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"Whose Electors? Our Electors!": Due Process as a Safeguard Against Legislative Direct Appointment of Presidential Electors After an Election

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"WHOSE ELECTORS? OUR ELECTORS!": DUE PROCESS AS A SAFEGUARD AGAINST LEGISLATIVE DIRECT APPOINTMENT OF PRESIDENTIAL ELECTORS AFTER AN ELECTION

Abstract: Prior to the 2020 general election, some commentators suggested that President Donald Trump and his allies would attempt to undermine the election's result by inducing Republican-controlled state legislatures to directly appoint pro-Trump electors to the Electoral College. As predicted, after losing his re-election bid to President Joe Biden, President Trump pressured some leaders in Republican-dominated state legislatures to ignore the election's result and to appoint electors who would vote for him in the Electoral College. Although these efforts were unsuccessful, the volatility of the current political landscape suggests that this issue might emerge again in a future election. In discussing possible safeguards against such an attempt, many commentators have focused on the Electoral Count Act and other legal measures. Most, however, have not addressed the possibility of a constitutional safeguard. This Note uses the 2020 presidential election as a case study and argues that the Due Process Clause of the Fourteenth Amendment provides a constitutional safeguard that can restrain states from overturning election results through direct appointment of presidential electors.

INTRODUCTION

On September 23, 2020, *The Atlantic* published an ominous article titled *The Election That Could Break America*, written by Barton Gellman.[1] The article suggested that if President Donald Trump lost the 2020 presidential election, Republican-controlled state legislatures may attempt to undermine the popular vote by directly appointing pro-Trump electors on the pretext that the election was fraudulent.[2]

After many news outlets called the election for Joe Biden on November 7, 2021, President Trump began an unprecedented campaign to overturn the elec-

[1] Barton Gellman, *The Election That Could Break America*, THE ATLANTIC (Sept. 23, 2020), https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/ [https://perma.cc/D3W9-6WS7].

[2] *Id.* The article suggests that the state legislatures could do this because the U.S. Constitution gives them the power to take back the right to vote from electors. *Id.* The article argues that this power would give state legislatures the authority to bypass the voters' choice post-election. *Id.* Part II of this Note explores the role of state legislatures and whether the Constitution does indeed give the legislatures authority to withdraw the power to select presidential electors. *See infra* notes 189–248 and accompanying text.

tion results.[3] These efforts included a string of lawsuits and a pressure campaign on state legislatures and officials.[4] Specifically, and as Gellman predicted, the Trump campaign pressured state legislatures in battleground states where President Trump lost the popular vote to send pro-Trump electors to the Electoral College.[5] The efforts proved unsuccessful, however, and on December 14th, the Electoral College gathered and voted for Joe Biden.[6] Then, on January 6th, the U.S. Capitol Building was attacked by a group of President Trump supporters, seeking to disrupt the certification of the votes and overturn the election's result.[7] Despite the unprecedented violence that resulted in the

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[3] *See* Kevin Breuninger, *Trump Refuses to Accept Election Results, Says It's 'Far from Over*,*'* CNBC, https://www.cnbc.com/2020/11/07/trump-refuses-to-accept-election-results-says-it-is-far-from-over.html [https://perma.cc/PEN8-72G2] (Nov. 7, 2020) (describing Joe Biden's victory in the presidential election); Jonathan Lemire, Zeke Miller & Will Weissert, *Biden Defeats Trump for White House, Says 'Time to Heal*,*'* ASSOCIATED PRESS (Nov. 7, 2020), https://apnews.com/article/joe-biden-wins-white-house-ap-fd58df73aa677acb74fce2a69adb71f9 [https://perma.cc/B3N3-QTNV]; Chelsea Stahl, *November 7 Highlights: Joe Biden Becomes the President-Elect*, NBC NEWS (Nov. 7, 2020), https://www.nbcnews.com/politics/2020-election/blog/2020-11-07-trump-biden-election-results-n1246882 [https://perma.cc/WN2Y-K9WC] (announcing that Joe Biden was the winner of the 2020 presidential election). After major news channels called the election for Joe Biden, President Trump refused to concede and vowed to fight the results. *See* Breuninger, *supra*.

