of voting because they conclude that voting would not be the best choice.\(^2^8\) Abstention, along with the choice of slated candidates in an election, is a rational option for an interested voter. The ability to abstain inherently falls within the right to vote freely; otherwise, voting is reduced to a privilege that the state can easily burden. For example, in response to state imposed wealth qualifications to voting, the Supreme Court stated in *Harper v. Virginia Board of Elections*\(^2^9\) that “the right to vote is too precious, too fundamental to be so burdened or conditioned.”\(^3^0\)

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27. See Angus Campbell et al., *The American Voter* 104 (1960). A survey of citizens eligible to vote in the 1956 election showed that 40% of those that cared somewhat or cared very much did not vote. *Id.* Thus, it appears the concept of opting out or exercising the right not to vote has existed for many years.
30. *Id.* at 670.
Both the Fourth and Fifth Circuits have recognized the existence of a right not to vote.\textsuperscript{31} Moreover, the legislative history of the NVRA reveals that Congress also acknowledged the right not to vote.\textsuperscript{32} While courts have not agreed upon what degree of protection the right not to vote deserves,\textsuperscript{33} the Senate subcommittee clearly stated that the right not to vote is as important as the right to vote.\textsuperscript{34} The Fifteenth Amendment grants each citizen the right to vote,\textsuperscript{35} and the Supreme Court has declared that citizens have the right to vote freely;\textsuperscript{36} thus, the right to abstain without penalty logically follows from that right. This section will examine the support for the right not to vote from the viewpoints of political behaviorists, legislators, and judges.

A. Not Voting As an Option for a Voter

Voting is a process with a number of distinct stages.\textsuperscript{37} Even the Voting Rights Act of 1965 defines voting as a process rather than as a single act: "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration . . . ."\textsuperscript{38} Registering to vote serves as a prerequisite to actual voting.\textsuperscript{39} Such a prerequisite

\begin{itemize}
  \item \textsuperscript{31} See Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 782 (4th Cir. 1989) (discussing the right to cast a write-in vote for a "nonexistent or fictional person" and concluding that "the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable"); Beare v. Smith, 321 F. Supp. 1100, 1103 (S.D. Tex. 1971), aff'd sub nom. Beare v. Briscoe, 498 F.2d 244, 248 (5th Cir. 1974) (upholding the lower court's decision where the district court stated that "it must be said that there is also a right not to vote").
  \item \textsuperscript{32} See Senate Report, supra note 20.
  \item \textsuperscript{33} Compare Hoffman v. Maryland, 928 F.2d 646, 648-49 (4th Cir. 1991) (refusing to decide whether the right not to vote deserves the same constitutional protection as the right to vote) with UAW, 198 N.W.2d 385, 390 (Mich. 1972) (declaring unconstitutional under the Michigan state constitution the two year voter purge statute thereby affording protection of the right not to vote).
  \item \textsuperscript{34} The subcommittee stated, "[W]hile voting is a right, people have an equal right not to vote, for whatever reason." Senate Report, supra note 20, at 17.
  \item \textsuperscript{35} See U.S. Const. amend. XV.
  \item \textsuperscript{36} See Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . ."); Meiklejohn, supra note 15.
  \item \textsuperscript{37} The Supreme Court has recently reaffirmed its prior statements discussing the right to vote in terms of a process rather than an act: "But the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." Burdick v. Takushi, 504 U.S. 428, 441 (1992) (citing Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)); see also Chisolm v. Edwards, 839 F.2d 1056, 1059-61 (5th Cir. 1988) (noting that the Voting Rights Act covers judicial elections and that black voters had established a theory of discriminatory intent and stated a claim of racial discrimination under the Fourteenth and Fifteenth Amendments).
  \item \textsuperscript{39} See Quinlivan, supra note 8, at 2375.
\end{itemize}
reinforces the concept that voting involves more consideration and conduct than the mere pulling of a lever.

Registering to vote can be a difficult task for some voters. It has been argued that the act of registering burdens the fundamental right to vote and therefore should be strictly scrutinized. A person who makes an effort to register exhibits a desire to be involved in the electoral process. Individuals who consider registering to vote particularly onerous would not endure such unnecessary hardship unless it stemmed from a conscious, rational choice. Thus, voter purge statutes force a voter to vote, even if no candidate appeals to the voter, or face the penalty of reregistration. Moreover, voter purge statutes remove an outlet for political expression by preventing an individual from being counted among the reported number of registered voters who choose not to vote in a given election. Therefore, individuals should be allowed to exercise their rights to vote and not vote freely and without penalty.

1. Deliberate Voter Abstention

After registering, the voter enters the "choosing stage" of the process. This is the point at which the voter decides for whom he wishes to vote. More than three decades ago the Supreme Court held, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Because voting is a fundamental right, a state should not exercise any influence upon a voter's decision to vote for a particular candidate or not to vote at all. Some voters may not like any of the candidates running for a particular public office. Thus, a voter who does not like any of the candidates running in a given election should be able to exercise freely the right not to vote. A state should not impose any consequences or requirements on a protest nonvoter than it does on any other voter who goes to the polls and selects a slated candidate.

Exercising the right not to vote is consistent with the predominant theories concerning voting and abstention. James Enelow and Melvin

40. In particular, minorities and uneducated individuals often have difficulty registering to vote. See infra part II.C.
41. See James, supra note 2, at 1617-19.
42. See Enelow & Hinich, supra note 28, at 2. Enelow's rational choice theory leads to the conclusion that a person who decides to register must have weighed the costs versus the benefits and realized that being involved in the voting process was in his or her best interest. Id. at 90.
43. See infra part II.A (discussing how voter purge statutes operate).
44. The Supreme Court has recognized that "voters' rights to make free choices and to associate politically through the vote" should not be severely and unnecessarily burdened. See Burdick v. Takushi, 504 U.S. 428, 439 (1992).
46. See supra notes 1-2 and accompanying text.
47. See supra text accompanying notes 32-36.
Hinich's spatial theory describes the behavior of both voters and candidates as motivated by self-interest. A voter evaluates candidates and votes in accordance with his or her own self-interest. Enelow and Hinich state, "What spatial theory assumes is that the voter has a given stake or interest in the outcome of the vote, which he recognizes, and which leads him to vote as he does."

The real possibility exists that no candidate will satisfy the voter's self-interest enough to motivate that person to vote. Enelow and Hinich, like other political scientists, conclude that voters act rationally. A voter should not suffer a penalty for protest nonvoting, especially if the individual has evinced a desire to be involved in the political process by registering. Enelow and Hinich's theory posits that voters "rationally judge the candidates competing for votes . . . ." Voters should not be punished for voting or not voting in a rational and educated manner because society can only benefit from a more educated and involved electorate.

Spatial theory explains some voter abstention. Nonvoting often results from deliberate, rational thought. Such behavior constitutes an exercise of the right not to vote. If a voter discerns no significant difference between candidates, then that indifferent voter might abstain because "[t]here are usually costs associated with the act of voting, such as the time involved, transportation costs, and the like." Thus, the voter makes a rational decision based upon dislike of the available choices in an election, because the cost of voting would outweigh the minimal benefit derived from voting when indifferent to the outcome. Enelow and Hinich label this "abstention from indifference."

Several years before Enelow and Hinich's spatial theory, Anthony Downs devised a similar theory concerning nonvoting: "When there are costs to voting, they may outweigh the returns thereof; hence rational abstention becomes possible even for citizens who want a particular party to win." Additionally, Downs posits another reason for abstention, contending that "[a]bstention thus becomes a threat to use against the party nearest one's own extreme position so as to keep it away from the center." Thus, Downs agrees with Enelow and

49. Id. at 3.
50. Id. at 3; see, e.g., Anthony Downs, An Economic Theory of Democracy 119 (1957) (discussing voter abstention in terms of the statics and dynamics of party ideologies).
51. Congress enacted the NVRA with the purpose of increasing the number of voting-age citizens involved in the electoral process and to ensure that no eligible voter be removed from the rolls. See FEC Guide, supra note 23, at I-1.
53. Downs, supra note 50, at 260.
54. Enelow & Hinich, supra note 28, at 90.
55. Id. (emphasis omitted).
56. Downs, supra note 50, at 265.
57. Id. at 119 (citation omitted).
Hinich that abstention results from a rational cost/benefit analysis by the voter.\textsuperscript{58} In either case, voter apathy does not explain all nonvoting, and as discussed above, other theories offer compelling arguments that voter abstention results from a conscious, rational choice.

2. Alienation as a Cause of Voter Abstention

Alienation also causes conscious voter abstention. Even politicians recognize this phenomenon:

[C]onscious voter abstention is a result of alienation. Even politicians recognize this phenomenon:

Politicians support the myth [of apathy], consciously or unconsciously, because it serves their purpose. They would much rather claim that nonvoters wish to vote but are kept outside the system for lack of needed 'reforms,' than face the unpleasant fact that voters voluntarily avoid the booth in droves because of their contempt for politicians and also because they see no connection between politics and their lives.\textsuperscript{59}

Academics also identify alienation as a reason for failure to vote.\textsuperscript{60} Enelow and Hinich defined the phenomenon "abstention from alienation," as occurring "when a voter's utility for his favorite candidate fails to exceed a certain positive threshold."\textsuperscript{61} An alienated voter does not like any candidate enough to vote and thus abstains with a distinct purpose in mind.\textsuperscript{62} That purpose is to voice discontent with the system or with the choice of candidates presented by that system.

In fact, the nonvoter often acts with the belief that abstention will diminish the possibility of majority tyranny.\textsuperscript{63} These theories concerning nonvoting explain certain phenomena observed in the 1994 election.

