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Brandon T. Goldstein

MAYBE WE DON'T NEED TO FIND WALDO AFTER ALL: WHY PREVENTING VOTER FRAUD IS NOT A COMPELLING INTEREST

Brandon T. Goldstein*

> To put obstacles between eligible voters and the voting booth is not responsible. It is not brave. It is not honest. It is not public-spirited. It is civic vice.[1]

INTRODUCTION

During the 2020 Presidential Election, the idea of mass voter fraud exploded into public discourse.[2] As the COVID-19 pandemic ravaged the country, many states quickly adopted policy changes intended to make absentee voting more accessible to their citizens.[3] In Virginia, registered voters no longer needed an excuse to vote absentee—they could simply request a ballot, fill it in, and return it, or even just show up to vote early in-person.[4] Policy changes like these very quickly became another partisan battleground, with Democrats supporting them and President Trump marshaling Republicans to oppose them.[5]

Early in the process of making these changes, President Trump latched onto the notion that making voting by mail easier increased the risk of voter fraud, urging his

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* JD, William & Mary Law School Class of 2022.

[1] Gary Hart, *Voter Suppression and Civic Vice*, THE BULWARK (Oct. 31, 2020, 5:04 AM), https://thebulwark.com/voter-suppression-and-civic-vice/ [https://perma.cc/T6WH-7L7D].

[2] Searching the term "voter fraud" on Google's News function yielded more than 32 million articles, as of November 18, 2020. *See* News Search Results for "Voter fraud", GOOGLE, https://www.google.com/search?q=voter+fraud&rlz=1C5CHFA_enUS862US862&source=lnms&tbm=nws&sa=X&ved=2ahUKEwja_oTkh43tAhVKiFkKHQa3Dj4Q_AUoAXoECAIQAw&biw=1440&bih=689 [https://perma.cc/9Y74-RVJC].

[3] Sara Swann, *These 34 States Are Making Voting Easier, If Only for This Fall*, THE FULCRUM (Sept. 24, 2020), https://thefulcrum.us/voting/how-to-vote [https://perma.cc/4TAL-EZ9B].

[4] VA. DEP'T OF ELECTIONS, 2020 CHANGES TO VIRGINIA'S ELECTION LAWS 4 (2020), https://www.elections.virginia.gov/media/electionadministration/electionlaw/2020-Changes-to-Virginia-Election-Laws.pdf [https://perma.cc/6G6D-CNLL].

[5] *See* Mackenzie Lockhart et al., *America's Electorate Is Increasingly Polarized Along Partisan Lines About Voting by Mail During the COVID-19 Crisis*, 117 P.N.A.S. 24640 (2020); *see also* Richard North Patterson, *Will Trump's GOP Turn the Election into a Sham?*, THE BULWARK (Sept. 15, 2020, 5:30 AM), https://thebulwark.com/will-trumps-gop-turn-the-election-into-a -sham/ [https://perma.cc/W6G6-E9UY].

Republican colleagues to oppose these measures as early as April 2020.[6] Throughout that summer, as President Trump continued his public skepticism of the integrity of voting by mail, he also escalated to the entire election process, stating at his campaign rallies that "the only way we're going to lose this election is if the election is rigged."[7] Bolstered by similar claims from Attorney General William Barr,[8] President Trump carried on claiming that the 2020 Election would be marred with fraud through and beyond Election Day.[9] Within the first two weeks after election day, his reelection campaign team had filed lawsuits in several key electoral states claiming that widespread fraud had occurred and therefore the judges must overturn the results to show that he won.[10] Despite his campaign and even some individuals in his administration making very strong public claims,[11] no lawsuit alleging fraud held up in court.[12] In cases exemplary of the failure to adduce evidence of widespread

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[6] *See* Tim Dickinson, *Trump Tampers with Postal Service After Months of Railing Against Vote-By-Mail*, ROLLING STONE (Aug. 14, 2020, 4:42 PM), https://www.rollingstone.com/politics/politics-news/rigged-fraud-scam-cheat-trump-against-vote-by-mail-1044177/ [https://perma.cc/7LUP-BUGZ].

[7] *See, e.g.*, Morgan Chalfant, *Trump: 'The Only Way We're Going to Lose This Election Is If the Election Is Rigged,'* THE HILL (Aug. 18, 2020, 7:22 PM), https://thehill.com/homenews/administration/512424-trump-the-only-way-we-are-going-to-lose-this-election-is-if-the [https://perma.cc/QTZ4-69LN]; *Trump Refuses to Commit to Peaceful Transition of Power if He Loses*, AXIOS (Sept. 23, 2020), https://www.axios.com/trump-peaceful-transfer-power-election-e615d8fb-acef-4e63-9446-be1dd935464a.html [https://perma.cc/PK3L-UJQN].

[8] *See* Ryan Beckwith & Mark Niquette, *William Barr Floats Foreign Mail-Vote Fraud Theory That Experts Call Impossible*, BLOOMBERG QUINT (Sept. 15, 2020, 1:30 PM), https://www.bloombergquint.com/politics/barr-floats-foreign-mail-vote-fraud-that-experts-call-impossible [https://perma.cc/H7MH-HECS].

[9] *See* Chalfant, *supra* note 7; John Haltiwanger et al., *Trump Falsely Claimed He Won the 2020 Presidential Election Even as Votes Were Still Being Counted in Key States*, BUS. INSIDER (Nov. 4, 2020, 2:45 AM), https://www.businessinsider.com/trump-falsely-claims-he-won-presidential-election-2020-10 [https://perma.cc/6WNC-EPZF].

[10] *See, e.g.*, Haltiwanger et al., *supra* note 9; Tom Hals & Jan Wolfe, *Trump Election Campaign Asks Judge to Declare Him Winner in Pennsylvania*, REUTERS (Nov. 18, 2020, 3:44 PM), https://www.reuters.com/article/usa-election-lawsuit-pennsylvania/trump-election-campaign-asks-judge-to-declare-him-winner-in-pennsylvania-idUKKBN27Y2UM [https://perma.cc/9PK3-DGX6].

[11] *See, e.g.*, Adam Shaw, *Defiant Pompeo Predicts 'Smooth Transition' to a 2nd Trump Administration*, FOX NEWS (Nov. 10, 2020, 2:42 PM), https://www.foxnews.com/politics/pompeo-smooth-transition-second-trump-administration [https://perma.cc/Z2VD-22BS]; Sophia Ankel, *White House Press Secretary Kayleigh McEnany Insists that Trump Will Attend 'His Own' Inauguration in January*, BUS. INSIDER (Nov. 14, 2020, 12:09 PM), https://www.businessinsider.com/kayleigh-mcenany-trump-will-attend-his-own-inauguration-in-january-2020-11 [https://perma.cc/RMR6-5QGD]; Jemima McEvoy, *Rudy Giuliani Claims He Has Proof of Voter Fraud, But Says He Can't Share It Yet*, FORBES (Nov. 15, 2020, 11:45 AM), https://www.forbes.com/sites/jemimamcevoy/2020/11/15/rudy-giuliani-claims-he-has-proof-of-voter-fraud-but-says-he-cant-share-it-yet/?sh=17f31eba235e.

[12] *See* Zoe Tillman, *Trump and His Allies Have Lost Nearly 60 Election Fights in Court (and Counting)*, BUZZFEED NEWS (Dec. 14, 2020, 12:09 PM), https://www.buzzfeednews

voter fraud, judges dismissed the campaign's allegations as "inadmissible hearsay within hearsay,"[13] or attributions of corrupt motives to actions they simply had not made an effort to understand.[14]

Despite repeated failures to prove widespread fraud, unfounded allegations like these have corrosive and divisive effects on the electorate's belief in the functioning of American democracy.[15] A poll conducted between November 6, 2020, and November 9, 2020, showed that 70 percent of Republicans nationwide believed that the 2020 Presidential Election was not free and fair.[16] Even more concerning, 64 percent of Republicans believed the results were unreliable, and worst of all, 38 percent believed that the results would actually be overturned.[17] After two months of repeated claims that the election was being stolen from his supporters, this distrust turned into tension, and finally boiled over into open violence on January 6, 2021, when a pro-Trump-rally-turned-protest-turned-riot stormed the Capitol Building, killing at least five while seeking to prevent Congress from certifying Joe Biden's 2020 victory.[18]

.com/article/zoetillman/trump-election-court-losses-electoral-college; Nomaan Merchant, *Trump's Election Lawsuits Plagued by Elementary Errors*, ASSOCIATED PRESS (Nov. 19, 2020), https://apnews.com/article/joe-biden-donald-trump-politics-lawsuits-elections-a508ebaafae82286c69eb091b75abdfc.

[13] Opinion and Order on Plaintiff's Emergency Motion for Declaratory Judgment at 4, Donald J. Trump for President, Inc. v. Benson, Case No. 20-000225-MZ (Mich. Ct. Cl. 2020), https://www.michigan.gov/documents/ag/20201106_Opin_and_Ord_707156_7.pdf [https://perma.cc/HJ8J-SSKU].

[14] *See* Opinion and Order on Plaintiff's Motion for Preliminary Injunction at 13, Costantino v. City of Detroit, Case No. 20-014780-AW (3d Cir. of Mich., Wayne Cnty.), http://cdn.cnn.com/cnn/2020/images/11/13/costantino.et.al.v.wayne.boc.et.al.opinionorder.pdf [https://perma.cc/3634-5NNM] ("Perhaps if Plaintiffs' election challenger affiants had attended the October 29, 2020, walk-through of the TCF Center ballot counting location, questions and concerns could have been answered in advance of Election Day. Regrettably, they did not and, therefore, Plaintiffs' affiants did not have a full understanding of the TCF absent ballot tabulation process. No formal challenges were filed. However, sinister, fraudulent motives were ascribed to the process and the City of Detroit. Plaintiffs' interpretations of events is incorrect and not credible.").

[15] *See generally* Nicolas Berlinski et al., *The Effects of Unsubstantiated Claims of Voter Fraud on Confidence in Elections*, J. EXPERIMENTAL POL. SCI. (2021) (concluding that even fact-checking the claims does not mitigate the damage of unsubstantiated voter fraud allegations).

[16] Catherine Kim, *Poll: 70 Percent of Republicans Don't Think the Election Was Free and Fair*, POLITICO (Nov. 9, 2020, 5:00 PM), https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488 [https://perma.cc/2CLE-ZEKU].

[17] *Id.*

[18] *See* Steve Holland & Andrea Shalal, *Trump Faces Calls for Removal, Possible Impeachment, After Capitol Chaos*, REUTERS (Jan. 7, 2021, 3:51 AM), https://www.reuters.com/article/usa-election/trump-faces-calls-for-removal-possible-impeachment-after-capitol-chaos-idINKBN29C0ZK [https://perma.cc/L3TK-XZTL]. Many in Congress and the media have even gone as far as to label this riot an "insurrection" or a "coup attempt." *See* Eugene Robinson,

Beyond the unprecedented violence, this phenomenon of distrust is neither new nor surprising—Americans have long lacked confidence in the electoral process for varying reasons.[19] However, in the hyper-partisan age that spawned the 2020 Election, divisiveness about the defining features of American democracy—elections and the peaceful transition of power—demonstrates the need for an honest accounting of voter fraud and a reevaluation of how to approach it.

