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# THE VALIDITY OF VOTER REGISTRATION DEADLINES UNDER STATE CONSTITUTIONS

Sean J. Young<sup>†</sup>

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## INTRODUCTION

A recent study estimates that three to four million Americans were unable to cast a vote in the 2012 presidential elections because of voter registration deadlines.<sup>1</sup> Are voter registration deadlines, which seem ubiquitous and up to thirty days in some states,<sup>2</sup> truly necessary in the modern age?

Modern trends suggest that the answer is no. In the 1970s, three states—Maine, Minnesota, and Wisconsin<sup>3</sup>—allowed voters to both register and vote on Election Day, establishing what has become known as Election Day Registration (EDR). In the 1990s, spurred by the National Voter Registration Act (NVRA),<sup>4</sup> the number of states with

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<sup>†</sup> Staff Attorney for the American Civil Liberties Union Foundation (ACLU), Voting Rights Project. The views expressed in this article are my personal views and do not reflect those of the ACLU. I would like to thank Jeanne-Michele Mariani and Daniel Hessel for the research support that they provided.

1. See Alex Street et al., *Estimating Voter Registration Deadline Effects with Web Search Data*, 23 POL. ANALYSIS 225, 233, 238 (2015), <http://pan.oxfordjournals.org/content/23/2/225.full.pdf+html>.

2. *Voter Registration Deadlines Listed by State*, ROCKTHEVOTE.COM, <http://www.rockthevote.com/get-informed/elections/voter-registration-deadlines.html>.

3. Jacob R. Neiheisel & Barry C. Burden, *The Impact of Election Day Registration on Voter Turnout and Election Outcomes*, 40 AM. POL. RESEARCH 636, 637 (2012), <http://apr.sagepub.com/content/40/4/636.full.pdf+html>. In Wisconsin at the time, some municipalities did not have a voter registration system, and those municipalities were not affected. *Id.* at 641. Only those that did have a voter registration system were now required to remove the deadline. *Id.* at 643.

4. The National Voter Registration Act of 1993 requires states to provide, among other things, meaningful voter registration opportunities at motor vehicles and public assistance offices. See generally 52 U.S.C.A. §§ 20504(a)(1), 20506(a)(2)(A) (West 2015)

EDR doubled to six, adding Idaho, Wyoming, and New Hampshire to the list.<sup>5</sup> Montana and Iowa eliminated their registration deadlines in 2005 and 2007, respectively.<sup>6</sup> And in the last five years alone, the number of jurisdictions enacting EDR doubled *again* to sixteen, with the District of Columbia, Connecticut, California, Colorado, Hawaii, Illinois, and Vermont all passing laws to enact EDR immediately or in the near future.<sup>7</sup>

Attempts to eliminate registration deadlines through lawsuits in federal court have thus far failed, in part because of a pair of Supreme Court cases decided over forty years ago, *Marston v. Lewis*, 410 U.S. 679 (1973), and *Burns v. Fortson*, 410 U.S. 686 (1973), which found that registration deadlines of up to fifty days were reasonable at the time.<sup>8</sup> But thanks to the work of Professor Frank Askin, Director of the

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(previously codified at 42 U.S.C. §§ 1973gg-3, 1973gg-5). However, the law exempted from these requirements states that allowed Election Day Registration on and after August 1, 1994. See *National Voter Registration Act of 1993*, DEP'T JUST., <http://www.justice.gov/crt/nationalvoterregistrationact1993nvra>.

5. DEPARTMENT OF JUSTICE, *supra* note 4.

6. *Same Day Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Jun. 2, 2015), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

7. *Id.* Arguably, however, states like California and Montana do not provide meaningful opportunities to register on Election Day, since registrations must take place in a centralized county office rather than at polling places. See MONT. ADMIN. R. 44.3.2015 (2015). It is doubtful that many would even be aware of this restriction, much less have the time or the means to access such locations. See CAL. ELEC. CODE § 2170 (d)(1) (West Supp. 2015) (EDR established subject to Secretary of State certification); Act of Sept. 24, 2012, ch. 497, § 6, 2012 Cal. Stat. 4525, 4529 (Secretary of State must certify statewide voter registration database's compliance with federal law one year prior to EDR program's commencement); John Hrabe, *Same-Day Voter Registration Law Delayed Until 2016*, CALNEWSROOM (Feb. 5, 2014) (Secretary of State failed to certify, and stated that she would not certify in 2015), <http://www.calnewsroom.com/2014/02/05/samedayvoterregistrationlawdelayeduntil2016/>.