Even before the 1994 election day, forecasters predicted voter turnout would be lower than in the previous Presidential election, particularly in the primaries.\textsuperscript{64} The reason given for this large scale abstention was not apathy, but disenchantment.\textsuperscript{65} This suggests that people involved in the process would decide that voting would not benefit them. The 1994 election displays the results that occur when people are dissatisfied with their electoral choices.\textsuperscript{66} Prior to the 1994

\begin{thebibliography}{9}
\bibitem{58} Id. at 260.
\bibitem{59} See Hadley, \textit{supra} note 26, at 24.
\bibitem{61} Enelow & Hinich, \textit{supra} note 28, at 90 (emphasis omitted).
\bibitem{62} See Enelow & Hinich, \textit{supra} note 28.
\bibitem{63} Enelow & Hinich, \textit{supra} note 28, at 90-95.
\bibitem{65} See id.
\bibitem{66} For example, the \textit{New York Times} ran an article two days before the election conveying this feeling about the gubernatorial race in New York. \textit{See} Janny Scott, \textit{Undecided in New York: For Many Voters, No Choice is Satisfying}, \textit{N.Y. Times}, Nov. 6, 1994, at 49, 53.
\end{thebibliography}
election, states recognized voter reluctance and encouraged people to vote by implementing programs such as "early voting, no-excuse-needed absentee voting and mail-in ballots."\textsuperscript{67}

The 1994 election for Mayor of the District of Columbia exemplified displeasure with choice of candidates. The \textit{Washington Post} could not decide which candidate to endorse, feeling it could not support former Mayor Marion S. Barry because the \textit{Post} had previously castigated him for his conviction on drug charges.\textsuperscript{68} The other candidate was a white Republican whom the \textit{Post} could not in good faith endorse, because the District of Columbia is composed overwhelmingly of African American citizens and a scant eight percent of its registered voters are Republican.\textsuperscript{69} Finally, the \textit{Post}'s remaining option was to support no candidate, or someone with no chance of winning, but the paper felt the public would view either choice as irresponsible.\textsuperscript{70} Eventually, the \textit{Washington Post} decided not to endorse Barry and instead endorsed his opponent, emphatically stating its dislike for Barry's candidacy.\textsuperscript{71}

Thus, an influential newspaper, whose selection of a candidate arguably has a more substantial effect than that of an individual voter, faced a similar dilemma to that of the protest nonvoter. Each endures a similar feeling of interest and involvement in an election, combined with guilt. The guilt arises as a result of being split between a reluctance to select a public official whom a voter believes is wrong for the job, and a desire to uphold a voter's civic duty.\textsuperscript{72}

Nonetheless, civic duty may actually require a voter to exercise the right not to vote rather than vote for an unqualified candidate. Widespread voter abstention may be the most efficient way to lure highly

\textsuperscript{67} \textit{States Innovate to Battle Low Turnout}, \textit{N.Y. Times}, Oct. 24, 1994, at B9. For example, seven counties in the state of Washington conducted primaries entirely by mail for the first time ever. Moreover, "Oklahoma, Oregon and Washington have similar absentee balloting that does not require participants to give reasons for taking part." \textit{Id.} It is important to recognize that states, by instituting these programs are working not to encourage people to register, but instead are focusing on those that have registered in order to get them to vote. Since the states realized that dissatisfaction would be a prevailing cause for abstention, this implicitly acknowledges the right not to vote.


\textsuperscript{69} Rosenbaum, \textit{supra} note 68, at 31.

\textsuperscript{70} \textit{Id.} A newspaper's decision to refrain from making an electoral choice could have more damaging repercussions than an individual or group of individuals who exercise the right not to vote. This may be necessary, however, in order to entice the best candidates to run for office.


\textsuperscript{72} \textit{See Campbell et al., supra} note 27, at 105.
qualified individuals to run for public office. The return of qualified candidates should entice disenchanted voters to return to the polls considering that a voter's decision not to vote in a particular election does not mean that the voter will always abstain from voting. In general, voters remain aware of the damaging consequences that accompany large scale voter abstention. A voter must have the right not to vote without fear of penalty, however, to ensure absolute free exercise of the right to vote.

B. Judicial Recognition of the Right Not to Vote

Voter abstention, and ultimately exercising the right not to vote, represents a viable option for a voter who cannot in good faith support any candidate and feels the need to express dissatisfaction. Voters often use the write-in vote as an alternate means of expressing dissatisfaction with the choices in a given election. The write-in vote is no more of a substantive option for the dissatisfied voter than exercising the right not to vote. Additionally, casting a write-in vote does not enable a voter to express dissatisfaction with the political process as a whole by being counted among the reported percentage of voters who fail to go to the polls.

The abstainer's voice can be lost amid discussions of voter apathy or alienation, yet for many voters abstention is a pivotal means of polit-

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73. Ross Perot served as a breath of fresh air for some voters who were disenchanted with the process in the 1992 presidential election. See Dan Balz, *Perot Unifies California's Disaffected: Political Neophytes Propel Texan's Petitions and Standing in Polls*, Wash. Post, May 22, 1992, at A1, A20 ("I found myself listening to the news and to Bush and I almost got down on my knees begging that he would say something that would make sense," said Marsha Hayden, 41, who helps run the Perot state office in nearby Ventura and whose husband, Bob, 38, chairs the California petition drive. 'Then Perot came along and he was like a savior."); see also Kathy Payton, *Government Reform, Consolidation Top Agendas*, The Bus. J.-Charlotte, Dec. 28, 1992, at 8, 9 ("When Ross Perot shook up the presidential race, politicians saw firsthand how disenchanted people were with the way government works . . . .").

74. See Downs, * supra* note 50, at 267-68.

75. See Lubin v. Panish, 415 U.S. 709, 711 (1974). "Write-in votes are not counted, however, unless the person desiring to be a write-in candidate files a statement to that effect with the Registrar-Recorder at least eight days prior to the election . . . ." Id. Thus, if one votes for Mickey Mouse as a display of dissatisfaction, the effect of this is no different than if the person exercised the right not to vote. It only has an effect on whether a voter may be purged.

76. Often a candidate runs unopposed, which limits even further a voter's choice. See Burdick v. Takushi, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting). Justice Kennedy stated, "Democratic candidates often run unopposed, especially in state legislative races. In the 1986 general election, 33 percent of the elections for state legislative offices involved single candidate races." Id. Rather than not vote and join the reported percentage of nonvoters, some voters who are dissatisfied with having no other option in uncontested elections cast blank ballots. Id. at 442-43. "In 1990, 27 percent of voters who voted in other races did not cast votes in uncontested state Senate races." Id. at 443. Thus, in effect, these individuals exercise the right not to vote in a given election by casting blank ballots but do not face the same consequences as one who completely abstains because they will not be purged.
ical expression—of evidencing a dissatisfaction with the present political climate. In a perfect world where everyone except protest nonvoters regularly vote, the voice of abstainers would not be so easily ignored by politicians. Fortunately, the right not to vote has been addressed by some courts in this country. Both the Fourth and Fifth Circuits, as well as the Michigan Supreme Court have recognized that a voter has the right not to vote. These courts have protected the dissident voice, regardless of the form in which a voter chooses to express dissatisfaction with the choice of candidates in an election or with the political system itself.

1. Fifth Circuit and Michigan Supreme Court Recognize the Right Not to Vote

The Fifth Circuit in Beare v. Briscoe\(^\text{77}\) affirmed a Texas district court’s invalidation in Beare v. Smith\(^\text{78}\) of a law requiring annual registration.\(^\text{79}\) Before giving the reasoning for its decision, the district court stated, “At the outset, it must be said that the right to vote is a right which is at the heart of our system of government. Parenthetically, it must be said that there is also a right not to vote.”\(^\text{80}\) Consequently, the Fifth Circuit agreed with the district court and found the annual registration law to be unconstitutional.\(^\text{81}\) This strong endorsement of the right not to vote helps explain why Texas is one of a minority of states that has no form of a voter purge statute based on failure to vote.\(^\text{82}\)

If a voter only votes for a candidate whom he can support in good faith, a high probability exists that the voter will choose not to vote several times over a decade,\(^\text{83}\) especially considering the present mood concerning politicians.\(^\text{84}\) The decision in Beare v. Smith recognizes that the right to choose freely, even if that means choosing no candidate at all, must be protected. Nevertheless, in many states, those who exercise the right not to vote may be forced to register every

\(^{77}\) 498 F.2d 244 (5th Cir. 1974).


\(^{79}\) Id. at 248 (affirming Beare v. Smith, 321 F. Supp at 1100).

\(^{80}\) Smith, 321 F. Supp. at 1102-03.

\(^{81}\) Briscoe, 498 F.2d at 248.


\(^{83}\) See generally Hadley, supra note 26, at 67-103 (defining the six types of abstainers).

\(^{84}\) See Scott, supra note 66, at 53.
other year. Under the rationale of *Beare v. Smith*, such a requirement is unduly burdensome. In fact, the court in *Beare v. Smith* noted that "the registration procedures of this era have been described by one student of registration practices as 'expensive, cumbersome, and inconvenient to the voter.'" Thus, reregistration clearly is a penalty for those individuals who have initially registered and, while remaining eligible, have chosen not to vote.

