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A NEW APPROACH TO JUDICIAL SCRUTINY OF VOTER REGISTRATION LAWS

David Feinstein†

† Associate Editor, *Cardozo Law Review*. J.D. Candidate (May 2014), Benjamin N. Cardozo School of Law. I would like to thank Professor Michelle Adams for her guidance and feedback; the Office of the General Counsel, Service Employees' International Union, for providing the opportunity to explore this topic; and the staff of *de•novo* for their thoughtful and careful editing..

"[T]he Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'"[1]

"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."[2]

INTRODUCTION

Private voter registration drives have been remarkably effective in the last few presidential elections. In 2004, groups such as Rock the Vote, Project Vote, and the League of Women Voters registered ten million new voters through voter registration drives.[3] In one particular Florida county that demonstrates the scope of this broad effort, private registration accounted for the majority of *all* new voter registrations.[4] Recalling the narrow state margins of victory in 2000 helps to shed light on the significance of such activities in the greater national registration scheme.[5] Even in the 2008 electoral landslide, a substantial number of those electoral votes were cast on the basis of fewer than 20,000 individual votes.[6] For this very reason, voter registration has proven a fertile area for partisan maneuvering at the state level, and accordingly has been the subject of a number of legal battles in federal court.[7]

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[1] Reynolds v. Sims, 377 U.S. 533, 563 (1964) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

[2] Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

[3] Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012*, BRENNAN CENTER FOR JUSTICE 20 (2012), http://brennan.3cdn.net/92635ddafbc09e8d88_i3m6bjdeh.pdf.

[4] *Id.*

[5] *Presidential Election of 2000, Electoral and Popular Vote Summary*, INFORMATION PLEASE DATABASE (2007), http://www.infoplease.com/ipa/A0876793.html. Florida went to George Bush by a margin of fewer than 1,000 votes; Iowa, by fewer than 5,000; New Hampshire by roughly 7,000; New Mexico, by fewer than 500.

[6] Public Disclosure Division, Office of Communications, Federal Election Commission, *2008 Official Presidential General Election Results* 2 (Jan. 22, 2009), http://www.fec.gov/pubrec/fe2008/2008presgeresults.pdf. Missouri, Montana, and North Carolina are examples.

[7] *See* Wendy R. Weiser & Diana Kasdan, *Voting Law Changes: Election Update*, BRENNAN

Those seeking to increase voter participation champion the activities of third-party voter registration organizations (hereinafter 3PVROs) as demonstrations of civic virtue and preservative of the democratic process.[8] Others, concerned by perceived irregularities at the voting booth, argue that local government should take a greater role in regulating voter registration; their fear is that the process could be abused for political ends.[9] In response, numerous state legislatures have recently debated or enacted restrictions on 3PVRO activity.[10] While employing different tactics for regulating 3PVROs, these laws share marked similarities: mandatory turnaround times for voter registration applications, harsh criminal and civil sanctions for even minor or accidental violations of election laws, training requirements for 3PVROs and their volunteers, and in some cases, strict reporting and archiving responsibilities.[11]

Proponents argue that such restrictions are necessary to deter potential fraud.[12] Challengers have responded by claiming that voting registration is intricately entwined with voting, and therefore protected under classic constitutional doctrine surrounding the rights to free speech and freedom of association.[13] More recently, they have also argued that the act of registering voters is itself expressive conduct and political speech conveying the explicit or implicit political message that a potential voter ought to engage civically through voting.[14] However, federal courts have struggled to apply consistent standards in evaluating the constitutionality of state election laws.[15] This is particularly true with regard to laws that regulate voter registration.[16]

This Note argues that 3PVRO activities implicate First Amendment rights to a degree that merits substantial constitutional protection, and therefore more robust judicial scrutiny of laws regulating them. The applicable constitutional standard requires a court

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CENTER FOR JUSTICE 7 (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/Voting_Law_Changes_Election_Update.pdf.

8 Weiser & Norden, *supra* note 3, at 20.

9 *How Widespread is Voter Fraud? 2012 Facts & Figures*, TRUE THE VOTE, http://www.truethevote.org/news/how-widespread-is-voter-fraud-2012-facts-figures (last visited Jan. 12, 2013); *see also* Weiser & Norden, *Voting Law Changes in 2012*, supra note 3, at 20.

10 Weiser & Norden, *supra* note 3, at 21.

11 *Id.*

12 *Id.* at 2.

13 *See, e.g.*, League of Women Voters of Fla. v. Cobb (*LWV I*), 447 F. Supp. 2d 1314, 1334 (S.D. Fla. 2006).

14 *See, e.g.*, Voting for Am., Inc. v. Andrade (*Andrade I*), 888 F. Supp. 2d 816 (S.D. Tex. 2012).

15 *Compare* Project Vote v. Blackwell, 455 F. Supp. 2d 694, 701 (N.D. Ohio 2006), *with* Am. Ass'n of People with Disabilities v. Herrera (*Herrera I*), 580 F. Supp. 2d 1195, 1215–18 (D.N.M. 2008).

16 *See supra* note 15.

to ask whether the regulated acts constitute political activity within the meaning of the First Amendment. An approach that more accurately reflects the political nature of voter registration will likewise enhance the utility of that standard, and yield more consistent results.[17] This Note further argues that in certain cases restrictions on voter registration activities severely burden core First Amendment rights, and should therefore be subject to the most rigorous scrutiny.[18]

In Part I, this Note presents the prevailing state of the law by reviewing leading Supreme Court cases and detailing the inconsistent application of that law at the trial and appellate levels. Part II analyzes why this dominant case law has been applied incorrectly, and presents a framework for incorporating additional relevant law into an analysis of such regulations. In Part III, this Note proposes an additional framework for especially severe restrictions, arguing that in such cases a balancing test is inappropriate, and heightened standards of review should apply.

I. BACKGROUND

Regulation of voter registration inevitably affects the rights to vote and associate with others for political purposes.[19] Registration conducted with the purpose of increasing political participation (the only plausible motive for conducting voter registration drives) is an unequivocal exercise of those rights.[20] Indeed, the Ninth Circuit stated explicitly that voter registration was speech protected by the First Amendment.[21] Yet cases interpreting restrictions on 3PVROs have ranged broadly in interpreting the degree to which voter registration activities implicate the First Amendment.[22]

Constitutionally, a voter registration drive can be analyzed two ways: as an activity sufficiently intertwined with voting to merit inclusion under the protection afforded voting in particular,[23] and as expressive conduct and speech that itself merits First Amendment

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[17] Anderson v. Celebrezze, 460 U.S. 780, 793–94 (1983); *see infra* Part I to learn about this test, as it constitutes the central point of controversy that this Note addresses.

[18] This argument is buttressed by a substantial chain of Supreme Court decisions, including but not limited to: Meyer v. Grant, 486 U.S. 414 (1988); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999).

[19] *Anderson*, 460 U.S. at 788.

[20] Tashjian v. Republican Party of Conn., 479 U.S. 208, 214, 214 (1986).

[21] Preminger v. Peake, 536 F.3d 1000, 1007 (9th Cir. 2008) (opinion amended and superseded on other grounds).

[22] *Compare Herrera II*, 690 F. Supp. 2d at 1216, *with Herrera I*, 580 F. Supp. 2d at 1214.

[23] *See, e.g.*, Am. Ass'n of People with Disabilities v. Herrera (*Herrera II*), 690 F. Supp. 2d 1183, 1212–13 (D.N.M. 2010).

protections.[24] Most recent federal decisions have traveled almost exclusively down the first path in performing their constitutional analyses.[25] That path—which starts at the firmly protected right to vote, and then tries to decide what is included in that right—has overwhelmingly resulted in application of a balancing test.[26] This test represents a particularized form of intermediate scrutiny that in practice has yielded wildly disparate results.[27] Even when evaluating highly similar laws, the courts demonstrate essentially no consensus about the extent to which voter registration is intertwined with the right to vote—and therefore, the extent to which it shares in the special constitutional protections that voting receives.[28]

The difficulty is in applying the proper form of judicial review, one that meaningfully accounts for the actual nature of the rights implicated, the level to which those rights are burdened, and the state's authority to regulate them. In doing so, any court reviewing an election regulation must first assure itself that the challenged law does in fact implicate questions of a constitutional nature.[29]

When regulations heavily burden rights that are considered to be fundamental to the constitutional scheme, the court employs a standard called "strict" or "exacting" scrutiny.[30] Strict scrutiny requires the court to search the challenged law for a compelling government interest.[31] If it finds one, the court must then ask if the regulation employs the least restrictive means possible in order to accomplish that purpose.[32] The goal of strict scrutiny is to erect a tall, protective barrier around essential rights and liberties.[33]

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[24] *See* League of Women Voters of Fla. v. Browning (*LWV III*), 863 F. Supp. 2d 1155, 1158–59 (N.D. Fla. 2012); Project Vote v. Blackwell, 455 F. Supp. 2d 694, 701 (N.D. Ohio 2006).