Despite advocates' near-complete inability to actually prove in court that voter fraud occurs, judges have routinely accepted that "preventing voter fraud" justifies laws that restrict individuals' right to vote.[20] The Supreme Court has even gone as far as identifying the prevention of voter fraud as a compelling state interest, indicating that such laws could withstand strict scrutiny.[21] The combination of such a permissive legal structure,[22] with the current widespread partisan distrust of the electoral

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Opinion, *We Just Saw an Attempted Coup d'etat. Blame Trump. Blame His Republican Enablers.*, WASH. POST (Jan. 6, 2021), https://www.washingtonpost.com/opinions/trump-has-wounded-this-country-it-will-take-a-long-long-time-for-us-to-heal/2021/01/06/c9f74102-5068-11eb-bda4-615aaefd0555_story.html [https://perma.cc/5WTY-RMXF]; Amanda Taub, *It Wasn't Strictly a Coup Attempt. But It's Not Over, Either.*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/2021/01/07/world/americas/what-is-a-coup-attempt.html; Casey Tolan et al., *Insurrection Fueled by Conspiracy Groups, Extremists, and Fringe Movements*, CNN (Jan. 7, 2021, 5:01 PM), https://www.cnn.com/2021/01/07/us/insurrection-capitol-extremist-groups-invs/index.html [https://perma.cc/6Q7J-T7LY]. President Trump was officially impeached for "incitement of insurrection." *See* Jeremy Herb et al., *House Impeaches Trump for 'Incitement of Insurrection'*, CNN (Jan. 13, 2021, 8:23 PM), https://www.cnn.com/2021/01/13/politics/house-vote-impeachment/index.html [https://perma.cc/9FV3-EGVU].

[19] *See* Andrew N. DeLaney, Note, *Appearance Matters: Why the State Has an Interest in Preventing the Appearance of Voter Fraud*, 83 N.Y.U. L. REV. 847, 847–48 (2007) (declaring at the outset that Americans have little confidence in their own electoral process).

[20] *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2340, 2348 (2021) ("One strong and entirely legitimate state interest is the prevention of fraud. . . . [I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders."); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196 (2008) (finding "no question about the legitimacy or importance of a State's interest" in preventing voter fraud); Richardson v. Texas Sec'y of State, 978 F.3d 220, 239–40 (5th Cir. 2020) (concluding that "Texas's interest in reducing voter fraud . . . easily justifies" the restrictions it imposed and that states need not "shoulder 'the burden of demonstrating empirically the objective effects' of election laws.") (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986)); Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614, 616 (8th Cir. 2001) (stating unequivocally that the "state has a compelling interest in preventing fraud.").

[21] *See* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (declaring that states have a "compelling interest in preventing voter fraud").

[22] In conjunction with the controlling *Anderson-Burdick* equal protection standard for restrictions on the right to vote, allowing the prevention of voter fraud to stand as a compelling state interest, or at least an interest justifying restrictions on the franchise, leaves the right to vote open to numerous restrictions; even if it is found to be a "severe" burden on the right to vote under the *Anderson-Burdick* standard, a restriction purportedly aimed at reducing fraud could thus still survive scrutiny. *See generally* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

process,[23] will encourage states to further impede the right to vote in the name of preventing fraud.

This Note takes the position, counter to established jurisprudence, that the prevention of voter fraud is not a compelling state interest that can independently justify restrictions on the right to vote. It will seek to do so through two mechanisms. First, it will argue that the right to vote is unjustifiably treated differently than other rights by courts, using a comparison to the Second Amendment right to bear arms.[24] Second, it will argue that current jurisprudence holding the prevention of voter fraud to be a compelling interest misunderstands the inherent means-ends distinction in voting rights standards.[25] The prevention of voter fraud is not an end in itself, rather it is a means designed to serve the overarching end of election integrity. Finally, the Note will account for electoral policy solutions that can help address election integrity without overburdening citizens' voting rights.[26]

I. BACKGROUND

A. The Fundamental Right to Vote and Voter Suppression Through U.S. History

Activists on the political Left and the political Right can generally agree on one thing regarding the right to vote: "[v]oting is a duty, and a right, that men and women have died for. It is an accomplishment and a reminder that we are *consenting* to be governed by choosing our own leaders."[27] Thomas Paine, influential as he is in American history, phrased it in a reverse, less aspirational manner—saying instead that "[t]o take away this right is to reduce a man to slavery."[28] The Supreme Court has also acknowledged, several times, that the right to vote is "preservative of all rights,"[29] and has repeatedly held it to be a fundamental right under equal protection.[30]

However, at the founding, only white men with property could vote in most states.[31] Indeed, throughout American history, politicians have endeavored to exclude

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[23] *See supra* notes 15–17 and accompanying text.

[24] *See infra* Part II.

[25] *Infra* Part III.

[26] *Infra* Part IV.

[27] Peter Schweizer, *Foreword* to ERIC EGGERS, FRAUD: HOW THE LEFT PLANS TO STEAL THE NEXT ELECTION 1 (Regnery 2018).

[28] THOM HARTMANN, THE HIDDEN HISTORY OF THE WAR ON VOTING: WHO STOLE YOUR VOTE—AND HOW TO GET IT BACK 2 (Berrett-Koehler Publishers, Inc. 2020) [hereinafter HARTMANN, THE HIDDEN HISTORY OF THE WAR ON VOTING] (internal quotations omitted).

[29] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). *See also* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

[30] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.8.1 at 942 (6th ed. 2019) (citing Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969); Harper v. Va. State Bd. Of Elections, 383 U.S. 663, 666 (1966); Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

[31] *See* HARTMANN, THE HIDDEN HISTORY OF THE WAR ON VOTING, *supra* note 28, at 26

"undesirable" citizens from the community of voters.[32] In order to preserve political power, the process of granting the franchise to other demographic groups was long and tedious.[33] People fought, bled, and died for the right to vote.[34]

Currently, the right to vote has several sources of textual protection in the Constitution[35] and Bill of Rights.[36] The Fifteenth Amendment prohibited states from denying the right to vote to former slaves, and based on race or skin color.[37] The Nineteenth Amendment prohibits states from denying the right to vote to women.[38] The Twenty-Fourth Amendment prohibits the use of poll taxes and literacy tests to determine voting qualifications.[39] The Twenty-Sixth Amendment prohibits denying the right to vote to anyone eighteen years old or older.[40] Despite the Constitutional Amendments, policymakers found (and still find) ways to keep those who would vote them from office away from the polls.[41]

The Constitution's protection leaves a significant gray area in voting rights law surrounding exactly what restrictions may be placed on the franchise and for what reasons.[42] Although the four Amendments protecting the right to vote are textual

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("Wealthy white men have had the right to vote in America since the beginning of our republic."); *see also* KIM WEHLE, WHAT YOU NEED TO KNOW ABOUT VOTING AND WHY 183 (HarperCollins 2020).

[32] *See* ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT 3–4 (Harv. Univ. Press 2018) [hereinafter LICHTMAN, THE EMBATTLED VOTE IN AMERICA].

[33] *See id.* at 4.

[34] *See, e.g.*, John Lewis, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html; Katharine Q. Seelye, *John Lewis, Towering Figure of Civil Rights Era, Dies at 80*, N.Y. TIMES (July 17, 2020), https://www.nytimes.com/2020/07/17/us/john-lewis-dead.html.

[35] U.S. CONST. art. IV, § 4 guarantees a "Republican Form of Government" to every state. Arguably, this provision does not explicitly protect the right to vote, but has been noted to imply one.

[36] U.S. CONST. amends. XV, XIX, XXIV, & XXVI prevent the states from denying the right to vote based on race, sex, color, previous condition of servitude, age (over 18), and based on the failure to pay a poll tax or pass a literacy test.

[37] U.S. CONST. amend. XV.

[38] U.S. CONST. amend. XIX.

[39] U.S. CONST. amend. XXIV.

[40] U.S. CONST. amend. XXVI.

[41] *See* HARTMANN, THE HIDDEN HISTORY OF THE WAR ON VOTING, *supra* note 28, at 13–34; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 43–44, 249 (2000).

[42] *See* LICHTMAN, THE EMBATTLED VOTE IN AMERICA, *supra* note 32, at 2 ("[T]he framers made a consequential mistake when they drafted the Constitution and Bill of Rights, the Constitution's first ten amendments. They failed to enshrine in these pivotal documents of our democracy the right to vote, not just for men or even only white men but for any American. Among many enumerated rights that the government cannot abridge, the right to vote remained conspicuously absent and remains so to this day.").

sources of protection, they protect the right to vote from very specific incursions,[43] namely racial discrimination,[44] sex discrimination,[45] age discrimination,[46] and the use of poll taxes or literacy tests as additional qualifications on voting.[47] Policymakers frequently exploit this gray area to advance their political agendas and enhance their political power.[48]

In the one hundred years between the passage of the Fifteenth Amendment and the Voting Rights Act, White Supremacists in the South sought to undermine African Americans' right to vote—the foundation on which the balance of their newly granted rights rested.[49] They achieved this with remarkable speed and efficiency—by 1908, all eleven states that had seceded a half-century earlier had instituted a poll tax, most had layered a grandfather clause by which white voters could retain the right to vote regardless of the tax, and seven required prospective voters to pass a literacy test.[50] Quickly, the South descended into one-party rule, leading to little meaningful resistance throughout the rise and entrenchment of Jim Crow Segregation.[51] However, in early 1965, in the throes of the Civil Rights Movement, police accosted a large protest marching on Selma, Alabama.[52] The result, soon dubbed "Bloody Sunday," finally spurred Congress into action.[53] With the passage of the Twenty-Fourth Amendment earlier in 1962 and then the Voting Rights Act shortly after Bloody Sunday, by August 1965, both poll taxes and literacy tests were banned.[54]

Even more potent was the Voting Rights Act's Section 5 "preclearance" requirement, which forced federal review and permission before a covered state could enact any voting law.[55] The restriction was an extraordinary prophylactic measure instituted to prevent states with a history of pervasive discrimination from enacting discriminatory voting laws.[56] Although extraordinary in design, the Voting Rights

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[43] *See id.* ("All subsequent amendments protecting [] voting rights . . . are framed negatively, stipulating not, what the states must do to ensure people's voting rights in America's democratic republic but what they cannot do.").

[44] U.S. CONST. amend. XV.

[45] *Id.* amend. XIX.

[46] *Id.* amend. XXVI.

[47] *Id.* amend. XXIV.

[48] *See* LICHTMAN, THE EMBATTLED VOTE IN AMERICA, *supra* note 32, at 4 ("Disputes over the vote have been intensely partisan, with principled justifications for voting restrictions functioning as thinly masked attempts to favor one party over another.").

[49] *See* LAWRENCE GOLDSTONE, ON ACCOUNT OF RACE: THE SUPREME COURT, WHITE SUPREMACY, AND AFRICAN AMERICAN VOTING RIGHTS 234 (Counterpoint 2020).

[50] *See id.*

[51] *See id.* at 235.

[52] *See id.* at 3–4.

[53] *See id.* at 4.

[54] *See id.* at 5.

[55] *See* Shelby Cnty. v. Holder, 570 U.S. 529, 534–35 (2013).