Only one court in this country has invalidated a voter purge statute based upon an intrusion of the rights to vote and not vote. In *Michigan State UAW Community Action Program Council v. Austin*, the Supreme Court of Michigan applied strict scrutiny to a voter purge statute that removed voters from the rolls if they failed to vote within two years. The court held that the statute violated the Michigan State Constitution because the state had failed to demonstrate a compelling state interest underlying the statute, determining that the state did not prove election fraud to be a compelling interest. More fundamentally, the court in *UAW* recognized the right not to vote, citing the decision in *Beare*:

"At the outset, it must be said that the right to vote is a right which is at the heart of our system of government. Parenthetically, it must be said that there is also a right not to vote. The really important aspect of this problem is that any restrictions on or impediments to this right should be legislatively imposed solely and only to protect a compelling state interest and any other restrictions on or impediments to this right cannot meet constitutional standards."

As plaintiffs point out, there are numerous legitimate reasons why a voter might not vote, including illness, travel, absence of baby-sitters, or a conscious protest against all of the candidates in a particular election.

The Michigan Supreme Court held that "removing otherwise qualified citizens from the voter rolls clearly affects the right to vote." Moreover, the Michigan State Constitution of 1963 does not impose any

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89. *See id.* at 386.

90. *Id.* at 390.

91. *Id.* at 389-90.

92. *Id.* at 387-88 (quoting *Beare v. Smith*, 321 F. Supp. 1100, 1102-03 (S.D. Tex. 1971)).

93. *Id.* at 387.
further requirements or action, other than age or residency, on citizens in order to vote than does the United States Constitution.  

2. Fourth Circuit Recognition and Treatment of the Right Not To Vote

The Fourth Circuit Court of Appeals has also recognized the right not to vote. The Fourth Circuit in Hoffman v. Maryland affirmed the district court's decision which stated, "'[T]he right not to vote—and to have one's non-vote recorded—must be viewed in the same light [as the right to vote]. In that context, the right to vote includes the right not to vote.'"  

The Fourth Circuit, although it had earlier recognized that "the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable," refused to address the constitutional protection, if any, that should be attributed to the right not to vote. While arguably the right not to vote may not be a distinct right equal in weight to the right to vote in the Fourth Circuit analysis, undoubtedly the right not to vote logically derives from the fundamental right to vote.  

In Hoffman, the plaintiffs claimed that the Maryland statute, which purged voters from the list of registered voters for failure to vote for five years, infringed their rights to vote and not to vote as protected by the First and Fourteenth Amendments of the Constitution. The district court recognized that as a form of dissident expression "the right to vote includes the right not to vote." Nevertheless, the court applied rational basis scrutiny to the purge statute and found that "to the extent that the Maryland statute restricts the rights of a registrant, it does so on a minimal basis and for a purpose which is rationally related to the interests of the State of Maryland in providing appropriate standards to govern election procedures." Rational basis scrutiny requires only that the restriction imposed by the state rationally relate to the state's interests. The

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95. 928 F.2d 646 (4th Cir. 1991).  
96. Id. at 648 (alteration in original) (quoting Hoffman v. Maryland, 736 F. Supp. 83, 85 (D. Md. 1990)).  
98. Hoffman, 928 F.2d at 648.  
99. Telephone Interview with Joseph Wagner, Associate Professor of Political Science, Colgate University (Feb. 6, 1995). Therefore, the right not to vote, which is necessary to ensure that an individual can vote freely, derives from the Fifteenth Amendment.  
102. Id.  
103. Id.  
104. See infra part III.C (discussing the use of rational basis review).
court applied rational basis review because it believed the statute affected no fundamental right or any suspect class.\footnote{105}

The Fourth Circuit affirmed the decision of the district court, including the presumption that the right not to vote, while derivative of the right to vote according to the district court, is not a fundamental right.\footnote{106} Neither court examined whether nonvoting, reflected in the difference between 100% registered voter turnout and the officially reported percentage of voters casting ballots, constitutes a meaningful mechanism for protest nonvoters to express dissatisfaction with their electoral choices.\footnote{107} Instead, the district court insisted that any violation of the right not to vote or any violation of equal protection was too minimal to warrant invalidating the statute.\footnote{108}

Regardless of the lack of constitutional support for the right not to vote in \textit{Hoffman}, the Fourth Circuit Court of Appeals had acknowledged the right of a voter to choose not to vote prior to its decision in \textit{Hoffman}.\footnote{109} While the Fourth Circuit did not protect the right not to vote from voter purge statutes at issue in \textit{Hoffman},\footnote{110} it declared such a right to inherently derive from the right to vote in \textit{Dixon v. Maryland}.\footnote{111}

There, the Fourth Circuit reversed the district court’s decision upholding a Maryland law that required certain non-indigent write-in candidates to file a certificate of candidacy and pay a filing fee of $150 in order to have votes cast in the candidate’s favor reported publicly.\footnote{112} The district court had applied rational basis scrutiny to the state’s action and determined that the state’s restriction did not constitute “a significant obstacle to a candidate’s eligibility to run” for office or to voters’ ability to vote for the candidate of their choice.\footnote{113}

\footnote{105. See infra part III.A (discussing that if either a fundamental right or a suspect class had been implicated, courts must apply strict scrutiny); see also \textit{Hoffman}, 736 F. Supp. at 89 (holding that the Maryland voter purge statute did not offend the fundamental rights of free speech or equal protection).}

\footnote{106. See \textit{Hoffman v. Maryland}, 928 F.2d 646, 648-49 (4th Cir. 1991).}

\footnote{107. See supra part I.A (discussing the right not to vote as an option for a dissatisfied voter).}

\footnote{108. \textit{Hoffman}, 736 F. Supp. at 87.}

\footnote{109. See \textit{Hoffman}, 928 F.2d at 648. Concerning the constitutional status of the right not to vote, the Fourth Circuit stated, “We need not and do not decide the correctness of the comparison because, even if there is a right not to vote of constitutional significance, it is not infringed upon by Maryland’s purge statute.” \textit{Id.} Thus, the Fourth Circuit left an open issue for this Note; see also \textit{Dixon v. Maryland State Admin. Bd. of Election Laws}, 878 F.2d 776, 781 (4th Cir. 1989) (holding a filing fee of $150 for certain non-indigent write-in candidates to gain access to the ballot to be unconstitutional).}

\footnote{110. See \textit{Hoffman}, 928 F.2d at 648.}

\footnote{111. See \textit{Dixon}, 878 F.2d at 782.}

\footnote{112. \textit{Id.} at 778.}

\footnote{113. \textit{Id.} (quoting \textit{Dixon v. Maryland State Admin. Bd. of Election Laws}, 686 F. Supp. 539, 541 (D. Md. 1988)). Rational basis scrutiny refers to the review of a state regulation or law that does not infringe upon a fundamental right or affect a suspect class. This form of scrutiny merely looks to ensure that there is a legitimate state
The Fourth Circuit in *Dixon*, however, concerned with laws that limit voters' options, reversed the district court and referred to *Bullock v. Carter*,\(^\text{114}\) in which the United States Supreme Court held that "the rights of voters and the rights of candidates do not lend themselves to neat separation."\(^\text{115}\) Accepting this inextricable connection, the Fourth Circuit then recognized that a vote that will have no significant effect in an election deserves the same constitutional protection as a vote for a major party candidate:

Nor do we think it loses this character if cast for a non-existent or fictional person, for *surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable*. The Supreme Court has repeatedly recognized that minor parties and their supporters seek "influence, if not always electoral success."\(^\text{116}\)

The court noted that voters, aware that a write-in vote will probably have no effect on the outcome of the election, cast their nonconformist vote with the hope that it will disseminate their views and increase their influence.\(^\text{117}\) The "hope" referred to by the Fourth Circuit represents the desire of protest nonvoters to have their dissatisfaction recognized by the political system.

The Fourth Circuit in *Dixon* reasoned that the state's failure to report write-in votes for indigent or unknown candidates would close a vital outlet for dissident expression.\(^\text{118}\) In fact, at least part of the value of a write-in vote stems from a voter expressing dissatisfaction with the present state of the political process.\(^\text{119}\) A voter exercises a

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\(^{114}\) 405 U.S. 134 (1972).

\(^{115}\) *Dixon*, 878 F.2d at 779 (quoting *Bullock*, 405 U.S. at 143).

\(^{116}\) *Id.* at 782 (emphasis added) (quoting Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185-86 (1979)).

\(^{117}\) *Id.*

\(^{118}\) *Id.* Nevertheless, the Fourth Circuit's holding in *Dixon* has been limited to its facts by the Supreme Court, which held that a state is not required to have write-in voting as an option for voters. *See* Burdick v. Takushi, 504 U.S. 428, 441-42 (1992). Yet, according to the Fourth Circuit's holding in *Dixon*, if a state opts to allow write-in voting, that state cannot refuse to record votes for a candidate who does not pay the filing fee. *Dixon*, 878 F.2d at 782-83. Thus, the Fourth Circuit's declaration that "[o]ur system of government accords the expression of this hope the status of a protected right," only holds true where state law permits write-in voting. *Id.* at 782.

\(^{119}\) *Id.* Voters also cast blank ballots to express dissatisfaction. In 1990, twelve to thirteen percent of actual voters cast blank ballots in contested election races. *Burdick*, 504 U.S. at 443. It is true that a voter could express dissatisfaction by going to the polls and casting blank ballots for all races. This would prevent a voter from being purged, but it is debatable whether the value of casting a blank ballot as dissident expression is stronger than exercising the right not to vote and being counted among the reported number of nonvoters on election day. Moreover, it is clear that functionally casting blank ballots and choosing not to vote have the same effect. The only difference is that voter purge statutes penalize one option and not the other. This was not supposed to be the intention of voter purge statutes. *See* Menchel, *supra* note 25,
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form of the right not to vote when casting a write-in vote, to the extent that the voter knows his selection has no chance to win the election.