[25] *See, e.g.*, *Herrera II*, 690 F. Supp. 2d at 1212–13. *But see Project Vote*, 455 F. Supp. 2d at 700 ("These rights belong to—and may be invoked by—not just the voters seeking to register, but by third parties who encourage participation in the political process through increasing voter registration rolls"). The other path, which interprets voter registration activities as expressive conduct and speech protected under the First Amendment, is addressed in Part III.

[26] *See infra* Part I.A.

[27] Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 657 (2008) (describing the state of voting law as "thoroughly unsettled").

[28] *See supra* note 22.

[29] This Note focuses on First Amendment arguments, though the same issue is regularly interpreted through an Equal Protection lens as well. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2006); Fla. State Conference of the NAACP v. Browning, 569 F. Supp. 2d 1237 (N.D. Fla. 2008); ACORN v. Bysiewicz, 413 F. Supp. 2d 119 (D. Conn. 2005). *Anderson v. Celebrezze*, 460 U.S. 780 (1983), one of this Note's keystone cases, invalidated the statute in question on not only First but also Fourteenth Amendment grounds.

[30] *See, e.g.*, *Meyer*, 486 U.S. 414.

[31] *Id.*

[32] *Id.*

[33] *Id.* ("[T]he freedom of speech [is] . . . among the fundamental personal rights and liberties

At the other end of the spectrum is "rational basis" review. Courts apply this standard for challenges to laws that appear neutral with regard to constitutional rights.[34] In such cases, the court merely asks whether the government had a legitimate purpose in enacting the regulation, and whether the means employed are rationally related to that purpose.[35] The goal, generally, is to permit legal challenges while still granting broad leeway to the legislature to enact laws within the proper scope of its authority.[36]

These standards entail such different inquiries that a choice in one direction or another may dictate the outcome of the case itself.[37] It is therefore essential to develop a viable framework for determining which is the appropriate standard, and why.

Some courts reason that First Amendment rights are scarcely implicated in voter registration activities,[38] whereas others hold that such rights are deeply implicated.[39] Since the result of this analysis is largely dispositive under the current framework, the lion's share of judicial interpretation centers on illuminating the constitutional implications of engaging in private voter registration drives.[40]

A. Federal Courts Apply a Balancing Test When Evaluating the Constitutionality of State Election Laws

Despite the broad doctrinal differences courts reveal in their interpretation of voting laws, they uniformly[41] apply a balancing test

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which are secured to all persons . . . against abridgment by a State") (citing to Thornhill v. Alabama, 310 U.S. 88, 95 (1940)).

34 *See, e.g.*, Voting for America, Inc. v. Steen, 732 F.3d 382 (5th Cir. 2013).

35 *Id.*

36 *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 799 (2006).

37 *Id.* at 798-99.

38 *See, e.g.*, *Herrera I*, 580 F. Supp. 2d at 1213; League of Women Voters of Fla. v. Browning (*LWV II*), 575 F. Supp. 2d 1298, 1320–21 (S.D. Fla. 2008).

39 *See LWV III*, 863 F. Supp. 2d at 1158–59 ("The assertion that the challenged provisions implicate no constitutional rights is plainly wrong."); *Herrera II*, 690 F. Supp. 2d at 1215 ("[T]he Court finds that the Plaintiffs . . . have met both prongs of the expressive-conduct standard and have, accordingly, stated a First–Amendment expressive-conduct claim."); *LWV I*, 447 F. Supp. 2d at 1331–32 ("[T]he collection and submission of voter registration drives is intertwined with speech and association . . ."); Project Vote v. Blackwell, 455 F. Supp. 2d 694 (N.D. Ohio 2006) ("[P]articipation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment.").

40 *See infra* Part II (answering one question provides the answer to the second as well).

41 With one very recent exception: *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013), falls far outside the mainstream in applying rational basis. Even so, the court still conducts a lengthy *Anderson/Burdick* analysis in its opinion. *Id.* at 386–89. To demonstrate exactly how far outside the mainstream *Steen* is, recall that it applied rational basis to a residency requirement for

derived from the Supreme Court's decisions in *Anderson v. Celebrezze*[42] and *Burdick v. Takushi*[43] in conducting constitutional review of state election laws. Neither case addressed voter registration. However, sweeping language in the opinions seems to permit application of these cases' reasoning to other situations in the electoral context.[44]

This inquiry into the constitutionality of a state election law that burdens the right to vote has two stages. First, the court will interpret the extent to which a set of regulations implicates First Amendment rights.[45] If the burden on those rights is especially severe, it may apply strict scrutiny.[46] If the burden is less significant, or only indirectly implicates those rights, the court will apply the balancing test first articulated in *Anderson*.[47] The *Anderson* test requires the court to consider first the character and magnitude of the asserted injury to the challenger's rights, and then to identify and evaluate the State's justification for imposing that injury.[48] The legitimacy and strength of these interests are then balanced against the burden imposed.[49] This is widely known as "intermediate scrutiny."[50]

In *Anderson*, the Court invalidated an Ohio statute requiring independent candidates for office to complete filings by an earlier date than candidates from the two mainstream parties.[51] The Court reasoned that this deadline required independent voters and candidates to solidify their strategies substantially earlier than those supporting or representing mainstream parties.[52] In the context of an operation as

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voter registration volunteers. *Id.* at 392–93. In cases deciding the constitutionality of residency requirements for petition circulators—a role this Note argues is functionally indistinguishable—four out of five Courts of Appeal have applied *strict scrutiny*. Indeed, federal appellate courts are in "general agreement that [such] . . . restrictions burden First Amendment rights in a sufficiently severe fashion to merit the closest examination." Libertarian Party of Va. V. Judd, 718 F.3d 308, 318 (4th Cir. 2013).

42 460 U.S. 780 (1983).

43 504 U.S. 428 (1992).

44 *Anderson*, 460 U.S. at 788–89. ("Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions.").

45 *Id.* at 789.

46 *See Burdick*, 504 U.S. at 434.

47 *Anderson*, 460 U.S. at 789.

48 *Id.*

49 *Id.*

50 Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783.

51 *Id.* at 782–83.

52 *Id.* at 792–93.

highly tactical and sensitive as a national election, this imposed a real burden on voters sympathetic to independent candidates or parties.[53] Further, the Court was unimpressed by Ohio's claimed justifications that the law would provide greater opportunity to educate voters, and that it preserved a higher degree of political stability.[54] The interests of the voter, the Court noted, were its primary concern; any burdens falling on political candidates were presumed also to fall, at least theoretically, on the rights of voters as well.[55] Holding that there was no "litmus-paper test" for evaluation of state election laws, the *Anderson* Court weighed the law's admittedly tenuous burden on the right to vote against the state's claimed interests.[56]

Anderson states that voter registration "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends,"[57] but it goes no further in defining how, or how much. The use of this balancing test was reaffirmed in *Burdick v. Takushi*.[58] There, a Hawaiian election regulation prohibiting write-in voting was challenged on the ground that it impaired voters' constitutional rights.[59] The *Burdick* Court applied the *Anderson* balancing approach despite the complainant's request that the Court apply a strict standard of review.[60] The Court cited *Anderson* frequently, reasoning that, while any election regulation will inevitably affect voting rights, to subject all such regulations to strict scrutiny would unreasonably tie the hands of local and state government to administer elections.[61] The Court held that Hawaii's prohibition on write-in voting only affected the rights of voters who had been unable to get their candidates on the ballot through the ordinary petition process (which was equally available to all candidates).[62] Applying the *Anderson* balancing test, the Court found this burden too limited to merit the heavy scrutiny the challengers sought, given the alternate and equally viable methods of ballot access still permitted under state law.[63]

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53 *Id.*

54 *Id.* at 796–805.

55 *Id.* at 786.

56 Bhagwat, *supra* note 50 at 789.

57 *Id.* at 788 ("Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.").

58 504 U.S. 428.

59 *Id.* at 430.

60 *Id.* at 433–34.

61 *Id. See also id.* at 438 ("The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*.").

62 *Id.* at 436–37.

63 *Id.* at 438–39.

Broad language in these opinions about the effects of state election regulations has permitted *Anderson*'s influence to expand outward from ballot-access restriction, to cases involving meaningfully different laws.[64] *Burdick* presumed that it was the standard for evaluating the constitutionality of all state election laws.[65] While recent cases have uniformly applied the *Anderson* test to cases involving 3PVROs, and thus presumably imported its reasoning, those courts have differed drastically in their treatment of voter registration's First Amendment implications—an essential ingredient of the *Anderson* test.[66] Some courts reason that First Amendment rights are scarcely implicated in voter registration activities, and therefore laws purporting to regulate them deserve more deferential scrutiny from the judiciary.[67] Others hold that such rights are deeply implicated, and that such laws risk burdening the exercise of fundamental rights.[68] Yet even courts that view the connection between voter registration and First Amendment voting rights as too attenuated to merit robust scrutiny[69] apply the *Anderson* test.[70]

Confusion (and thus inconsistency) appear to result from the redundancy of the *Anderson* test's two prongs.[71] They seem different, but the difference as applied is merely semantic—in fact, they are unable to operate independently of one another.[72] This has a paradoxical result: answering the first question provides the answer to the second as well. A judge who isn't convinced that voter registration is within the constellation of First Amendment rights would be hard-pressed to view burdens on those activities as severe enough to merit real scrutiny. Alternatively, a judge of the opinion that voter registration is an important part of that body of rights could only be skeptical of bureaucratic procedures that hinder their exercise. Troublingly, though perhaps not surprisingly, the results follow decisively partisan lines.[73]

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64 *See, e.g.*, Crawford v. Marion County Election Bd., 553 U.S. 181 (2008).