[56] *See id.* at 545 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)) ("[T]he

Act is widely considered the most successful piece of civil rights legislation ever passed.[57] "African-American voter registration exploded in every state that had been a part of the old Confederacy . . . ."[58] By 2009, the racial gap in registration and turnout in states covered by the Act was actually lower than the national average.[59] Moreover, by the time of the decision in *Shelby County v. Holder*, Census data indicated that African-American turnout actually exceeded white turnout in five of the six covered states, with a gap of only half of a percent in the sixth.[60]

As successful as the law was on that score, laws and abuses in the gray area began to proliferate in the early 2000s.[61] Particularly, Georgia passed the nation's first photo ID law for voters in 2005 with the support of the Civil Rights Division at George W. Bush's Department of Justice.[62] Over the course of the Bush years, federal enforcement of the Voting Rights Act slowed to a near halt, further enabling the proliferation of laws in the gray area.[63] Proponents of these early laws justified them as important measures designed to secure elections and prevent fraud.[64]

In 2013, the *Shelby* decision ultimately invalidated Section 4(b) of the Voting Rights Act, which developed the formula used to subject states to preclearance.[65]

Act constitutes 'extraordinary legislation otherwise unfamiliar to our federal system.'") (quoting Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 211 (2009)).

[57] *See* GOLDSTONE, *supra* note 49, at 5. The U.S. Department of Justice itself has expressed the same sentiment. *See* U.S. DEP'T OF JUST., INTRODUCTION TO FEDERAL VOTING RIGHTS LAWS: THE EFFECT OF THE VOTING RIGHTS ACT (June 19, 2009), https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0 [https://perma.cc/DY2X-PZUC].

[58] GOLDSTONE, *supra* note 49, at 6.

[59] *See Shelby*, 570 U.S. at 535.

[60] *See id.*

[61] *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 223, 229 (Picador 2015).

[62] *See id.* at 223, 226–30. This included support from Hans von Spakovsky, then a member of the Civil Rights division. His role in securing preclearance for Georgia's voter ID law, and the ripple effect that created throughout election law more broadly cannot be understated, and will be addressed in more depth in Section I.B, *infra*.

[63] *See id.* at 229. Between 2001 and 2005, the Bush Department of Justice reviewed over 81,000 proposed voting changes, but objected to clearance only forty-eight times. *Id.* This was ten times fewer objections than the first four years of the Reagan administration. *Id.* Even more, the Bush Department of Justice filed only one case over its first five years alleging voter discrimination—against an African-American Democrat on behalf of white voters in Mississippi. *Id.* at 230.

[64] *See id.* at 223. As the Georgia state representative that introduced the first voter ID bill explained, "It's about protecting the security of our elections, ... The bill does get at the heart of voter fraud. The reason voter fraud isn't caught at the polls is because there is no picture ID requirement." *Id.* As will be demonstrated in Section I.B, *infra*, fraud prevention or election integrity is commonly the stated goal of more recent restrictive voting laws.

[65] *See* Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) ("[Congress's] failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.").

Shelby has been widely derided for gutting Section 5 of the Voting Rights Act,[66] and it has enabled even more laws in the gray area to proliferate.[67] Shortly after *Shelby*, states previously subject to preclearance began implementing restrictive changes.[68] Within days, the Republican-dominated legislature in North Carolina introduced and passed a voter ID law that the Fourth Circuit later found "target[ed] African Americans with almost surgical precision."[69] As of 2015, thirty-four states enforced some form of voter ID, and several more have passed such laws since.[70] The Brennan Center also found that after *Shelby*, states previously subject to preclearance had significantly higher rates of voter roll purges than those not subject to preclearance.[71] It concluded that over two million fewer voters would have been purged had preclearance limited their use of that mechanism as it previously had.[72] Further, arcane registration requirements, felon disenfranchisement, and overcrowded polling places unduly restrict access to the ballot box.[73] Partisan gerrymandering dilutes votes in some districts but enhances them in others, depriving some Americans of a meaningful right to vote.[74] Research even suggests that policies like these suppressed enough minority votes for former President Trump to win the 2016 election.[75] Even outside of these policies, millions of Americans either do not register or simply choose not to exercise their right to vote.[76] At this point, it is quite easy to see why many who write on voting rights describe the right as "embattled,"[77] "contested,"[78] or engaged in a "struggle."[79]

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[66] *See* GOLDSTONE, *supra* note 49, at 9 ("But perhaps the most pernicious effect of *Shelby County v. Holder* is the renewed perception, among those who would discriminate, that the Supreme Court is their ally.").

[67] *See* LICHTMAN, THE EMBATTLED VOTE IN AMERICA, *supra* note 32, at 4.

[68] *See* BERMAN, *supra* note 61, at 223, 229.

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

[70] *See* Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 363 (2016).

[71] *See* JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUST., VOTER PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf [https://perma.cc/PJK2-34PQ].

[72] *See id.*

[73] *See* LICHTMAN, THE EMBATTLED VOTE IN AMERICA, *supra* note 32, at 4.

[74] *See id.*

[75] *See* Matthew Murillo, *Did Voter Suppression Win President Trump the Election?: The Decimation of the Voting Rights Act and the Importance of Section 5*, 51 U. S.F. L. REV. 591, 608–13 (2017).

[76] *See generally* KNIGHT FOUNDATION, THE 100 MILLION PROJECT: THE UNTOLD STORY OF AMERICAN NON-VOTERS (2020), https://knightfoundation.org/wp-content/uploads/2020/02/The-100-Million-Project_KF_Report_2020.pdf [https://perma.cc/4YVU-3KR8]. The report painstakingly details who these non-voters are, what they care about, and most importantly, why they chose not to vote.

[77] *See generally* LICHTMAN, THE EMBATTLED VOTE IN AMERICA, *supra* note 32.

[78] *See generally* KEYSSAR, *supra* note 41.

[79] *See generally* BERMAN, *supra* note 61.

B. Voter Fraud Now—The Current Data

Although election fraud may have been common through American history,[80] scant evidence exists to show that it remains so now.[81] However, this is an issue subject to partisan divide, with the political Right disagreeing with the above conclusion,[82] and political Left agreeing with the above conclusion, arguing instead that voter suppression is the greater threat to American democracy.[83] In *Stealing Elections*, *Wall Street Journal* columnist John Fund was among the first to purport to demonstrate that major fraud continues to occur in American elections.[84] That claim has been echoed over the past fifteen years and is now a common claim among the Republican party, enjoying support from some of the most prominent party leaders.[85] More recently, others have written on the topic, with many sliding down the slippery partisan slope to claim that the "Left" plans to use fraud to "steal" the next election.[86] Less flagrantly partisan accounts, however, confirm the "Left's" point of view—voter fraud is not as prevalent as many make it seem, and perhaps not even a very big problem at all.[87]

This Note sought to avoid the early definitional trap that many in this discourse appear to fall into—conflating *voter fraud* with *election fraud.* Accordingly, it adopts a definition of voter fraud consistent with Professor Levitt's seminal work for the Brennan Center, *The Truth About Voter Fraud*: "voter fraud" is fraud perpetrated by voters, who, knowing they are ineligible to vote, nonetheless vote anyway in an attempt to defraud the election system.[88]

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[80] *See generally* TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION 1742–2004 (Carroll & Graf Publishers 2005).

[81] A number of sources confirm this argument. This section will discuss them and the data in turn.

[82] *See, e.g.*, JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 2 (Revised ed., Encounter Books 2008).

[83] *Id.*

[84] *Id.* at 4–5.

[85] For instance, President Trump has provided the most open and notorious mouthpiece for claims of fraud in the 2020 Election cycle. *See supra* Introduction.

[86] *See generally, e.g.*, EGGERS, *supra* note 27. *See also* ADRIAN NORMAN, THE ART OF THE STEAL: EXPOSING FRAUD & VULNERABILITIES IN AMERICA'S ELECTIONS 6–9 (Eleven Press, 2020). *But see* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 1–2 (Bloomsbury Publ'g, 2018); GILDA R. DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA 2 (N.Y.U. Press, 2020). Anderson and Daniels squarely place the blame on the Republican Party for stealing elections, claiming it has fabricated fraud as a more palatable rationale to suppress minority voters unlikely to vote for them.

[87] *See generally, e.g.*, RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY 12–13 (Yale Univ. Press, 2020); SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 14–16 (W.W. Norton & Co., 2005).

[88] *See* Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST. 4 (Nov. 9, 2007), https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud [https://perma.cc/HFC2-UB5N]; *see also* LORRAINE MINNITE, THE MYTH OF VOTER FRAUD

On that score, this Note will now turn to current data supporting the existence of voter fraud. The most comprehensive actual data available comes from the Heritage Foundation.[89] To date, they claim to present 1,340 "proven" instances of fraud,[90] leading to 1,152 criminal convictions,[91] 147 civil penalties or diversion program placements,[92] and 41 judicial or other official findings.[93] Using this database, Heritage advocates for a number of policy prescriptions, including voter ID and documentary proof of citizenship requirements.[94] Other data includes a report by the Public Interest Legal Foundation alleging serious problems with non-citizen voting in Virginia.[95] That report factored heavily into former Kansas Secretary of State Kris Kobach's attempts to enforce a documentary proof of citizenship requirement in his state.[96] Although these are both heavily relied upon for proponents of voting restrictions, both the Kansas law and the Heritage Data have been thoroughly rebutted.[97]

In 2018, the Brennan Center issued a rebuttal to the Heritage database.[98] That report found that the Heritage database was not all it was advertised to be.[99] In fact, according to their analysis, it was quite the opposite.[100] While the database claimed 1,340 instances at that time, the Brennan Center found that in reality there were only 749 cases, involving 1,100 individuals.[101] Only 105 of those cases were in the most

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36 (Cornell Univ. Press, 2010) (defining voter fraud as "the intentional, deceitful corruption of the electoral process *by voters*.") (emphasis added).

[89] *See generally* HERITAGE FOUND., *Database of Election Fraud*, https://www.heritage.org/voterfraud [https://perma.cc/XA92-RBL8].

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *See* Hans A. von Spakovsky, *9 Reforms States Can Implement to Prevent Mistakes and Vote Fraud*, HERITAGE FOUND. (Feb. 2, 2021), https://www.heritage.org/election-integrity/commentary/9-election-reforms-states-can-implement-prevent-mistakes-and-vote [https://perma.cc/3LG7-QUV8].

[95] *See generally* PUBLIC INTEREST LEGAL FOUND., ALIEN INVASION II: THE SEQUEL TO THE DISCOVERY AND COVER-UP OF NON-CITIZEN REGISTRATION AND VOTING IN VIRGINIA (2017), https://publicinterestlegal.org/files/Alien-Invasion-II-FINAL.pdf [https://perma.cc/TK3W-YG8X].

[96] *See* HASEN, *supra* note 87, at 15–24.

[97] *See, e.g.*, Rudy Mehrbani, *Heritage Fraud Database: An Assessment*, BRENNAN CTR. FOR JUST. 1, 7–8 (2018); Christopher Famighetti et al., *Non-Citizen Voting: The Missing Millions*, BRENNAN CTR. FOR JUST. 1–2 (2017).

[98] *See generally* Mehrbani, *supra* note 97.

[99] *See id.* at 1.

[100] *See id.* at 3 ("In short, the database overstates the problem of voter fraud, and its own cases disprove the claims by President Trump and some of his Fraud Commission members that large scale voter fraud exists in America's elections. It serves to perpetuate the false narrative of widespread fraud often used to justify voting restrictions and distract the public from other, more useful, policy proposals that would actually improve the administration of our elections.").