A write-in vote for a fictitious or unknown person has the same effect as exercising the right not to vote, because neither vote will be recorded in favor of an officially registered candidate.\textsuperscript{120} The difference is that exercising the right not to vote allows an individual to be recognized as one of the reported percentage of nonvoters. An individual who exercises the right not to vote can pool his discontent with all other protest nonvoters to express dissatisfaction and send a message to the political system. This distinguishes the right not to vote from casting a write-in vote for a fictitious person which will likely not be reported unless such candidate officially registers.

The right not to vote, representing the clearest way to express dissatisfaction, is not one that is separately granted, but is inherent in the right to vote.\textsuperscript{121} Because the right not to vote is simply the inverse of the right to vote, it should be equally free from restrictions. A voter who registers once and votes is not vulnerable to being purged; a registered voter who expresses his political views by not voting should be similarly free from state interference.

C. Congressional Recognition Of The Right Not To Vote

In 1993, Congress passed the NVRA.\textsuperscript{122} The objectives of the Act were two-fold. The NVRA established procedures designed to “increase the number of eligible citizens who register to vote in elections for Federal office,” while still maintaining “the integrity of the electoral process by ensuring that accurate and current voter registration rolls are maintained . . . .”\textsuperscript{123}

Congress realized that one way to encourage people to vote is to ensure that they remain registered, even if they fail to vote in certain elections.\textsuperscript{124} Congress understood that various reasons underlie the

\begin{itemize}
  \item at 373 (discussing the fact that voter purge statutes were not intended to target such voters).
  \item Casting blank ballots occurs more frequently in uncontested elections, but can be used by voters to convey displeasure with a particular candidate or with the choices in a contested election as well. See \textit{Burdick}, 504 U.S. at 442-43.
  \item 120. This is because a write-in candidate must register within a certain period of time before the election to have his or her votes recorded. See \textit{Lubin v. Panish}, 415 U.S. 709, 711 (1974). “Write-in votes are not counted, however, unless the person desiring to be a write-in candidate files a statement to that effect with the Registrar-Recorder at least eight days prior to the election . . . .” \textit{Id.}
  \item 121. See \textit{Hoffman v. Maryland}, 928 F.2d 646, 648 (4th Cir. 1991).
  \item 123. FEC Guide, \textit{supra} note 23, at I-1.
  \item 124. Senate Report, \textit{supra} note 20, at 2. The Committee stated, “The bill would provide procedures and standards regarding the maintenance and confirmation of voter rolls to assure that voters’ names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address to one outside their current registration jurisdiction.” \textit{Id.}
\end{itemize}
decision not to vote, and enacted a statute designed to increase voter registration with the belief that "while voting is a right, people have an equal right not to vote, for whatever reason." In short, the Senate Committee on Rules and Administration recognized the existence of the right not to vote, and Congress attempted to resolve any conflict between that right and maintaining accurate voter rolls by precluding purging for failure to vote.

The NVRA permits states to remove names from the voter registration file only if those individuals are actually no longer eligible to vote. The NVRA permits a voter to be removed from the rolls if: (1) the voter requests removal of his or her name; or (2) according to state law the voter is ineligible due to mental incompetency or criminal conviction; (3) the voter dies; (4) the voter changes residence to outside the jurisdiction; or (5) the voter fails to respond to confirmation mailings and fails to offer to vote in any election within two subsequent general federal elections. The statute clearly indicates that a voter does not become ineligible by merely failing to vote or by changing his or her mailing address within the jurisdiction of the registrar of voters.

Thus, the NVRA reconciles the conflicting governmental goals of maintaining the same level of fraud prevention while "ensur[ing] that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction." Election fraud occurs when an individual assumes the name of a registered voter who has died or moved out of the voting jurisdiction and votes in that person's name. Widespread voter fraud poses a threat to the integrity of our entire electoral system.

The NVRA does, however, permit nonvoting to be used as one factor favoring removal of a voter from the rolls. Under the NVRA, two types of confirmation notices—inquiring to see if a voter is still eligible before beginning the purging process—can be sent to a nonvoter. The first is sent after the Postal Service relays information that a registrant may have moved within the jurisdiction. The second type of notice ("type 2 notice") provides an indication that the

125. Id. at 17.
126. 42 U.S.C. § 1973gg-6(b) (1994). This section states:

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office... shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

128. Id.
129. Senate Report, supra note 20, at 17.
registrant may no longer live in the registrar's jurisdiction. The registrar may only remove a name from the rolls if a registrant fails to respond to a type 2 notice and that registrant has not voted or appeared to vote in an election during a time period that begins on the date of notice and ends on the day after the next general election for federal office. Thus, while a consideration in certain circumstances, failure to vote can never be the sole criterion used to remove a voter from the rolls.

The NVRA explicitly protects the right not to vote in federal elections. Other than the need to declare previous voter purge decisions "dead law," the problems concerning purging for failure to vote in federal elections appear to be settled. Yet not every state has agreed to follow the NVRA. For example, in Illinois, the Association of Community Organizations for Reform Now ("ACORN") sued the governor for failure to implement the NVRA. Thus, voter

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133. Id. § 1973gg-6(d)(1).
134. See id. § 1973gg-6(b).
135. See Association of Community Org. For Reform Now v. Edgar, 56 F.3d 791, 798 (7th Cir. 1995) (declaring the NVRA constitutional and enjoining Illinois to comply with the Act); see also U.S. Countersues Virginia Over Motor Voter Law, N.Y. Times, July 9, 1995, at A18 (discussing Justice Department suit against Virginia for failure to comply with the NVRA). In fact, there remain several questions concerning the NVRA and voter purge statutes that are beyond the scope of this Note. The NVRA clearly prohibits purging for failure to vote in federal elections, but makes no mention of purging in state and local elections. It is doubtful that the NVRA preempts purging for failure to vote in state and local elections. Thus, it appears that states could continue to purge for failure to vote in state and local elections if they maintain dual registration systems. Presently, only Illinois and Mississippi have chosen to use the expensive and cumbersome dual registration approach for complying with the NVRA. See Association of Community Org. For Reform Now v. Edgar, No. 95-C174, 1995 WL 532120, at *1 (N.D. Ill. Sept. 7, 1995). Widespread use of a dual registration system, however, seems unlikely due to the high cost of maintaining such systems. See House Report, supra note 12, at 27-28.

Moreover, it was feared that the NVRA may face challenges that claim it violates the Tenth Amendment and is therefore unconstitutional. See Maureen E. Mahoney & Michael J. Guzman, With Motor-Voter Bill, Congress May Have Invited A Constitutional Challenge, (Wash. Legal Found., Wash., D.C.), Mar. 11, 1994. In fact, the Seventh Circuit has determined that the NVRA is constitutional despite the requirements it imposes on state governments. See Edgar, 56 F.3d at 798. This Note argues, however, that regardless of whether the NVRA will eventually be invalidated as a national motor-voter law, the implications for protecting the right not to vote remain the same. If the Supreme Court finds the NVRA unconstitutional on Tenth Amendment grounds, this would likely be because the judicial branch determines that the NVRA represents Congress commandeering state legislatures and treasuries by ordering them to regulate elections and by requiring states to use their own money to do so. See New York v. United States, 505 U.S. 144, 161 (1992) (noting Court's disapproval of this congressional practice). Preempting states from purging for failure to vote in no way resembles "commandeering" and could be accomplished in both state and federal elections through a separate law enacted by Congress. Therefore, even if the NVRA cannot withstand constitutional scrutiny, Congress still retains the power to protect the right not to vote.

136. Edgar, 56 F.3d at 791.
purge statutes remain on the books in many states and continue to infringe upon the right not to vote. The next section examines the various detrimental effects resulting from the operation of such statutes.

II. VOTER PURGE STATUTES AND THEIR NEGATIVE EFFECTS ON VOTERS

Voters must be able to rely on the fact that they can exercise the right not to vote if they do not like the choices in an election, without suffering any penalty. Voter purge statutes stifle the right not to vote by preventing a nonvoter from being counted among the reported number of voters who fail to vote in an election. Therefore, an examination of how voter purge statutes operate is necessary in order to understand how they both logically and constitutionally undermine the right not to vote.

A. How Voter Purge Statutes Operate

States use voter purge statutes to remove ineligible voters from the voter rolls. These statutes remain on the books in many states despite the enactment of the NVRA. If an ineligible name remains on the voter rolls, this increases the risk of election fraud. Election fraud occurs when someone assumes the name of a voter who is either deceased or has moved out of the voting jurisdiction, and votes using that individual's name either in person or through an absentee ballot. Voter purge statutes seek to prevent such fraud by purging the names of voters who have not voted in a certain number of consecutive elections, thus decreasing the opportunity for an individual to commit election fraud.

Voter purge statutes presume that if a voter has not voted in a certain number of elections, then that voter either has moved, died, or...