65 That is to say, all state election laws that do not facially discriminate. *Burdick*, 504 U.S. at 438.

66 *See supra* note 22.

67 *Herrera I*, 580 F.Supp.2d 1195.

68 *Herrera II*, 690 F.Supp.2d 1183.

69 Or that such regulations constitute "reasonable, non-discriminatory" regulations requiring only rational basis review. Storer v. Brown, 415 U.S. 724, 730 (1974) ("[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

70 *Herrera I*, 580 F. Supp. 2d 1195.

71 Once again: The first prong consists of evaluating the burden on the complainant's rights. The second consists of counterbalancing the government's justification for imposing that burden. *See* Anderson v. Celebrezze, 460 U.S. 780 (1983).

72 *See supra* notes 38–39 for cases in which the answer to the first prong supplies an answer to the second.

73 Republican judges overwhelmingly view voter registration as an incidental aspect of voting

Such broad discrepancies indicate that the discourse is not entirely rooted in a meaningful analysis of the actual burdens each law poses to constitutional rights.[74] Given the dangerous malleability of this balancing test, it is well worth investigating the national context of constitutional challenges to voter registration laws in light of recent federal—and particularly Supreme Court—decisions. As Professor Elmendorf notes: "A doctrine that makes scrutiny levels highly dependent on the judge's own normative intuitions seems . . . ill advised for an election law domain in which jurisprudential intuitions and partisan interests coincide."[75] Despite these difficulties, however, the majority of federal decisions reveal something resembling a consensus. That view—and the view expressed in this Note—is that registering voters is sufficiently entwined with voting to merit substantial First Amendment protection.[76]

B. Federal Courts Applying the Anderson *Balancing Test Have Ruled Inconsistently on State Voter Registration Laws*

As noted in the introduction, the actual mechanisms by which State election laws regulate 3PVROs vary. More exhaustive materials can be found elsewhere,[77] but a brief look into provisions of some of the challenged laws will help the reader to understand the legal arguments at play. Most important is to note how the laws themselves, while occasionally containing unique provisions, are fundamentally interchangeable—they use different means to accomplish the same result.[78] Doing so will highlight the stark dissimilarities in the respective courts' reasoning and results.

The Florida statute challenged in *League of Women Voters III*[79] required 3PVROs to submit completed applications within 48 hours of

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rights, or a purely administrative task that involves few if any constitutional questions. Democratic judges view private voter registration drives as civic and political activity inherently protected by the Constitution and federal statute. Elmendorf, *supra* note 27, at 704.

74 *See Herrera I*, 580 F. Supp. 2d 1195 (D.N.M. 2008). *Cf. Herrera II*, 690 F. Supp. 2d 1183 (D.N.M. 2010).

75 Elmendorf, *supra* note 27, at 667.

76 Consensus is determined by a number of decisions. *See supra* note 39.

77 *See generally Voting and Registration in the Election of November 2008*, UNITED STATES CENSUS BUREAU, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html (last visited March 2, 2014); *Voter Registration Modernization*, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, http://www.lawyerscommittee.org/issues?id=0005 (last visited March 2, 2014); Weiser & Kasdan, *supra* note 7.

78 The result is the sharp reduction, or even cessation, of 3PVRO activities. *See* Weiser & Kasdan, *supra* note 7, at 3.

79 863 F. Supp. 2d 1155 (N.D. Fla. 2012).

completion, or face substantial penalties; to report the identities not only of officers of the 3PVRO, but also any volunteer aiding the 3PVRO, as well as the dates of their volunteering; to require each volunteer to sign sworn statements that warned of strict felony liability for submitting applications with false or incorrect information on them; and to numerically account for every form it received and submitted to the Board of Elections.[80]

The Ohio statute challenged in *Project Vote v. Blackwell*[81] required that those compensated by 3PVROs for their work pre-register with local election officials; complete an online training; sign an affirmation making reference to potential criminal liability; personally deliver or mail each application collected; and identify themselves by name, address, and 3PVRO affiliation.[82]

The Texas statute challenged in *Voting for America, Inc. v. Andrade* imposed a scheme whereby only individuals registered to vote in Texas could aid others in registering; limited workers to aiding only those from the same county as themselves; required 3PVRO workers to submit all completed applications in person; criminalized compensation of 3PVRO workers; required training for all potential workers; and required workers to carry documents containing their names and home addresses, to be presented to any applicant that so requested.[83]

The New Mexico statute challenged in *Herrera II* required 3PVRO workers to provide their names and addresses; to sign sworn statements informing them of criminal and civil penalties for any failure to comply with third-party registration laws; to submit completed application forms within 48 hours; and made 3PVRO's vicariously liable for the acts of volunteers.[84]

Each of the courts reviewing these restrictions applied the *Anderson* test, but rationales for doing so varied widely, if any was presented at all. The court in *Project Vote* reasoned that, despite placing burdens on "critical First Amendment rights," those burdens were "not likely properly characterized as 'severe.'"[85] The court in *League of Women Voters I* reasoned that the case in question was analogous to a Supreme Court case applying strict scrutiny, yet without explanation elected to apply a balancing test.[86] The court in *Herrera II*, in a detailed exegesis of the pertinent law at that time, factually distinguished the

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80 FLA. STAT. ANN. § 97.0575 (West 2011).

81 455 F. Supp. 2d 694 (N.D. Ohio 2006).

82 OHIO REV. CODE ANN. § 3503.29 (LexisNexis 2008).

83 *See Andrade*, 888 F. Supp. 2d 816.

84 N. M. STAT. ANN. § 1-4-49 (West 2007).

85 Project Vote v Blackwell, 455 F. Supp. 2d 694, 701 (N.D. Ohio 2006).

86 *LWV I*, 447 F. Supp. 2d 1314, 1331–32 (S.D. Fla. 2006). That Supreme Court case is *Meyer v. Grant*, 486 U.S. 414 (1988), discussed at length in Part III.

requirements in question from those in cases mandating strict scrutiny;[87] any discussion of the inevitable and discriminatory effects of regulating 3PVROs out of existence, though, is notably absent.[88] Most curiously, the court in *Andrade I* applied *Anderson*'s balancing test even though it considered several of the challenged regulations arguably subject to strict scrutiny. The court justified this by stating that the provisions would not survive *either* form of scrutiny.[89]

Both *Herrera I*[90] and *League of Women Voters II*[91] were skeptical of the degree to which voter registration drives implicated rights of speech and association.[92] For example, the court in *Herrera I* claimed that, because the law did not purport to regulate either the literal content of speech or the legal right to conduct voter registration drives, any expressive aspect of such activity was merely "incidental," and was itself unregulated by the challenged law.[93] Similarly, *League of Women Voters II* found that the collection of voter registration forms was not inherently expressive activity.[94] These courts reasoned that only a content-based restriction, or one that imposed a "severe" burden, would merit invalidation on constitutional grounds.[95]

In stark contrast, five federal district courts (including subsequent rehearings in both the New Mexico and Florida cases) have held that voter registration activities do implicate substantial First Amendment concerns.[96] The court in *Herrera II*[97] based this ruling on several grounds. First, it cited a Supreme Court decision holding that any conduct intended to convey a message—if accompanied by a likelihood that those viewing the conduct will understand this message—may constitute "expressive conduct."[98] The 3PVROs had argued that their actions were intended to convey the message that "voting is important, that [they] believe in civic participation, and that [they] are willing to expend the resources to broaden the electorate to include allegedly under-served communities."[99] Crucially, the court cited the proposition

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87 *Herrera II*, 690 F. Supp. 2d 1183, 1212–14 (D.N.M. 2010).

88 *Id.*

89 Voting for America, Inc. v. Andrade, 888 F. Supp. 2d 816, 843 (S.D. Tex. 2012).

90 580 F. Supp. 2d 1196 (D.N.M. 2008).

91 575 F. Supp. 2d 1298 (S.D. Fla. 2008).

92 It is meaningful that, despite their skepticism, both courts felt compelled to apply the *Anderson* test, which measures the burden on constitutional rights. *Herrera I*, 580 F. Supp. 2d at 1229–30; *LWV II*, 575 F. Supp. 2d at 1319.

93 *Herrera I*, 580 F. Supp. 2d at 1229.

94 *LWV II*, 575 F. Supp. 2d at 1319.

95 *Herrera I*, 580 F. Supp. 2d at 1213–14; *LWV II*, 575 F. Supp. 2d at 1320.

96 *LWV III*, 863 F. Supp. 2d 1155 (S.D. Fla. 2012); *Herrera II*, 690 F. Supp. 2d 1183; *LWV I*, 447 F. Supp. 2d 1314; Project Vote v. Blackwell, 455 F. Supp. 2d 694 (N.D. Ohio 2006).