[101] HERITAGE FOUND., *supra* note 89; Mehrbani, *supra* note 97, at 1.

recent five years, and just over half within the preceding ten.[102] Over the decades included in the database, the Brennan Center analysis only found ten cases involving in-person impersonation fraud.[103] The analysis found only forty-one cases involving non-citizen registration or voting, despite claims by Heritage, Public Interest Legal Foundation, and even President Trump, that immigrants cast anywhere from thousands to millions of illegal votes in 2016 alone.[104] Moreover, only thirty incidents of suspected non-citizen voting were actually referred to prosecutors for further investigation.[105] According to the Brennan Center, this data serves to refute the refrain that fraud is common, but under-prosecuted.[106] Since there were so few referrals to prosecutors, it is not a matter of it being difficult to prove and prosecute fraud, but rather that election officials did not even suspect much fraud to begin with.[107]

Additionally, advocates of voting restrictions often suffer from serious credibility problems.[108] Using the most prominent as an example, as noted above, Hans von Spakovsky is a key figure in the advancement of restrictive voting laws.[109] His advocacy for voter ID laws stretches back in to the mid-1990s.[110] In late 2001, Attorney General John Ashcroft brought Von Spakovsky (among others) into the Department of Justice Civil Rights Division, where six former attorneys in the voting section called him "the point person for undermining the Civil Rights Division's mandate to protect voting rights."[111] In 2005, one week after the Georgia voter ID law was introduced in the state legislature, he penned an anonymous article in the *Texas Review of Law & Politics*, again advocating for voter ID.[112] According to Department

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[102] Mehrbani, *supra* note 97, at 1.

[103] *Id.* at 2.

[104] *Id.*; *see also* Hans A. von Spakovsky, *New Report Exposes Thousands of Illegal Votes in 2016 Election*, HERITAGE FOUND. (July 28, 2017), https://www.heritage.org/election-integrity/commentary/new-report-exposes-thousands-illegal-votes-2016-election [https://perma.cc/K363-RM24]; PUBLIC INTEREST LEGAL FOUND., *supra* note 95, at 1–2, 10; Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting with Lawmakers*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html.

[105] *See* Famighetti et al., *supra* note 97, at 1.

[106] *Id.* at 2.

[107] *See id.* at 2.

[108] *See* Jane Mayer, *The Voter-Fraud Myth*, NEW YORKER (Oct. 22, 2012), https://www.newyorker.com/magazine/2012/10/29/the-voter-fraud-myth [https://perma.cc/F968-F92M]; Sam Levine & Spenser Mestel, *"Just Like Propaganda": The Three Men Enabling Trump's Voter Fraud Lies*, THE GUARDIAN (Oct. 26, 2020), https://www.theguardian.com/us-news/2020/oct/26/us-election-voter-fraud-mail-in-ballots [https://perma.cc/97CP-RMZF].

[109] *See* Section I.A; *supra* note 62 and accompanying text.

[110] In 1995, early in his career as a Republican Party operative in Georgia, he wrote an op-ed in the *Wall Street Journal* claiming that voter identification would immediately cut down on a large amount of fraud. *See* BERMAN, *supra* note 61, at 217–18.

[111] *Id.* at 218.

[112] *See id.* at 226. When his identity was exposed to the general public a year later, in 2006, the revelation was considered "explosive." *Id.*

ethics guidelines, Von Spakovsky should have recused himself from preclearance consideration of Georgia's law.[113] However, not only did he fail to recuse himself, he instead became a leading proponent of the law during the review process.[114] With only one new member of the voting section since Bush's victory in 2001, the law still faced a steep uphill battle to pass preclearance.[115] However, Von Spakovsky coordinated with the new hire, sending him articles and arguments in support of voter ID laws.[116] On August 25, 2005, the four-member majority of the review team presented its analysis and recommendation that the law be rejected preclearance.[117]

A day later, Georgia officials actually reached back out to voting section lawyers to inform them that they had miscalculated, and in their view overstated the amount of Georgia voters who already possessed ID by over 600,000.[118] Although the review team asked for more time to incorporate this information into their analysis, the new Chief of the voting section told them he'd already decided to approve the law, citing the lone dissenting reviewer who had collaborated with Von Spakovsky.[119] Starting with Von Spakovsky's cooperation and ending with the official reprimand of the four-reviewer majority, critics of the Bush Department of Justice saw that process as the epitome of corruption.[120]

Von Spakovsky's advocacy for voting restrictions did not end with his time at the Department of Justice, however.[121] Frequently citing the *Alien Invasion* report and various articles of his own, he argued in 2018 that voter fraud is the real problem and that claims of voter suppression are overblown political rhetoric designed only to scare voters.[122] Moreover, he used the Department of Justice's decision to preclear Georgia's voter ID law in 2005 as evidence that these laws are longstanding and considered fair,[123] completely omitting his own behind-the-scenes role in ensuring that outcome over the objection of a majority of career voting section lawyers.[124] Without necessarily stating so, he crafted his argument in that article around a narrow definition of voter suppression tailored to Section 2 of the Voting Rights Act.[125] Unlike the more expansive Section 5, however, that provision only covers denial or abridgement on

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[113] *See id.* at 226–27.

[114] *See id.* at 227.

[115] Four out of five members of the review team were career holdovers. *See id.*

[116] BERMAN, *supra* note 61, at 227.

[117] *See id.* at 228.

[118] *See id.*

[119] *See id.* at 228–29.

[120] *See id.* at 229. Within one year, the other four members of the review team for the Georgia law had all left the voting section. *See id.*

[121] *See generally* Hans A. von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 MEMPHIS L. REV. 1147 (2018) [hereinafter von Spakovsky, *The Myth of Voter Suppression*].

[122] *See id.* at 1149–50, 1151–52, 1182.

[123] *See id.* at 1154.

[124] *See* BERMAN, *supra* note 61, at 226–29.

[125] *See* von Spakovsky, *The Myth of Voter Suppression*, *supra* note 121, at 1157–59.

account of race,[126] and advocates assess that voter suppression cloaks the racial element in a facially non-discriminatory regulation.[127] Even so, Von Spakovsky briefly glossed over in his conclusion that he did not incorporate Section 3 enforcement into his analysis, under which there were two enforcement actions.[128] Using now-common platitudes about the ubiquity of photo ID and definitional chicanery as outlined above, he assertively concluded that any claims of widespread voter suppression are wrong.[129] With a record of advocacy as long and questionable as Von Spakovsky's, it is clear why a federal judge discounted his "expert" testimony in a recent case regarding a regulation requiring documentary proof of citizenship to vote.[130] The court in that case found that "[t]he record [was] replete with [] evidence of Mr. von Spakovsky's bias."[131] The court concluded that although his notable lack of an academic background was not fatal to the credibility of his presentation, "the lack of academic rigor in his report, in conjunction with his clear agenda and misleading statements, render[ed] his opinion on the matter unpersuasive."[132] Another prominent supporter of voting restrictions, Kansas Secretary of State Kris Kobach, was sanctioned by the court in that case due to his misleading statements about the nature of voter fraud in his state.[133] Although a good example of "my team–your team" facts,[134] when it comes to voter fraud, proponents clearly overstate the problem, and have given themselves personal credibility problems due to their unrelentingly zealous advocacy.

II. THE RIGHT TO VOTE VS. THE RIGHT TO BEAR ARMS

Beyond recognizing each as a politically charged subject, the Second Amendment and the right to vote bear little superficial relation to one another.[135] However, upon

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[126] *Compare* Voting Rights Act of 1965 § 5, *with* Voting Rights Act of 1965 § 2.

[127] *See* Lydia Hardy, Comment, *Voter Suppression Post*-Shelby*: Impacts and Issues of Voter Purge and Voter ID Laws*, 71 MERCER L. REV. 857, 857 (2020).

[128] *See* von Spakovsky, *The Myth of Voter Suppression*, *supra* note 121, at 1181–82.

[129] *See id.* at 1183 (concluding that ensuring every American can vote, and that they can do so without dilution "requires states to take reasonable common sense actions that impose minimal burdens on voters and do [sic] not constitute voter suppression. *Any claims to the contrary are wrong.*") (emphasis added) (internal quotation marks omitted).

[130] *See* Fish v. Kobach, 309 F. Supp. 3d 1048, 1082 (D. Kan. 2018) ("The Court gives little weight to Mr. Von Spakovsky's opinion and report because they are premised on several misleading and unsupported examples of noncitizen voter registration, mostly outside the State of Kansas. His myriad misleading statements, coupled with his publicly stated preordained opinions about this subject matter, convinces the court that Mr. Von Spakovsky testified as an advocate and not as an objective expert witness.").

[131] *Id.* at 1083.

[132] *Id.* at 1184.

[133] *See id.* at 1119 ("IT IS FURTHER ORDERED that Defendant shall attend 6 hours *in addition to* any other CLE education required by his law license for the 2018–2019 reporting year.").

[134] *See* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 210–15 (2018).

[135] Outside of single-issue voters, there is perhaps no superficial relation at all between the two rights.

digging deeper, Second Amendment jurisprudence is a helpful doctrinal comparison to the voting rights jurisprudence. Although there are several apt comparisons between the two, they share the most common ground within the difference of judicial analysis between policies that strip individuals of Second Amendment rights and policies that strip individuals of the right to vote.[136] In particular, this Section will contrast judicial analysis of extreme risk protection laws (more commonly known as "red flag" laws) and voter ID laws to show that courts typically require a less stringent showing before they allow incursions on the right to vote, despite applying (at least nominally) a heightened level of scrutiny.

A. Second Amendment Jurisprudence

In 2008, the Supreme Court for the first time declared that the Second Amendment protects an individual's right to bear arms for historically lawful purposes.[137] Two years later, the Court held that this right applied to the states via Fourteenth Amendment incorporation.[138] Particularly, the Court singled out self-defense and defense of home as such historically lawful purposes.[139] The Court also vaguely mentioned that the right, like most other rights "is not unlimited,"[140] and that the opinion did not purport to "cast doubt on longstanding prohibitions" like possession by convicted felons or the mentally ill, or laws forbidding carrying firearms in "sensitive" places like schools or government buildings.[141] Beyond that, however, the Court left little guidance for the lower courts to use in a Second Amendment analysis. Although there is considerable debate about the overall correctness of the *Heller* decision,[142] such debate is beyond the scope of this Note.

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[136] *See* Philip Bump, *Which Is Easier In Your State: Buying a Rifle or Voting?*, WASH. POST (Mar. 18, 2021, 2:55 PM), https://www.washingtonpost.com/politics/2021/03/18/which-is-easier-your-state-buying-rifle-or-voting/ [https://perma.cc/UAV2-2DJP].

[137] *See* District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (declaring that the text of the Second Amendment protects a right that is "exercised individually and belongs to all Americans").

[138] *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

[139] *See id.* at 780 ("[O]ur central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.").

[140] *Heller*, 554 U.S. at 626.

[141] *Id.* at 626–27.

[142] Justice Scalia's textual analysis of the Second Amendment has drawn sharp criticism, with two dissenting opinions in *Heller* itself, as well as a dozen years of socio-political and legal-academic commentary. *See, e.g.*, *id.* at 636–80 (Stevens, J., dissenting); *id.* at 681–723 (Breyer, J., dissenting); THOM HARTMANN, THE HIDDEN HISTORY OF GUNS AND THE SECOND AMENDMENT 102–05 (Berrett Koehler, 2019) (arguing, alongside Justice Stevens' dissent, that the phrase "bear arms" carried a particular idiomatic meaning in the Founding Era that related specifically to service in a local militia).