8. See, e.g., *Key v. Bd. of Voter Registration*, 622 F.2d 88, 90 (4th Cir. 1980) (first citing *Marston v. Lewis*, 410 U.S. 679 (1973); then citing *Burns v. Fortson*, 410 U.S. 686 (1973); and then citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)) (upholding registration deadline); *Barilla v. Ervin*, 886 F.2d 1514, 1523 (9th Cir. 1989) (first citing *Marston*, 410 U.S. 679; then citing *Burns*, 410 U.S. 686) (same); *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 141–42 (D. Conn. 2005) (first citing *Marston*, 410 U.S. 679; then citing *Burns*, 410 U.S. 686) (same); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1330–31 (S.D. Fla. 2008) (first citing *Dunn*, 405 U.S. 330 (1972); then citing *Marston*, 410 U.S. 679; and then citing *Burns*, 410 U.S. 686) (same). Some of these federal challenges also rely on *Rosario v. Rockefeller*, 410 U.S. 752 (1973), which upheld a New York requirement that voters who wish to vote in a party's primary must register for that party one month before the preceding general election, which effectively amounted to an eight-month primary registration deadline. See, e.g., *ACORN*, 413 F. Supp. 2d at 123 (quoting *Rosario*, 410 U.S. at 762). However, the Supreme Court found this deadline to be justified primarily because of the state's interest in preventing party raiding—where members who do not really subscribe to the tenets of a particular party register as members of that party solely to vote in that party's primary, so as to spoil the outcome. *Rosario*, 410 U.S. at 760. Those interests do not come into play with

Constitutional Rights Clinic at the Rutgers School of Law-Newark,<sup>9</sup> as well as the American Civil Liberties Union of New Jersey and the Appleseed Public Interest Law Center, at least one state court has been open to the possibility that registration deadlines may no longer be justifiable under its state constitution.<sup>10</sup> Indeed, many state courts have found that their respective state constitutions contain protections for the fundamental right to vote that may exceed those that have been found under the United States Constitution.<sup>11</sup>

This Article discusses that possibility. First, I discuss the importance of Election Day Registration. Second, I explain why Election Day Registration is feasible in the modern era. Last, I explore the foundations for a claim under state constitutional principles that a state's registration deadline is unconstitutional.

## I. THE IMPORTANCE OF ELECTION DAY REGISTRATION

### A. *Election Day Registration Increases Turnout*

Over the last few decades, an abundance of political science literature has studied the impact of Election Day Registration, providing substantial evidence that EDR results in greater voter turnout. As Professors Jacob R. Neiheisel and Barry C. Burden of the University of Wisconsin recently explained:

EDR was introduced in just a few states in the mid-1970s. That number had doubled by the early 1990s. This spawned a cottage industry of studies seeking to evaluate the effects of the program on voter turnout and the composition of the electorate. In study after study using a variety of different methodologies, scholars have come to the same basic conclusion: EDR lowers the cost of voting for many Americans and increases overall turnout.<sup>12</sup>

No study, of course, is perfect. Political scientists cannot force a state to pass EDR for the purposes of experimentation. Different states may

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voter registration deadlines generally. Andrea M. Lee, *Don't Save the Date: How More Restrictive State Voter Registration Deadlines Disenfranchise Minority Movers*, 43 COLUM. J.L. & SOC. PROBS. 245, 253 n.58 (2010).

