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## Privacy or the Polls: Public Voter Registration Laws as a Modern Form of Vote Denial

Audrey Paige Sauer

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# NOTES

## PRIVACY OR THE POLLS: PUBLIC VOTER REGISTRATION LAWS AS A MODERN FORM OF VOTE DENIAL

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## INTRODUCTION

On May 11, 2017, President Donald J. Trump signed an executive order establishing the Presidential Advisory Commission on Election Integrity (PACEI), with the mission to “study the registration and voting processes used in Federal elections.”<sup>1</sup> Pursuant to this mission, Vice Chair of the Commission, Kansas Secretary of State Kris Kobach, sent out letters to state election officials soliciting all “publicly available voter roll data,” including all registrants’ full first and last names, middle names or initials, addresses, dates of birth, political party, last four digits of Social Security numbers if available, voter history from 2006 onward, information regarding any felony convictions, voter registration in another state, and military status.<sup>2</sup> The requests were met with fierce public backlash from both citizens<sup>3</sup> and state officials,<sup>4</sup> with as many as fourteen states refusing to comply with the Commission’s request,<sup>5</sup> ultimately forcing the Commission to dissolve due to sheer lack of state compliance.<sup>6</sup>

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1. Exec. Order No. 13799, 82 Fed. Reg. 22,389 (May 11, 2017).

2. Cobun Keegan, *Trump’s Voter Data Request Tests State Public Data Rules*, INT’L ASS’N PRIVACY PROFS. (July 7, 2017), <https://iapp.org/news/a/trumps-voter-data-request-tests-state-public-data-rules/> [<https://perma.cc/TZ97-3F27>]; *see also* Letter from Kris W. Kobach, Vice Chair, PACEI, to Hon. Elaine Marshall, Secretary of State, North Carolina (June 28, 2017), <https://www.documentcloud.org/documents/3881856-Correspondence-PEIC-Letter-to-North-Carolina.html> [<https://perma.cc/J7TA-ALKV>].

3. *See* KUSA Staff, *3,700 Colorado Voters Withdrew Registration Since State’s Decision to Comply With Voter Commission*, 9NEWS (July 17, 2017), <https://www.9news.com/article/news/local/next/3700-colorado-voters-withdrew-registration-since-states-decision-to-comply-with-voter-commission/457425914> [<https://perma.cc/RK47-EDPC>] (reporting that 3738 voters withdrew their registrations, and 200 voters became confidential, after Colorado announced it would comply with the PACEI request).

4. *See, e.g.*, Letter from Twenty-Five U.S. Senators to the PACEI (July 6, 2017), <https://epic.org/privacy/voting/pacei/senators-letter-to-commission-070617.pdf> [<https://perma.cc/8DB7-3ATB>]; Letter from Seventy-Three U.S. House Members to the PACEI (July 18, 2017), <https://epic.org/privacy/voting/pacei/house-members-letter-to-commission-071817.pdf> [<https://perma.cc/28UL-MYDU>].

5. *See* Mark Berman & John Wagner, *Why Almost Every State Is Partially or Fully Rebuffing Trump’s Election Commission*, WASH. POST (July 5, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/07/05/most-states-are-now-partially-or-fully-refusing-to-hand-over-data-to-trumps-voter-fraud-commission/> [<https://perma.cc/Q3WG-N5UV>].

6. *See* Press Release, Press Secretary, Statement by the Press Secretary on the Presidential Advisory Commission on Election Integrity (Jan. 3, 2018), <https://www.white>

Although many citizens may be glad that their information will not be disclosed to the Trump administration, the uproar over the PACEI request suggests that many citizens are unaware of the already public nature of their voter registration data.<sup>7</sup> PACEI did not require states to submit any information beyond that which is already publicly available.<sup>8</sup> Currently, “[a]ll 50 states and the District of Columbia provide access to voter information.”<sup>9</sup> Just as citizens and representatives strongly opposed disclosing voter information to the federal government, many voters express similar opposition to forfeiting their privacy to the public.<sup>10</sup> Representatives and public officials are becoming increasingly aware of constituents’ privacy concerns and the negative effect that public record laws have on voter registration. Connecticut State Senator Paul Doyle said: “My constituent told me that they were going to take themselves off the voter list and de-register because of their information being available online.”<sup>11</sup> The Supervisor of Elections for Marion County, Florida, Wesley Wilcox, noted a similar response from Florida constituents: “As a result of th[e] unintended impact of the ‘Public Records Law’, some voters are turned off to voting and have even requested to be removed from the voter registration rolls and surrender their right to vote in exchange for additional protection of their privacy.”<sup>12</sup> State legislatures have responded to such concerns; in 2016, there were at least thirteen bills proposed in eight

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house.gov/briefings-statements/statement-press-secretary-presidential-advisory-commission-election-integrity/ [https://perma.cc/VE2W-DMXN].

7. See Keegan, *supra* note 2.

8. See *id.*

9. *It's a Presidential Election Year: Do You Know Where Your Voter Records Are?* 66 CANVASS 1 (Feb. 2016), [http://www.ncsl.org/Documents/Elections/The\\_Canvass\\_February\\_2016\\_66.pdf](http://www.ncsl.org/Documents/Elections/The_Canvass_February_2016_66.pdf) [https://perma.cc/5BY2-RZAX] [hereinafter NCSL]. Individual states differ in regard to what information is available, who may access it, and what voter data may be used for. See *infra* Part II.

10. See *Why Are Millions of Citizens Not Registered to Vote?* PEW CHARITABLE TRUSTS (June 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote> [https://perma.cc/9WP7-MYGK] (11 percent of unregistered individuals did not register due to privacy concerns).

11. See NCSL, *supra* note 9, at 3.

12. Wesley Wilcox, *Editorial: Voter Privacy Concerns Under Florida's Public Records Law*, VOTEMARION (Apr. 20, 2017), [https://www.votemarion.com/Portals/Marion/Documents/DPT-Outreach/20170420\\_VoterInfoPublicRecord.pdf](https://www.votemarion.com/Portals/Marion/Documents/DPT-Outreach/20170420_VoterInfoPublicRecord.pdf) [https://perma.cc/B8DS-TXGG].

states that dealt with the distribution and availability of voter information.<sup>13</sup>

There are legitimate and compelling reasons that eligible voters might be concerned about the public disclosure of their registration information.<sup>14</sup> Consequently, publicizing voter registration presents the risk that, when forced to choose between protecting their privacy and registering to vote, some voters choose not to register;<sup>15</sup> the unacceptable consequence being that eligible citizens are left unable to exercise their right to vote. This Note will argue that state disclosure of voter registration information as public record operates as a form of vote denial by conditioning voter registration on the public disclosure of a voter's registration information. This disclosure threatens to decrease the number of eligible citizens who register to vote and consequently prevent eligible citizens from exercising their constitutional right to vote. This Note will then propose that Congress model a reform for voter registration laws after the Driver's Privacy Protection Act.

## I. THE IMPORTANCE OF ELIMINATING BARRIERS TO VOTER REGISTRATION

The right to vote is well established as imperative to American democracy,<sup>16</sup> yet it is important to recognize the somewhat obvious fact that registering to vote is a crucial first step to citizens exercising their right to vote.<sup>17</sup> This Part will cover how barriers to voting are detrimental to the functioning of representative democracy and why, by extension, barriers to registration warrant attention and concern. This Part will first acknowledge the impact of historical barriers to voting and how modern barriers to voter registration continue to affect democracy. This Part will then address

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13. See NCSL, *supra* note 9, at 3.

14. See *infra* Part III.B.1-3.

15. See *Why Are Millions of Citizens Not Registered to Vote?*, *supra* note 10.

16. The right to vote is protected in the U.S. Constitution, U.S. CONST. amends. XV, XIX, XXVI, and further affirmed by the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

17. See *Voter Registration*, NCSL (Sept. 27, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-registration.aspx> [<https://perma.cc/C6TN-2B3Y>] ("In 49 states, an eligible citizen must be registered to vote. North Dakota does not require voter registration ahead of an election—eligible citizens can simply appear at the polls with required identification and be permitted to vote.").

modern efforts to improve ease of voter registration, specifically the National Voter Registration Act of 1993.