Lacking Supreme Court guidance, the Courts of Appeals have largely filled in the blanks with a two-pronged approach.[143] According to the Fourth Circuit, the first step of the inquiry "is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."[144] If the law does burden protected Second Amendment conduct, the court will next move to "apply[ ] an appropriate form of means-ends scrutiny."[145] Usually, the courts will apply intermediate scrutiny[146] unless the law burdens the ability to defend oneself in one's home.[147]

"Red flag" gun laws exist within this jurisprudential framework.[148] These laws allow courts to issue temporary orders stripping individuals of their ability to possess firearms based on a showing that the individual is imminently dangerous to him- or herself or others.[149] These laws are a relatively new phenomenon made popular by recent mass shootings like Sandy Hook,[150] Parkland,[151] Pulse Nightclub,[152] Thousand Oaks[153] and Las Vegas.[154] While seemingly unlike voter ID laws, these "red flag"

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[143] SARAH HERMAN PECK, CONG. RSCH. SERV., R44618, POST-*HELLER* SECOND AMENDMENT JURISPRUDENCE (2019), https://fas.org/sgp/crs/misc/R44618.pdf [https://perma.cc/ZJ8L-2U3A].

[144] Woollard v. Gallagher, 712 F.3d 865, 875 (4th Cir. 2013) (quoting United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)).

[145] *Id.*

[146] PECK, *supra* note 143, at 16.

[147] *Id.* (quoting United States v. Masciandro, 638 F.3d 458, 470–71 (4th Cir. 2011)) (using the Fourth Circuit decision in United States v. Masciandro to show that courts treat self-defense in one's own home as a fundamental right, subject to strict scrutiny).

[148] *See* MICHAEL A. FOSTER, CONG. RSCH. SERV., R45629, FEDERAL FIREARMS LAWS: OVERVIEW AND SELECTED LEGAL ISSUES FOR THE 116TH CONGRESS 45 (2019), https://crsreports.congress.gov/product/pdf/R/R45629.

[149] *Id.* at 44. *See also* MICHAEL A. FOSTER, CONG. RSCH. SERV., FIREARM "RED FLAG" LAWS IN THE 116TH CONGRESS (2019) [hereinafter FOSTER, FIREARM "RED FLAG" LAWS], https://fas.org/sgp/crs/misc/IF11205.pdf [https://perma.cc/VF7H-T5E9]; Coleman Gay, *"Red Flag" Laws: How Law Enforcement's Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence*, 61 B.C. L. REV. 1491, 1495 (2020).

[150] *See* Reid Wilson, *Seven Years After Sandy Hook, The Politics of Guns Has Changed*, THE HILL (Dec. 14, 2019, 6:00 AM), https://thehill.com/homenews/state-watch/474479-seven-years-after-sandy-hook-the-politics-of-guns-has-changed [https://perma.cc/3TPC-YNBC].

[151] *See* Joel Rose & Brakkton Booker, *Parkland Shooting Suspect: A Story of Red Flags, Ignored*, NPR (Mar. 1, 2018, 7:03 AM), https://www.npr.org/2018/02/28/589502906/a-clearer-picture-of-parkland-shooting-suspect-comes-into-focus [https://perma.cc/5ZYF-4V2Q].

[152] *See* Ben Leonard, *Biden Calls for Gun Reform 5 Years After Pulse Nightclub Shooting*, POLITICO (June 21, 2021, 1:14 PM), https://www.politico.com/news/2021/06/12/biden-gun-reform-pulse-nightclub-shooting-493764 [https://perma.cc/4J29-PZF4].

[153] *See California Senate OKs Expansion of "Red Flag" Gun Law*, ASSOCIATED PRESS (Sept. 4, 2019), https://apnews.com/article/1e61720b80e441d480fc467889b8832a.

[154] *See* Andrew Blankstein et al., *Las Vegas Shooting: 59 Killed and More Than 500 Injured Near Mandalay Bay*, NBC NEWS (Oct. 2, 2017, 10:33 PM), https://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-police-investigating-shooting-mandalay-bay-n806461 [https://perma.cc/Q9J2-K558].

laws are related to voter ID laws in several critical ways, making the comparison ripe for academic scrutiny.

B. Contrasting "Red Flag" Laws with Voter ID Laws

Importantly, both "red flag" gun laws and voter ID laws necessarily result in a temporary inability to exercise the implicated right. The temporary nature of the incursion on Second Amendment rights is explicit in the composition of a "red flag" law—the state must prove that an individual is currently too dangerous to possess a firearm in order to earn a court order, fixing dates until the state must next make a showing.[155] In the voter ID context, the temporary nature is implicit, but less clear. For instance, a voter who lacks required ID may be prohibited from exercising their right to vote in one election, but may obtain the required ID before the next, and vote in that election. However, an individual's Second Amendment rights can lie latent in a way that an individual's right to vote cannot. Unlike the right to bear arms under the Second Amendment, which an individual can exercise at almost any time, the nature of the right to vote is that it only arises when elections arise. In Virginia, for instance, the state holds annual elections—federal offices in even-numbered years, and state offices in odd-numbered years.[156] In that way, a hypothetical Virginia voter barred from participating in the 2020 federal elections for some reason could vote in the 2021 state elections should they correct that issue. However, is such a voter truly only temporarily deprived of their right to vote? Many would argue that such a deprivation of the right to vote is permanent—the individual can never exercise their right to vote in that particular election again, and their political voice goes completely unheard in that election.[157] In practice, this distinction between a

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[155] *See* FOSTER, FIREARM "RED FLAG" LAWS, *supra* note 149 (noting that a preliminary order can last up to three weeks and a final order typically lasts up to one year under most state provisions, but with the opportunity for renewal).

[156] *Office of Elections: General Information*, FAIRFAX COUNTY, https://www.fairfaxcounty.gov/elections/general-information [https://perma.cc/KL5V-B84C] (last visited Apr. 26, 2022).

[157] *See* THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, VISION FOR DEMOCRACY: FORTIFYING THE FRANCHISE IN 2020 AND BEYOND 2 (2019), http://civilrightsdocs.info/pdf/voting/Vision-For-Democracy.pdf [https://perma.cc/EV7M-4F6Q] ("With each expansion [of the right to vote], there have been corresponding efforts to erect barriers to restrict the franchise. Today our democracy and rule of law are under attack. Public officials have threatened our democratic norms, created barriers to the ballot box, and undercut the power and representation of people of color, Americans with limited English proficiency, young voters, and other groups historically excluded from our political process. This must end. The stakes for our civil and human rights are too high for inaction. Fundamental reforms are necessary to rebuild our democracy and ensure a government that works for everyone. The ability to participate in civic life—to have a voice in electing the public officials whose decisions impact our lives, families, and communities—is at the core of what it means to be a citizen.").

temporary deprivation of rights and a permanent loss of rights is extremely important. However, for the purpose of comparison to red flag laws, this Note will assume an individual's right to vote is only temporarily restricted when they are barred on the basis of a lack of ID.

That said, the single greatest distinction between the two types of laws is where the burden of proof rests. In most states that have passed them, a "red flag" law requires the state to prove that the individual should not be allowed to exercise their Second Amendment right.[158] While the stringency requirement for such a showing may vary,[159] typically the laws require a state to show that the individual is currently too dangerous to own a firearm by clear and convincing evidence.[160] This type of burden, while the particular amount of evidence required may vary, is not new in constitutional law.[161] While no right is unlimited,[162] in order to restrict most rights, the state must show that the individual in some way does not deserve to exercise that particular right.[163] However, that burden is placed backwards in the voting rights context, especially with voter ID laws.[164] In those cases, oddly, the presumption seems to be in favor of ineligibility.[165] Voters must prove eligibility, whereas if it

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[158] *See* FOSTER, FIREARM "RED FLAG" LAWS, *supra* note 149 ("Before an order can be entered, some factual showing must be made that the person for whom the order is sought poses a risk of using a firearm to harm himself or others . . . .").

[159] *See id.* ("[T]he stringency of the requisite showing [may] depend[ ] on whether an *ex parte* or final order is requested."). In many states, *ex parte* orders will only require probable cause, or a preponderance of the evidence. *See id.*

[160] *See id.* ("[C]lear and convincing evidence . . . is often required.").

[161] *See id.*

[162] *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited."); *see also* James Eliason, *No Constitutional Rights Are Unlimited*, DES MOINES REG. (June 28, 2016, 12:03 AM), https://www.desmoinesregister.com/story/opinion/readers/2016/06/28/no-constitutional-rights-unlimited/86339798/ [https://perma.cc/5XYC-NLXT].

[163] In the First Amendment context, the state either must show that the First Amendment's guarantees did not cover the content of the individual's speech, or that a countervailing government interest outweighed the individual's interest in the time, place, or manner in which the individual spoke. *See* VICTORIA L. KILLION, CONG. RSCH. SERV., 7-5700, THE FIRST AMENDMENT: CATEGORIES OF SPEECH IFI I1072, 1 (2019), https://sgp.fas.org/crs/misc/IF11072.pdf [https://perma.cc/LJ7Y-KMJJ]. Additionally, in the Fourth Amendment context, without a search or arrest warrant, the state must show that an officer's search or seizure of an individual was supported by probable cause and the officer's actions were reasonable in order to survive judicial scrutiny. *See* MICHAEL S. FOSTER, CONG. RSCH. SERV., POLICE USE OF FORCE: OVERVIEW AND CONSIDERATIONS FOR CONGRESS, 1 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10516.

[164] In some states, voters without ID are still allowed to vote, provided they sign an affidavit or other sworn statement that they are who they proclaim to be under penalty of perjury. *See Voter ID Laws*, VOTE.ORG, https://www.vote.org/voter-id-laws/ [https://perma.cc/MT4M-ZM5N] (last visited Apr. 26, 2022). Nonetheless, despite a mechanical allowance for those without ID to vote, the law itself still places the burden of proof on the voter.

[165] *See id.*

were treated like most other rights, the state would have to prove that the prospective voter is not eligible to vote.[166]

With these key similarities and differences in mind, it is important to note the difference in treatment by the courts. Judges have analyzed each type of law differently. Despite the nominal lip service to the right to vote,[167] judges have seemed willing to accept the prevention of voter fraud as a state interest justifying the exclusion of some voters.[168] This is true despite the substantial evidence that, as defined and shown above,[169] voter fraud is not currently a real problem that states should address. Even the Supreme Court is not immune.[170] On the other hand, using the "red flag" laws as a comparison, judges maintain a very rights-protective methodology in the face of overwhelming data showing a real gun violence problem in America today.[171]

C. Mass Shootings and Gun Violence

Over the past decade, mass shootings have captured Americans' attention.[172] This is rightfully so—the sheer number of people killed all at once is morbid and disturbing.[173] Moreover, they remind Americans that they could be killed anywhere, even "at random by a [complete] stranger."[174] Morbid curiosity also extends to the shooter—what could drive a person to commit mass murder? Mass shooters tend to have a number of characteristics in common, but the things that spark outrage[175]

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[166] *See, e.g.*, *supra* Part II, contrasting judicial consideration of the Second Amendment right to bear arms with the right to vote.

[167] As noted above, the right to vote often receives the loftiest language in judicial opinions, usually referencing the democratic ideals of the country.