137. See infra note 139 (listing states still maintaining voter purge statutes).
138. See supra text accompanying notes 26-36.
139. Thirty-five states and the District of Columbia currently purge for failure to vote. See Schaecher, supra note 82, at 1363 n.225. Some examples of state voter purge statutes include, Alaska Stat. § 15.07.130 (1988 & Supp. 1995); Ga. Code Ann. § 21-2-231 (Cum. Supp. 1995); Miss. Code Ann. § 23-15-159 (1990); N.Y. Elec. Law § 5-406 (McKinney Supp. 1995). It is important to realize that some of these states have amended their statutes to conform to the requirements of the NVRA. Many states, like Georgia, however, have reserved the right to declare ineligible any voter who fails to vote within a certain number of years. See Ga. Code Ann. § 21-2-234(c)(3) (Cum. Supp. 1995). Thus, nonvoting serves not merely as a trigger, but can still be the sole criteria for removing an otherwise eligible voter from the voter rolls.
140. See supra note 139.
141. See Barber et al., supra note 12, at 483; Menchel, supra note 25, at 372.
142. See Ortiz v. City of Phila. Office of the City Comm'r's Voter Registration Div., 28 F.3d 306, 316-17 (3d Cir. 1994) (discussing the recent problems with election fraud that Philadelphia has encountered).
become ineligible for another reason.143 This conclusion is premised on the belief that people are interested in voting and will either vote or respond to being purged by reregistering. Voter purge statutes fail to recognize, however, that nonvoters may be interested and may reregister, but still wish to have the ability to opt out without any additional burden.144 Even Congress disagrees with the above presumption concerning nonvoting which underlies voter purge statutes, and it expressed such disapproval by enacting the NVRA.145

Voter purge statutes were intended to remove ineligible voters from the voter rolls in order to prevent election fraud, not to punish individuals who fail to vote.146 In reality, however, "[t]he purge for failure to vote penalizes past nonvoting, irrespective of a voter's interest in an upcoming election,"147 as well as without regard for the right not to vote. A state may inevitably designate voters who exercise the right not to vote as ineligible even though they were not the intended targets of the statute.148 Such improper purging is a significant problem: "Although these laws are aimed at reducing the opportunity for vote fraud by identifying unqualified voters, they in fact often remove large numbers of qualified registrants from voting rolls."149

B. How Voter Purge Statutes Inhibit Protest Nonvoting

Voter purge statutes do not directly preclude an individual from voting because that person can reregister and vote in a subsequent election. The statutes fail to consider, however, that registration itself can be an obstacle to voting.150 Further, the statutes impose reregistration on a voter who is only assumed to be ineligible. In fact, the voter may remain eligible, because he or she has not died or moved but simply chose not to vote. Moreover, in many states a citizen must register within a certain period of time before an election,151 so an

143. Menchel, supra note 25, at 373; Barber et al., supra note 12, at 508.
144. See supra part I.A (discussing that abstention often results from a rational decision, weighing the costs versus the benefits to voting).
145. See 42 U.S.C. § 1973gg-6(b) (stating that a voter should not be removed from the voter list for failure to vote in a federal election).
146. See Menchel, supra note 25, at 390-91; Barber et al., supra note 12, at 483.
147. Barber et al., supra note 12, at 499.
148. See id. at 499-500.
149. Id. at 483.
150. See id. at 489-92; see also Beare v. Smith, 321 F. Supp. 1100, 1104-05 (S.D. Tex. 1971) (discussing the expensive and burdensome nature of registration for voters), aff'd sub nom. Beare v. Briscoe, 498 F.2d 244 (5th Cir. 1974); James, supra note 2, at 1640 (arguing for strict scrutiny of registration because it burdens the fundamental right to vote).
151. All but seven states and the District of Columbia currently have a deadline for registration in order to vote in the next election. Letter from Peggy Sims, Election Specialist National Clearinghouse on Election Administration, Federal Election Commission, to Jeffrey A. Blomberg, Associate Editor, Fordham Law Review 1 (Mar. 14, 1995) (on file with the Fordham Law Review) [hereinafter FEC Letter].
individual who is wrongfully purged might not receive notice of such purging in time to reregister before the next election.\textsuperscript{152}

Purge statutes particularly impede voter participation in states where the registrar does not notify eligible voters that they have been purged and are no longer eligible to vote.\textsuperscript{153} Additionally, states vary as to the number of years that will trigger purging based on failure to vote. A number of states purge if a voter does not vote within two years while another state waits five years before purging.\textsuperscript{154} Thus, states who purge every two years place an additional burden on individuals who choose to vote only in presidential elections.\textsuperscript{155}

In general, voter purge statutes inherently inhibit voter participation by imposing reregistration.\textsuperscript{156} At least one author has proposed abolishing registration completely, arguing that registration impermissibly infringes upon the right to vote.\textsuperscript{157} The burden of reregistering would not prohibit an individual from voting if every state had election day registration,\textsuperscript{158} but most states do not provide that option.\textsuperscript{159} Congress, recognizing that registration waiting periods can impede one's ability to vote, exempted states with election day registration from the requirements of the NVRA.\textsuperscript{160}

While voter purge statutes do not undermine a voter's right to actually go and pull the lever, voter purge statutes still violate the inherent right not to vote. By purging voters who choose not to vote, and forcing them to reregister because they did not vote, voter purge statutes

\textsuperscript{152} This could happen because a person is unexpectedly away from home for an extended period of time prior to an election or simply because the notice card is either lost or thrown away by accident. In fact, at least one state does not provide notice prior to purging for failure to vote. \textit{See infra} note 153.

\textsuperscript{153} Voter purge statutes vary from state to state as to whether they provide notice to those being purged and the amount of time it takes to trigger being purged for failure to vote. \textit{See} Menchel, \textit{supra} note 25, at 374-75. Idaho provides no notice prior to purging. \textit{See} Idaho Code § 34-435 (1995). This Note is concerned with the concept of purging for failure to vote which, as a mechanism for preventing voter fraud, unnecessarily infringes the right not to vote and does not accomplish its initial goal. The discussion of differing notice provisions and trigger periods is beyond the scope of this Note.


\textsuperscript{156} Purging combined with burdensome reregistration requirements has led to decreased minority participation in elections. \textit{See infra} part II.C.

\textsuperscript{157} \textit{See} James, \textit{supra} note 2, at 1617.

\textsuperscript{158} \textit{See} House Report, \textit{supra} note 12, at 6 (stating that election day registration is one way to lessen impediments to registration and thus voting).

\textsuperscript{159} \textit{See} FEC Letter, \textit{supra} note 151 (stating that "[t]he District of Columbia and all but seven States currently have a deadline before election day by which time a person must register if he or she wishes to vote in the upcoming election.").

\textsuperscript{160} \textit{See} House Report, \textit{supra} note 12, at 6.
penalize voters who intentionally abstain. Moreover, purge statutes further discourage registered voters already dissatisfied with the political process. A positive relationship exists between an individual's trust in political efficacy and his or her degree of participation. Voter purge statutes strip away the last possible form of involvement for those disenchanted with the process:

Purging qualified voters who have fulfilled registration requirements will likely increase their frustration and humiliation over continued obstacles to the franchise. Furthermore, it is likely to deter voting by increasing alienation and apathy toward the political process and by intimidating qualified voters and creating a fear of encounters with election officials in the reinstatement process or at the polling place.

Purge statutes also dissuade voters who might otherwise wait to vote for a candidate whom the voter can support in good faith. As a result, voter purge statutes suppress the dissident voice of those who choose not to vote.

C. Voter Purge Statutes May Inhibit Minority Voting

State statutes that purge voters based on their failure to vote have harmful effects beyond simply infringing the right not to vote. These varied harms have led litigants to attempt different approaches for attacking the statutes. The most recent unsuccessful challenge, Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division, involved a claim that the Pennsylvania purge statute violated Section 2 of the Voting Rights Act of 1965, the First and Fourteenth Amendments, and the Pennsylvania Election Law itself. The Ortiz case represents the first challenge to a voter purge law based on Section 2 of the Voting Rights Act. Based on their discouraging effects, voter purge statutes have been alleged to serve as a continuing impediment to minority political participation, seemingly in violation of the Voting Rights Act of 1965. Moreover, where states violate their own purge statutes, "courts examine the extent to

161. See UAW, 198 N.W.2d 385, 387, 390 (Mich. 1972) (discussing how purging for failure to vote imposes a further qualification to voting).
162. Barber et al., supra note 12, at 484.
163. Id. at 523 (footnote omitted).
164. See id.
165. See id. at 514.
166. 28 F.3d 306 (3d Cir. 1994).
168. Ortiz, 28 F.3d at 307-08.
169. Id. at 316; Schaecher, supra note 82, at 1338.
170. See Barber et al., supra note 12, at 517-18. Prior to the 1982 amendment, the Voting Rights Act of 1965 provided: "[N]o voting qualification or prerequisite to voting... shall be imposed or applied by any State... to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1976).
which the infringement is likely to result in preventing properly registered voters from voting.”

The plaintiff in Ortiz based his challenge on the fact that the statute had a disparate impact on minority participation in elections. Ortiz pointed to statistics showing that the percentage of African American and other minority voters that actually voted in elections from 1987 to 1991 was consistently less than that of white voters. He contended that the electoral practice of purging registered voters for failure to vote resulted in decreased minority voter turnout and thus violated Section 2 of the Voting Rights Act of 1965.

Ortiz argued, as some commentators had a few years earlier, that the Voting Rights Act was intended to apply to all forms of voter discrimination, including purge statutes. Moreover, Ortiz referred to Chisom v. Roemer, in which the Supreme Court stated that “Congress made clear that a violation of Section 2 could be established by proof of discriminatory results alone.” Ortiz argued that regardless of whether it could be proved that the purge statute caused the disparate effect on minority voting, the discriminatory results following a purge were enough to prove a violation of Section 2 of the Voting Rights Act. Nevertheless, the Third Circuit, applying the “totality of the circumstances” test set forth in Section 2(b) of the Voting Rights Act, which the Supreme Court outlined in Thornburg v.