### A. *Historical Barriers to Voting*

American citizens have not always universally had, or been able to effectively exercise, a right to vote.<sup>18</sup> In drafting the U.S. Constitution, the Founding Fathers did not grant an affirmative right to vote to anyone.<sup>19</sup> Rather, the Constitution left suffrage decisions to the individual states.<sup>20</sup> For nearly one hundred years of U.S. history, most states granted only white, land-owning men over the age of twenty-one the right to vote.<sup>21</sup>

Even as states began eliminating the requirement of property ownership, large segments of the population—including women, African Americans, and Native Americans—remained barred from voting.<sup>22</sup> In 1870, after the Civil War, Congress extended the right to vote to nonwhite men by passing the Fifteenth Amendment, which prohibited denying a citizen the right to vote on the basis of race.<sup>23</sup> In practice, however, states largely ignored and circumvented the Fifteenth Amendment for many years.<sup>24</sup>

The spike in African American voter registration numbers that resulted from the passage of the Fifteenth Amendment triggered a shift from express vote denial to indirect forms of disenfranchise-

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18. See Sean Illing, *Why the Right to Vote Is Not Enshrined in the Constitution*, VOX (Oct. 23, 2018, 10:24 AM), <https://www.vox.com/2018/9/17/17842890/constitution-day-votingrights-gerrymandering-lichtman> [<https://perma.cc/3PSA-FHDL>].

19. See *id.*

20. See U.S. CONST. art. I, § 2.

21. See TEACHING ELECTIONS IN WASHINGTON STATE 8, OFFICE OF THE SEC'Y OF STATE, [https://www.sos.wa.gov/\\_assets/elections/mock/teachers%20guide%20curriculum%2010.08.2018.pdf](https://www.sos.wa.gov/_assets/elections/mock/teachers%20guide%20curriculum%2010.08.2018.pdf) [<https://perma.cc/GPT6-JCX6>].

22. See *Who Got the Right to Vote When? A History of Voting Rights in America*, AL JAZEERA (2016), <https://interactive.aljazeera.com/aje/2016/us-elections-2016-who-can-vote/index.html> [<https://perma.cc/X8CR-TUAU>].

23. U.S. CONST. amend. XV. The Fifteenth Amendment marked an important step in expanding voting rights to include African American men, however, women and Native Americans remained unable to vote until the 1920s. See U.S. CONST. amend. XIX; Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924).

24. See Richard H. Pildes & Bradley A. Smith, *Common Interpretation: The Fifteenth Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xv/interps/141> [<https://perma.cc/99WQ-QPNH>].

ment.<sup>25</sup> In 1890 (during what would become known as the Era of Disenfranchisement), states began adopting laws that made it difficult for African Americans to vote.<sup>26</sup> These laws implemented discriminatory voting qualifications, such as literacy tests, poll taxes, and proof of good character.<sup>27</sup> African Americans also faced violence and intimidation tactics aimed at keeping them from the polls.<sup>28</sup>

These indirect methods of disenfranchisement effectively kept African American voting levels extremely low.<sup>29</sup> In Louisiana, from 1896 to 1904, African American registration numbers decreased by 96 percent.<sup>30</sup> Similar drops in African American registration rates were seen across the southern states during the Era of Disenfranchisement: Alabama's numbers fell from 140,000 to 3742, South Carolina's numbers fell from 92,081 to 2823, and Mississippi's numbers fell from 52,705 to 3573.<sup>31</sup> Consequently, by 1965, even predominately African American cities such as Selma, Alabama, had voter rolls that were 99 percent white.<sup>32</sup> It was not until 1965, with the passage of the Voting Rights Act, that discriminatory voting practices such as poll taxes and literacy tests were officially banned by the federal government.<sup>33</sup>

### *B. Modern Voter Registration Barriers*

Despite the elimination of legal barriers to voting, the right to vote is still hindered by new, more obscure barriers.<sup>34</sup> Voter ID laws, voter roll purges, political and racial gerrymandering, and

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25. See John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 105-07 (1972).

26. See *id.* at 107.

27. See *id.* at 107-08.

28. See *Who Got the Right to Vote When?*, *supra* note 22.

29. See Lewis & Allen, *supra* note 25, at 107.

30. See *id.*

31. See *id.*

32. See Stewart J. Guss, *Your Right to Vote: A Brief History*, HG LEGAL RES., <https://www.hg.org/legal-articles/your-right-to-vote-a-brief-history-18535> [<https://perma.cc/DRX4-4696>].

33. See Lewis & Allen, *supra* note 25, at 113.

34. See Illing, *supra* note 18.

felon disenfranchisement all threaten to suppress voters and change election outcomes.<sup>35</sup>

The controversy surrounding voter ID laws in Wisconsin highlights how modern barriers to voter registration threaten to affect democracy. In 2016, Wisconsin implemented a strict voter ID law that left 300,000 voters (9 percent of Wisconsin's electorate) without an eligible form of ID.<sup>36</sup> As a result, Wisconsin's voter turnout in the 2016 presidential election was reduced by an estimated 200,000 votes.<sup>37</sup> Decreasing voter turnout by this amount can be politically decisive, considering 2016 presidential candidate Donald Trump won Wisconsin by a mere 22,748 votes.<sup>38</sup>

Beyond affecting sheer voting numbers, barriers to voter registration can also affect voter diversity and equality in political representation.<sup>39</sup> Studies estimate that, after implementing stricter voter ID laws, Wisconsin's electorate was 6.1 percent more Republican and 5.7 percent less Democrat than the group of 200,000 "lost voters."<sup>40</sup> Wisconsin's electorate may have also become less racially diverse, with an estimated 3.7 percent more white voters and 3.8 percent fewer African American voters than the group of "lost voters."<sup>41</sup>

Although studies are mixed as to whether voter ID laws have an impact on voter turnout and how much of an effect,<sup>42</sup> any election law that may negatively impact equal representation in elections warrants attention and concern.

### *C. National Voter Registration Act of 1993*

In passing the National Voter Registration Act of 1993 (NVRA), supporters recognized barriers to registration as the most important factor contributing to low voter turnout rates.<sup>43</sup> The NVRA

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35. *See id.*

36. *See* Ari Berman, *Wisconsin's Voter-ID Law Suppressed 200,000 Votes in 2016*, NATION (May 9, 2017), <https://www.thenation.com/article/wisconsins-voter-id-law-suppressed-200000-votes-trump-won-by-23000/> [<https://perma.cc/V25X-LFXH>].

37. *See id.*

38. *See id.*

39. *See id.*

40. *Id.*

41. *Id.*

42. *See id.*

43. *See* 136 CONG. REC. H254 (daily ed. Feb. 6, 1990) (statement of Rep. Swift).

sought to bolster voter turnout by increasing the ease of voter registration, explicitly acknowledging that “unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office.”<sup>44</sup>

Recognizing that voter registration is a critical first step to exercising the right to vote remains as important today as it was in 1993. Statistics show that once people are registered, they are likely to turn out to vote.<sup>45</sup> In the 2016 presidential election, over 87 percent of registered voters actually voted.<sup>46</sup> However, only 70 percent of American citizens were registered.<sup>47</sup> Eleven percent of unregistered eligible citizens reported that they did not want to register due to privacy or security reasons.<sup>48</sup>

## II. CURRENT STATE LAWS GOVERNING ACCESS TO VOTER REGISTRATION INFORMATION

Under the Help America Vote Act of 2002 (HAVA), states are required to maintain “a single, uniform, official, centralized, interactive computerized statewide voter registration list.”<sup>49</sup> States use these voter registration databases to manage voter rolls, and the databases serve important administrative functions.<sup>50</sup> Beyond internal state use, however, all fifty states and the District of Columbia also allow some level of access to voter information.<sup>51</sup> Individual states vary in regard to what information is disclosed as

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44. National Voter Registration Act of 1993, Pub. L. No. 103-31, § 2(a)(3), 107 Stat. 77.

45. See, e.g., 136 Cong. Rec. H 254; *Voting and Registration in the Election of November 2016, Table 1*, U.S. CENSUS BUREAU (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html> [<https://perma.cc/78YW-P66F>].

46. See *Voting and Registration in the Election of November 2016*, *supra* note 45 (reporting 157,596,000 U.S. citizens eighteen and older as registered to vote and 137,537,000 citizens as having voted).