9. See generally Frank Askin, *Protecting the Right to Vote on Election Day*, 21 CLINICAL L. REV. 323, 332 (2015) (citing *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 102 A.3d 408 (N.J. Super. Ct. App. Div. 2014)); Frank Askin, *Expanding Voter Participation in New Jersey*, N.J. LAW, Feb. 2014, at 5, 6 [hereinafter *Expanding Voter Participation*].

10. See *Rutgers Univ. Student Assembly*, 102 A.3d at 416.

11. See generally Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 105, 110–19 (2014).

12. See Neiheisel & Burden, *supra* note 3, at 638.

have different confounding factors (i.e., a culture of strong voter turnout) impacting the turnout data. And as most law students and former LSAT-takers know, correlation (e.g., increased turnout following the passage of EDR) does not always imply causation (e.g., turnout increased *because* of EDR).<sup>13</sup> Nonetheless, these studies employ methodologies that are widely accepted in the political science field.<sup>14</sup> It is telling that the results of nearly all of these studies conducted over decades consistently point in the same direction: that EDR increases voter turnout.<sup>15</sup>

It is difficult to discuss the impact of EDR without asking: *who* tends to be most impacted by EDR? Last year, the ACLU demonstrated in two separate courts that the elimination of Same Day Registration (a variant of EDR where the voter can register and vote on the same day, just not on Election Day) was likely to have a disproportionate impact on the poor and minorities in Ohio, and on minorities in North Carolina.<sup>16</sup> Law review articles have arrived at similar conclusions.<sup>17</sup> Neiheisel and Burden further suggest that EDR increases turnout among one political party over another.<sup>18</sup> This Article does not explore this latter question, though I note that democracy is always healthier when more people vote, not fewer, regardless of their background or party affiliation.

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13. *Id.* at 639. Neiheisel and Burden account for these variables by studying Wisconsin, where EDR was introduced only in some municipalities but not others, and concluding consistently with past studies that EDR likely increases turnout. *Id.* at 640–46.

14. *See generally* Rebecca B. Morton & Kenneth C. Williams, *Experimentation in Political Science*, in OXFORD HANDBOOK OF POLITICAL METHODOLOGY 339 (Janet Box-Steffensmeier et al. eds., 2008); Adam Chilton & Dustin Tingley, *Why the Study of International Law Needs Experiments*, 52 COLUM. J. TRANSNAT'L L. 173, 184 (2013) (surveying different uses of experimentation in political science).

15. *See also* JAN E. LEIGHLEY & JONATHAN NAGLER, WHO VOTES NOW? DEMOGRAPHICS, ISSUES, INEQUALITY, AND TURNOUT IN THE UNITED STATES 96 (2014) (“Most studies of the impact of EDR suggest that being able to register at the polls on election day increases turnout by about 3 to 5 percentage points.”).

16. *See* Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 533–37 (6th Cir.), *granting stay*, 135 S. Ct. 42 (2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 244–46 (4th Cir. 2014).

17. *See* Pedro De Oliveira, Note, *Same Day Voter Registration: Post-Crawford Reform to Address the Growing Burdens on Lower-Income Voters*, 16 GEO. J. ON POVERTY L. & POL'Y 345, 353–55 (2009); Lee, *supra* note 8, at 259–71.

18. *See* Neiheisel & Burden, *supra* note 3, at 648–54.

*B. Why Election Day Registration Increases Turnout*

These studies point to a conclusion that is consistent with common sense: removing barriers to voting will make it more likely that more people will vote. But there are likely other factors as well.

First, Americans move often and many do not know that their registrations must typically be updated every time they move.<sup>19</sup> Lower-income Americans in particular move frequently.<sup>20</sup> According to a U.S. Census report, 35.9 million people—11.7% of the population—changed residence from 2012 to 2013.<sup>21</sup> One report by the Wisconsin elections governance board observed that a “large number” of registrants on Election Day involve registration updates to “reflect an address change or a name change.”<sup>22</sup>

Second, media coverage and campaigns ramp up leading up to Election Day, generating the interest of voters well after the registration deadline has passed. One federal court considering a registration deadline challenge summarized the testimony of Professor Donald Green of Yale University as follows:

[R]equiring registration in advance of elections for non-presidential races is problematic in [Professor Green’s] view because lower-profile races, and especially state and local races, tend to excite voter interest only very close to election day and usually after most registration deadlines have passed. He explained that most media coverage comes in the two weeks leading up to elections, just as voters themselves are becoming interested in the races, but that, by then, it is too late to register for most unregistered citizens who decide they want to vote. Campaigns for candidates for most offices also typically ramp up their

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19. See 148 CONG. REC. S10,491 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) (“It is well documented that registration lists around the country [are] in disarray . . . . In part, this is because we live in an increasingly mobile society.”).