[4] *See* Kyle Cheney, *Trump Calls on GOP State Legislatures to Overturn Election Results*, POLITICO (Nov. 21, 2020), https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031 [https://perma.cc/CP7A-J3QT] (detailing Trump's efforts to convince state legislatures to overturn the result of the presidential election); Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to 'Find' Votes to Overturn Election*, N.Y. TIMES, https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html [https://perma.cc/7CEF-RDNS] (May 26, 2021) (describing President Trump's phone call with Georgia's Secretary of State in which he sought to overturn the result of the presidential election in that state); Pete Williams & Nicole Via y Rada, *Trump's Election Fight Includes Over 50 Lawsuits. It's Not Going Well.*, NBC NEWS, https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289 [https://perma.cc/3FNS-FZXK] (Dec. 10, 2020) (assessing President Trump's legal efforts in the courts to overturn the result of the presidential election).

[5] *See* Trip Gabriel, *Trump Asked Pennsylvania House Speaker About Overturning His Loss*, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/2020/12/08/us/politics/trump-pennsylvania-house-speaker.html [https://perma.cc/2CF9-HSTK] (detailing President Trump's conversation with the Republican Speaker of the Pennsylvania House of Representatives about how to reverse the result of the election); Ed White, David Eggert & Zeke Miller, *Trump Summons Michigan GOP Leaders for Extraordinary Meeting*, ASSOCIATED PRESS (Nov. 19, 2020), https://apnews.com/article/trump-invites-michigan-gop-white-house-6ab95edd3373ecc9607381175d6f3328 [https://perma.cc/U6GZ-867D] (describing President Trump's summoning of Republican Michigan state lawmakers allegedly for the purpose of asking them to overturn the result of the presidential election).

[6] Mark Sherman, *Electoral College Makes It Official: Biden Won, Trump Lost*, ASSOCIATED PRESS (Dec. 14, 2020), https://apnews.com/article/joe-biden-270-electoral-college-vote-d429ef97af2bf574d16463384dc7cc1e [https://perma.cc/Q3NR-B5NE].

[7] *See* Sabrina Tavernise & Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation's Capitol*, N.Y. TIMES, https://www.nytimes.com/2021/01/07/us/names-of-rioters-capitol.html?searchResultPosition=9 [https://perma.cc/6FJC-9WZ9] (May 12, 2021) (detailing the events of the January 6th riot at the U.S. Capitol Building). On January 6, 2021, thousands of pro-Trump demonstrators gathered to protest the result of the 2020 presidential election. Ryan Foley, *Trump Supporters Gather in DC for Peaceful Save America March Before Some Storm Capitol*, CHRISTIAN POST (Jan. 6, 2021),

death of five people, Congress certified the election's result, formally recognizing Joe Biden as the 46th President of the United States.[8]

Although the 2020 presidential election concluded, both politicians and commentators continued to spread doubts about the validity of the election's result.[9] Particularly, those contesting the election's result argued that the increase in mail-in voting, spurred by the COVID-19 pandemic, made it easier for bad actors to commit voter fraud.[10] In response, Republican-dominated state legislatures in multiple states enacted restrictive voting laws.[11] Although these states argued that the laws were necessary to prevent future frauds, the laws effectively limited many voters' access to the ballot.[12]

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https://www.christianpost.com/news/trump-supporters-gather-in-dc-for-peaceful-save-america-march-before-some-storm-capitol.html [https://perma.cc/SYK9-75X4]. The gathering quickly turned violent as hundreds began to storm the Capitol building. *Id.*

[8] Kenya Evelyn, *The Capitol Attack: The Five People Who Died*, THE GUARDIAN (Jan. 8, 2021), https://www.theguardian.com/us-news/2021/jan/08/capitol-attack-police-officer-five-deaths [https://perma.cc/6CYS-MWK6] (describing the five people who died in during the Capitol riot); Juana Summers, *Congress Certifies Biden Victory; Trump Pledges 'Orderly Transition' on Jan. 20*, NPR, https://www.npr.org/2021/01/07/954234902/congress-certifies-biden-victory-after-pro-trump-rioters-storm-the-capitol. [https://perma.cc/E6KQ-VVQF] (Jan. 7, 2021) (reporting that Congress successfully certified the 2020 presidential election results after Congress returned to session following the Capitol riot).