47. See *id.*

48. See *supra* note 10 and accompanying text.

49. Help America Vote Act, Pub. L. No. 107-252, § 303(a)(1)(A), 116 Stat. 1666, 1708 (2002). The one exception is North Dakota, which was exempted from certain provisions of HAVA and does not formally require voter registration. N.D. Cent. Code § 16.1-02-01 (2020). However, North Dakota maintains a “central voter file” containing much of the same information as the voter registration databases of other states. See *id.* §§ 16.1-02-01, 16.1-02-12.

50. See NAT'L RES. COUNCIL OF THE NAT'L ACAD., IMPROVING STATE VOTER REGISTRATION DATABASES 3-13 (2010).

51. See NCSL, *supra* note 9, at 1.

public record,<sup>52</sup> who can access this information,<sup>53</sup> and what the information can be used for.<sup>54</sup> Some states also provide exemptions from the public disclosure of information for registrants meeting specific criteria.<sup>55</sup> This Part provides an overview of current state laws governing voter registration information and illustrates the degree of disparity that exists between how states treat voter registration information.

### A. *What Information Is a Public Record?*

Federal standards establish some degree of national consistency as to what basic information is collected upon voter registration in every state.<sup>56</sup> Yet, how this information is treated once it is collected varies dramatically from state to state.<sup>57</sup>

Almost all states provide registered voters' names upon request.<sup>58</sup> Forty-nine states and the District of Columbia disclose voter history as public record—meaning that they do not disclose who a person voted for, but only whether a person voted and in which elections.<sup>59</sup> Thirteen states place no official restrictions on what information is available to the public.<sup>60</sup> One such state that allows almost unrestricted access to voter data is Alabama, where a voter's full name, active or inactive voter status, address, phone number, date of birth, date of voter registration, last election voted in, complete voter history, race, and gender are all available to the general public.<sup>61</sup>

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52. See *infra* Part II.A.

53. See *infra* Part II.B.

54. See *infra* Part II.C.

55. See *infra* Part II.D.

56. See Keegan, *supra* note 2 (“HAVA includes a requirement to collect from registered voters either a state driver’s license number or the last four digits of an SSN.... [T]he National Voter Registration Act of 1993 ... requires that states accept a standardized federal voter registration form.... [that] includes blanks for a voter’s full date of birth, ID number and signature.”).

57. See generally Michael P. McDonald, U.S. ELECTIONS PROJECT, [http://electproject.org/\[https://perma.cc/3VKU-WKU4\]](http://electproject.org/[https://perma.cc/3VKU-WKU4]) (reporting the availability of voter data for all fifty states and the District of Columbia).

58. See NCSL, *supra* note 9, at 1.

59. See *id.* (noting that the one exception is Rhode Island, which does not disclose voter history).

60. *Id.*

61. See Leada Gore, *Name, Birthday, Voting History? It's All Available-For a Price-From Alabama Secretary of State's Office*, AL (July 5, 2017), <https://www.al.com/news/2017/07/>

Other states place statutory limitations on what voter information is available to the general public. In California, for example, a voter's home address, telephone number, email address, and precinct number are "confidential" and are not disclosed to the general public.<sup>62</sup> States used to disclose Social Security numbers in public voter files,<sup>63</sup> but no longer do so<sup>64</sup> because such disclosures raised serious privacy concerns.<sup>65</sup>

### *B. Who Can Access Voter Information?*

In addition to differences in *what* information people can access, *who* can access it also varies by state.<sup>66</sup> Eleven states restrict access to voter information to that state's residents.<sup>67</sup> Seven states limit access to other registered voters.<sup>68</sup> Eleven states do not allow the general public to access voter information at all.<sup>69</sup> However, restricting public access to voter information does not mean that voter data is completely free from disclosure. All states allow candidates running for elected office and political parties to access voter records,<sup>70</sup> which includes access to information that is otherwise considered confidential and not disclosed to the general public.<sup>71</sup> Six states allow similar exemptions for nonprofit organizations, and nine states also allow exemptions for researchers.<sup>72</sup>

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name\_birthday\_voting\_history\_i.html [https://perma.cc/GT83-JY79].

62. CAL. GOV'T CODE § 6254.4(a) (2015). Note that this restriction applies to access by the general public only and is subject to statutory exemption. *See infra* Part II.B; *see also* CAL. ELEC. CODE § 2194(a)(3) (2018) (providing that confidential voter data can be disclosed "to any candidate for federal, state, or local office ... any committee ... and to any person for election, scholarly, journalistic, or political purposes").

63. *See, e.g.*, VA. CODE ANN. §§ 24.1-23(8), 24.1-56 (repealed 1993).

64. *See* Keegan, *supra* note 2.

65. *See* Greidinger v. Davis, 988 F.2d 1344, 1353-54 (4th Cir. 1993).

66. *See* NCSL, *supra* note 9, at 2. *See generally* McDonald, *supra* note 57 (reporting which entities have access to voter data for all fifty states and the District of Columbia).

67. *See* NCSL, *supra* note 9, at 2.

68. *Id.*

69. *Id.*

70. *See id.*

71. *See, e.g.*, CAL. ELEC. CODE § 2194(a)(1) (2018).

72. NCSL, *supra* note 9, at 2.

### C. How Voter Data Can Be Used

Few states place restrictions on what available voter registration information can be used for. Most states allow voter data to be used for “noncommercial purposes,” which means any use other than selling a product or service.<sup>73</sup> Some states limit the use of voter data to “political purposes;” however, state statutes often do not define what constitutes a political purpose.<sup>74</sup> Regardless of restrictions, once voter information is released it becomes difficult for the state to control its use.<sup>75</sup>

### D. Statutory Exemptions

Most states allow registering voters to apply for an exemption from the public disclosure of their voter information, granted the registrant meets certain statutory criteria.<sup>76</sup> Such exemptions accommodate individuals who would face a known safety risk if their personal information were made public record, such as victims of domestic violence, sexual assault, or stalking.<sup>77</sup> At least twenty-nine states prevent the public disclosure of voter information for citizens who are members of the state’s Address Confidentiality Program.<sup>78</sup> For victims not belonging to their state’s Address Confidentiality Program, or in states that do not have such programs, some state statutes require victims of domestic violence seeking a public record exemption to demonstrate a safety risk by obtaining a court order requiring their registration record not be made available to the public,<sup>79</sup> obtaining official verification that a crime has occurred,<sup>80</sup>

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73. *Id.*

74. IOWA CODE § 48A.39 (2019); TENN. CODE ANN. § 2-2-138(d)(1) (2019).

75. See NCSL, *supra* note 9, at 2.

76. See *infra* notes 79-82 and accompanying text.

77. See NCSL, *supra* note 9, at 2.

78. See *Voter Registration & Privacy*, TECH. SAFETY (2016), <https://www.techsafety.org/voter-registration-privacy/> [<https://perma.cc/SFL3-SCR9>]. Address Confidentiality Programs give victims a legal substitute address to use in place of their physical address whenever an address is required by public agencies. *Address Confidentiality Programs*, STALKING RES. CTR., <http://victimsofcrime.org/our-programs/stalking-resource-center/help-for-victims/address-confidentiality-programs> [<https://perma.cc/6R78-ZEGW>].

79. See, e.g., ARIZ. REV. STAT. ANN. § 16-153 (2019); 15 DEL. CODE ANN. tit. 15, § 1303(a) (2011); N.Y. ELEC. LAW § 5-508(2) (2017).

80. See FLA. STAT. § 119.071(2)(j)(1) (2019).

having a court-issued protective order,<sup>81</sup> or furnishing a signed statement that the registrant is in fear for his or her safety due to threats or stalking and evidence that the registrant filed a complaint with law enforcement against the culpable person.<sup>82</sup>

Some states also allow public record exemptions for select “high risk” professionals, including justices and judges, law enforcement officers, state employees and their families, and active and retired military members.<sup>83</sup> States that allow sixteen- and seventeen-year-old voters to preregister differ in how they treat minors’ voter information. Some states keep minors’ information off of public record lists by designating preregistered voters as “pending,” and thus not disclosed on the public list of “active” voters.<sup>84</sup> Other states make preregistered voters’ information a matter of public record the same as all other voters.<sup>85</sup>

### III. PUBLIC VOTER REGISTRATION LAWS AS A MODERN FORM OF VOTE DENIAL

The modernization of the election process and voting administration, largely brought about by the HAVA,<sup>86</sup> has led to new and often less immediately apparent forms of disenfranchisement. No longer are voters faced with explicit disenfranchisement methods, such as poll taxes and literacy tests.<sup>87</sup> Today, practices such as racial gerrymandering<sup>88</sup> and voter identification laws<sup>89</sup> threaten to deny voters

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81. See VA. CODE ANN. § 24.2-418(B)(2) (2019).