[168] *See* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (declaring that states have a "compelling interest in preventing voter fraud").

[169] *See supra* Section I.B.

[170] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 181–82, 203–04 (2008) (noting that Indiana had presented no evidence at all showing that voter fraud had ever occurred in their state, but nonetheless accepting the prevention of it as a justification for the state's voter ID law).

[171] *See infra* Section II.C.

[172] *Infra* notes 173–80 and accompanying text.

[173] *See* ALLAN J. LICHTMAN, REPEAL THE SECOND AMENDMENT: THE CASE FOR A SAFER AMERICA 19 (St. Martin's Press, 2019) [hereinafter LICHTMAN, REPEAL THE SECOND AMENDMENT].

[174] Pamela Colloff, *96 Minutes*, *in* TOO MANY TIMES: HOW TO END GUN VIOLENCE IN AMERICA, at 4 (Melville House Publ'g, 2020) ("Whitman rode the elevator to the twenty-seventh floor, dragged his footlocker up the stairs to the observation deck, and introduced the nation to the idea of mass murder in a public space. Before 9/11, before Columbine, before the Oklahoma City bombing, before 'going postal' was a turn of phrase, the 25-year-old [Whitman] ushered in the notion that any group of people, anywhere—even walking around a university campus on a summer day—could be killed at random by a stranger.").

[175] *See* LICHTMAN, REPEAL THE SECOND AMENDMENT, *supra* note 173, at 17.

more than any other are that they kill indiscriminately,[176] and that "virtually all of them plan on dying" at the scene.[177] Despite the public attention these acts garner, they account for only a small fraction of all gun murders each year.[178] Moreover, gun murders account for less than half of all gun deaths in any given year.[179] Although deaths understandably receive the most attention, victims of gun-related injuries are numerous, and often not as publicly known.[180]

Nonetheless, data from 2020 suggests an especially active year regarding gun violence.[181] According to the Gun Violence Archive, there were 43,643 gun deaths in 2020.[182] Among those, 19,487 were murders and another 24,156 were suicides.[183] There were 611 mass shooting events (defined as four or more individuals shot or killed, not including the shooter), and 21 of those qualify as mass murders (defined as four or more confirmed deaths).[184] Above and beyond those figures however, another 39,514 Americans were injured as a result of gun violence.[185] While 2020 was very active, variation between 2020 and earlier years was minimal—total deaths in each year between 2014 and 2019 ranged from about 35,000 to over 39,000 annually.[186] Significantly, the rate of gun deaths rose around this time too.[187] According to the

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[176] *See* HARTMANN, THE HIDDEN HISTORY OF GUNS AND THE SECOND AMENDMENT, *supra* note 142, at 87 ("[T]he shooter[s] [don't] seem to have precise targets and [were] out to use [their] guns to kill indiscriminately.").

[177] JOHN R. LOTT, JR., GUN CONTROL MYTHS 83 (2020) ("[T]here is an important difference between mass public shooters and other types of murders—mass public shooters usually die at the scene. Virtually all of them plan on dying so they don't think about arrest rates nor care about the legal penalties that exist for their crimes.").

[178] *See* LICHTMAN, REPEAL THE SECOND AMENDMENT, *supra* note 173, at 17.

[179] *Statistics—National*, GIFFORDS L. CENTER TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-violence-statistics/#national-anchor [https://perma.cc/B2AE-6YP8] (last visited Apr. 26, 2022) (noting that total gun deaths in 2018 were 37,603, but only 36 percent of those (13,380) were homicides).

[180] *See* LICHTMAN, REPEAL THE SECOND AMENDMENT, *supra* note 173, at 19.

[181] *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE (Feb. 26, 2021), https://www.gunviolencearchive.org/past-tolls.

[182] *Id.*

[183] *Id.*

[184] *Id.* The methodology yielding these definitions can be found at: https://www.gunviolencearchive.org/methodology.

[185] *Id.*

[186] *Id.*; *Firearm Deaths*, USAFACTS.ORG, https://usafacts.org/data/topics/security-safety/crime-and-justice/firearms/firearm-deaths/ [https://perma.cc/WTS5-L9ZF] (last visited Apr. 26, 2022).

[187] *Deaths Due to Injury by Firearms per 100,000 Population—Trend Graph*, KAISER FAMILY FOUND., https://www.kff.org/other/state-indicator/firearms-death-rate-per-100000/?activeTab=graph&currentTimeframe=0&startTimeframe=19&selectedRows=%7B%22wrapups%22:%7B%22united-states%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%222014__Firearms%20Death%20Rate%20per%20100,000%22,%22sort%22:%22asc%22%7D[https://perma.cc/8QNY-WY87] (parameters: 1999–2018, United States) (last visited Apr. 26, 2022).

Kaiser Family Foundation, the United States averaged about ten gun deaths per 100,000 population from 1999 through 2014.[188] After 2014, however, that average rose to nearly 12 deaths per 100,000 population by 2018.[189] By way of comparison, even taking the Heritage Foundation Voter Fraud Database at face value, voter fraud would still pale in comparison to the massive human toll of gun violence.[190] Despite these huge annual tolls, few policy changes are ever actually made.[191] Even in the face of an abhorrent mass shooting at a school, like in the Parkland shooting where dozens of children are wounded or killed, the response is so predictable as to be scripted: politicians offer thoughts and prayers, debates ensue, typically leading back to mental health, gun accessibility, and violence in the media, politicians warn each other not to politicize tragedy, and eventually national attention fades, and another crucial moment passes.[192] Notwithstanding this inaction, a few states have managed to pass "red flag" laws, and their courts' analysis of them is instructive.[193]

D. Toward an Equivalent Voting Rights Jurisprudence

Two state-level cases in the "red flag" law context demonstrate how a stronger focus on the protection of the right at issue may lead to a more rights-protective voting rights jurisprudence: *Hope v. State*[194] and *Redington v. State*.[195] In each, a state appellate court upholds the "red flag" law at issue under a Second Amendment–style challenge.[196]

In *Hope*, the Connecticut Court of Appeals adjudicated a direct Second Amendment challenge to Connecticut's "red flag" law.[197] The plaintiff had been stripped

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[188] *Id.*

[189] *Id.*

[190] As of January 28, 2022, the Heritage Database claims to present 1,340 proven instances of voter fraud dating back to the 1980s. *Database of Election Fraud*, *supra* note 89. The 43,643 total gun related deaths in 2020 alone dwarf such a figure. *See* GUN VIOLENCE ARCHIVE, *supra* note 181.

[191] *See generally* Jaclyn Schildkraut & Collin M. Carr, *Mass Shootings, Legislative Responses, and Public Policy: An Endless Cycle of Inaction*, 69 EMORY L.J. 1043 (2020).

[192] *See id.* at 1045–46.

[193] *See infra* Section II.D.

[194] *See* 133 A.3d 519, 524–25 (Conn. App. Ct. 2016).

[195] *See* 992 N.E.2d 823, 830, 833–35 (Ind. Ct. App. 2013).

[196] *Id.* at 830–35 (upholding the law in spite of a stronger, more direct right to bear arms found in the Indiana Constitution). The Connecticut court made a similar, even stronger finding, that the "red flag" law did not even implicate the Second Amendment because the law only restricts the rights of those adjudged dangerous in court, proven by clear and convincing evidence. *Hope*, 133 A.3d at 524–25 (finding that "red flag" laws "do[ ] not implicate the Second Amendment" because it does not restrict the right of "responsible, law-abiding citizens" to keep and bear arms). Instead, the law at issue was exemplary of a "presumptively lawful regulation" under *Heller*. *Id.*

[197] *See Hope*, 133 A.3d at 521–22 (On appeal, the plaintiff claims that "§ 29-38c violates the second amendment to the United States constitution . . . .").

of his firearms for one year after a court found him to pose an imminent risk of harm to himself or others by clear and convincing evidence, as required by the statute.[198] After finding that the due process clause of the Fourteenth Amendment incorporates the Second Amendment into the states, the court proceeded to find that the law withstood constitutional scrutiny under *Heller*.[199] In holding this, the court specially noted three important things: (1) it only restricts the right for one year, (2) a court has adjudged the individual a danger to themselves or others, and most importantly, (3) they were afforded due process to challenge the seizure of the firearms.[200]

In a similar case in Indiana, the plaintiff challenged the state's seizure of his fifty-one firearms under a Second Amendment–style provision of the Indiana state constitution.[201] In that case, the plaintiff had been adjudged a risk of harm to himself or others after officers found him on the third floor of a parking garage with several weapons scoping out a college bar near Indiana University in Bloomington, Indiana.[202] After a psychiatrist testified at the hearing that he believed Redington suffered from a "schizotypal" disorder, the trial court found that the state proved him dangerous by clear and convincing evidence, and ordered the state to seize his firearms.[203] Article 1, Section 32 of the Indiana Constitution simply provides: "The people shall have a right to bear arms, for the defense of themselves and the State."[204] Nonetheless, the court found for the state, holding that the magnitude of the burden imposed on Redington was insubstantial and that, regardless, the state bears the burden of proving an individual dangerous by clear and convincing evidence.[205]

Taken together, these two cases represent the state of Second Amendment jurisprudence in the "red flag" context.[206] However, this Note posits that they are also exemplary of how a court should require states to justify restrictive laws in the voting rights context. Before stripping an individual of their right to vote, a state should prove that they are, for one reason or another, ineligible to exercise that right. That established, the question remains how to get to that legal framework from where it stands now.

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[198] *See id.* at 523.

[199] *See id.* at 524 ("Section 29-38c does not implicate the second amendment, as it does not restrict the right of law-abiding, responsible citizens to use arms in defense of their homes.").

[200] *See id.* ("It restricts for up to one year the rights of only those whom a court has adjudged to pose a risk of imminent physical harm to themselves or others after affording due process protection to challenge the seizure of the firearms.").

[201] *See Redington*, 992 N.E.2d at 830.

[202] *See id.* at 825, 828.

[203] *See id.* at 827–28.

[204] *Id.* at 830 (quoting IND. CONST. art. 1, § 32).

[205] *Id.* at 834–35.

[206] *See Hope*, 133 A.3d at 524–25; *Redington*, 992 N.E.2d at 834–35; FOSTER, FIREARM "RED FLAG" LAWS, *supra* note 149 (describing the general features of "red flag" laws and an overview of the debate around the constitutionality of "red flag" laws).

III. MISUNDERSTANDING THE MEANS-ENDS DISTINCTION

A. Untangling the Ends and the Means: Preventing Voter Fraud May Not Even Be a Government Interest at All

While courts have routinely, and even nonchalantly,[207] held that "preventing voter fraud" is a compelling government interest, such a holding incorrectly identifies the purposes of election laws.