[9] *See* Bridget Bowman, *GOP Senate Candidates Backed Legal Challenges to the 2020 Election*, ROLL CALL, https://www.rollcall.com/2021/09/15/gop-senate-candidates-backed-legal-challenges-to-the-2020-election/ [https://perma.cc/CCD9-L8VJ] (Sept. 15, 2021) (detailing how different Republican Senate candidates supported President Trump's claims of election fraud after the 2020 presidential election); Editorial Bd., *Gov. DeSantis Plays with Dynamite by Suggesting Popular Vote Be Thrown Out*, SUN SENTINEL (Nov. 10, 2020), https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-desantis-overturn-election-20201110-pgxkqqv46rblpnjnctadruatba-story.html [https://perma.cc/298C-HSBE] (expressing disapproval at Governor Ron DeSantis's refusal to recognize the result of the presidential election and his urging to state legislatures to undermine the results of their elections).

[10] *See* Robert T. Garrett, *Texas Gov. Greg Abbott Says Tighter Restrictions on Mail-In Ballot Procedures Will Deter Voter Fraud*, DALL. MORN. NEWS (Feb. 2, 2021), https://www.dallasnews.com/news/politics/2021/02/03/texas-gov-greg-abbott-says-tighter-restrictions-on-mail-in-ballot-procedures-will-deter-voter-fraud/ [https://perma.cc/7BGG-YGG7] (describing Governor Greg Abbott's claim that more restrictions on mail-in voting is needed to deter voting fraud); Em Steck & Andrew Kaczynski, *Rudy Giuliani Voted with an Affidavit Ballot, Which He Bashed in Failed Effort to Overturn the Election*, CNN, https://www.cnn.com/2021/01/18/politics/rudy-giuliani-affidavit-ballot-vote-kfile/index.html [https://perma.cc/Q9RE-CJF9] (Jan 18, 2021) (reporting on Rudy Giuliani's false allegations regarding mail-in voting).

[11] *See* Horus Alas, *Report: Republican-Led State Legislatures Pass Dozens of Restrictive Voting Laws in 2021*, U.S. NEWS (July 2, 2021), https://www.usnews.com/news/best-states/articles/2021-07-02/17-states-have-passed-restrictive-voting-laws-this-year-report-says [https://perma.cc/ZWS5-MY2X] (reporting that at least seventeen Republican-dominated states have passed restrictive voting measures after the 2020 presidential election).

[12] *See* Mark Niesse, *Sweeping Changes to Georgia Elections Signed into Law*, ATLANTA J.-CONST., https://www.ajc.com/politics/bill-changing-georgia-voting-rules-passes-state-house/EY2MATS6SRA77HTOBVEMTJLIT4/ [https://perma.cc/643W-LN9A] (Mar. 25, 2021) (reporting new changes to the Georgia electoral system and statements from various state officials expressing their belief that the new laws will prevent voter frauds); Alexa Ura, *Gov. Greg Abbott Signs Texas Voting Bill into Law, Overcoming Democratic Quorum Breaks*, TEX. TRIB., https://www.texastribune.org/

Given the erratic nature of the political landscape in the United States, both now and for years to come, it is possible that a state legislature will decide to undermine the popular vote by choosing its own presidential electors in a future election under the guise of preventing voter fraud.[13] Commentators who discussed future safeguards against this scenario focused on legislative remedies like the Electoral Count Act, which regulates both the process and the vote count procedure of presidential elections.[14]

Most, however, have not discussed the possibility of applying the Due Process Clause of the Fourteenth Amendment as a constitutional safeguard against the appointment of electors unrepresentative of the popular vote.[15] On one hand, the Due Process Clause of the Fourteenth Amendment prohibits state governments from depriving an individual of their life, liberty, and property without due process of law.[16] This protection includes both procedural and substantive dimensions.[17] A government action violates procedural due process

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2021/09/01/texas-voting-bill-greg-abbott/ [https://perma.cc/8BZT-CH95] (Sept. 7, 2021) (describing Governor Greg Abbott's statement affirming that Texas's new voting law will make it harder to commit voter fraud); *see also* Geoffrey Skelley, *How the Republican Push to Restrict Voting Could Affect Our Elections*, FIVETHIRTYEIGHT (May 17, 2021), https://fivethirtyeight.com/features/how-the-republican-push-to-restrict-voting-could-affect-our-elections/ [https://perma.cc/9HNT-PDD5] (detailing the impacts of new voting laws on future elections).