82. See *id.* § 24.2-418(B)(3).

83. See Brevard County Supervisor of Elections, *Request a Public Records Exemption*, VOTEBREVARD, <https://www.votebrevard.com/voter-information/request-a-public-records-exemption> [https://perma.cc/DFS8-YZT2].

84. See NCSL, *supra* note 9, at 2-3.

85. See *id.*

86. Pub. L. No. 107-252, 116 Stat. 1666 (2002).

87. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”).

88. See, e.g., Patricia Okonta, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 269-70 (2018).

89. See, e.g., Richard W. Trotter, *Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a Structural Right*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 515, 545-46 (2013).

a fair and equal voice in elections.<sup>90</sup> These modern mechanisms do not explicitly deny citizens the right to vote; however, as applied they present the risk of effectively diluting voter representation or barring equal access to the polls.<sup>91</sup> State public record laws present a similar risk. Although publicizing voter registration information does not outwardly deny any citizen's right to vote, these laws can impose a barrier to registering to vote that subsequently prevents eligible citizens from exercising their right to vote.<sup>92</sup>

This Part analyzes the constitutionality of public voter registration information laws. Many courts have upheld voter registration laws requiring registrants to disclose information to the state.<sup>93</sup> However, conditioning the right to vote on citizens disclosing their personal registration information to the *public* is a distinctly different issue. Requiring citizens to disclose identification information to the state in order to register to vote is a minimal burden that serves a legitimate state interest of verifying voter eligibility and preventing fraud.<sup>94</sup> Disclosing this information to the public, on the other hand, is a severe burden that is not necessary to safeguard voters or protect the integrity of the election process.

This Part first assesses the applicable standard of review, then proceeds to identify and evaluate the burden that public voter registration information laws impose on voters and the democratic process. Based on the burden, this Part then applies the standard

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90. See, e.g., Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation That Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 57-59 (2008) (discussing the impact of modern disenfranchisement methods).

91. See *id.* at 66-69.

92. See *infra* Part III.B.

93. See *McKay v. Thompson*, 226 F.3d 752, 756-57 (6th Cir. 2000) (holding that a Tennessee law requiring disclosure of a Social Security number to the state to register to vote did not unconstitutionally burden the right to vote); *Kemp v. Tucker*, 396 F. Supp. 737 (M.D. Pa. 1975), *aff'd* 423 U.S. 803 (1975) (*per curiam*) (holding that a Pennsylvania law requiring a registrant to disclose his or her race when registering to vote was constitutional); *State ex rel. Klein v. Hillenbrand*, 130 N.E. 29, 32 (Ohio 1920) (holding that an Ohio law requiring a registrant to disclose his or her age did not deny the constitutional right to vote).

94. See Jay M. Zitter, Annotation, *Validity of Statute Requiring Proof and Disclosure of Information as Condition of Registration to Vote*, 48 A.L.R. 6th 181 (2009) (“[C]ourts often reasoned that far from impeding the right to vote, the registration statutes seeking certain information from applicants were designed to, and actually did, improve the voting process by eliminating fraud and abuses.”).

of review, and argues that publicizing voter registration information is overly burdensome and does not withstand exacting scrutiny.

*A. A Burden-Based Standard of Review*

In cases involving voter qualifications and ballot access, the Supreme Court has traditionally applied strict scrutiny, requiring that “restrictions on the right to vote must serve a compelling state interest and be narrowly tailored to serve that state interest.”<sup>95</sup> Yet when a “burdensome condition” is placed on an individual exercising the right to vote, as opposed to an “absolute denial” of the right to vote, the Court is less clear in identifying whether strict scrutiny or rational basis review should apply.<sup>96</sup>

*Anderson v. Celebrezze* established a general balancing test that calls for weighing the injury to voters’ rights against the asserted state interest.<sup>97</sup> The Court recognized that some state restrictions on voters’ rights are necessary “as a practical matter” to regulate and achieve orderly, fair elections, and stated that reasonable, nondiscriminatory restrictions could generally be justified by the state’s “important regulatory interests.”<sup>98</sup> However, the Court qualified that, “even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty.”<sup>99</sup>

The Court expounded on the *Anderson* balancing test in *Burdick v. Takushi*.<sup>100</sup> *Burdick* “call[ed] for application of a deferential ‘important regulatory interests’ standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote.”<sup>101</sup>

In response to more recent claims contesting the constitutionality of state voter identification laws, *Crawford v. Marion County*

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95. See *id.* (citing *Greidinger v. Davis*, 988 F.2d 1344, 1352 (4th Cir. 1993)).

96. See *Greidinger*, 988 F.2d at 1350.

97. 460 U.S. 779, 789 (1983) (challenging a state statutory filing deadline for political candidates to be placed on the ballot).

98. *Id.* at 788.

99. *Id.* at 806 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)).

100. 504 U.S. 428, 434 (1992) (challenging Hawaii’s prohibition on write-in voting as an unreasonable burden on citizens’ right to vote).

101. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring).

*Election Board* confirmed the application of a balancing test, stating that, however slight the burden may appear, it must be “justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”<sup>102</sup> More specifically addressing state disclosure requirements, *Doe v. Reed* applied a similar balancing test under “exacting scrutiny” to evaluate the constitutionality of the public disclosure of petition signatures, holding that the petitioners’ success depended upon demonstrating a resulting harm that outweighed the state’s administrative interests.<sup>103</sup> Thus, determining the applicable standard of review depends on first evaluating how severely the public disclosure of voter registration information burdens the right to vote.

### *B. Identifying the Burden: Privacy in the Digital Age*

Historically, voter rolls have always been a matter of public record; however, the nature of public records and the harms stemming from one’s personal identifying information being available to the public have changed over time.<sup>104</sup> As the world grows increasingly connected and digitized, public records have become increasingly public: voter roll information that once required a physical trip to the board of elections in order to access it is now instantly available to anyone, anywhere, at the click of a button, on both state websites and numerous third-party websites.<sup>105</sup> This increased ease of access to public records has exposed voters to new harms not previously imposed by public voter information laws, such as voter intimidation, personal safety concerns, and identity theft risks, and also inflicts broader democratic and societal harms.<sup>106</sup>

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102. *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

103. 561 U.S. 186, 200-02 (2010).

104. See David A. Graham, *The Strange Phenomenon of Voter Self-Suppression*, ATLANTIC (July 21, 2017), <https://www.theatlantic.com/politics/archive/2017/07/the-strange-phenomenon-of-voter-self-suppression/533766/> [<https://perma.cc/7RJ9-D6PG>].

105. See *id.*

106. See *id.*

### 1. *Voter Intimidation*

Voter intimidation is any conduct that “intimidates or threatens voters into voting a certain way or refraining from voting.”<sup>107</sup> Voter intimidation is easily spotted when achieved through violence and threats, yet modern intimidation tactics often take more subtle forms.<sup>108</sup> For example, political organizations have begun utilizing public voter registration records to obtain registrants’ names and home addresses in order to send out intimidating—and often overtly threatening—mailers.

In 2014 in Lee County, Florida, many voters were shaken when they received letters from a political group called “Citizens for a Better Florida.”<sup>109</sup> The letters urged recipients to vote, but also included their neighbors’ names and voting records, with an added threat to include recipients’ names and voting records in future mailers.<sup>110</sup> Lee County Elections Supervisor Sharon Harrington reported receiving “lot[s] of calls” from very upset voters in response to the letters.<sup>111</sup> New York voters received similarly ominous letters from The New York State Democratic Committee, reading: “Who you vote for is your secret.... But whether or not you vote is public record.”<sup>112</sup> The letter went on to suggest that eyes were on recipients, stating that “[m]any organizations monitor turnout in your neighborhood and are disappointed by the inconsistent voting of many of your neighbors,” further threatening that “[w]e will be reviewing the Kings County official voting records after the upcoming election to determine whether you joined your neighbors who voted in 2014.”<sup>113</sup>

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107. WENDY WEISER & VISHAL AGRAHARKAR, BRENNAN CTR. FOR JUSTICE, *BALLOT SECURITY AND VOTER SUPPRESSION: WHAT IT IS AND WHAT THE LAW SAYS* 2 (2012).