20. See De Oliveira, *supra* note 17, at 354. Americans with less than \$40,000 annual income were thirty-six percent more likely to move than those with higher income. *Id.* (citing *Geographic Mobility: 2005 to 2006 Table 11: General Mobility of Persons 15 Years and Over, by Region, Age, and Income in 2005*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/migration/data/cps/cps2006.html> (find Table 11; then follow U.S. “XLS” hyperlink); *Husted*, 768 F.3d at 539 (“the elimination of [Same Day Registration] ‘burdens the voting rights of lower income and homeless individuals’ because the record reflected that such individuals ‘move frequently’ as well as ‘lack access to transportation,’ which combine to make it harder for such individuals to maintain accurate registration.” (citation omitted)).

21. DAVID IHRKE, U.S. CENSUS BUREAU, REASON FOR MOVING: 2012–2013: POPULATION CHARACTERISTICS 1 (2014), <http://www.census.gov/prod/2014pubs/p20-574.pdf>.

22. GOV’T ACCOUNTABILITY BD., STATE OF WIS., THE CASE FOR ELECTION DAY REGISTRATION IN WISCONSIN 2 (2011), [http://www.gab.wi.gov/sites/default/files/publication/70/the\\_case\\_for\\_election\\_day\\_registration\\_03\\_22\\_2011\\_\\_14829.pdf](http://www.gab.wi.gov/sites/default/files/publication/70/the_case_for_election_day_registration_03_22_2011__14829.pdf).

efforts in the week or two before an election . . . .<sup>23</sup>

In that same case, Professor Kenneth Goldstein of the University of Wisconsin “presented the results of various studies demonstrating that a high proportion of all campaign advertisements for, and local news stories about, federal races occur in the final week or two weeks before an election.”<sup>24</sup> Furthermore, “an event could occur shortly before an election that would greatly increase interest in voting, especially among those who previously had been uninterested in the electoral process.”<sup>25</sup> Indeed, the study referenced in the introduction above found that three to four million Americans sought voter registration information online after their respective states’ voter registration deadlines had passed.<sup>26</sup>

Third, “EDR allows voters to register and vote in one essentially continuous act,”<sup>27</sup> and for that reason, “[s]ome have even gone so far as to argue that same-day registration eliminates ‘all barriers to voting that are associated with registration.’”<sup>28</sup> That is because EDR allows voters to resolve any registration difficulties or confusion in-person at the polling place with an elections official knowledgeable about those procedures. This is especially important for voters from economically disadvantaged backgrounds. According to a statement from the Director of the Athens County Department of Job and Family Services in Ohio that was submitted in litigation,

[H]is department’s clients overwhelmingly register to vote when given the opportunity to do so in person, but almost never do so when given the opportunity over the telephone or by mail as “day-to-day life is chaotic and focused on survival. Taking the time to fill out a voter registration form and then finding transportation to get to a post office is simply not going to happen for many of our clients.” Further, many of Frech’s clients are distrustful of government and the mail, and are fearful that filling out a form or failing to fill out a form and send it in the mail could lead to a denial of benefits.<sup>29</sup>

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23. *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 133–34 (D. Conn. 2005).

24. *See ACORN*, 413 F. Supp. 2d at 134; Neiheisel & Burden, *supra* note 3, at 639 (registration deadlines require voters to take action “before the campaign has reached its maximum intensity”); Michael P. McDonald, *Portable Voter Registration*, 30 POL. BEHAV. 491, 491 (2008), <http://www.jstor.org/stable/40213330> (“EDR moves registration closer to the election when prospective voters’ interest in political campaigns peaks”).