97 690 F. Supp. 2d 1183 (D.N.M. 2010).

98 *Id.* at 1200 (citing Texas v. Johnson, 491 U.S. 397, 404 (1989)).

99 *Id.* at 1216–16.

that not registering to vote may be a political choice.[100] The 3PVRO's activities advocated a particular response to that choice, and therefore were construed as political expression as well.[101]

Second, the *Herrera II* court found that incidental speech between registration applicants and those registering was protected by the First Amendment, since the act of registering and the incidental speech were "inherently intertwined."[102] The court replied to claims that the law only indirectly burdened such speech by citing Supreme Court doctrine refuting the permissibility of that notion.[103] The court interpreted a burden falling indirectly on protected speech as being therefore worthy of scrutiny, regardless of the law's putative indifference to that speech. Lastly, the same court found that voter registration implicates the right of "expressive association," since that right includes not just the right to associate with others, but also the right to select the optimal means for doing so.[104]

This reasoning can be found in *League of Women Voters I* as well.[105] In that case, the court found that restrictions on voter registration drives presented a diminution of actual political speech.[106] The state had claimed that a purportedly content-neutral statute such as this left open other modes of speaking. In response, the court reasoned that a law leaving open only "'more burdensome' avenues of communication" was not constitutionally sound.[107] Further, in response to the State's allegations that voter registration was merely inexpressive conduct, the court held that voter registration activities are "intertwined with speech and association."[108]

In *Project Vote v. Blackwell*, a district court in Ohio accepted without analysis the proposition that voter registration drives implicate

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100 *Id.* at 1216 (citing Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 195–97 (1999)).

101 *Id.* ("Rather than lacking communicative force, efforts to register people to vote communicates a message that democratic participation is important . . . [T]o participate in voter registration is to take a position and express a point of view in the ongoing debate whether to engage or to disengage from the political process.").

102 *Id.* at 1217; *see also* Village of Schaumburg v. Citizens for a Better Env't., 444 U.S. 620 (1980).

103 Meyer v. Grant, 486 U.S. 414, 424 (1988) ("That appellees remain free to employ other means to disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection.").

104 *Herrera II*, 690 F. Supp. 2d at 1218 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

105 *LWV I*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006).

106 *Id.* at 1332–33.

107 *Id.* at 1334.

108 *LWV I*, 447 F. Supp. 2d at 1334.

First Amendment expressive and associational rights.[109] Further, it found that these rights may be invoked by third party participants, such as 3PVROs.[110] However, in electing to apply intermediate scrutiny and not strict scrutiny, the court reasoned it was unlikely that the challenged law's burdens on speech could be properly characterized as "severe."[111] That court neglected, unfortunately, to describe its (or any) standard for determining what would constitute a "severe" burden.

In *League of Women Voters III*,[112] the court forcefully rejected the State's assertions that voter registration did not implicate First Amendment rights, calling such assertions "plainly wrong."[113] Some of the challenged law's provisions, such as requiring certain registration workers to disclose their identities, regulated "pure speech," and "core First Amendment activity."[114]

The laws described, while not identical, employ a few central types of provisions used to regulate private registration drives. As mentioned above, these include registration of 3PVRO workers, mandated training and reporting procedures, and heightened sanctions for violations of registration procedure.[115] However, the aggregate results reveal how inconsistently such laws are interpreted under the *Anderson* balancing test.

PART II. THE SUPREME COURT'S BALANCING TEST HAS BEEN APPLIED INCORRECTLY BY FEDERAL COURTS INTERPRETING STATE LAW BURDENS ON PRIVATE VOTER REGISTRATION ACTIVITIES

While the *Anderson* line of cases presents a commonly accepted way of interpreting these laws, that line is neither the most well-adapted to understanding the relevant laws, nor does it most incisively articulate the rights in danger. As noted by the Sixth Circuit, applying a test to voter registration that is meant for evaluating burdens on access to the ballot "misses the point;"[116] while *Anderson* and *Burdick* pertain to the range of choices available to the voter, burdens on voter registration directly burden the right of the citizen to actually have his or her vote

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109 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006).

110 *Id.* at 701 ("[P]articipation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment. These rights belong to—and may be invoked by—not just the voters seeking to register, but by third parties who encourage participation in the political process through increasing voter registration rolls.").

111 *Id.*

112 *LWV III*, 863 F. Supp. 2d 1155, 1158 (S.D. Fla. 2012).

113 *Id.*

114 *Id.*

115 *See supra* Part I.B.

116 Stewart v. Blackwell, 444 F.3d 843, 861 (6th Cir. 2006).

counted.[117] The difference is not inconsequential. The right to vote obviously doesn't consist of a right to choose only from among candidates that the voter views favorably—selecting the lesser of two evils is the paradigmatic example. However, the right to voice a preference at all is much more fundamental.[118]

That said, the transition away from the *Anderson* test is likely to occur only as the federal judiciary develops a jurisprudence aimed more specifically at voter registration. Further, since the various voter registration laws employ different procedures, they create different burdens; the process of weighing the severity of those burdens on the right to vote is not likely to disappear anytime soon.

Challenges to 3PVRO laws have so far generated inconsistent results because federal courts disagree about the extent to which voter registration implicates First Amendment Rights.[119] The first component of the *Anderson* balancing test requires courts to evaluate how burdensome the challenged law is to the complainant's constitutional rights.[120] Because the currently controlling precedent does not actually discuss voter registration,[121] trial courts are essentially left alone to determine the nature of the rights implicated, and thus the weight of the burden.[122] In some cases, federal judges have disposed of this inquiry almost casually.[123] Not a single case discussed has pursued an empirical evaluation of 3PVRO activity within the broader context of state and federal election regimes. In contrast, *Anderson* was explicit that an election law's impact must be examined in a realistic light.[124]

Misapplication of Supreme Court standards reached its nadir in *Voting for America, Inc. v. Steen*, wherein the Fifth Circuit became the first federal court to hold the *Anderson*/*Burdick* balancing test inapplicable to a constitutional challenge to state election law.[125] The state law in that instance prohibited (among other things) non-Texans from collecting or submitting voter registration applications,[126] and

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117 *Id.*

118 *See* Brief of Erwin Chemerinsky as Amicus Curiae in Support of Neither Party, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (Nos. 07-21, 07-25), 2007 WL 3407037.

119 *See supra* Part I.

120 Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

121 *See* Burdick v. Takushi, 504 U.S. 428, 430 (1992) (prohibition of write-in voting did not impermissibly burden the right to vote); *Anderson*, 460 U.S. at 782–86 (early filing deadline placed unconstitutional restriction on voting and associational rights).

122 *See* Part I.

123 *See* Project Vote v. Blackwell, 455 F. Supp. 2d 694, 701 (N.D. Ohio 2006) (burden imposed by voter registration law "not likely properly characterized as 'severe.'").

124 *Anderson*, 460 U.S. at 786. As described *infra*, the Second Circuit clarified this directive to require evaluation of the law's burden "within the context of state's overall scheme of election regulations." Lerman v. Bd. of Elections in City of New York, 232 F.3d 135, 145 (2d Cir. 2000).

125 Voting for Am., Inc. v. Steen, 732 F.3d 382 (5th Cir. 2013).

126 TEX. ELEC. CODE ANN. § 13.031(d)(3) (West 2013).

anyone from collecting or delivering applications in any county where they had not been officially deputized by the local Board of Elections.[127] In *Steen*, the court opined that voter registration is actually a "smorgasbord of activities" that must be disassembled into its constituent sub-activities for judicial review.[128] The court then claimed that the collection and submission of registration applications had no constitutional protection at all, and that these activities therefore merited only rational basis review.[129]

The reasoning of this decision will be discussed at greater length in Part III, but suffice it for now to say that the theory applied in *Steen* flatly contradicts Supreme Court precedent regarding analysis of such challenges, and is clearly erroneous. As *Burdick* notes, "[t]he appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*."[130] In turn, *Anderson* holds that "[c]onstitutional challenges to specific provisions of a State's election laws" must be addressed through the balancing test it then articulates.[131] Indeed, *Anderson* held that "[e]ach provision of [state election law,] whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, *inevitably affects*—at least to some degree—the individual's right to vote and his right to associate with others for political ends."[132] The Court's repeated findings that the *Anderson* test—at minimum—applies in constitutional challenges to state election law cannot be squared with the *Steen* court's reasoning otherwise.