108. *See id.* at 7.

109. Betty Parker, *An Individual’s Voting History Is Public Record*, NEWS-PRESS (Nov. 1, 2014, 10:50 AM), <https://www.news-press.com/story/news/politics/betty-parker/2014/11/01/individuals-voting-history-public-record/18313485/> [<https://perma.cc/X4QZ-2RDT>].

110. *See id.*

111. *Id.*

112. Christopher Robbins, *GOTV MOFO: NY Democrats Getting Oddly Threatening Letters from State Democratic Committee*, GOTHAMIST (Oct. 30, 2014, 12:14 PM), <https://gothamist.com/news/gotv-mofo-ny-democrats-getting-oddly-threatening-letters-from-state-democratic-committee> [<https://perma.cc/97ZC-85Y3>].

113. *Id.*

Political organizations are not the only ones guilty of using public voter records to intimidate voters: Texas Senator Ted Cruz received harsh backlash for employing the same strategy in his 2016 presidential campaign.<sup>114</sup> Senator Cruz's campaign sent out mailers that gave recipients a "voting score" from A to F and included the phrase "official public record" to try to shame Iowa voters for their past voting participation.<sup>115</sup> Paul Pate, the Secretary of State of Iowa, condemned the mailers because they accused voters of committing fabricated "voting violation[s]" based on a lack of voting participation, and recipients of the mailers were equally outraged.<sup>116</sup>

As concerning as it is that political organizations and candidates use public records to send mailers of this sort, all state public record laws allow this practice.<sup>117</sup> The political organizations that send these mailers may claim they have good intentions of increasing voter turnout;<sup>118</sup> however, that does not make it a desirable use of public information. Similarly, politicians running for elected office may claim that contacting constituents is necessary for an effective campaign.<sup>119</sup> However, it is the intimidating content and tone of such mailers, not simply contacting voters or the use of mailers itself, that runs awry of the "political purposes" for which state statutes allow politicians and political organizations to use voter roll information.<sup>120</sup>

Using public voter registration records to send threatening, unsolicited mailers harms voters' confidence in their ability to freely exercise their right to vote. Some Florida voters contacted their elections office because receiving an intimidating mailer made them

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114. See Sabrina Siddiqui, *Cruz Campaign Draws Condemnation for Strategy of Shaming Iowans to Caucus*, GUARDIAN (Jan. 30, 2016, 8:43 PM), <https://www.theguardian.com/us-news/2016/jan/30/ted-cruz-campaign-voter-violation-grades-caucus> [<https://perma.cc/PH9C-ESMN>].

115. *Id.*

116. *Id.*

117. See *supra* note 70 and accompanying text.

118. See Alan S. Gerber et al., *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POL. SCI. REV. 33, 34-35, 42 (2008) (finding that neighbor mailers exerting social pressures on citizens to vote increased voter turnout).

119. See Ruth Igielnik et al., *Commercial Voter Files and the Study of U.S. Politics: Demystifying the Digital Databases Widely Used by Political Campaigns* 48-49, PEW RES. CTR. (Feb. 15, 2018), <https://www.pewresearch.org/methods/2018/02/15/commercial-voter-files-and-the-study-of-u-s-politics/> [<https://perma.cc/E4G5-9ZK8>] (discussing how commercial voter files may facilitate greater turnout in elections).

120. See *supra* note 74 and accompanying text.

fear that the sender knew who they had voted for in the past.<sup>121</sup> Other voters were upset that their voter information was publicly available, a fact previously unknown to them before receiving a mailer.<sup>122</sup> In light of today's tumultuous political climate, voters may consider intrusion into their political activities an offensive invasion and a source of emotional distress.<sup>123</sup> This raises the risk that eligible voters will refrain from registering to vote in order to avoid the burden of being subject to these acts—whether intentional or not—of political intimidation.

## 2. *Physical Safety Threats*

“I have been contacted by female voters concerned for their safety who, sadly, ask me to remove them from the voter rolls,” reported Lori Scott, the Brevard County, Florida, Supervisor of Elections.<sup>124</sup> Survivors of domestic violence, stalking, sexual assault, or trafficking have serious physical safety concerns implicated by public voter registration records.<sup>125</sup> For these individuals, protecting their personal information, particularly their addresses, can be a matter of life or death.<sup>126</sup> Attackers can easily use public information in order to locate, stalk, and physically harm their victims.<sup>127</sup> The law already recognizes the need to limit the availability of personal information in order to protect individuals' safety. For example, there are statutory protections for children's information on the Internet<sup>128</sup> and limitations on the use of individuals' Department of

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121. See Parker, *supra* note 109.

122. See Colin Campbell, *NC Democratic Party, Sierra Club Try Shaming Tactics to Get Out the Vote*, NEWS & OBSERVER (Oct. 28, 2014, 5:25 PM), <https://www.newsobserver.com/news/politics-government/election/article10110254.html> [<https://perma.cc/T3HZ-QJ4F>].

123. See Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1166 (2015) (noting that privacy harms may change based on shifts in social norms and changes in society's concerns).

124. See Lori Scott, *Elections Supervisor: Voter Data Should Not Be Open*, FLA. TODAY (Jan. 15, 2016, 3:10 PM), <https://www.floridatoday.com/story/opinion/columnists/guest-columns/2016/01/17/elections-supervisor-voter-data-open/78858530/> [<https://perma.cc/9GEU-85TL>].

125. See *Voter Registration Records & Privacy*, NAT'L NETWORK TO END DOMESTIC VIOLENCE (2017).

126. See Ohm, *supra* note 123, at 1156 (detailing two cases in which stalkers found and killed the women they were stalking, after obtaining their home or work addresses).

127. See *id.* at 1148.

128. See Children's Online Privacy Protection Rule, 16 C.F.R. § 312.2 (2018).

Motor Vehicle (DMV) records.<sup>129</sup> Public voter registration records present another source of personal identifying information that poses a physical safety threat to registrants.

The real-life consequences of personal information being public record came to the forefront of the public's attention in the late 1980s, with the infamous murder of twenty-one-year-old aspiring Hollywood actress Rebecca Schaeffer.<sup>130</sup> In 1989, an obsessed fan named Robert John Bardo stalked and killed Schaeffer in her Los Angeles apartment after obtaining her unlisted address from a private detective.<sup>131</sup> The detective had obtained Schaeffer's address from the California DMV.<sup>132</sup> At the time, anyone could go into the California DMV, fill out an information request form, and for as little as one dollar, be given a driver's record on the spot.<sup>133</sup> Schaeffer's murder was a catalyst for the passage of the Driver's Privacy Protection Act of 1994,<sup>134</sup> which limits the DMV's ability to disclose a driver's personal information without the driver's express consent.<sup>135</sup>

Recognizing that offenders often use public information such as voter and drivers' license registries to find a victim's address, thirty-six states have Address Confidentiality Programs (ACPs)<sup>136</sup> and at least twenty-nine states prevent the public disclosure of voter information for citizens who are members of the state's ACP.<sup>137</sup> Other states offer statutory exemptions for victims of crimes to have their voter registration information redacted from public records.<sup>138</sup>

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129. See Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721(b) (2012).

130. See *Ctr. for Individual Rights v. Chevaldina*, No. 16-civ-20905, 2018 WL 1795470, at \*6 n.3 (S.D. Fla. Feb. 21, 2018).

131. See Frank Wilkins, *The Death of Rebecca Schaeffer: The Stalking Death that Changed the Law*, REEL REVS., <http://reelreviews.com/shorttakes/shaeffer/shaeffer.htm> [https://perma.cc/LZ9Y-LNUH].

132. ROBERT GELLMAN & PAM DIXON, *ONLINE PRIVACY: A REFERENCE HANDBOOK* 144 (2011).

133. See Wilkins, *supra* note 131.

134. See *Chevaldina*, 2018 WL 1795470, at \*6 n.3.

135. See 18 U.S.C. § 2721(a)(2) (2012).

136. See *Address Confidentiality Programs*, *supra* note 78 (noting that ACPs give victims a post office box address to use in place of their physical address whenever an address is required by public agencies).