[13] *See* Gellman, *supra* note 1 (describing the author's conversation with leaders in the Pennsylvania Republican Party who expressed the possibility of direct appointment of electors as a way to overturn the presidential election to prevent fraud); *see also* Trip Gabriel & Stephanie Saul, *Could State Legislatures Pick Electors to Vote for Trump? Not Likely*, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/article/electors-vote.html [https://perma.cc/CG3M-DRVG] (describing several President Trump allies who suggested that Republican-majority state legislatures should ignore the popular vote and hand the electoral votes to President Trump).

[14] 3 U.S.C. §§ 1–16; *see* Erin Chlopak, *Can a State Legislature Overturn Presidential Election Results?*, CAMPAIGN LEGAL CTR. (Sept. 25, 2020), https://campaignlegal.org/update/can-state-legislature-overturn-presidential-election-results [https://perma.cc/M5NT-ZPRY] (describing how state legislatures' attempts to overturn the presidential election by legislative direct appointment of electors after the election might violate the Electoral Count Act); Lawrence Lessig & Jason Harrow, *State Legislatures Can't Ignore the Popular Vote in Appointing Electors*, LAWFARE (Nov. 6, 2020), https://www.lawfareblog.com/state-legislatures-cant-ignore-popular-vote-appointing-electors [https://perma.cc/Q6NX-ZWMP] (suggesting that the Supreme Court has precluded the possibility of post-election legislative direct appointment of electors).

[15] *See* Chlopak, *supra* note 14 (noting, without detail, how legislative efforts to overturn the presidential election might violate the Due Process Clause); Lessig & Harrow, *supra* note 14 (mentioning briefly the possibility that post-election legislative direct appointment of electors might violate the Due Process Clause).

[16] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). Under the Constitution, due process is guaranteed under both the Fifth and the Fourteenth Amendments. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."). The Due Process Clause of the Fifth Amendment places restraint on the federal government, while the Due Process Clause of the Fourteenth Amendment constrains state governments. 16C C.J.S. *Constitutional Law* § 1824 (2021).

[17] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.1, at 569 (5th ed. 2015).

if it deprives a person of their life, liberty, and property without giving them a meaningful opportunity to be heard.[18] On the other hand, a government action violates substantive due process if it deprives a person of their life, liberty, or property without providing adequate justification.[19]

Using the 2020 presidential election as a case study, this Note argues that the Due Process Clause of the Fourteenth Amendment provides a constitutional safeguard against legislative direct appointment of presidential electors after an election.[20] Because this issue involves legislative action, this Note will focus on the substantive dimension of the Due Process Clause, rather than the procedural dimension.[21] Part I of this Note provides an overview of the history and substance of the Electoral College and the Due Process Clause, and discusses how courts have applied the Fourteenth Amendment in election disputes.[22] Part II of this Note discusses the conflict between the restrictions of the Due Process Clause of the Fourteenth Amendment and the plenary authority granted to state legislatures in the appointment of presidential electors by the Constitution under Article II.[23] Part III of this Note argues that a post-election direct appointment of presidential electors by state legislatures would violate voters' right under the Due Process Clause of the Fourteenth Amendment.[24]

I. THE AMERICAN ELECTORAL SYSTEM AND THE RIGHT TO VOTE

Although the Supreme Court has long established that voting is a fundamental right, the Constitution does not explicitly recognize a right to vote.[25]

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[18] *See, e.g.*, United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993) (stating that the Due Process Clause requires that an individual receives notice and an opportunity to be heard before the government deprives them of their property); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) (holding that the Due Process Clause requires the government to provide every person a meaningful opportunity to be heard).