A. State Laws That Aggressively Hinder Private Voter Registration Drives Place Substantial Burdens on the Right to Vote

In *Burdick*, the Supreme Court rejected the argument that all voting regulations be subject to strict scrutiny, holding that to do so "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[133] When state election law subjects constitutional rights to a severe burden, they must be narrowly drawn, and aimed at particularly weighty government interests.[134] A lesser burden, though, must only be countered with state interests of sufficient

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127 *Id.* § 13.038.
128 *Steen*, 732 F.3d at 388.
129 *Id.* at 392.
130 Burdick v. Takushi, 504 U.S. 428, 438 (1992).
131 Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
132 *Id.* at 788 (emphasis added).
133 *Burdick*, 504 U.S. at 433.
134 *See* Norman v. Reed, 502 U.S. 279, 288–89 (1992).

relevance and legitimacy.[135] Indeed, under *Burdick*, "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[136] Importantly, while 3PVROs challenging such laws must present evidence of a burden, it does not appear that an empirical record of any kind is required by the courts in order to find that prevention of voter fraud is a legitimate state interest.[137]

But what is "reasonable" and "non-discriminatory" in this context? Is a regulation that results in unequal access to the voting process "discriminatory," or must such a regulation actively discriminate on its face? Furthermore, what is "severe?" Given the plain text of the Voting Rights Act and the National Voter Registration Act, it would appear that statutes resulting in unequal opportunity to exercise the franchise are themselves *per se* unreasonable and discriminatory.[138] *Anderson* itself articulated the inquiry required in evaluating these criteria as "whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity."[139] Accordingly, any statute that entails such a result places a substantial burden on those statutorily and constitutionally protected rights.

There are a number of empirical factors worth discussing in the context of performing an *Anderson* balancing test. First, voter registration drives contribute to the national goal of increasing voter registration, a goal that is explicitly codified in the National Voter Registration Act.[140] Second, they do so almost entirely through the means suggested in the Act.[141] Third, claims that registration drives result in in-person voter fraud[142]—the primary rationale offered as justification for these regulations—are close to being factually baseless. Recognition of these factors must be part of any impartial legal analysis,[143] regardless of the evidentiary standard required of states

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135 Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008) (quoting *Norman*, 502 U.S. at 288–89).

136 *Anderson*, 460 U.S. at 788.

137 *See Crawford*, 553 U.S. at 194–96 (reasoning that such fraud is a legitimate interest despite also finding "no evidence of any such fraud actually occurring in Indiana at any time in its history."); *see also* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997).

138 42 U.S.C. § 1973(b) (2012) ("A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . ").

139 *Anderson*, 460 U.S. at 793 (quoting Clements v. Flushing, 457 U.S. 957, 964 (1982)).

140 42 U.S.C. § 1973gg(b)(1)-(2) (2012).

141 *Id.* § 1973gg-4(b) ("The . . . State shall make the forms described . . . available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.").

142 *See Crawford*, 553 U.S. 181; *see also* Weiser & Norden, *supra* note 3.

143 *See* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 664 (1994) ("That the Government's

defending such laws,[144] but especially in jurisdictions where courts apply a balancing test. Fourth, because of the exceptional prominence of voter registration drives as a means of registering voters in lower-income or minority communities, severe burdens on those drives will have a discriminatory impact on vulnerable members of the voting-eligible population.[145] As a result, laws that "freeze out" 3PVRO activity will severely and unequally burden the exercise of the right to vote itself.[146]

The National Voter Registration Act (NVRA)[147] was enacted in response to Congressional findings that the right to vote was "fundamental," that it was the duty of Federal, State, and local governments to promote voting, and that "discriminatory and unfair" regulations can have both direct impact on voter participation and disproportionate effects on subgroups, including racial minorities.[148] While the stated Congressional purpose of protecting the "integrity" of elections[149] is heavily emphasized by those backing restrictions on registration drives, the preceding enumerated purposes—to create systems that increase the number of registered voters,[150] and to aid government at all levels in enhancing participation in elections[151]—are

asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests."); Dunn v. Blumstein, 405 U.S. 330, 343 (1972) ("[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference."); Reynolds v. Sims, 377 U.S. 533 (1964) ("'[T]he constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'"); *Crawford*, 553 U.S. at 188–9 (holding only that the established factual record was insufficient to sustain a facial challenge).

144 *Cf. Crawford*, 553 U.S. at 196–97; Common Cause/Georgia v. Billups 554 F.3d 1340, 1353 (11th Cir. 2009).

145 *Voting and Registration in the Election of November 2008—Detailed Tables* at *Table 14*: *Method of Registration by Selected Characteristics: November 2008*, UNITED STATES CENSUS BUREAU, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html (last visited March 2, 2014); Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) (requiring that courts "examine in a realistic light the extent and nature of [the law's] impact on voters" when weighing certain types of election regulations).

146 Press Release, League of Women Voters of Collier Cnty., *League of Women Voters Announcement Regarding Cessation of Voter Registration in the State of Florida* (May 7, 2011), *available at* http://www.lwvcolliercounty.org/pdfs/cessation.pdf; *Voter Registration Modernization*, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, http://www.lawyerscommittee.org/issues?id=0005 (last visited March 2, 2014); Weiser & Norden, *supra* note 3, at 28–30. *See* Brief of Erwin Chemerinsky as Amicus Curiae in Support of Neither Party, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (Nos. 07-21, 07-25), 2007 WL 3407037; *see also* Stewart v. Blackwell, 444 F.3d 843, 861 (6th Cir. 2006) (distinguishing *Burdick*, where the law's burden fell on a candidate's access to the ballot, and not a voter's right to vote).

147 42 U.S.C. § 1973 (2011).

148 42 U.S.C. § 1973gg(a) (2011).

149 42 U.S.C. § 1973gg(b)(3) (2011).

150 42 U.S.C. § 1973gg(b)(1) (2011).

151 42 U.S.C. § 1973gg(b)(2) (2011).

too frequently ignored.

Thus, Congress's purpose in enacting this law was not merely to make voter registration more *accurate*, but to enlarge its scope entirely, particularly in the face of voter registration procedures that result in unequal access for subgroups such as racial minorities.[152] To the extent that they provide the service of registering eligible citizens, private registration organizations function as envisioned by federal law. Given the substantial responsibility that such organizations have assumed for registering voters in the absence of equivalent efforts by state and local agencies,[153] they occupy an essential place in the federal election regulation scheme. State election regulations that burden these organizations therefore burden the functioning of the federal election scheme.

Furthermore, the application of any nomination or election standard that results in unequal opportunity to participate in elections is at least nominally in violation of the Voting Rights Act.[154] The language of these provisions is plainly oriented toward not just facially discriminatory election regulations, but those that create obstacles to equal voter participation in any form. The venerable Voting Rights Act itself prescribes a "totality of the circumstances" test by which to evaluate whether an election regulation may lead to unequal opportunity to participate.[155] This results-based prescription indicates that even facially non-discriminatory regulations should be scrutinized carefully for discriminatory effects.[156]

More specifically, the NVRA indicated the role that private voter registration drives were to play in this effort. It requires State election officials to make voter registration forms available to "private entities," with "particular emphasis" on organized voter registration drives.[157] These activities were envisioned as sufficiently central to the Federal voter registration scheme to merit named inclusion in the statute's protection.[158] Furthermore, in *Charles H. Wesley Educ. Foundation, Inc. v. Cox*, the Eleventh Circuit found that the NVRA specifically encourages private registration drives.[159] That ruling affirmed that 3PVROs have a federally-protected right to conduct voter registration drives.[160] State and local legislatures enacting restrictive election

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152 42 U.S.C. § 1973gg (2011).
153 *See infra* note 169.
154 42 U.S.C. § 1973(b) (2011).
155 *Id.*
156 *Id.*
157 42 U.S.C. § 1973gg-4(b) (2011).
158 *Id.*
159 Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1353 (11th Cir. 2005).
160 *Id.* at 1353–54.

regulations for voter registration drives therefore run the risk of undermining the stated Congressional purposes behind a federal statutory regime.[161] Even when states adopt measures that *unintentionally* prevent a 3PVRO from conducting registration drives, they may be violating federal law.[162]

The need for such registration drives is starkly apparent. Racial minorities, young people, the poor, and the less-educated are all registered to vote in abysmal amounts, ranging from roughly 50–60 percent.[163] The number of unregistered but eligible voters represents approximately one-quarter to one-third of all Americans.[164] In 2008, overall voter turnout for the Presidential election was just 64%—in contrast to 90 percent among those registered, demonstrating the degree to which registration is a fundamental precondition for enhancing voter participation.[165]

In this context, the value of private voter registration drives is just as obvious. Private registration drives have registered millions of voters for the last several Presidential elections,[166] and underrepresented groups have registered through these drives at substantially higher rates, in some cases double that of other groups.[167] In one notable instance in Florida, more than 60 percent of new voter registrations came through private registration drives.[168]

In contrast, registration at public agencies has plummeted, and in some cases nearly disappeared: between 1995 and 2010, at least four states reported public agency registration decreases of more than 80 percent.[169] Likewise, public agency registrations—the kind mandated by

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161 *Id.*

162 *LWV III*, 863 F. Supp. 2d 1155, 1163 (S.D. Fla. 2012).

163 *Voter Registration Modernization*, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, http://www.lawyerscommittee.org/issues?id=0005 (last visited March 2, 2014).

164 *Id*. *See also* Diana Kasdan, *State Restrictions on Voter Registration Drives*, BRENNAN CENTER FOR JUSTICE 2 (Nov. 30, 2012), http://brennan.3cdn.net/2665c26afbdd9a4bce_inm6blqw1.pdf.