137. See *id.*

138. See *supra* Part II.D.

The problem with ACPs and current statutory exemptions is that they are incredibly limited and do not effectively protect all at-risk voters from harm. A major flaw of ACPs is that an individual must opt in by submitting an application to the state ACP agency.<sup>139</sup> Opting in requires that an individual *know* they are the target of a potential threat.<sup>140</sup> This leaves anyone who does *not* know he or she has been targeted exposed to the risks of their public voter information being obtained by someone who intends to cause them harm.<sup>141</sup> In addition, statutory exemptions often require a registering voter to have documentation proving that a crime occurred.<sup>142</sup> This is an unrealistic requirement given that many victims of domestic violence do not report their abuse, for a variety of reasons including fear of reprisal from their abuser.<sup>143</sup> Thus, victims of unreported domestic violence or other unreported crimes are not protected by their states' statutory exemptions.

The inadequate privacy protections offered to registering voters leaves two primary concerns: (1) that many unsuspecting voters will have their voter records used by attackers to locate them and cause them harm, and (2) that survivors of crimes, who already go to great lengths to protect their personal information, may not be able to meet the documentation requirements or may find their states' ACP and statutory exemption procedures too complex to navigate, and thus ultimately decide not to register to vote in order to avoid threats to their safety.

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139. See Carol Lavery, *Address Confidentiality Programs Aim to Keep Victims Safe*, STALKING RES. CTR., <http://victimsofcrime.org/docs/src/address-confidentiality-programs-aim-to-keep-victims-safe.pdf?sfvrsn=2> [https://perma.cc/7ZYN-JDMU].

140. See VOTER INFORMATION WEBSITES STUDY, U.S. ELECTION ASSISTANCE COMM'N 18, [https://www.eac.gov/assets/1/6/Voter\\_Information\\_Web\\_Sites\\_Study.pdf](https://www.eac.gov/assets/1/6/Voter_Information_Web_Sites_Study.pdf) [https://perma.cc/FP5U-DPLG].

141. See *id.*

142. See *supra* Part II.D.

143. See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, NCJ 250231, POLICE RESPONSE TO DOMESTIC VIOLENCE, 2006-2015, at 3 (2017), <https://www.bjs.gov/content/pub/pdf/prdv0615.pdf> [https://perma.cc/6FGW-JYA9] (listing that an estimated 582,000 instances of domestic violence went unreported between 2006 and 2015).

### 3. *Identity Theft*

Brevard County, Florida, Supervisor of Elections Lori Scott reported, “I increasingly hear from voters who are concerned about Florida’s open access to their personal information.... I hear from voters concerned about increasing crimes of identity theft.”<sup>144</sup> Scott’s constituents’ concerns are well founded; Florida ranks second in the United States for states with the most cases of identity theft per capita.<sup>145</sup> Yet identity theft is on the rise throughout the entire United States. In 2017, 16.7 million Americans were victims of identity fraud—an 8 percent increase from the previous year—resulting in over \$16.8 billion dollars stolen from consumers.<sup>146</sup> Fraudsters mainly target online channels in order to steal victims’ personal information.<sup>147</sup> The increased online availability and ease of online access to voter registration records exposes voter data to similar risks. Criminals can use a name, address, and date of birth as a starting point to obtain an individual’s financial records and other information via “phishing.”<sup>148</sup> Phishing is when a scammer uses fraudulent emails or texts to get a recipient to divulge sensitive information, such as account numbers, Social Security numbers, or passwords, as a means to steal the individual’s money or identity.<sup>149</sup>

### 4. *Democratic Harm*

It is universally acknowledged that a well-functioning democracy depends upon all citizens being equally represented by their government.<sup>150</sup> Yet in order to be represented, citizens must vote, and in

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144. Scott, *supra* note 124.

145. See *Consumer Sentinel Network Data Book 2017: State Rankings: Identity Theft Reports*, FED. TRADE COMM’N (2017), <https://www.ftc.gov/policy/reports/policy-reports/commission-staff-reports/consumer-sentinel-network-data-book-2017/state-rankings-id-theft-reports> [https://perma.cc/9892-E79B].

146. See Al Pascual, Kyle Marchini, & Sarah Miller, *2018 Identity Fraud: Fraud Enters a New Era of Complexity*, JAVELIN (Feb. 6, 2018), <https://www.javelinstrategy.com/coverage-area/2018-identity-fraud-fraud-enters-new-era-complexity> [https://perma.cc/K9L6-HNLM].

147. See *id.*

148. See VOTER INFORMATION WEBSITES STUDY, *supra* note 140.

149. See *How to Recognize and Avoid Phishing Scams*, FED. TRADE COMM’N (May 2019), <https://www.consumer.ftc.gov/articles/0003-phishing> [https://perma.cc/NG2R-DTBK].

150. See, e.g., JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 102 (Currin V. Shields ed., The Liberal Arts Press 5th ed. 1958) (1861) (“The pure idea of

order to vote, citizens must first be registered.<sup>151</sup> Barriers to voter registration threaten the legitimacy of American democracy by excluding eligible citizens from participating in America's decision-making process, thus resulting in elected bodies that are not accurately representative of the entire population.<sup>152</sup> Public voter registration laws threaten to disproportionately burden and bar two groups of the population from voting: women and privacy-conscious citizens.

Public voter registration laws disproportionately burden women due to physical safety concerns. Eighty-five percent of domestic violence victims each year are women.<sup>153</sup> In addition, women ages eighteen to thirty-four experience higher rates of domestic violence than women of other age brackets, and African American women experience domestic violence at a higher rate than women belonging to other racial groups.<sup>154</sup> Consequently, safety concerns implicated by public voter registration laws threaten to disproportionately bar young women, and especially African American women, from being represented in elections.

Privacy-conscious citizens also compose a portion of the population that is burdened by public voter registration laws. A 2015 Pew Research Center survey found that Americans have strong views about the importance of privacy: 93 percent of adults responded that being in control of *who* can collect information about them is important to them, and 90 percent said that controlling *what* information is collected about them was also important.<sup>155</sup> A large group of Americans already engage in some "privacy-enhancing measures" to protect their information privacy in their everyday

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democracy, according to its definition, is the government of the whole people by the whole people, equally represented.").

151. See *Voter Registration*, *supra* note 17.

152. See Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CTR. AM. PROGRESS (July 11, 2018, 12:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/> [<https://perma.cc/6GJW-Y8BN>].

153. SHANNON CATALANO, U.S. DEPT OF JUSTICE BUREAU OF JUSTICE STATISTICS, NCJ 239203, INTIMATE PARTNER VIOLENCE, 1993-2010, at 3 (rev. ed. Sept. 29, 2015), <https://www.bjs.gov/content/pub/pdf/ipv9310.pdf> [<https://perma.cc/J4TX-4VH4>].

154. See *id.* at 2.

155. See Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RES. CTR. (May 20, 2015), <http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/> [<https://perma.cc/8YAY-F9M8>].

lives.<sup>156</sup> For example, 57 percent of Americans have refused to provide information about themselves that was not relevant to the transaction, and 23 percent have decided not to use a website because it asked for their name.<sup>157</sup>

Unfortunately, citizens have begun taking similar privacy measures in response to public voter records. In 2017, 11 percent of unregistered eligible citizens reported that they did not want to register to vote due to privacy or security reasons.<sup>158</sup> Awareness of monitoring also leads to heightened privacy concerns from citizens.<sup>159</sup> Consequently, receiving intimidating mailers from political groups monitoring voter behavior,<sup>160</sup> or general increased awareness of public voter registration information being available to anyone upon request,<sup>161</sup> raises the risk that more and more eligible voters will begin taking measures to protect their information by not registering to vote or by removing themselves from the rolls.

By forcing women and privacy-conscious citizens to face barriers to registering to vote that ultimately prevent them from voting, public voter registration laws result in an elected government that does not accurately represent the American citizenry.

### 5. *Societal Harm*

Information privacy has traditionally been considered an individual concern, but in the modern digital world, privacy concerns affect *everyone* and permeate almost every aspect of modern life.<sup>162</sup> Thus, in addition to being an individual concern, privacy should also be recognized as a general societal value and public interest.<sup>163</sup> One way public voter registration laws inflict society-wide harm is by compromising the relationship that citizens have with their government.