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171. Barber et al., supra note 12, at 515.
172. Ortiz, 28 F.3d at 314.
173. Id. at 313 & n.12.
174. Id. at 313-14. As amended in 1982, Section 2 of the Voting Rights Act states: No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
175. Barber et al., supra note 12, at 483.
178. Id. at 404.
179. Ortiz, 28 F.3d at 308-09.
found no causal connection between voter purging and low minority voter turnout.\textsuperscript{182}

The Third Circuit's holding in \textit{Ortiz} contravened a prior study which found that voter purge statutes that impose reregistration contribute directly to low minority voter turnout:

Low voter turnout stems in part from difficulty in registration. Once registered, minorities are very likely to vote. Of those registered in 1980, 84.7 percent of blacks and 83.3 percent of Hispanics turned out to vote in the presidential race. The chairperson of the U.S. Commission on Civil Rights, Arthur Flemming, testified that "it is clear that without affirmative efforts on the part of registrars and election officials throughout many of these jurisdictions [where blacks are disproportionately rural and low income], minorities will not have equal access to registration and minority registration rates therefore will continue to languish."\textsuperscript{183}

In fact, six years before the decision in \textit{Ortiz}, the study found that "[t]he Gingles requirement that the plaintiffs establish 'substantial difficulty electing representatives of their choice' is satisfied automatically by plaintiffs who have been removed from the voting rolls in a purge."\textsuperscript{184} The commentators further argued that "[f]ollowing a purge, a greater decline in either minority registration or turnout should suffice to establish the discriminatory effect of a purge law."\textsuperscript{185} Ortiz showed "decreased minority participation rates" following a purge.\textsuperscript{186} Yet, the Third Circuit imposed a greater burden on plaintiffs\textsuperscript{187} and its opinion conferred great deference to the states in the realm of regulating elections.\textsuperscript{188}

Even though the challenge in the most recent case in the area of voter purge law was unsuccessful, \textit{Ortiz} remains significant for determining whether voter purge laws withstand rational basis scrutiny, which will be discussed in the last part of this Note.\textsuperscript{189} In particular, this Note contends that the Third Circuit failed to examine whether the purge statute operates efficiently to prevent election fraud—the claimed state interest in \textit{Ortiz}.

\textsuperscript{181} 478 U.S. 30, 47 (1986) ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.").
\textsuperscript{182} \textit{Ortiz}, 28 F.3d at 313.
\textsuperscript{183} Barber \textit{et al.}, \textit{supra} note 12, at 490 (footnote omitted). The Senate Committee on Rules and Administration believed that difficulty in registering to vote accounted for only 36% voter turnout in the 1990 Congressional elections. \textit{See} Senate Report, \textit{supra} note 20, at 2.
\textsuperscript{184} Barber \textit{et al.}, \textit{supra} note 12, at 525 (footnote omitted).
\textsuperscript{185} \textit{Id.} at 526 (footnote omitted).
\textsuperscript{186} \textit{Ortiz}, 28 F.3d at 313 n.12 (citation omitted).
\textsuperscript{187} \textit{Id.} at 312.
\textsuperscript{188} \textit{Id.} at 316.
\textsuperscript{189} \textit{See infra} part III.C (discussing how voter purge statutes fail rational basis review).
D. Voter Purge Statutes: An Inefficient Means of Preventing Election Fraud

State legislatures designed voter purge statutes to be an efficient and administratively simple means of maintaining accurate voter rolls and preventing election fraud. As is often the case where “administrative ease is . . . achieved at the expense of fairness,” this design ultimately proved to be defective. Purging for failure to vote produces inefficient results. More than twenty years ago, a study cited by Professor Arnold Menchel showed that almost sixty percent of the people removed by a voter purge statute were unnecessarily purged. Voter purge statutes have long outlived their limited usefulness. The NVRA provides a more efficient and less burdensome method for maintaining accurate voter rolls.

Voter purge statutes are obsolete mechanisms that have harmful effects, including burdening registered participants who exercise the right not to vote. A 1986 study of Chicago’s electoral system and its large-scale purge procedures used to prevent election fraud presents a paradigm of the inefficiency of purging for failure to vote. The Illinois purge statute required notification to an individual both by canvass and by mail after that voter had been purged. The Chicago system purged for failure to vote for four years and provided notice of purging. This system gave more protection to the voter than many other state voter purge statutes, likely having less damaging effects. If a Chicago citizen wished to be reinstated as a voter, that person had to appear before the Board of Election Commissioners and sign an affidavit attesting to his or her qualifications.

190. Barber et al., supra note 12, at 483, 499.
191. See id. at 499.
192. Six out of ten people that the statute purged had not died or moved out of the voting jurisdiction, but simply chose not to vote. See Menchel, supra note 25, at 384.
193. See supra part I.C (discussing how the NVRA works); see also FEC Guide, supra note 23, at I-1.
194. Barber et al., supra note 12, at 492-97.
195. Id. at 493. The trigger period under this Illinois statute is four years. Thus, when a voter fails to vote for four years, that person is purged. Illinois provides a canvass that notifies the individual in person of his or her ineligible status and follows this with a notice of ineligibility by mail. Ill. Ann. Stat. ch. 46, para. 6-41 (Smith-Hurd 1986); Barber et al., supra note 12, at 493.
196. See Barber et al., supra note 12, at 550.
198. Ill. Ann. Stat. ch. 46, para. 6-41 (Smith-Hurd 1986). This process is burdensome in comparison to the NVRA, which notifies the voter before purging, permitting the individual to show why he or she should remain an eligible voter. 42 U.S.C. § 1973gg-6(d) (1994). The NVRA does not permit failure to vote to be the sole criteria in deciding to purge a voter. Id. § 1973gg-6(b)(2).
The Chicago case study revealed the disturbing effects of voter purge statutes. The Chicago canvass system wrongfully purged a disproportionate number of people. African Americans and Hispanics were purged more frequently than whites. More importantly, the system failed to purge many unqualified voters. The low purge rate and high reregistration rate among whites could indicate protest nonvoting because these individuals who failed to vote still wanted to remain involved in the process.

For years, scholars and even judges have noted that nonvoting purge statutes operate inefficiently. A survey of voter purge statutes throughout the United States concluded that purging for failure to vote is a "dubious mechanism for ensuring accurate voter registration rolls." In his dissent in Williams v. Osser, Judge Luongo of the Eastern Pennsylvania District Court also criticized the inefficiency of voter purge statutes, pointing out that "the procedure does not accomplish the purpose with sufficient precision to justify denial of the right to vote to those who are still bona fide residents of the voting district." Judge Luongo cited a study which revealed that three and a half eligible voters are purged for every ineligible voter purged. A year later, Professor Menchel lauded Judge Luongo's dissent and cited a study showing that 58.5% of those purged had not moved or died.

The purpose of purging for failure to vote is to remove from the voter registration rolls those who have died or moved in the hope of preventing election fraud. This purging is a crudely inefficient means for effectuating that goal. Using nonvoting as the sole trigger for purging leads to inefficient management of the voter rolls, burdening both the individual and the registrar. The Supreme Court has recognized that a minor benefit to the state, such as the identification of a few ineligible voters, does not justify the state's infringing upon the right to vote or to "choose."

This Note asserts that the right to

199. Barber et al., supra note 12, at 493.
200. Id. at 494.
201. Id. at 494-95.
202. Id.
203. The Chicago case study does not include a quantitative assessment of those individuals penalized for exercising the right not to vote.
204. Barber et al., supra note 12, at 508. The survey argued that voter purge statutes purge qualified voters and fail to purge unqualified voters. Id. at 494-95.
206. See id. at 654.
207. Id.
208. Id. at 654-55.
211. See supra part I.B (arguing that inefficient voter purge statutes burden the nonvoter by forcing them to reregister).
212. Carrington v. Rash, 380 U.S. 89, 96 (1965). In Carrington, the Court stated, "'The right . . . to choose,' that this Court has been so zealous to protect, means, at
"choose" includes a right to abstain. In sum, voter purge statutes do not maintain accurate voter rolls and needlessly harm various groups of people. Thus, courts must intervene to prevent states from using this ineffective and harmful mechanism for preventing election fraud. Judicial intervention would be justified because voter purge statutes fail to pass constitutional muster under any level of scrutiny, as discussed in the next part.

III. Voter Purge Statutes Are Unconstitutional Under Any Standard of Review

Voter purge statutes are unconstitutional under any standard of review because they infringe upon the right not to vote and are a crudely inefficient means of preventing election fraud. This part argues that under strict scrutiny, intermediate scrutiny, or even rational basis review, voter purge statutes should be struck down because they impermissibly intrude upon the fundamental right not to vote.

A. Strict Scrutiny Should Be Applied to Voter Purge Statutes

Convincing a court to apply strict scrutiny review is the simplest and most effective way to achieve judicial invalidation of a voter purge statute. Courts apply strict scrutiny when the governmental regulation under review infringes upon a fundamental right or interest, or creates a suspect classification. The Supreme Court has defined "fundamental interests" to include rights the Constitution either expressly or implicitly grants. Strict scrutiny requires that the government have a compelling interest for intruding upon a fundamental right or discriminating against a suspect class, and that any restriction or classification imposed be necessary and narrowly tailored to promote that compelling interest. When a court applies strict scrutiny, the government regulation has almost always failed this high tier review.


215. Nowak & Rotunda, supra note 2, § 14.3.

216. Stone, supra note 213, at 136. One significant exception to this trend was Burson v. Freeman, 504 U.S. 191, 211 (1992), where the Supreme Court applied strict scrutiny and upheld a state law creating a campaign-free zone around a polling place because the Court held that the fundamental right to vote freely trumped the fundamental right to free speech. Id.
The Court has held that the right to vote is a fundamental right deserving strict scrutiny.\textsuperscript{217} As outlined in part I, the right not to vote is equal to the right to vote and therefore is also a fundamental right under the Fifteenth Amendment.\textsuperscript{218} In order to ensure that an individual can freely exercise the fundamental right to vote, without being forced to choose a candidate or being assessed the penalty of reregistration, a voter must have the right not to vote.