165 Brenda Wright, *Why Are 51 Million Eligible Americans Not Registered to Vote?*, DEMOS (Nov. 21, 2012), http://www.demos.org/publication/why-are-51-million-eligible-americans-not-registered-vote (last visited March 2, 2014).

166 Weiser & Norden, *supra* note 3, at 20.

167 *Voting and Registration in the Election of November 2008—Detailed Tables* at *Table 14*: *Method of Registration by Selected Characteristics: November 2008*, UNITED STATES CENSUS BUREAU, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html (last visited March 2, 2014); *2010 Issues on Election Administration: Restricting Voter Registration Drives*, PROJECT VOTE (July 2010), http://projectvote.org/images/publications/2010%20Issues%20in%20Election%20Administration/RestrictingVoterRegistrationDrives-July2010.pdf.

168 Weiser & Norden, *supra* note 3.

169 Ryan P. Haygood, *The Past As Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 RUTGERS L. REV. 1019, 1034 (2012).

the NVRA—diminished 79 percent over that same time period.[170] Indeed, a majority of states have recently reported declines in numbers of registered voters.[171] Between 2004 and 2006, the sum total of registered voters in America declined overall.[172] These failures have led to a spate of legal challenges alleging failure by the States to uphold their obligations under the NVRA,[173] and if anything emphasize how critical private registration drives have become to upholding the federal mandate to increase voter registration rates.

Given the value of private registration drives in serving the stated goals of Congress as codified in the NVRA—and the protection that statute provides for them—it would appear State laws even minimally burdening 3PVROs are in danger of acting contrary to federal law. However, such burdens have been far more than minimal: the well-documented history surrounding the enactment of Florida's restrictions on 3PVROs reveals that the proposed restrictions burdened a group of 3PVROs so severely that they decided to cancel all voter registration efforts when the law was implemented.[174] While their efforts were restrained, voter registration in Florida dipped 100,000 votes over the equivalent period of the prior election cycle—a difference of 14 percent.[175] After the law was enjoined in *League of Women Voters I*,[176] voter registration jumped back up again, registering record numbers of new voters.[177] State laws that "freeze out" private organizations performing exactly the public function that was envisioned in the federal election scheme, and that do so amid what can only be described as a failing state registration apparatus, place severe burdens on the eligible population's right to vote.

B. The Court in League of Women Voters III *Correctly Applied the* Anderson *Framework to a State Law Restricting 3PVROs*

As noted in Part I, several federal decisions have misread both the

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170 Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 474–75 (2008).

171 *Id.*

172 *Id.*

173 *See id.* at 476.

174 Complaint for Declaratory and Injunctive Relief, *LWV* I, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) (No. 06CV21265), 2006 WL 1861182 (May 18, 2006); Press Release, League of Women Voters of Collier Cnty., *League of Women Voters Announcement Regarding Cessation of Voter Registration in the State of Florida* (May 7, 2011), *available at* http://www.lwvcolliercounty.org/pdfs/cessation.pdf.

175 Weiser & Kasdan, *supra* note 7, at n.117.

176 *League of Women Voters I*, 447 F. Supp. 2d 1314.

177 Weiser & Kasdan, *supra* note 7, at n.83-84.

appropriate legal doctrine and the federal election context in seeking to understand how voter registration implicates First Amendment rights.[178] As a result, the case law appears haphazard and unreliable. By this point it should be clear to the reader that much of that unreliability stems from decisions that do not sufficiently inquire into the constitutional implications of voter registration drives.[179] Since it is true that lesser restrictions may indeed not be properly characterized as severe, the *Anderson* test is likely to remain the applicable standard for such cases.[180] Having provided some opportunities for examining those implications, it is worth briefly examining a decision that correctly applies the *Anderson* framework.

League of Women Voters III enjoined a state election law requiring 3PVROs to register with the state; identify their employees and officers; file quarterly reports on their activities; return applications with 48 hours (or face steep fines); and sign affirmations containing language incorrectly stating that registration workers who submitted applications containing errors would be subject to felony liability.[181]

In interrogating these provisions, the court noted that state law already existed to regulate 3PVROs, and that no evidence had been presented to suggest that further restrictions were compelled by circumstance.[182] It held that the 3PVROs were engaged in core First Amendment activity, given their wish to speak and encourage others to register to vote.[183] It also held that, because they wished to do so collectively, the right of association was implicated as well. That this activity took place with the intent of aiding others in voting—an activity of "special significance"—brought the entire activity within the realm of constitutional protection.[184]

At this point, the *League of Women Voters III* court already evinced a more thorough understanding of the constitutional rights implicated by voter registration. With that understanding as a foundation for its analysis, the court conducted a meaningful balancing test that inquired whether the challenged provisions were sufficiently tailored and grounded in a legitimate purpose.[185] For example, the 48-hour requirement was struck down. The court ruled that because of strict penalties for failure to comply, and the absence of any legitimate reason for choosing such a short timeframe, that requirement could

178 *See supra* Part I.
179 *See supra* Part I.
180 *See supra* Part I.
181 *LWV III*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012).
182 *Id.* at 1160.
183 *Id.* at 1158.
184 *Id.* at 1158–59.
185 *Id.*

serve no other purpose than to discourage voter registration.[186] Similarly, the court struck down the requirement that volunteer 3PVRO workers register with the state, on the grounds that the state had no real interest in knowing their identities.[187] In contrast, it was disproportionately burdensome for the 3PVROs to comply, and dangerous for the volunteer, whose reward for his or her civic sense of duty could be up to five years in jail for failing to notice an error in someone's application—even where they had no means to ascertain that error.[188] Again, the court held that such a provision had no plausible purpose other than the suppression of constitutionally protected activity.[189]

The law is clear that voter registration implicates constitutional rights.[190] Burdens on constitutional rights, even those that are not severe, require adequate tailoring and legitimate purposes.[191] This court succeeded in envisioning the actual results of the challenged law, both in terms of its burden on an essential civic function and coordinate constitutional rights, and in terms of its alleged governmental purpose.

PART III. STATE LAWS THAT PUT SEVERE BURDENS ON THE SPEECH AND ASSOCIATION OF THIRD-PARTY VOTER REGISTRATIONS MAY BE SUBJECT TO STRICT SCRUTINY

There are at least two reasons a court evaluating the constitutionality of a state voter registration law might apply strict scrutiny. The first is by interpreting a direct burden on voter registration as an indirect burden on the right to vote itself.[192] The second is through a rearticulation of the nature of registration activities—as acts of speech and association themselves.

The right to vote is uncontroversially acknowledged to be profound and essential ("preservative of all other rights"), and deserving of substantial protection.[193] However, that right is not "absolute," and elections must be fairly regulated.[194] The closer an activity is to the actual act of voting or expressing a political preference, the more protection it deserves. For example, practices that "only potentially

186 *LWV III*, 863 F. Supp. at 1160–61.
187 *Id.*
188 *Id.* at 1164.
189 *Id.*
190 *See supra* Part I.
191 Dunn v. Blumstein, 405 U.S. 330, 343 (1972).
192 *See supra* Part I.
193 Reynolds v. Sims, 377 U.S. 533, 562 (1964).
194 *Dunn*, 405 U.S. at 336.

threaten political association are highly suspect."[195] The first path to strict scrutiny, therefore, is through the intimate connection between voter registration and voting itself. Depending on the actual content of the state regulation, this connection may be more or less attenuated, and this is what has occupied courts trying to understand how voter registration fits into First Amendment jurisprudence.[196] The *Anderson* test, which is commonly regarded as the standard test for state laws regulating elections, consists entirely of determining the extent and result of this attenuation.[197]

However, voter registration is not merely conduct intertwined with voting. It is also itself a political act. Pursuing increased voter registration conveys, at the very least, an urgent political message about the importance of civic engagement.[198] Under this rubric, the state law's burden is placed not only on the right to vote, but also on the explicit rights of free speech and association themselves.[199] As foundational as the right to vote is, the Court is even more protective of the freedom to convey political messages.[200]

The Supreme Court has not circumscribed First Amendment protection around only literal vocalization of political messages. In *Texas v. Johnson*,[201] the Court articulated a standard for determining when conduct might be considered expressive, and therefore merit constitutional protection. When conduct evinces an intent to convey a particularized message, coupled with a likelihood that the message will be understood by those viewing it, that conduct is considered to be protected under the First Amendment.[202] Despite case law indicating receptivity to the position that advocating greater voter turnout is a political message[203] and the fairly obvious extent to which registering voters is conduct expressing that message—this point has only begun to see the light of day in federal court.[204]

More recently, and in this Note's view more perceptively, courts have contemplated whether the act of seeking out, encouraging, and registering third parties to vote might be more properly characterized as

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195 McCloud v. Testa, 97 F.3d 1536, 1552 (6th Cir.1996).

196 *See supra* Part I.B..

197 460 U.S. 780 (1983).

198 Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 195 (1999) ("But there are also individuals for whom . . . the choice not to register implicates political thought and expression.").

199 *See Andrade I*, 888 F. Supp. 2d 816, 841–42 (S.D. Tex 2012).

200 Texas v. Johnson, 491 U.S. 397, 410–14 (1989).

201 491 U.S. 397 (1989).

202 *Id.* at 404.