[19] CHEMERINSKY, *supra* note 17, § 7.1, at 570.

[20] *See infra* notes 249–301 and accompanying text.

[21] *See infra* notes 249–301 and accompanying text. Although both procedural and substantive due process constrains governmental actions, procedural due process only limits adjudicative or administrative actions. *See, e.g.*, Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (noting that the Constitution does not guarantee the right to be heard for legislative actions that affect the public as a whole); Cnty. Line Joint Venture v. City of Grand Prairie, 839 F.2d 1142, 1144 (5th Cir. 1988) (stating that courts will not recognize a property owner's procedural due process claim if the government's action is legislative); O'Bradovich v. Village of Tuckahoe, 325 F. Supp. 2d 413, 429 (S.D.N.Y. 2004) (emphasizing that procedural due process does not affect purely legislative actions). This Note examines only whether the Due Process Clause of the Fourteenth Amendment would constrain a state legislature from post-election direct appointment of presidential electors. *See infra* notes 249–301 and accompanying text.

[22] *See infra* notes 25–188 and accompanying text.

[23] *See infra* notes 189–248 and accompanying text.

[24] *See infra* notes 249–301 and accompanying text.

[25] *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (emphasizing that no other right is more important than the right to vote); Yick Wo v. Hopkins, 118 U.S. (1 Wall.) 356, 370 (1886) (noting that the right to vote is a fundamental right because it is the "preservative of all rights"); Ben F.C. Wallace,

Nowhere is that lack of right more evident than in the context of the presidential election, where state legislatures have the discretion to determine not only how people can vote, but whether they can vote at all.[26] Section A of this Part provides an explanation on how the Electoral College works and a brief historical survey of its development.[27] Section B of this Part briefly describes the history of the Fourteenth Amendment and examines how the Supreme Court has analyzed the Due Process Clause in both its procedural and substantive dimensions, with an emphasis on substantive due process.[28] Section C of this Part explains how the courts have applied the Fourteenth Amendment in the context of voting.[29]

A. The Electoral College: A Survey

Of the world's democracies, the United States has a unique process to choose its chief executive—the Electoral College.[30] Under the Constitution, the people do not directly chose the President.[31] Rather, electors appointed by state legislatures chose the President.[32] The number of electors in a state is proportional to the number of representatives that the state has in the House of Representatives, plus the two senators that each state is entitled to.[33] After the electors cast their votes, the Constitution tasks Congress with counting those

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Note, *Charting Procedural Due Process and the Fundamental Right to Vote*, 77 OHIO ST. L.J. 647, 667 (2015) (stating that the U.S. Constitution does not explicitly recognize voting right).

[26] Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (emphasizing that a citizen does not have a right to vote in presidential elections until their state grants them that right); Burroughs v. United States, 290 U.S. 534, 544 (1934) (stating that Article II of the Constitution commits the power of appointing presidential electors to the states).

[27] *See infra* notes 30–61 and accompanying text.

[28] *See infra* notes 62–130 and accompanying text.

[29] *See infra* notes 131–188 and accompanying text.

[30] *See* Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 905 (2017) (noting that the Electoral College system is unusual because the system was unprecedented when it was created and no state or other nation has adopted the U.S. electoral system to select its leader); Drew DeSilver, *Among Democracies, U.S. Stands Out in How It Chooses Its Head of State*, PEW RSCH. CTR. (Nov. 22, 2016), https://www.pewresearch.org/fact-tank/2016/11/22/among-democracies-u-s-stands-out-in-how-it-chooses-its-head-of-state/ [https://perma.cc/C7X9-K3ME] (observing that no other democracy in the world uses the same system as the United States to decide its head of state).

[31] Whittington, *supra* note 30, at 906.

[32] *See* U.S. CONST. art. II, § 1, cl. 2–3 (stating that the President and Vice President shall be selected in a manner chosen by state legislatures); Whittington, *supra* note 30, at 906 (noting that the people select the President indirectly through presidential electors).