Applying strict scrutiny to voter purge statutes requires states to prove both that the prevention of election fraud is a compelling state interest, and that voter purge statutes are the least intrusive means of achieving this goal.\textsuperscript{219} Voter purge statutes will not survive strict scrutiny analysis. Even if the prevention of election fraud is concededly a compelling state interest, voter purge statutes are not the least intrusive means to prevent such fraud.\textsuperscript{220} Studies have proven that voter purge statutes are inefficient mechanisms for preventing election fraud.\textsuperscript{221} Thus, regardless of whether the prevention of election fraud is a compelling state interest, voter purge statutes operate inefficiently, and unnecessarily penalize eligible voters.\textsuperscript{222} Other methods, such as signature comparison, intrude less on the fundamental rights to vote and not to vote.\textsuperscript{223} The various challenges to voter purge statutes have unsuccessfully tried to persuade courts to apply strict scrutiny.\textsuperscript{224} Where strict scrutiny has been applied in order to protect the right not to vote, however, the government regulation infringing that right has been struck down.\textsuperscript{225}

In fact, in recognizing the existence of the right not to vote, the Fifth Circuit in \textit{Beare v. Briscoe}\textsuperscript{226} affirmed the constitutional aspect of the district court opinion which included the application of strict scrutiny to a law requiring annual registration.\textsuperscript{227} The district court held that any restrictions or impediments on the right to vote, which includes the right not to vote, should only be allowed to the extent that they

\begin{itemize}
\item \textsuperscript{217} See \textit{Burson}, 504 U.S. at 208 (recognizing and supporting the government's "compelling interest in securing the right to vote freely and effectively"); see also \textit{Berry}, \textit{supra} note 213, at 905 n.9 (citing \textit{Harper v. Virginia Bd. of Election}, 383 U.S. 663 (1966)).
\item \textsuperscript{218} See \textit{supra} part I.A (arguing that the right not to vote is equal to the right to vote).
\item \textsuperscript{219} See \textit{Nowak \\& Rotunda, supra note 2, § 14.3.}
\item \textsuperscript{220} Cf. \textit{Menchel, supra note 25, at 384-86.}
\item \textsuperscript{221} See \textit{supra} part II.D (discussing the inefficiency of voter purge statutes).
\item \textsuperscript{222} See \textit{id.}
\item \textsuperscript{223} Cf. \textit{Menchel, supra note 25, at 389. The NVRA serves as an example of less intrusive means to prevent election fraud since its goal is to maintain the same level of protection without purging for failure to vote.}
\item \textsuperscript{224} See \textit{supra} note 18 (listing unsuccessful challenges to voter purge statutes).
\item \textsuperscript{226} 498 F.2d 244 (5th Cir. 1974).
\item \textsuperscript{227} \textit{Id.} at 248.
\end{itemize}
promote a compelling state interest. Therefore, even if we assume that preventing election fraud is a compelling state interest, the Fifth Circuit would allow voter purge statutes only if the state demonstrates them to be the least intrusive means by which to prevent election fraud. States would be hard pressed to convince a court that voter purge statutes constitute the least intrusive means to prevent election fraud given the statutes' demonstrated inefficiencies.

In *Michigan State UAW Community Action Program Council v. Austin*, the Supreme Court of Michigan applied strict scrutiny to a voter purge statute that removed voters from the rolls if they failed to vote within two years. The court felt that the voter purge statutes infringed the right not to vote, a right equal to the fundamental right to vote. Applying strict scrutiny, the court held that the voter purge statute was not the least intrusive means by which to prevent election fraud. Moreover, the court did not conclusively feel that the prevention of election fraud was a compelling state interest. The court criticized the statute for unnecessarily purging voters who had not moved or died, but simply chose not to vote.

The court pointed out that Michigan could use other less stringent techniques to prevent voter fraud, such as signature comparison and notification procedures through the county clerk. The court noted that not every state uses nonvoting as a trigger by which voters are removed from the rolls, indicating that nonvoting purging is not essential to preventing election fraud. To pass strict scrutiny, a statute must be necessary and essential and the state's objective incapable of accomplishment by any less intrusive means. Because neither of these requirements is met, voter purge statutes do not pass this high level of review. Thus, because the right not to vote derives from and

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229. See supra part II.D (discussing inefficiency of voter purge statutes).
231. Id. at 390.
232. Id. at 387-88.
233. Id. at 390.
234. See id. at 388.
235. Id. at 389-90.
236. Id. at 390 n.8. The Michigan Supreme Court probably overestimated the value of a voter purge statute as a device for preventing election fraud when it conceded that the statute might be somewhat effective in battling election fraud but felt that the benefit was not enough to warrant upholding the statute because there existed other less intrusive means. Id. at 389-90.
237. In fact, the other mechanisms proposed by the Michigan Supreme Court in 1972 resemble some of the procedures that the NVRA has recently implemented to maintain accurate voter rolls. For example, the Michigan Supreme Court indicated that it would allow purging if the Registrar were to send a card with the request that it be returned and not forwarded because this would serve as a sufficient indicator that someone has moved. Compare id. at 390 with 42 U.S.C. § 1973gg-6 (1994) (setting forth minimum standards for state voter removal programs).
is logically part of the right to vote, it is a fundamental right and must be protected from voter purge statutes. The Michigan Supreme Court recognized this and decided to protect the right not to vote by strictly scrutinizing the purge statute. 238

In Williams v. Osser, 239 Judge Luongo of the Eastern Pennsylvania District Court wrote a dissent criticizing the improper level of constitutional scrutiny imposed on the voter purge statute by the majority opinion. 240 Judge Luongo argued that strict scrutiny should be applied to the voter purge statute. 241 In his dissent, Luongo conceded that the burden of reregistration is light, but still felt that the voter purge statute was constitutionally impermissible because of its effect on the right to vote. 242 Judge Luongo, referring to the Supreme Court's decision in City of Phoenix v. Kolodziejski, 243 stated “[t]he Supreme Court has held that statutes placing restrictions on the right to vote can be sustained only upon a showing that they are necessary to promote a compelling state interest.” 244

Moreover, Judge Luongo failed to see a relationship between voter fraud and the failure to vote. 245 Absent such a relationship, Judge Luongo believed that voter purge statutes could not constitute the least intrusive means by which the state can prevent election fraud. Although it contained no mention of the right not to vote, Judge Luongo’s opinion implicitly recognized such a right by asserting that many people only vote in presidential elections and should not be penalized as a result. 246 In either event, he argued for strict scrutiny and found that a voter purge law could not pass such a standard. 247

B. The Application of Intermediate Scrutiny to Voter Purge Statutes

Intermediate review requires that there be a close fit between the means chosen by the state and the important ends the state seeks to achieve. 248 Voter purge statutes would fail intermediate constitutional scrutiny because while preventing election fraud may be an important state end, such statutes are so ineffective that they do not have the

238. UAW, 198 N.W.2d at 390. Additionally, the court likely based its decision on state law grounds so as to ensure that the United States Supreme Court could not review the decision and possibly overturn it. See Geoffrey R. Stone, et al., Constitutional Law 126 (2d ed. 1991).


240. Id. at 653.

241. Id.

242. Id.

243. 399 U.S. 204, 213 (1970) (holding that the Equal Protection Clause does not permit a state to restrict the franchise to real property taxpayers in elections to approve the issuance of general obligation bonds).

244. Osser, 350 F. Supp. at 653.

245. Id.

246. Id. at 654.

247. Id. at 655.

248. See Nowak & Rotunda, supra note 2, § 14.3.
requisite close fit. No clear guideline exists, however, as to when intermediate scrutiny will be applicable. In the Supreme Court's decision in *Plyler v. Doe*, Justice Brennan determined that intermediate scrutiny was appropriate because of the cumulative effect of two existing "rights,"—the "right" to education and the "right" of a child of an illegal alien to equal protection under the law.250

In *Plyler*, the Court invalidated a Texas statute that withheld state funds from local school districts for children of aliens not legally admitted to the United States.251 Justice Brennan wrote the majority opinion combining these two "rights," neither of which alone would have been sufficient to support intermediate review, but together created a quasi-suspect classification deserving of intermediate scrutiny.252

Analogously, the right not to vote deserves at least intermediate scrutiny protection. Brennan combined the elements of a semi-fundamental right with a quasi-suspect class and decided to apply intermediate scrutiny to the statute. A combination of the right to vote and the right not to vote should qualify for heightened judicial scrutiny in the same way that Justice Brennan combined the classification of a child of an illegal alien and the importance of education to achieve intermediate scrutiny. The right to vote is granted by the Constitution, unlike either of the "rights" used by Brennan.253 This Note argues that the right not to vote derives from or is an element of the right to vote as protected by the Fifteenth Amendment.254 Voting, like education, serves a vital role in the organization of our society.255 In fact, the Court has recognized the right to vote as the underlying foundation tying together all of our other rights.256 Therefore, there exists a stronger argument for applying intermediate scrutiny to voter purge statutes than to the challenged law in *Plyler*.