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156. *Id.*

157. *Id.*

158. See *Why Are Millions of Citizens Not Registered to Vote?*, *supra* note 10.

159. See Madden & Rainie, *supra* note 155.

160. See *supra* Part III.B.1.

161. As occurred in response to President Trump's PACEI requests in 2017. See *supra* note 7 and accompanying text.

162. See James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 3-5 (2003).

163. See *id.* at 7.

Public records reflect the sensitive relationship that citizens have with their government.<sup>164</sup> “Privacy is rooted in the classical liberal belief in limited government and a general distrust of powerful institutions.”<sup>165</sup> When citizens lose control over personal information, there is a recognized “loss of dignity, autonomy, or respect for the individual.”<sup>166</sup> Additionally, government amassment of information about people creates public anxiety of being monitored, often resulting in people altering their behavior.<sup>167</sup> The potential harm of public voter information is that citizens will alter their behavior by choosing to not register to vote.<sup>168</sup>

While many citizens understand that information access can produce benefits such as a more efficient government,<sup>169</sup> most Americans are not confident in the government’s ability to adequately safeguard their information and protect their privacy interests.<sup>170</sup> Survey results reveal that 94 percent of Americans are not very confident that government agencies can keep their information private and secure.<sup>171</sup> Recognizing that privacy plays a “crucial role in protecting diversity of thought and equality,”<sup>172</sup> we must similarly recognize that privacy in voter records is crucial to protect diversity and equality in the registration and turnout of American voters.

### *C. State Interests*

After identifying how public voter registration laws burden citizens’ right to vote, the next step is to identify potential state interests that could justify the disclosure and dissemination of voter information to the public.<sup>173</sup> Potential state interests regarding

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164. *See* Ohm, *supra* note 123, at 1160.

165. Nehf, *supra* note 162, at 71.

166. *Id.* at 70.

167. *See* Ohm, *supra* note 123, at 1165.

168. *See id.*

169. *See* Nehf, *supra* note 162, at 4.

170. *See* Madden & Rainie, *supra* note 155.

171. *Id.*

172. Ohm, *supra* note 123, at 1165.

173. *See supra* Part III.A.

public voter registration laws include preventing voter fraud and improving administrative efficiency.<sup>174</sup>

Courts recognize that preventing voter fraud is an important state interest.<sup>175</sup> However, the fact that voter fraud is actually quite rare<sup>176</sup> makes the state's interest in preventing voter fraud less compelling. A comprehensive 2014 study found only thirty-one potentially credible incidents of voter fraud in the entire United States over the course of fourteen years out of a total of over one billion ballots cast.<sup>177</sup> In the 2016 presidential election, more than 135 million ballots were cast yet only four cases of in-person voter fraud were documented.<sup>178</sup> In addition to in-person voter fraud, other forms of voter fraud, such as double voting via absentee ballots or providing fraudulent registration information, are similarly rare and such claims are often unsubstantiated.<sup>179</sup> A 2007 Brennan Center report on voter fraud found that most purported incidents of fraud actually resulted from mistakes by state election workers—such as clerical, typographical, or data matching errors—not actual fraud on the part of voters.<sup>180</sup> So although voter fraud does occur, it is so exceedingly rare that the state interest at issue is weak at best.

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174. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008).

175. See, e.g., *id.* (“There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.”); *Greidinger v. Davis*, 988 F.2d 1344, 1354 (4th Cir. 1993) (“Unquestionably, [the state] has a compelling state interest in preventing voter fraud.”).

176. See *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. (Jan. 31, 2017), <https://www.brennancenter.org/debunking-voter-fraud-myth> [<https://perma.cc/PMR2-3P4J>]. In assessing Indiana's state interest in preventing voter fraud, the Supreme Court recognized that there was “no evidence of any [in-person voter impersonation] fraud actually occurring in Indiana at any time in its history.” *Crawford*, 553 U.S. at 194.

177. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/> [<https://perma.cc/W8M8-BWEH>].

178. Philip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Election*, WASH. POST (Dec. 1, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/> [<https://perma.cc/3ZK8-VUZM>].

179. See JUSTIN LEVITT, BRENNAN CTR. FOR JUST., *THE TRUTH ABOUT VOTER FRAUD*, BRENNAN CTR. FOR JUSTICE 12-22 (2007), <https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf> [<https://perma.cc/S2C8-8X3F>].

180. See *id.* at 7-8.

A second potential state interest is that public voter registration records improve administrative efficiency. Allowing access to voter registration information, particularly via websites with voter registration lookup, means citizens can easily check to see if they are registered to vote.<sup>181</sup> “Several officials commented that voter information websites have reduced calls to the election department on Election Day.”<sup>182</sup> The traffic and frequency of look ups on voter registration websites also suggests that such websites are popular and citizens benefit from them.<sup>183</sup> Convenience for its own sake is not, however, a particularly weighty state interest. In recognizing administrative efficiency as a “proper state interest worthy of cognizance in constitutional adjudication,” the Court firmly qualified that “the Constitution recognizes higher values than speed and efficiency.”<sup>184</sup>

#### *D. A Balancing Act: Applying the Standard of Review*

Having identified both the burdens imposed on citizens’ right to vote and potential state interests, evaluating the constitutionality of public voter registration laws requires weighing the injury to voters’ rights against the state interest.<sup>185</sup> This Part argues that the burden imposed on voters’ rights by public voter registration laws warrants “exacting scrutiny,” and that public voter registration laws are not substantially related to the alleged state interests to justify infringing on citizens’ constitutional right to vote.

Establishing the burdens imposed on voters by public voter registration records illuminates which “balancing test” standard of review should apply. Although this Note argues that public voter registration laws operate as a restriction on the right to vote, public voter registration laws are fundamentally state disclosure requirements, rendering this argument most analogous to First Amendment challenges to state disclosure requirements, as in *Doe v. Reed*.<sup>186</sup> Although this Note focuses on the constitutional right to

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181. See VOTER INFORMATION WEBSITES STUDY, *supra* note 140, at 2.

182. *Id.*

183. *See id.*

184. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

185. *See supra* Part III.A.

186. *See* 561 U.S. 186, 194 (2010).

vote, not a First Amendment right, both claims challenge disclosure requirements in the electoral context and assert similar privacy and safety harms incurred by citizens.<sup>187</sup>

In *Doe v. Reed*, the Court followed a series of precedents that applied “exacting scrutiny,” a standard requiring “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.”<sup>188</sup> “To withstand [exacting] scrutiny, ‘the strength of the governmental interest must reflect the seriousness of the ... burden on’” the individual’s constitutional right.<sup>189</sup>

The analysis begins with evaluating the relation between public voter registration laws and government interests of preventing voter fraud and improving administrative efficiency. Public voter registration laws are not substantially related to preventing voter fraud, because they do not effectively serve that purpose, and there are other, more effective and less burdensome means of preventing voter fraud.<sup>190</sup> State collection and internal use of voter information is necessary to keep an accurate list of eligible voters and prevent voter fraud;<sup>191</sup> dissemination of voter information to the *public*, on the other hand, only purports to prevent voter fraud by allowing private citizens to challenge voter eligibility.<sup>192</sup> Although vote challenging has a long history in the United States, modern election reforms render the archaic practice of private citizens policing voter eligibility ineffective and unnecessary.<sup>193</sup> “Most [voter] challenger laws pre-date major reforms in election administration” such as the use of computerized voter registration systems.<sup>194</sup> Modern election reforms have “significantly diminish[ed] the need for poll challengers” by “largely eliminat[ing] the very problem that challengers are

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187. *See id.* at 193, 196.

188. *Id.* at 196 (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366-67 (2010)).

189. *Id.* (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744 (2008)).

190. *See Anderson v. Celebrezze*, 460 U.S. 779, 789 (1983).

191. *See supra* note 175 and accompanying text.

192. *See* NICOLAS RILEY, BRENNAN CTR. FOR JUSTICE, *VOTER CHALLENGERS* 1, 4 (2012).

193. *See id.* at 7. It should also be noted that, while voter challenge laws were enacted for the alleged purpose of preventing election fraud, the legislative history in some states suggests that such laws were actually enacted with the discriminatory purpose of suppressing minority voters. *See id.* This begs the question of whether voter challenging is a valid practice we want to continue to uphold in U.S. elections, or merely a reflection of historically discriminatory election laws that would be best done away with altogether.