203 *See supra* note 19

204 For examples of cases that do not present this argument, see *Andrade I*, 888 F. Supp. 2d 816 (S.D. Tex. 2012); *see also Herrera I*, 580 F. Supp. 2d 1195 (D.N.M. 2008); *LWV I*, 447 F. Supp. 2d 1314 (S.D. Fla 2006); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2006).

political speech and associative conduct. Despite much opining about the foundational nature of the right to vote,[205] burdens on that right are often accorded only intermediate scrutiny that itself functions essentially as rational basis.[206] Characterizing voter registration drives as speech and association, however, places these activities in the most protected constitutional realm.[207] The uneasy and uneven application of ballot access cases like *Anderson* and *Burdick*—factually very distinct, and yet seeming to constitute much of the Supreme Court's election law jurisprudence—would no longer be required.

There are further compelling reasons to distinguish the *Anderson* test as inapposite to voter registration cases. Professor Chemerinsky notes that, while *Anderson* appears to make itself mandatory in the state election law context, prior Supreme Court holdings applying strict scrutiny to state election laws have been neither overruled nor criticized.[208] Indeed, his analysis reveals a meaningful distinction between the two lines. The cases applying strict scrutiny do so when the statute threatens to entirely disenfranchise an eligible citizen.[209] In contrast, the *Anderson* line concerns statutes that do not interfere with the right to vote, but instead merely restrict the number of candidates from which a voter may choose.[210] This is the "burden" to which those opinions referred. The effects of implementing heavy restrictions on 3PVROs more closely resemble wholesale disenfranchisement, insofar as they diminish the capacity of eligible members of the electorate to voice any preference at all.

A. Meyer *and* Schaumburg *Permit Strict Scrutiny of State Laws That Burden 3PVRO's Right to Promote Voter Registration*

Two notable Supreme Court cases offer the possibility of stricter levels of scrutiny in the election context. In *Meyer v. Grant*, the Court

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[205] *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("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.").

[206] *See LWV II*, 575 F. Supp. 2d 1298 (S.D. Fla. 2008); *Herrera II*, 690 F. Supp. 2d 1183 (D.N.M. 2010); Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009).

[207] Meyer v. Grant, 486 U.S. 414, 425 (1988).

[208] Brief of Erwin Chemerinsky as Amicus Curiae in Support of Neither Party, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (Nos. 07-21, 07-25), 2007 WL 3407037, at *12.

[209] *Id.* ("The line of cases that includes *Dunn* is concerned with the complete denial of the right to vote . . . On the other hand, the ballot access line of cases such as *Burdick* and *Anderson* is concerned with only an indirect effect upon the right to vote that derives from a narrowing of the field of candidates for which a vote can be cast . . . ").

[210] *Id.*

invalidated a Colorado statute prohibiting compensation of petition circulators.[211] Naturally, this reduced the pool of potential circulators willing or able to participate in the petitioning effort. Since the prohibition limited the "number of voices" conveying this political message, and reduced the total "quantum of speech" on a public issue, the law was subject to exacting scrutiny.[212] "The circulation of a petition," the Court reasoned, "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"[213] Finally, the Court found it irrelevant that other avenues of conveying this message remained open, holding that the First Amendment protected not only the political message, but their right "to select what they believe the most effective means" of conveying that message.[214]

Meyer struck down a law that inevitably, but not explicitly, reduced the number of petition workers, on the grounds that it restricted their political expression.[215] Leaving them alternate modes of promoting their views (outside the petition circulation process, in other words) did not make the burden more acceptable to the Court.[216] Voter registration much more closely resembles what the Court upheld in *Meyer* as core First Amendment activity than it does a candidate's access to the ballot (as in *Anderson*).[217] Petition circulation involves volunteer or paid individuals interacting with the public on a personal basis, exchanging political views, and advocating for political causes. Voter registration drives consist of the same kind of workers, mingling with the general public, and promulgating the political message that voting is important. One court found the political nature of this message "obvious."[218]

Given the voter registration statistics cited earlier, there is every reason to believe that choosing to vote is now itself a political position, as a 2008 report by the U.S. Election Assistance Commission implied.[219] This is almost certainly why a recent Federal district

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211 486 U.S. 414 (1988).

212 *Id.* at 422–23.

213 *Id.* at 421–22.

214 *Id.* at 424.

215 *Id.* at 422–23.

216 *Id.* at 424. This is another point the *Steen* court ignores; in the body of its opinion, the court constructs a hypothetical alternative to the means which the plaintiffs have selected, and then wonders aloud why this would not be sufficient. Voting for Am., Inc. v Steen, 732 F.3d 382, 389–90 (5th Cir. 2013).

217 Stewart v. Blackwell, 444 F.3d 843, 861 (6th Cir. 2006).

218 Project Vote v. Blackwell, 455 F. Supp. 2d 694, 706 (N.D. Ohio 2006) ("The interactive nature of voter registration drives is obvious: they convey the message that participation in the political process through voting is important to a democratic society.").

219 *2008 Election Administration and Voting Survey: A Summary of Key Findings*, U.S. ELECTION ASSISTANCE COMMISSION 8 (November 2009), http://www.eac.gov/assets/1/Documents/2008%20Election%20Administration%20and%20Votin

decision interpreting 3PVRO restrictions found that such organizations "seek political change at the most elemental level . . . few messages strike closer to the underlying rationale for First Amendment protection."[220] Even a Fifth Circuit case upholding a 3PVRO restriction and rejecting the application of strict scrutiny accepted that "the primary act of simply encouraging citizens to vote constitutes core speech . . . ."[221]

In *Village of Schaumburg v. Citizens for a Better Environment*, the Court invalidated a state prohibition on door-to-door solicitation.[222] The Court held that "communication of information, dissemination and propagation of views and ideas, and advocacy of causes" were all activities protected by the First Amendment.[223] While it distinguished solicitation of contributions from those activities, it held that solicitation and the expressive activity were "characteristically intertwined," and that without solicitation of this type, such communication would likely cease.[224] Under this analytical regime, the First Amendment protects incidental political expression, *as well as acts so fundamental to that expression that, without them, the expression itself would be regulated out of existence*. To the extent that such expression is burdened by regulations purporting to be indifferent or non-discriminatory, the court may construe that burden as falling on political speech itself, and therefore requiring strict scrutiny.

At the very least, voter registration falls under the characteristic intertwining of political speech and the administrative task accompanying it, as described in *Schaumburg*. The prospective voter is approached by a 3PVRO worker, who, in seeking to register the voter, must explain the value and importance of voting, as well as counter any arguments that it lacks value. As noted in *Buckley*, "interactive communication concerning political change" represents the zenith of activity protected by the First Amendment.[225]

In any case, the Supreme Court does not require literal vocalization of a political message in order to grant First Amendment protection—conduct merely conveying that message will suffice, so long as an intent to convey the message exists.[226] Thus, the inevitable political communication between registrant and registrar is superfluous to a

g%20Survey%20EAVS%20Report.pdf ("Even with a good estimate of the number of eligible citizens, not all citizens choose to register to vote.").

220 *Andrade I*, 888 F. Supp. 2d 816 (S.D. Tex. 2012).

221 Voting for Am., Inc. v. Andrade *(Andrade II)*, 488 F. App'x 890, 897 (5th Cir. 2012).

222 444 U.S. 620 (1980).

223 *Id.* at 632.

224 *Id.*

225 Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 186–87 (1999).

226 *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404–06 (1989).

finding that voter registration is core First Amendment activity. However, cases such as *Schaumburg* and *Meyer* preclude us from discounting that communication's value—nor should we. This accords with the general requirement that core First Amendment rights be given the broadest protection, so as to "assure unfettered interchange of ideas,"[227] and the obligation of the courts to protect against unnecessary barriers to political speech.[228] In fact, it was the interactive quality of that activity that mandated application of strict scrutiny.[229]

B. Federal Courts Applying Rational Basis or Intermediate Scrutiny Misread the Holdings of Meyer *and* Schaumburg

This interpretation of voter registration encountered a turbulent reception in *Andrade I*'s appeal to the Fifth Circuit.[230] There, the court differentiated between pure advocacy of the importance of voting, and the administrative process of collecting applications.[231] The court held that there was nothing "inherently expressive" about the latter, and found the regulation impairing it permissible.[232] This decision stands alone in explicitly electing to apply rational basis review, and flies directly in the face of Supreme Court doctrine mandating otherwise.[233] The decision also ignores Supreme Court precedent pertaining to the intertwining of speech, association, and purely administrative tasks that function as the site of that communication.[234] That precedent supplies an exacting standard of review for statutes that "*may* have the *effect* of curtailing the freedom to associate,"[235] even when those statutes did not purport to regulate speech itself.[236]

Additionally, *Andrade II* failed to conduct a proper "relatedness" inquiry between the avowed purpose of the statute and its actual mechanism. There, the statute forbade out-of-state citizens from fully

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227 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995).

228 *Buckley*, 525 U.S. at 192.

229 *Id.* at 215.

230 *Andrade II*, 488 F. App'x 890 (5th Cir. 2012).