Long held to be a fundamental right under the U.S. Constitution,[208] election laws affecting the right to vote trigger some form of means-ends scrutiny in court.[209] A means-ends test requires the court to identify and examine the purpose (the end) the law serves as a method (means) of addressing.[210] First, the court must identify the interest served by the challenged law.[211] For the law to survive scrutiny, the strength of the government's asserted interests must outweigh the asserted interests of the challenging party.[212] The strength of the challenging party's asserted interest may also have some bearing on the level of scrutiny applied to the law's operative mechanism.[213] Once determined, the court will analyze whether the law meets the appropriate level of tailoring to address the government's interest.[214] This review of the means-ends nexus occurs in any case challenging a policy that denies an individual the right to vote, under both the controlling *Anderson-Burdick* standard in equal protection cases and as a factor in a totality of the circumstances analysis for Section 2 cases under *Brnovich*.[215] The *Anderson-Burdick* standard creates a two-step inquiry.[216] First, the court must determine "whether the process poses a severe or

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[207] *See* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006). After holding that the "'state indisputably has a compelling interest in preserving the integrity of its election process[,]'" a mere four sentences later the Court simply conflated that interest with the prevention of voter fraud. *Id.*

[208] *See Ex parte* Yarbrough, 110 U.S. 651, 665 (1884) ("The exercise of the right [to vote] . . . is guaranteed by the Constitution, and should be kept free and pure.").

[209] *See* CHEMERINSKY, *supra* note 30, at 589, 942–43; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 136 (Harv. Univ. Press 1980).

[210] Russell W. Galloway, *Means-Ends Scrutiny in Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449 (1988).

[211] *Id.* at 450.

[212] *Id.* at 450–51.

[213] *Id.*

[214] *Id.*

[215] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2339–40 (2021) ("[T]he strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account. As noted, every voting rule imposes a burden of some sort, and therefore, in determining "based on the totality of circumstances" whether a rule goes too far, it is important to consider the reason for the rule. Rules that are supported by strong state interests are less likely to violate § 2.").

[216] Richardson v. Texas Sec'y of State, 978 F.3d 220, 228 (5th Cir. 2020).

instead a 'reasonable, nondiscriminatory' restriction on the right to vote," and then decide "whether the state's interest justifies the restriction."[217] Beyond the additional first step of determining the severity of the burden a law imposes on the right to vote, it is clear that *Anderson-Burdick* is merely another iteration of typical means-ends scrutiny.[218] It simply asks whether the state's asserted end justifies using the mechanism the legislature chose when creating the law.[219] Thus, a typical case involving restrictions on the right to vote will follow a similar track to any other.

Yet, among all the varying justifications given for placing restrictions on the right to vote, and whatever the standard used to judge them, one thing remains clear—taken at face value, almost every justification given serves, in some way, an even greater overarching purpose—election integrity.[220] This Note acknowledges election integrity as a compelling government interest. While the Supreme Court has never exactly articulated standards for determining what interests should correctly be identified as compelling,[221] one student note succinctly defines a crucial criterion with which this Note takes no issue:

> The term "compelling state interest" itself provides the clue. By simple linguistic analysis, the term indicates a governmental interest so strong, so important, that a threat to it not only suggests, but actually *compels* government action. Only the interest of self-preservation can be so strong. The state's self-preservation forms the basis for everything that one can term a "compelling state interest." But our government is a special type of government, a constitutional democracy. Thus, as a working theory, one may subsume all compelling governmental interests under one general heading: continued survival of the constitutional democratic state.[222]

According to Sobelsohn, this means that "government may infringe fundamental interests to preserve democracy—a basic part of the American experiment."[223] After

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[217] *Id.* at 235 ((quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)) (internal quotation marks omitted).

[218] *Id.* at 235, 236 n.33.

[219] *Id.* at 240.

[220] *See, e.g.*, *Brnovich*, 141 S. Ct. at 2347–48 (stating that "state[s] indisputably have a compelling interest in preserving the integrity of [their] electoral process[es]" before immediately turning to fraud and how states may prevent it).

[221] *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 933–35 (1988) ("Several cases have referred to superseding governmental powers without explaining how those powers acquired sufficiently compelling weight to overbalance protected rights.").

[222] David Charles Sobelsohn, Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U. L. REV. 462, 479 (1977).

[223] *Id.*

the national experience of 2016–2020 and the newfound national consciousness of attempted (and possibly successful) foreign interference in the American electoral process,[224] it is clear that U.S. election integrity needs to be valued at a premium. This Note accepts the Sobelsohn definition and construes it to require that protecting the integrity of elections is indeed a 'compelling' interest of self-preservation.[225]

However, many different methods may serve the end of election integrity[226]—the prevention of voter fraud should rightfully be included among those. More succinctly put—laws attempting to prevent voter fraud are most aptly described as means that serve the compelling interest of preserving the integrity of the election process.

B. Evaluating the Means

Once distinguished from the end of election integrity they serve, laws aimed at the prevention of voter fraud should be analyzed like any other means. Under the classic strict scrutiny test, this requires both that such laws are narrowly tailored to serve that purpose and that they actually do advance that interest.[227]

Based on the current available data on voter fraud,[228] it is unclear that any law designed to prevent voter fraud could currently meet this standard. One suggested method by which a state can show this is as follows:

> *At the very least, antifraud advocates must show that their regulations prevent more fraudulent votes from being cast than legitimate votes.* If the facts show that a particular antifraud requirement prevents 100 fraudulent votes for every five legitimate voters excluded, we might want to support the provision. If the facts show the numbers are reversed, however (the law excludes 100 legitimate voters for every five fraudulent voters), the antifraud provision must be rejected.[229]

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[224] *See generally* Robert S. Mueller III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, Vol. I, DEP'T OF JUST. (2019), https://www.justice.gov/storage/report_volume1.pdf [https://perma.cc/92GE-SZES].

[225] Sobelsohn, *supra* note 222, at 479.

[226] *See, e.g.*, 18 U.S.C. § 594 (criminalizing voter intimidation and coercion).

[227] Galloway, *supra* note 210, at 450 ("[T]he court must find the means demonstrably and substantially effective in furthering the government's interests.").

[228] Elise Viebeck, *Minuscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts Trump Claims About Election Risks*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/politics/minuscule-number-of-potentially-fraudulent-ballots-in-states-with-universal-mail-voting-undercuts-trump-claims-about-election-risks/2020/06/08/1e78aa26-a5c5-11ea-bb20-ebf0921f3bbd_story.html [https://perma.cc/L4BD-3ZXD].

[229] OVERTON, *supra* note 87, at 163.

This Note accepts Professor Overton's method of examining the effectiveness of voter fraud legislation. While "every fraudulent vote that is cast [may] invalidate[] the vote of an eligible voter,"[230] the right to vote "is the primary right by which other rights are protected[,]"[231] and when unjustifiably restricted "undermine[s] rather than enhance[s] confidence in elections."[232] In other words, without proof of fraud outweighing the voter-suppressive effects of the legislation, the law cannot stand upon scrutiny.[233] Voter fraud plainly does not exist at the massive levels necessary to change the outcome of elections.[234]

Once the prevention of voter fraud was correctly identified as a means serving the end of election integrity, laws designed to prevent voter fraud would also very likely fail even under the more deferential *Anderson-Burdick* standard.[235] While a state could argue, for instance, that a voter ID law is reasonable and non-discriminatory distinction, a challenger to such a law could easily argue something very similar to the above. Simply asking whether a restriction that addresses a non-existent problem can truly be said to be "reasonable" at all exposes the obvious failure to prove any real widespread voter fraud.

However, in his note, Andrew DeLaney raised an interesting counter-argument—what about the *appearance* of voter fraud?[236] As discussed in this Note's introduction, the mere suggestion by a powerful person with a large enough platform that the election process is exposed to fraud seriously undermines electoral confidence.[237] DeLaney's argument is based on *McConnell v. F.E.C.*,[238] which held that the state has an interest in preventing the appearance of corruption in the campaign finance context.[239] However, noting the *McConnell* record's impressive length, the Supreme

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[230] Hans A. von Spakovsky, *U.S. Election Fraud Is Real—And It Is Being Ignored*, HERITAGE FOUND. (Oct. 27, 2020), https://www.heritage.org/election-integrity/commentary/us-election-fraud-real-and-it-being-ignored [https://perma.cc/XH35-MTSC].

[231] HARTMANN, THE HIDDEN HISTORY OF THE WAR ON VOTING, *supra* note 28, at 2 (quoting Thomas Paine, *Dissertation on First Principles of Government*, *in* GREATEST WORKS OF THOMAS PAINE: 39 BOOKS IN ONE EDITION (Musaicum Books, ebook); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[Voting] is regarded as a fundamental right, because [it is] preservative of all rights."); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

[232] Joseph Garcia, *Battle Over the Ballot Box: Voter Fraud or Voter Suppression?*, MORRISON INST. FOR PUB. POL'Y AT AZ STATE U. (Aug. 3, 2016), https://morrisoninstitute.asu.edu/content/battle-over-ballot-box-voter-fraud-vs-voter-suppression [https://perma.cc/K6BW-YMWH].

[233] *Id.*

[234] *See supra* Section II.C.

[235] Richardson v. Texas Sec'y of State, 978 F.3d 220, 228 (5th Cir. 2020).

[236] *See generally* DeLaney, *supra* note 19.

[237] *See supra* notes 15–17 and accompanying text.

[238] 540 U.S. 93 (2003).

[239] *Id.* at 143 ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits.").

Court in *Citizens United v. F.E.C.*[240] found that record lacking in evidence.[241] Without evidence, the Court surmised, it "confirms *Buckley's* reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption."[242] Therefore, the Court concluded, the regulation of core First Amendment political speech at issue could not stand.[243]

Similarly, the *Citizens United* logic should apply in the voting rights context, using DeLaney's own comparison.[244] Therefore, if burdens on core political speech in the campaign finance context cannot stand without evidence of actual corruption,[245] burdens on the right to vote should not stand without evidence of actual voter fraud either.

C. Correcting the Error

Given the weight ascribed to *stare decisis*, correcting this misidentification may prove to be a challenge. However, precedents have been overturned before as the Supreme Court has found better ways to analyze cases that come before it.[246] This is true especially in the area of voting rights, where, for almost fifty years, the Voting Rights Act of 1965 stood unchanged, and Congress to renewed it each time it was slated to expire.[247] However, in *Shelby County v. Holder*, the Supreme Court uprooted Section 5 preclearance, the primary mechanism that prevented states from enacting and enforcing discriminatory voting policies.[248] The Court's reasoning, however, was not that Section 5 preclearance itself was unconstitutional, but rather

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[240] *See generally* 130 S. Ct. 876, 876 (2010).

[241] *See id.* at 910–11.

[242] *Id.* at 911.

[243] *See id.* at 911 ("Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.").

[244] *See* DeLaney, *supra* note 19, at 849 (stating that the note takes the position that the interest in preventing the appearance of corruption should be treated equally across all of election law).

[245] *Id.*

[246] These methods are not always better, so much as different. *See, generally, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (crafting the "undue burden" standard for abortion cases despite precedent that strict scrutiny should apply). Other lower court judges have corrected course as well. *See generally* Frank v. Walker, 773 F.3d 783 (7th Cir. 2014). For instance, Judge Richard Posner of the Seventh Circuit Court of Appeals dissented from a denial of rehearing en banc in a 2014 voter ID case on the ground that his earlier acquiescence to voter ID policies in *Crawford* was unjustified. *Id.* at 796–97 (Posner, J., dissenting). Judge Posner had previously authored the majority opinion that the Supreme Court upheld in *Crawford.* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007). It was a remarkable reversal. *See* DANIELS, *supra* note 86, at 71 (calling the reversal "surprising").