Furthermore, the legislative history of the NVRA supports an argument for heightened scrutiny of voter purge statutes. The argument for invalidating voter purge statutes is much stronger than the argument put forth to the Court in *Plyler*. In *Plyler* the Court looked to the intent of Congress and found no congressional policy supporting the Texas statute.257 By contrast, the legislative history of the NVRA recognizes the right not to vote, and Congress acted explicitly by enacting a provision precluding purging for failure to vote in federal

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250. Id. at 223.
251. Id. at 230.
252. Id.
253. U.S. Const. amend. XV.
254. See supra part I.
257. See *Plyler*, 457 U.S. at 224-25.
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elections. The Court in Plyler had to impute the intent of Congress concerning the treatment of illegal alien children. The NVRA, on the other hand, clearly spells out a congressional intent to preclude states from purging for failure to vote.

Voter purge statutes will not pass the intermediate scrutiny test, not because the government does not have an important interest, but because the means used by the government does not bear a substantial relation to the ends it seeks to achieve. The crudely inefficient nature of voter purge statutes renders them an arbitrary mechanism by which the government attempts to prevent election fraud. The application of intermediate scrutiny will result in the invalidation of a voter purge statute because, due to the statute's ineffectiveness, there does not exist a "close fit" between purging for failure to vote and preventing election fraud.

C. Voter Purge Statutes Fail Rational Basis Scrutiny

Voter purge statutes should also fail rational basis review. The rational relationship test is applied to state classifications that do not affect fundamental rights or a suspect class and are designed to achieve a legitimate governmental interest. Furthermore, under rational basis review the state classification must be rationally related to the achievement of the legitimate state interest. Rational basis is often applied to economic legislation because a court feels that it does not have any more expertise in this area than the legislature. Therefore, in reference to economic legislation, a court will typically inquire only to ensure that it is conceivable that the classification bears a rational relationship to a government end that the Constitution does not prohibit. The court will review such legislation to ensure that it is not merely random or arbitrary.

258. See supra part I.C (discussing how the NVRA prohibits purging for failure to vote in federal elections)
260. See supra part II.D (discussing the inefficiency of voter purge statutes).
261. Nowak & Rotunda, supra note 2, § 14.3.
262. Id.
263. Id. For example, in Williamson v. Lee Optical, 348 U.S. 483, 491 (1955), the Court upheld a state law preventing opticians from fitting an individual with lenses without a prescription from an ophthalmologist or optometrist. The Court deferred to the judgment of the state legislature because the Court felt the legislature "might [have] conclude[d]" that such a law was necessary for various health reasons. Id. at 490. The Court hypothesized reasons for the state statute in order to uphold it, rather than determine if there was really any rational relationship between the law and the legitimate state interest the statute aimed to protect. Id. In Ferguson v. Skrupa, 372 U.S. 726, 732-33 (1963), the Court upheld a Kansas law that prohibited non-lawyers from acting as debt-adjusters. Justice Black wrote that even though the Court might find a law to be "economically unwise," the Court refused "to sit as a 'superlegislature to weigh the wisdom of legislation.'" Id. at 731 (quoting Day-Brite Lighting v. Missouri, 342 U.S. 421, 423 (1952)). Professor Laurence Tribe refers to Ferguson as a case
The states concededly have a legitimate governmental interest in their desire to prevent election fraud; however, voter purge statutes are not rationally related to achieving the state's end.\(^{264}\) If a court applies rational basis correctly, however, the statutes will be found unconstitutional. Because such statutes have become an inefficient means of preventing election fraud,\(^{265}\) they are an arbitrary method for achieving the state's goals.

While courts typically defer to state action when applying rational basis review, a trend has arisen favoring a rational basis "with teeth" review.\(^{266}\) Rational basis "with teeth" refers to the use of rational review that does not automatically defer to the judgment of the state legislature.\(^ {267}\) Voter purge statutes, which originated early in this century,\(^{268}\) no longer serve any state interest and fail such a rational basis "with teeth" review—a standard that constitutes actual scrutiny, rather than just deferential review.\(^{269}\)

Rationality review requires that the state have a legitimate governmental objective and that the state choose means that are rationally related to its objective. If the standard is applied in this manner, voter purge statutes should be invalidated. While preventing election fraud is a legitimate state interest, determining whether voter purge statutes effectively prevent election fraud remains an open question that most courts refuse to address adequately. Recently, in \textit{Ortiz}, the Third Circuit did not require the state to prove that a voter purge statute was necessary to prevent election fraud.\(^ {270}\) The Third Circuit stated, "Even if there were such a requirement, we are satisfied that a review of the record and present reality demonstrates that the City's purge statute meets an important and legitimate civic interest and is needed

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\(^{264}\) See supra part II.D (discussing the inefficient nature of voter purge statutes which renders them arbitrary mechanisms for preventing election fraud).

\(^{265}\) See supra part II.D.

\(^{266}\) See \textit{City of Cleburne v. Cleburne Living Center, Inc.}, 473 U.S. 432, 448 (1985).

\(^{267}\) See generally id. at 448 (invalidating application of zoning ordinance concerning the mentally retarded because the "record" did "not reveal any rational basis for believing that . . . [the] home [for the mentally retarded] would pose any special threat to the city's legitimate governmental interests").

\(^{268}\) See, e.g., \textit{Duprey v. Anderson}, 518 P.2d 807, 808 (Colo. 1974) (stating that Colorado's voter purge law has been in effect since 1911).

\(^{269}\) See \textit{City of Cleburne}, 473 U.S. at 448. In \textit{Cleburne}, the Court held that "the record does not reveal any rational basis for believing that the Featherston home [for the mentally retarded] would pose any special threat to the city's legitimate interest . . ."). \textit{Id}. Thus, the Court invalidated legislation under a rational basis standard. \textit{Cf. Williamson}, 348 U.S. at 483 (upholding an Oklahoma statute preventing opticians from fitting eyeglass lenses without a prescription from an ophthalmologist or optometrist). If the Court examined a statute under rational basis review without taking such a deferential stance, the nonvoting purge statute would serve as an example of a law that does not pass rational basis scrutiny.

\(^{270}\) See \textit{Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div.}, 28 F.3d 306, 316 (3d Cir. 1994).
to prevent electoral fraud."271 This unsupported statement only proves that the court recognized that the state has a legitimate governmental interest in preventing election fraud. The court failed to analyze, however, the effectiveness of the statute in preventing election fraud.

Purging for failure to vote does not effectuate the state's main interest. Individuals who fraudulently cast votes are the target of the statute, but these individuals cannot be identified solely by their failure to vote. In Ortiz, the Third Circuit referred to a recent Philadelphia Inquirer newspaper article that reported that at least twenty-two voters had been identified who had died or moved out of the jurisdiction but had cast votes in the most recent election.272 These individuals certainly could not have been caught as a result of not voting. Thus, no direct relationship seems to exist between not voting and election fraud.273

In fact, twenty years ago, Arnold Menchel argued that the relationship between nonvoting and election fraud was attenuated at best.274 Moreover, he suggested that a more efficient means for preventing election fraud would be "signature comparison, rather than attempting to change the civic habits of a substantial portion of the population not engaged in any fraudulent activity."275 Menchel's proposal is an even more attractive option today considering the availability of computers for signature comparison. The NVRA serves as a prime example of less intrusive and more efficient means used to accomplish the state's goal as it strives for the same level of protection against election fraud without purging for failure to vote.

While voter purge statutes clearly cut off an avenue for political expression, their main defect is their inability to effectively prevent election fraud. Courts applying strict scrutiny, intermediate scrutiny, or rational basis review that is not blindly deferential to the legislature will reach the same conclusion: voter purge statutes unduly burden Fifteenth Amendment rights without significantly eliminating election fraud.

CONCLUSION

The right not to vote deserves constitutional protection in order to reassure the individual voter that he or she retains freedom of choice in an election. That freedom must "include[] the right to say that no candidate is acceptable."276 The exercise of the right not to vote is

271. Id.
272. Id. at 317.
273. See Menchel, supra note 25, at 390.
274. Id.
275. Id.
consistent with prominent political behaviorist theory. In addition, Congress and two United States circuit courts have recognized a right not to vote.

State statutes that purge for failure to vote undermine the right not to vote by punishing a voter through the requirement of reregistration. Registration already stands as the major obstacle to increased voter participation. Additionally, the burden of reregistration discourages a voter who may already be disenchanted with the political process. Moreover, regardless of the burden imposed by voter purge statutes, these statutes have proven to be a grossly inefficient means to accomplish the stated goal of preventing election fraud. Studies have demonstrated that not only do voter purge statutes frequently purge eligible voters from voting rolls, but such statutes do not effectively purge ineligible voters.

Strict scrutiny should be applied to voter purge statutes because of their stifling effect on the right not to vote, a right derivative of the fundamental right to vote. Nonetheless, regardless of the level of constitutional protection accorded, voter purge statutes fail to pass any standard of constitutional review because they do not rationally relate to the goal of preventing election fraud. Voter purge statutes were designed arbitrarily to purge anyone who does not vote, regardless of the reason for not voting.

While the statutes' inefficiency alone account for why voter purge statutes should fail rational basis review, legislation that singles out nonvoters also fails to consider the damaging effect on the fundamental rights to vote and not vote. Allowing states to purge for failure to vote enables them to intrude upon a voter's decision-making process by forcing the voter to choose a candidate or suffer a penalty, rather than merely regulating the electoral system. Further, voter purge statutes close an outlet for dissident political expression by preventing individuals from being counted among the reported percentage of voters who fail to go to the polls. In sum, voter purge statutes fail to accomplish their designed task while unnecessarily infringing upon fundamental constitutional rights.

277. See Senate Report, supra note 20, at 2 ("The most common excuse given by individuals for not voting is that they are not registered."); James, supra note 2, at 1617.