231 *Id.* at 897–98. This ignores *Schaumburg*'s and *Meyer*'s actual reasoning. If applied to the facts in *Meyer*, the 5th Circuit's perspective would have differentiated between merely speaking to someone at their door, and asking them to actually sign the petition. *Meyer* did exactly the opposite, as did *Schaumburg*.

232 *Id.* at 898–900 (applying "rational basis" scrutiny to a 3PVRO regulation).

233 *See* Anderson v. Celebrezze, 460 U.S. 780 (1983).

234 *See id.*; *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999); Meyer v. Grant, 486 U.S. 414 (1988)..

235 NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 460–61 (1958) (emphasis added).

236 *Buckley*, 525 U.S. at 192.

participating in voter registration drives.[237] The "rational basis" presented was that "without some regulation, out-of-state individuals could descend upon Texas before the voter registration deadline, engage in unlawful and fraudulent registration practices, and then leave the state before action could be taken against them."[238] However, merely envisioning a possible disastrous outcome is not the same as discerning a rational basis. Likewise, this parade of horribles was dealt with incisively in *Libertarian Party of Virginia v. Judd*.[239] There, the Fourth Circuit noted that a simple consent to jurisdiction would suffice to dispel the State's fears that voter registration fraudsters would swoop in and out of the state too rapidly for law enforcement to respond—and would avoid highly problematic constitutional concerns in the process.[240] Given the explicit discrimination against out-of-state 3PVRO workers, a "reasonable, non-discriminatory" standard cannot be applied, and the State would be required to articulate the method by which this regulation would actually accomplish its stated purpose, and establish that it would actually do so.[241]

A veritable array of Supreme Court precedent also makes clear that states may not "unnecessarily restrict" exercises of constitutional freedoms, especially when there are less restrictive means of accomplishing the same purpose.[242] In *Meyer*, the Court rejected the very reasoning presented in *Andrade II*, for the simple reason that even a non-discriminatory law interfering with constitutionally protected activities must establish some inherent usefulness to the justifying state interest.[243] There, the state had failed to establish that paid circulators were more likely corruptible;[244] in *Andrade II*, the state was unable to

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237 They were permitted to pass out forms and "speak," but not to handle completed forms or submit them. TEX. ELEC. CODE ANN. § 13.031 (West 2011).

238 *Andrade II*, 488 F. App'x 890, 899 (5th Cir. 2012).

239 718 F.3d 308 (4th Cir. 2013).

240 *Id.* at 318. The court goes on to note that "[f]ederal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result."

241 Meyer v. Grant, 486 U.S. 414, 426 (1988) ("The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns.").

242 Dunn v. Blumstein, 405 U.S. 330, 343 (1972); *see also* Bates v. Little Rock, 361 U.S. 516, 523 (1960) ("Freedoms such as [association for the purpose of advancing ideas and airing grievances] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference."); Kusper v. Pontikes, 414 U.S. 51, 59 (1973) ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.").

243 *Meyer*, 486 U.S. at 426.

244 *Id.*

establish any basis for believing out-of-state registration workers were more likely to engage in fraudulent activities.[245]

Additionally, the court in *Andrade II* failed to understand the effects-based prescription contained in Justice Thomas' concurrence in *Buckley*, citing to *Meyer* for the principle that a regulation inevitably reduces the "quantum of speech" by "limiting the number of voices" to convey the political message.[246] *Andrade II* distinguishes 3PVRO activity by claiming that the law did not prevent anyone from passing out registration forms or speaking about the importance of voting.[247] The decision in *Meyer*, however, was rooted in the conclusion that a law resulting in the hindrance of petition circulators from being hired—and therefore the organization from promoting its message effectively—was an impermissible burden on the exercise of that organization's rights.[248] The *effect* of the law on those organizations, not the narrow construction of its provisions, determined its constitutionality.[249] Untethered as it is from the long history of Supreme Court precedent governing election regulations, the reasoning in *Andrade II* is not viable, and should not be applied in any future case.

The Fifth Circuit's unfortunate repetition of many of these same arguments in *Voting for America, Inc. v. Steen*[250] likewise cannot be sustained. In *Steen*, the court repeated its position that the expressive and administrative components of voter registration drives were separable, and thus subject to differing legal standards.[251] This reasoning relies on the "disaggregation" of the act of voter registration, an exercise that neither *Meyer*, *Buckley*, nor *Schaumburg* permit.

Steen purports to distinguish its facts from the relevant Supreme Court case law on the grounds that petition circulation inherently differs from voter registration in the extent to which it represents an expressive act. *Steen* opines that petitioners and 3PVROs share the expressive acts of solicitation of passersby, and attempts to persuade, but that voter registration's constitutional protection ends the moment the potential voter signs the application.[252] At this moment, the reasoning goes, both registrar and applicant have finished speaking, and what follows is mere

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245 *Andrade II*, 488 F. App'x 890, 913 (5th Cir. 2012).

246 *Id.*

247 *Id.* at 897 n. 12.

248 *Meyer*, 486 U.S. at 422 ("[I]t makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.").

249 *Id.* at 424 ("That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection.").

250 732 F.3d 382 (2013).

251 *Id.* at 388–89.

252 *Id.* at 390.

administrative conduct.

This line of reasoning reads Supreme Court doctrine on expressive conduct much more narrowly than the cases permit, and draws an arbitrary line bisecting the very field of speech that the Court sought to protect. *Steen*'s conclusion is untenable under *Schaumburg*, which explicitly included the administrative task within the scope of the protected expressive conduct, describing them as "characteristically intertwined."[253] There, the Supreme Court declined to disaggregate the act of circulating a petition into its expressive and administrative aspects.[254] Doing so would not be difficult, under the Fifth Circuit's reasoning in *Steen*: the circulator's persuasive speech would be protected, but his or her capacity to actually collect and deliver a signature could be prohibited. However, the Court in *Meyer* cites *Schaumburg* in finding that the petition circulators in fact had a right not only to engage in speech with citizens, but to collect their signatures and deliver them to the state.[255]

Likewise, the Court in *Meyer* declined to disaggregate the state scheme purporting to regulate payment of petition circulators from the overall expressive conduct, and applied strict scrutiny.[256] Under *Steen*'s reasoning, a state would be free to prohibit payment of petition circulators so long as it did not directly regulate their ability to speak. However, the Court found that payment of circulators was characteristically intertwined with the expressive activity of the group they represented, and therefore that outlawing their payment constituted a burden on their protected expression.[257]

Even the court in *Steen* notes that *Meyer* "did not isolate and limit the scope of its definition of core political speech to the verbal exchange between the petition circulator and the person whose signature was being solicited. Instead, it considered the solicitation activity in the aggregate as core speech."[258] The *Steen* court's application of this Supreme Court doctrine, however, would militate results in direct opposition to those in *Schaumburg* and *Meyer*. Thus, it is fatally

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253 Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) ("Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.").

254 *Id.*

255 *Meyer*, 486 U.S. at 421-22 ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'"

256 *Id.*

257 *Meyer*, 486 U.S. 414.

258 Voting for Am., Inc. v. Steen, 732 F.3d 382, 402 (2013).

inconsistent with binding Supreme Court law.

CONCLUSION

While the *Anderson* line appears to predominate, there are reasons, both legal and practical, to believe it should not continue to do so. For one, there is a valid and venerable line of Supreme Court doctrine professing special respect for the right to vote, beyond what the chaotic results at the district level have demonstrated. These results have themselves, in their variety, betrayed the fundamental unmanageability of the *Anderson* standard. In so doing, they reveal the degree to which that standard does not "fit" the facts argued. *Meyer* and *Schaumburg* apply much more readily to the registration of voters, and likewise provide a standard for reviewing regulations in that area that mirrors the reverence for voting that the Court and Congress prescribe.

Further, as public agencies have lagged behind in fulfilling the federal mandate to register voters—and as election administration has become more dispositive to the results of elections—3PVROs have become ever more essential.[259] In the future, courts weighing a state's interests in regulating elections should be forced to meaningfully consider the likelihood of wiping double-digit percentages of the voting population off the electoral map, as against the danger of entirely speculative and unproven frauds.[260]

Lastly, this struggle to register voters must compel a slight renaissance in construing the political nature of voter registration. When the number of unregistered voters roughly equates to the votes received by either party in a presidential election,[261] it is clear to what extent promotion of voter registration constitutes a political message. That message is the same as the Constitution's, the same as the Court's: voting is "a fundamental political right, because preservative of all rights."[262] When the number of people prevented from voting in an election exceeds the popular-vote margin of that election,[263] it is clear exactly how much is at stake in ensuring that these laws receive the proper scrutiny.

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259 *See supra* notes 169–170; *see also* Weiser & Norden, *supra* note 3, at 20.

260 David Firestone, Editorial, *Why Florida Really Changed Its Voting Rules*, N.Y. TIMES (Nov. 26, 2012), http://takingnote.blogs.nytimes.com/2012/11/26/why-florida-really-changed-its-voting-rules/?hp.

261 *See supra* Part I.

262 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

263 Ian Urbina, *Hurdles to Voting Persisted in* 2008, N.Y. TIMES, March 10, 2009, at A18.