[247] *See generally* Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437; Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

[248] 570 U.S. 529 (2013).

that the coverage formula in Section 4(b) no longer reflected current problems, and it was therefore unjustified to leave it in place in its current form.[249] In light of that reasoning, as well as the above reasoning in *Citizens United*, a similar judicial statement could overturn some of the restrictions that preventing voter fraud supposedly justifies.[250] For example, courts could easily block restrictive voter ID laws, acknowledging instead that those laws address an out-of-date or non-existent problem. When the Supreme Court upheld Indiana's voter ID law in *Crawford v. Marion County Election Board*, it acknowledged that evidence of contemporary voter fraud was scant, and even non-existent in Indiana.[251] As indicated in Section I.B above,[252] impersonation voter fraud in modern elections is less likely than a lightning strike. Moreover, voter fraud of any kind on an individual level is too rare to justify burdensome restrictions that are not also narrowly tailored to protect the right to vote.[253]

Another problem that might delay such an acknowledgment is a similar but separate emerging doctrine that one scholar calls "undue deference."[254] Although analyzed in the context of emergency changes to the electoral process in response to the COVID-19 pandemic, the idea Professor Douglas presents is nonetheless similar to the voter fraud jurisprudence, and equally troubling.[255] The federal courts have proven themselves all too willing to defer to state legislatures, and Professor Douglas concludes that this deference, especially when given to states imposing restrictive measures, will have negative impacts for access to the ballot and voter participation.[256] Based on the analytical structure such a deferential review requires, this may threaten voting rights, even in the absence of a recognized compelling interest in preventing voter fraud.[257] However, a recognized interest in preventing voter fraud is a necessary first step to receiving deference, and accordingly, fairly adjudicating that voter fraud is not an interest could avert further struggles for voting rights down the line.

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[249] *See id.* at 557 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

[250] *See generally* Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 886 (2010).

[251] *See* 553 U.S. 181, 194–95 (2008) (noting that the record "contains no evidence of any such fraud actually occurring in Indiana at any time in its history," but agreeing that "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history" justified the law).

[252] *See supra* Section I.B.

[253] *See generally* Mehrbani, *supra* note 97.

[254] *See generally* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 60–61 (2021).

[255] *Id.* at 59, 64, 88.

[256] *See id.* at 78, 81.

[257] *See generally id.*

IV. ELECTORAL POLICY SOLUTIONS

This Note does not argue that voter confidence in the electoral process is unimportant. To the contrary, it leverages voter confidence against reality to bolster the need to act to preserve election integrity. Nor does it take the position that voter fraud completely does not exist. Instead, as the title suggests, it compares voter fraud to the popular children's puzzle book series *Where's Waldo?* It takes the position that Waldo is an apt representation of fraud in U.S. elections, and that unduly restricting others' right to vote in order to find him is not necessary. Indeed, it is even improper.[258]

But if the government cannot act against the individual voter to prevent fraud, as this Note argues, how can it feasibly ferret out real, damaging fraud in the electoral process? More importantly, how can it restore voter confidence without taking these steps? Again, this Note finds itself in agreement with Professor Overton:

> Because some antifraud regulations exclude legitimate voters and skew election outcomes, we should target our antifraud efforts primarily to monitor election administrators, and consider regulating voter-registration and voter-mobilization groups only if studies show high levels of fraud. We should burden voters with antifraud regulations only as a last resort, and even these rules must be narrowly tailored so as not to hinder legitimate voters from casting their ballots.[259]

Professor Overton also suggests "a program of regular and unannounced independent audits of polling places, county election boards, secretary of state offices, and private vendors that provide voting machines and computer software and contract to perform services such as voter-roll purges."[260] This Note finds few issues and vast benefits with such a program.

Furthermore, some of the more odious restrictions should be repealed: strict voter ID laws, voter-roll purges, and stringent signature matching requirements all undermine confidence in the electoral process by excluding voters from the process.[261] For example, one can easily imagine a different voter identification regime that properly places the burden of proof back on the state. Proper enforcement of Motor-Voter

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[258] *See supra* Part III.

[259] OVERTON, *supra* note 87, at 167.

[260] *Id.* at 165.

[261] Typically, those excluded are historically underrepresented minorities, as discussed above. Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 363–64, 369 (2016). However, they can affect anyone. *Id.* This Note's author voted early in-person during the 2020 election, despite COVID-19, because he was convinced his inability to sign his name the same way more than once would disenfranchise him had he chose to vote absentee by mail.

will allow citizens with existing in-state identification photos to transfer that photo to their voter registration, and those lacking photo identification may present another form at their local registrar's office, and then take a photo there when they register.[262] Instead of turning away voters on election day who did not bring their own identification, this would allow states to maintain a database of photos associated with registrations that they can check on the spot when the voter arrives. The election workers and administrators then must determine that the correct individual has arrived to vote using that photo. This system would not be administratively all that different than the current one—each voter registration file in the electronic poll book already contains a lot of information: prior participation in elections, residence address, whether the voter is an "active" voter, whether they need election day assistance to vote, and even whether they've already voted early or absentee.[263] Adding a photo to that system would be an easy way to mitigate the burden of photo identification for many voters unable to acquire one.

V. ELECTION LAW SOLUTIONS

In addition to overhauling election policy, this Note's core argument that the prevention of voter fraud is not a compelling interest (or even an interest at all) does not conclude what may be done through the courts to protect the right to vote. The *Anderson-Burdick* line of cases should be overturned or modified as well.[264] In particular, *Crawford* likely applied *Anderson-Burdick* in an inappropriate setting.[265] More than that, however, it should not matter whether a burden is "severe" or "reasonable"—the right to vote should not be burdened at all. Living in a representative democracy, the right to vote should hold a sacred space above and beyond even the most fundamental of other rights. While this Note only argues that the prevention of voter fraud should not justify the restrictions on the franchise that it does, other legal scholars might go even further. For instance, some suggest enshrining a broader right to vote in the constitution via a new amendment,[266] others have argued

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[262] DEP'T OF JUST., ABOUT THE NATIONAL VOTER REGISTRATION ACT (2019), https://www.justice.gov/crt/about-national-voter-registration-act [https://perma.cc/6W27-5HNJ] (last visited Apr. 26, 2022).

[263] *Electronic Poll Books*, Nat'l Conf. State Legislators, https://www.ncsl.org/research/elections-and-campaigns/electronic-pollbooks.aspx [https://perma.cc/3XPG-WWUR] (last visited Apr. 26, 2022).

[264] *See* Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 215 (2019) (arguing that the Supreme Court incorrectly decided *Crawford v. Marion County Election Board* using *Anderson/Burdick*).

[265] *See id.* at 228–29 (noting that *Anderson/Burdick* came out of the candidate ballot access context, not the voting rights context, and arguing that the Supreme Court defied and disrespected the *Harper* decision by not applying strict scrutiny as had been the case previously).

[266] Proponents of this argue that the language should more closely follow that of the Second Amendment—simply stating that the right shall not be infringed. *See* HARTMANN,

that even requiring registration is violative of the right to vote.[267] Still others have suggested adopting a more empirically driven recognition of the compelling state interest.[268] Under this theory, a court would evaluate qualitative and quantitative evidence available regarding a particular strain of fraud, and balance it against the constitutional implications of restricting the right to vote.[269]

The exact implications of each of these proposals is beyond the scope of this Note, but each maintains the potential to address the problems identified herein.

CONCLUSION

Looking back at the 2020 election undoubtedly will evoke strong reactions deep into the future. Sensational claims of rampant fraud stoked deep partisan distrust in the electoral process. Already, legislatures in at least nineteen states have mobilized along partisan lines to enact thirty-four new laws containing restrictions on the right to vote in the name of preventing fraud.[270] Nearly every state legislature considered such a proposal in 2021.[271] Another nine states will reconsider eighty-eight bills with

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THE HIDDEN HISTORY OF THE WAR ON VOTING, *supra* note 28, at 73–76. Doing so, they argue, would protect the right to vote against all manner of attacks on the franchise, rather than the more specific patchwork of protections currently enshrined in the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. *Id.* For a more skeptical view of a potential right to vote amendment, *see* Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 WM. & MARY BILL RTS. J. 11, 11 (2014) ("It is unlikely that an amendment would achieve what reformers have promised it will achieve."); Richard Briffault, *Three Questions for the "Right to Vote" Amendment*, 23 WM. & MARY BILL RTS. J. 27, 46 (2014) ("Such a right-to-vote amendment would surely and appropriately express the central value of voting in our democracy. But in practice it would do little to "correct" the constitutional gaps, restrictive regulations, and Court decisions that provide much of the current impetus for a right-to-vote amendment.").

[267] *See* Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615, 1615 (1987) ("This Note presents a framework for challenging the pre-election day registration requirement as violative of the fundamental right to cast a ballot on election day in general purpose elections.").

[268] *See generally* Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L.J. 661 (2014). Although tailored to the affirmative action context, Professor Deo's idea could easily be expanded across many areas of constitutional law, including voting rights and election law.

[269] *See* Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 1–2 (2009).

[270] *See Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Dec. 21, 2021) [hereinafter BRENNAN CTR., *Voting Laws Roundup*], https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021 [https://perma.cc/H78P-LH22]; *see also* STATES UNITED DEMOCRACY CTR., *Democracy Crisis in the Making Report Update 2021 Year-End Numbers* 1 (Dec. 23, 2021), https://statesuniteddemocracy.org/wp-content/uploads/2021/12/Democracy-Crisis-Report_FINAL.pdf [https://perma.cc/Y2WD-CGW8] (finding similar data through joint research with Protect Democracy and Law Forward).

[271] 440 bills with provisions that would restrict voting rights were introduced in forty-nine

restrictive provisions in their 2022 legislative sessions and a further eleven states had seventy-four bills with restrictive provisions prefiled for consideration in 2022.[272] Even more disturbingly, at least three states have passed, and another ten have considered, provisions that would place election oversight duties and vote-counting under partisan control.[273] Most perversely, legislators in seven states proposed at least ten bills that would have directly empowered partisan officials to change or overturn election results they perceived as tainted by fraud.[274] In the midst of this onslaught of voter fraud-fueled legislative restrictions, it becomes extremely important that the national conversation about voter fraud is bounded by data and fact, not emotion and hysteria, as much of America's political discourse has become.

After briefly recounting the history of the right to vote and voter suppression, this Note used data and facts to refute the narrative of fraud laid out before the 2020 Election.[275] Then, using a jurisprudential comparison to the Second Amendment, it developed a working theory of how courts should analyze the right to vote.[276] Using that framework, it then demonstrated how the current means-ends distinction in the voting rights area leads to a backward jurisprudential result, and lays out how to correct for it by correctly identifying election integrity as the state's interest, not the prevention of voter fraud.[277] Finally, this Note provided a brief overview of some proposed policy and legal solutions that could fit within the framework as developed.[278] With this new analytical tool developed, hopefully courts will begin to give the right to vote the jurisprudential respect it deserves by requiring more from states before restrictions are allowed to stand.

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state legislatures between January 1 and December 7, 2021. *See* BRENNAN CTR., *Voting Laws Roundup*, *supra* note 270.

[272] *Id.*

[273] *See* Will Wilder et al., *The Election Sabotage Scheme and How Congress Can Stop It* 3, BRENNAN CTR. FOR JUST. (Nov. 8, 2021), https://www.brennancenter.org/our-work/research-reports/election-sabotage-scheme-and-how-congress-can-stop-it [https://perma.cc/JXV3-5J76].

[274] *Id.* at 2.

[275] *See supra* Section I.B.

[276] *See supra* Part II.

[277] *See supra* Part III.

[278] *See supra* Parts IV–V.