25. *See Lee*, *supra* note 8, at 272.

26. *See Street et al.*, *supra* note 1, at 225.

27. *See Neiheisel & Burden*, *supra* note 3, at 639.

28. *Id.* (quoting Glenn E. Mitchell & Christopher Wlezien, *The Impact of Legal Restraints on Voter Registration, Turnout, and the Composition of the American Electorate*, 17 POL. BEHAV. 179, 191 (1995)) (emphasis added).

29. *Ohio State Conference of the NAACP v. Husted*, 43 F. Supp. 3d 808, 841 (S.D.

It is for that reason that the Northeast Ohio Coalition for the Homeless took special advantage of Same Day Registration in Ohio, to help people struggling with homelessness vote and register in one shot.<sup>30</sup>

Lastly, Election Day Registration can result in more votes actually being counted, by potentially reducing the number of provisional ballots cast on Election Day. Under the Help America Vote Act of 2002 (HAVA), states are now required to allow any voter to cast a provisional ballot if for some reason their name does not appear on the registration rolls, though the details of how such ballots are resolved are largely left up to the states.<sup>31</sup> In 2012, nearly three million provisional ballots were cast, but only 66.2% of them were actually counted.<sup>32</sup> To the extent that any uncounted provisional ballots were cast because the voter's registration never got processed or the voter was unable to register before the deadline, these provisional ballots would likely be unnecessary if such voters could simply submit a fresh voter registration form on Election Day and cast a regular ballot.<sup>33</sup> For example, "in 2000, officials in Portland, Maine were accused of illegally purging the names of up to 15,000 voters. Fortunately, because Maine ha[d] EDR, voters were able to re-register on Election Day and then vote."<sup>34</sup>

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Ohio 2014) (citations omitted) (quoting Declaration of Jach Frech at ¶ 13, *Husted*, 43 F. Supp. 3d 808 (No. 2:14-cv-00404), ECF No. 18-23).

30. NE. OHIO COAL. FOR THE HOMELESS, HOMELESS VOTING IN CLEVELAND OHIO PRESIDENTIAL ELECTION 2012 6–7 (2012), <http://static1.1.sqspcdn.com/static/f/988136/22818237/1370108148617/VotingReport2012.pdf?token=mTqJDWbezdx5XeFObRJ3Ez2Em54%3D>.

31. 52 U.S.C.A § 21082 (West 2015) (previously codified at 42 U.S.C. § 15482).

32. U.S. ELECTION ASSISTANCE COMM'N, 2012 ELECTION ADMINISTRATION AND VOTING SURVEY 12 (2013), [http://www.eac.gov/assets/1/Page/990-050%20EAC%20VoterSurvey\\_508Compliant.pdf](http://www.eac.gov/assets/1/Page/990-050%20EAC%20VoterSurvey_508Compliant.pdf).

33. See GOVERNMENT ACCOUNTABILITY BOARD, *supra* note 22, at 5 ("EDR limits the number of provisional ballots cast."); PROJECT VOTE, LEGISLATIVE BRIEF: ENSURING THAT PROVISIONAL BALLOTS ARE COUNTED 3 (2010), <http://www.projectvote.org/wp-content/uploads/2010/01/2010-Legislative-Brief-Provisional-Ballots.pdf> ("The easiest way to enable the largest number of potential voters to cast regular ballots [instead of provisional ones] is to allow Election Day Registration."); De Oliveira, *supra* note 17, at 360 ("The same time and effort spent obtaining that information [for a provisional ballot] could be applied to registering those same voters on Election Day, rather than having them cast provisional ballots.").