194. *Id.* at 7.

ostensibly meant to address—namely, in-person voter fraud—and reveal just how unlikely it is that an untrained, citizen challenger will serve any useful purpose at the polls today.”<sup>195</sup>

In addition to not effectively preventing voter fraud, public voter registration laws are overly restrictive means of preventing voter fraud. There are other systems already in place that allow states to confirm voter eligibility and prevent fraud without disclosing a voter’s information to other members of the public.<sup>196</sup> New registrants’ voting applications are automatically verified by state voter registration databases, and databases automatically check for existing voter file matches.<sup>197</sup> Election officials also already employ a variety of methods to maintain up-to-date voter rolls, including cross-checking voter data with the DMV, the United States Post Office, or National Change of Address files to identify voters who have changed addresses or moved out of the state, receiving information from the state department of health to identify deceased voters, and receiving information from state courts to identify mentally incapacitated voters and convicted felons.<sup>198</sup>

Many states also work together to maintain voter roll accuracy.<sup>199</sup> As of September 2019, twenty-nine states participate in the Electronic Registration Information Center (ERIC), which helps states keep voter rolls up to date by conducting data checks between states.<sup>200</sup> ERIC processes voter registration data from member states to create reports detailing voters who have moved within the state, voters who have moved out of state, voters who have died, and duplicate registrations in the same state.<sup>201</sup> All of these measures effectively prevent voter fraud by confirming voter eligibility, preventing duplicate registrations, and keeping voter rolls up-to-date. And all of these methods do so without any need to disclose voters’ personal information to the public.

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195. *Id.*

196. See *Voter List Accuracy*, NCSL (Aug. 22, 2019), <http://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx> [<https://perma.cc/TDC3-RA4H>].

197. See *id.*

198. See *id.*

199. See *Ensuring the Efficiency and Integrity of America’s Voter Rolls*, ELEC. REGISTRATION INFO. CTR., <https://ericstates.org/> [<https://perma.cc/45PK-LD2N>].

200. *Id.*

201. See *id.*

Public voter registration laws are also not substantially related to improving the efficiency of administering elections. Administrative efficiencies are achieved by internal state use of voter registration information (such as electronic databases and multistate use of ERIC, as discussed above), but are not furthered by allowing public access to this information. Election departments may be less burdened by phone calls if individual voters are able to check their registration status online before election day;<sup>202</sup> however, “anonymous public access to all data in a record is not necessary to prepare an individual voter for an election.”<sup>203</sup> There are other, less intrusive ways to inform individuals of their registration status and alleviate demands placed on election departments. For example, voter registration websites could require individuals to take steps to verify their identity before disclosing registration information.<sup>204</sup> Voter registration websites could also simply confirm or deny an individual’s registration status without disclosing other personal identifying information contained in a voter’s file.<sup>205</sup>

Although the alleged state interests are important, these interests are not strong enough to justify the seriousness of the burden imposed on citizens’ right to vote. Public voter registration laws present serious barriers to registering to vote: citizens face the risk of voter intimidation, physical safety threats, and identity theft, and larger democratic and societal harms are incurred by the nation as a whole.<sup>206</sup>

#### IV. THE DRIVER’S PRIVACY PROTECTION ACT AS A MODEL FOR REFORM

This Part proposes that Congress reform voter registration laws to be modeled after the Driver’s Privacy Protection Act of 1994, which limits the public disclosure of citizens’ DMV records.<sup>207</sup> A similar law for voter registration information would restrict voter information to internal state use unless a voter gives express

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202. See *supra* notes 181-82 and accompanying text.

203. VOTER INFORMATION WEBSITES STUDY, *supra* note 140, at 17.

204. See *id.* at 19-20.

205. See *id.*

206. See *supra* Part III.B.

207. See 18 U.S.C. § 2721 (2012).

consent authorizing disclosure, and would include a statutory exception allowing disclosure for well-defined, limited uses.

Congress passed the Driver's Privacy Protection Act of 1994 in response to some of the same privacy concerns raised by public voter registration laws.<sup>208</sup> The Act prevents a state DMV and any DMV employee from knowingly disclosing or otherwise making drivers' personal information available to any person or entity.<sup>209</sup> The Act grants a list of exceptions that driver records can be disclosed for, which includes use by government agencies in carrying out their functions, use by legitimate businesses for narrowly defined purposes, and research activities "so long as the personal information is not published, redisclosed, or used to contact individuals."<sup>210</sup> When a request is made for a driver's information for any unauthorized purpose, the driver must waive their right to privacy in order for the requesting person or entity to receive their information; without a waiver, an individual's DMV information will not be released.<sup>211</sup>

A similar model for voter registration information would largely eliminate the current harms imposed by public voter registration laws and remove the barrier to voter registration. Preventing states from disclosing voter information to private citizens and entities would safeguard victims of domestic violence, stalking, and other crimes from having their information obtained by another individual intending to cause them harm. This consent-based disclosure model would also give privacy-conscious citizens control over the dissemination of their information.

Some individuals who want to access voter information, such as researchers,<sup>212</sup> may object to this model of reform as overly restrictive. Recognizing the need for some access to voter information, statutory exemptions can be granted for researchers, political candidates, and political organizations.<sup>213</sup> By drafting statutory

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208. *See supra* Part III.B.2.

209. *See* 18 U.S.C. § 2721(a).

210. 18 U.S.C. § 2721(b)(1), (3), (5).

211. *See* 18 U.S.C. § 2721(d).

212. *See* NCSL, *supra* note 9, at 3 (quoting an election researcher's response to states limiting voter information access: "I'm a researcher who studies voting trends to improve elections—I need access to this information").

213. *See id.* at 2-3.

exemptions that authorize the use of voter information for legitimate political purposes, voter intimidation can be minimized by clearly and narrowly defining what constitutes a legitimate “political purpose.”<sup>214</sup> Disclosure exceptions should also contain the requirement that voter information not be published or redisclosed, so as to protect voters from physical safety threats and identity theft risks, as well as improve voters’ confidence in the government’s respect for and ability to safeguard their personal information.

By significantly reducing the harms resulting from public voter registration laws, this proposed reform would remove privacy concerns as a barrier to registering to vote, allowing more eligible citizens to freely register and exercise their right to vote. This reform comports with a fundamental ideal of privacy law, reflected in the Privacy Act, that “if we must require our citizens and residents to divulge information to the government to participate in our society, we should protect that information from being used for purposes other than the purpose for which data was first required.”<sup>215</sup>

### CONCLUSION

Public voter registration laws expose registered voters to voter intimidation, physical safety threats, and identity theft risks, and also impose larger democratic and societal harms on the nation as a whole.<sup>216</sup> The severity of privacy harms, although often considered “easy to ignore” because they seem abstract or difficult to quantify, should not be understated.<sup>217</sup> A concerning attitude, infamously expressed by Sun Microsystems CEO Scott McNealy, is that “[y]ou have zero privacy anyway. Get over it.”<sup>218</sup> Discrediting privacy concerns turns a blind eye to the growing incidences of real and serious harms resulting from public information falling into the wrong hands,<sup>219</sup> and further disregards the fact that rapid changes in technology promise to present new risks of significant privacy

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214. *See id.* at 2.

215. Ohm, *supra* note 123, at 1160.

216. *See supra* Part III.B.

217. Ohm, *supra* note 123, at 1147.

218. Nehf, *supra* note 162, at 67.

219. *See supra* Part III.B.1-3.

harms going forward.<sup>220</sup> Viewed as a larger democratic and social issue, not caring about privacy because one has nothing to hide is akin to not caring about free speech because one has nothing to say.

Many citizens understand that privacy interests must be balanced against other interests and benefits that result from readily accessible information,<sup>221</sup> however, *no one* should be required to choose between their safety and security and exercising their right to vote. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>222</sup> The right to vote is simply too sacred to American citizens and the validity of American democracy to restrict.

*Audrey Paige Sauer*\*

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220. See Ohm, *supra* note 123, at 1196.

221. See Nehf, *supra* note 162, at 4.

222. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

\* J.D. Candidate, 2020, William & Mary Law School; B.A., Economics, 2016, North Central College. Thank you to *William & Mary Law Review* for all of the hard work that went into the publication process. This Note is dedicated to my stepdad, for being such an amazing influence in my life. Thank you for always inspiring me, believing in me, and making my law school dream possible.