34. Brooke Lierman, Short Essay and Book Review, *Election Day Registration: Giving All Americans a Fair Chance to Vote*, 2 HARV. L. & POL'Y REV. 173, 184 (2008) (citing SARAH TOBIAS & DAVID CALLAHAN, DEMOS, EXPANDING THE VOTE: THE PRACTICE AND PROMISE OF ELECTION DAY REGISTRATION 8–9 (2002), [http://www.demos.org/sites/default/files/publications/EDR\\_-\\_Expanding\\_the\\_Vote%20\(1\).pdf](http://www.demos.org/sites/default/files/publications/EDR_-_Expanding_the_Vote%20(1).pdf)).

## II. ELECTION DAY REGISTRATION IS FEASIBLE

Why, then, do we have voter registration deadlines? The Supreme Court's explanation for lengthy registration deadlines, now over forty years old, was that elections officials needed that time to process and verify voter registration forms, in a way that would sufficiently guard against fraud.<sup>35</sup> In the paper era, that might have been true. But pursuant to the requirements of HAVA, more states are adopting electronic statewide voter registration databases, which replaced older systems in which voter registration rolls were usually kept solely at the county or municipality level.<sup>36</sup> According to the Act, "[a]ll voter registration information obtained by any local election official in the State shall be electronically entered into [a] computerized list on an expedited basis at the time the information is provided to the local official."<sup>37</sup> A statewide electronic system allows, among other things, easy updating of a voter's registration information if they have moved within the state.<sup>38</sup> To the extent necessary, it can allow additional identity verification by automatically cross-checking voter registration information with motor vehicles or Social Security databases,<sup>39</sup> which can be further facilitated by the increasing availability of online voter registration.<sup>40</sup> In the modern computer age, registration forms submitted on Election Day can be readily processed just like registration forms submitted prior to Election Day in a matter of hours, if not minutes.

It is also feasible to permit EDR at the polling place. As Wisconsin's elections governance board has observed, "[w]ell-managed polling places have separate lines for voters who are registered and voters who need to register. A separate line for voter registration is no more of a distraction for registered voters than separate lines for driver

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

36. See 52 U.S.C.A. § 21083(a), (d) (West 2015) (previously codified at 42 U.S.C. § 15483 (2012)); 148 CONG. REC. S10,491 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) ("In most States, registration will be maintained for the first time on a statewide basis rather than jurisdiction by jurisdiction.").

37. 52 U.S.C.A. § 21083(a)(1)(A)(vi) (previously codified at 42 U.S.C. § 15483).

38. See 148 CONG. REC. S10,491 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) ("It is well documented that registration lists around the country [are] in disarray . . . . In part, this is because we live in an increasingly mobile society.").

39. See, e.g., MINN. STAT. ANN. § 201.022(1)(6) (West 2009).

40. See, e.g., MASS. GEN. LAWS ANN. ch. 51, § 33A (West Supp. 2014); see generally Michael D. Hernandez, *Online Registration Grows in 2014*, NAT'L CONF. ST. LEGISLATURES: THE CANVASS (April 2014), <http://www.ncsl.org/research/elections-and-campaigns/states-and-election-reform-the-canvass-april-2014.aspx#OnlineVoterRegistrationin2014>.



licenses and license plates at the DMV.”<sup>41</sup> As one law review article noted,

[w]hen Minnesota instituted EDR, the state sent \$800,000 to its counties to help defray costs, but only a small amount of that money was actually necessary, and most of it was spent by the smaller counties that had never required registration and had to implement it for the first time.<sup>42</sup>

And as noted above, EDR has the potential to dramatically decrease the number of provisional ballots cast, making Election Day run more smoothly.<sup>43</sup> For example, confusing provisional ballot processes that have been implemented in Ohio for nearly a decade have wasted precious time and energy of both poll workers and voters over several elections, resulting in a nearly decade-long lawsuit that has sought to ensure that no one is disenfranchised by the process.<sup>44</sup> EDR might possibly have precluded these problems altogether.

This is not to be casual about the hard work that is already required of elections officials on Election Day—in one federal case, a twenty-nine day registration deadline was upheld primarily, if not exclusively, because elections officials testified about all of the other work that is required of them.<sup>45</sup> But that does not mean that EDR is not feasible. It is understandable that some elections officials might naturally resist changes to the status quo, just as anyone might object to any changes in his or her current job responsibilities.<sup>46</sup> As Professor Burden recently explained:

A related reason for expecting resistance to voter convenience is simple status quo bias. Election officials operate within a set of rules and standard operating procedures over time. Switching to a new

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41. GOVERNMENT ACCOUNTABILITY BOARD, *supra* note 22, at 7.

42. *See* Lierman, *supra* note 34, at 178 (citation omitted).

43. *Id.* at 184.

44. *See generally* Ne. Ohio Coal. for the Homeless v. Husted, 696 F.3d 580 (6th Cir. 2012). This lawsuit resulted in a consent decree that has required continuous enforcement, and most recently the complaint has been amended in response to the Ohio Legislature’s renewed attempts to make the provisional ballot process even more confusing and prone to disenfranchising voters. *See* Ne. Ohio Coal. for the Homeless v. Husted, No. 2:06-CV-00896 (S.D. Ohio Aug. 7, 2015), ECF No. 452; *see also* Barry C. Burden et al., *Early Voting and Election Day Registration in the Trenches: Local Officials’ Perceptions of Election Reform*, 10 ELECTION L.J. 89, 90 (2011) (summarizing confusion and problems with provisional ballot implementation).

45. *See generally* Diaz v. Cobb, 541 F. Supp. 2d 1319 (S.D. Fla. 2008).

46. *See* James Power, Note, *A Status Quo Bias: Behavioral Economics and the Federal Preliminary Injunction Standard*, 92 TEX. L. REV. 1027, 1039–40 (2014); Burden et al., *supra* note 44, at 90–91 (noting status quo bias among elections officials in Wisconsin survey).

approach creates transition costs that might be viewed as increasing long-term workload. The existence of a status quo bias has been found to explain election official attitudes toward voting technologies, as well as their perception of efforts to change the election system, in the form of HAVA.<sup>47</sup>

Yet when EDR has been required, hardworking elections officials are unsurprisingly more than capable of implementing it without major incident.<sup>48</sup>

Opponents of EDR speculate that EDR encourages voter fraud, but the above discussion on feasibility implicitly addresses this argument. If registration forms submitted on Election Day can be processed in the same or similar manner in which the state already processes registration forms submitted prior to Election Day, then the same effective protections that are already in place to help prevent or deter fraudulent registrations will apply to EDR registrations. And there simply has been no evidence that EDR has resulted in widespread fraud.<sup>49</sup>

### III. CHALLENGING VOTER REGISTRATION DEADLINES UNDER STATE CONSTITUTIONS

As noted above, voter registration deadlines have thus far been held to be constitutional under the United States Constitution in the few federal cases that have challenged them,<sup>50</sup> but they may not be able to withstand scrutiny under the respective constitutions of the states. As Professor Joshua A. Douglas has recently surveyed, the constitutions of all fifty states provide protections for the right to vote.<sup>51</sup>

Importantly, while many state constitutions set forth the exclusive qualifications for voter eligibility such as age and United States citizenship,<sup>52</sup> only some constitutions expressly provide for a

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47. *Id.* at 92–93 (citations omitted).

48. *See id.* at 100 (“EDR enjoyed greater support among election officials than early voting, and at least part of the distinction between these options is the result of comfort with the status quo.”); *see also* Lierman, *supra* note 34, at 178–79; Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 548–49 (6th Cir. 2014) (regarding same-day registration).

49. *Expanding Voter Participation*, *supra* note 9, at 6.

50. *Key v. Bd. of Voter Registration*, 622 F.2d 88, 90 (4th Cir. 1980); *see cases cited supra* note 8.

51. *See Douglas*, *supra* note 11, at 101–05. Though Douglas suggests that the Arizona constitution “does not explicitly grant the right to vote,” the constitution still provides that elections shall be “free and equal,” and as Douglas goes on to observe, several state constitutions contain that language and it has been construed as “guaranteeing all eligible voters access to the ballot.” *Id.* at 102–03.

52. *Id.* at 104–05; James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 648 (2004); Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1628 (2015).

registration deadline.<sup>53</sup> For states whose constitutions do not explicitly provide a voter registration deadline, unnecessary deadlines essentially impose an additional qualification to voter eligibility in violation of that constitution. To illustrate this principle, consider that some people, including elections officials, oppose EDR because they believe that only those who “care” enough about the election to register in advance should be allowed to vote.<sup>54</sup> But no state constitution prescribes such a paternalistic and amorphous litmus test for determining voter eligibility.<sup>55</sup> It is furthermore anathema to the very premise of democracy for a government to disenfranchise certain classes of voters based on the viewpoints, or perceived quality of their viewpoints, that they are likely to hold; as the United States Supreme Court has said, “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”<sup>56</sup>

To be sure, while some state constitutions expressly permit their state legislatures to regulate voter registration<sup>57</sup>—that power is obviously not absolute. For instance, the West Virginia Constitution provides: “The Legislature shall enact proper laws for the registration of

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53. See, e.g., N.Y. CONST. art. II, § 5 (providing for ten-day minimum registration deadline); OR. CONST. art. II, § 2 (providing for twenty-day registration deadline); OHIO CONST. art. V, § 1 (providing for thirty-day registration requirement); R.I. CONST. art. II, § 1 (similar).

54. See, e.g., Burden et al., *supra* note 44, at 97 (quoting elections official saying, “[i]f a person is not responsible enough to be prepared and have the knowledge to know when or how or who to ask about the voting process how can they possibly have the knowledge to make a responsible decision to vote?”); Clark Griep, Letter to the Editor, *Why Election Day Registration is a Bad Idea*, DENVER POST: ELETTERS (Apr. 13, 2010, 5:03 PM) <http://blogs.denverpost.com/eletters/2010/04/13/why-election-day-registration-is-a-bad-idea/8805/> (“If an individual does not have the foresight to register to vote prior to Election Day, by what stretch of the imagination could anyone believe that same individual would have the foresight to research the candidates and issues prior to voting?”); GOVERNMENT ACCOUNTABILITY BOARD, *supra* note 22, at 6 (noting argument against EDR that “EDR encourages voters to procrastinate and avoid their responsibility for exercising the right to vote”).

55. *But cf.*, e.g., Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931 (2007); WIS. CONST. art. III, § 2 (permitting legislature to exclude suffrage from persons adjudicated to be incompetent, unless the “judgment specifies that the person is capable of understanding the objective of the elective process”).

56. *Dunn v. Blumstein*, 405 U.S. 330, 355 (1972) (quoting *Carrington v. Rash*, 380 U.S. 89, 94 (1965)); see also *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 685 (1966) (Harlan, J., dissenting) (defending the rationale, implicitly rejected by the Court, that a poll tax “promotes civic responsibility, weeding out those who do not care enough about public affairs to pay \$1.50 or thereabouts a year for the exercise of the franchise”).

57. See, e.g., W. VA. CONST. art. IV, § 12; MD. CONST. art. I, § 2; NEV. CONST. art. II, § 6.

all qualified voters in this State,”<sup>58</sup> but the state’s highest court has held that “this authority to require registration of voters, does not empower the Legislature to nullify or modify the constitutional right of a citizen to vote. Hence, registration laws must be framed with great caution, and construed liberally and favorably toward the right to vote.”<sup>59</sup> And regardless of whether state courts interpret their state constitutions as adopting the federal standard governing protections of the right to vote or go further,<sup>60</sup> burdens that are placed on voters must be sufficiently justified by relevant government interests. As discussed in Part II, voter registration deadlines are no longer necessary and should thus be considered unjustifiable under any standard of review.

#### CONCLUSION

Our democracy must be committed to ensuring that all unnecessary obstacles to exercising the fundamental right to vote be removed. In the electronic era, it is well past time to consider whether antiquated voter registration deadlines bear any meaningful relationship to modern elections administration other than artificially fencing out otherwise eligible voters from the franchise.

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58. See W. VA. CONST. art. IV, § 12.

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

60. See Douglas, *supra* note 11, at 105–19.