[33] *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ."); Mitchell W. Berger & Zachary P. Hyman, *The Electoral College: The Appendicitis of American Democracy*, 43 NOVA L. REV. 111, 120 (2019) (noting that the Constitution allocates the number of electors based on the congressional representation each state has).

votes.[34] The candidates that win the majority of the votes will become President and Vice President.[35] If no candidate wins the majority of the votes, the Constitution empowers Congress to select the President and the Vice President.[36]

Congress has the power to choose the time when electors must be appointed, and when they must cast their votes.[37] State legislatures have the power to choose the manner in which electors are chosen.[38] Since the nineteenth century, however, every state has given its electorate the power to select electors.[39] Most states have also adopted a unit voting system, also known as "winner-takes-all," whereby a state would give its entire share of electoral votes to the winner of that state's popular election.[40]

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[34] *See* U.S. CONST. art. II, § 1, cl. 3 ("The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.").

[35] *See id.* ("The Person having the greatest Number of Votes shall be the President . . . ."); *id.* amend. XII (same). The original Constitution did not provide that the President and Vice President will be voted on separately. Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Changing Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 214 (1994). Instead, the individual who received the majority of the vote would become the President, while the individual receiving the second highest number of votes would become Vice President. *Id.* at 214–15. This system led to an electoral crisis in 1800 where Thomas Jefferson and his running mate, Aaron Burr, received an equal number of electoral votes. Berger & Hyman, *supra* note 33, at 121. Because neither candidate received the majority of the electoral votes, the choice for President was given to Congress, which gave the presidency to President Jefferson. *Id.* at 121–22. The experience of the 1800 election led Congress to adopt the Twelfth Amendment, which separated the ballots for President and Vice President. *See* U.S. CONST. amend. XII ("[T]hey shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President . . . ."); *Id.* at 122–23 (describing how the election of 1800 spurred a call for reform that eventually led to the adoption of the Twelfth Amendment).

[36] *See* U.S. CONST. art. II, § 1, cl. 3 ("[I]f no Person have a Majority . . . the said House shall in like Manner chuse [sic] the President."); *id.* amend. XII (same). In selecting the President, each state will have one vote. *See id.* art. II, § 1, cl. 3 ("But in chusing [sic] the President, the Votes shall be taken by States, the Representation from each State having one Vote . . . ."); *id.* amend. XII (same).

[37] *See id.* art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes . . . ."). Congress designated the Tuesday after the first Monday in November as the date whereby states must choose electors. 3 U.S.C § 1. Congress also designated the Monday after the second Wednesday of December as the day when electors must gather to cast their ballots. *Id.* § 7.

[38] U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct . . . ."); *see* McPherson v. Blacker, 146 U.S. 1, 25 (1892) (stating that the legislature has "plenary authority" to decide the manner with which to select presidential electors).

[39] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2321 (2020) (noting that by 1832, every state but one introduced popular voting for presidential elections).

[40] *See* Whittington, *supra* note 30, at 908 (noting that most states chose popular election as the means of selecting presidential electors shortly after the Constitution was ratified). Maine and Nebraska are the only two states without a winner-take-all system. Rhonda D. Hooks, Comment, *Has the Electoral College Outlived Its Stay?*, 26 T. MARSHALL L. REV. 205, 212 (2001). Instead, both states utilize a split voting system. *Id.* at 213. In Maine, two electors are chosen through popular votes, and two are chosen based on the popular vote within each congressional district. *Id.* Nebraska employs a similar system. *Id.* Under a "winner-take-all system," a candidate in a presidential election can claim all the electors of a state if they win that state's election, regardless of the margin of victory. Ky

In creating this unique electoral system during the 1787 Constitutional Convention, the drafters of the Constitution attempted to address several concerns.[41] First, many drafters had significant concerns about the separation of powers.[42] Some at the Convention supported the Virginia Plan, an electoral scheme that would give Congress the power to select the President.[43] Others, however, argued that such a plan would undermine the separation of powers because it would affect the ability of the executive branch to function independently from the legislative branch.[44] Second, the drafters wanted to maintain a balance of power between small and large states.[45] Although a simple popular voting system would have solved the separation of powers issue, many feared that it would give more populous states an advantage in choosing the President.[46] Third, the drafters were concerned about the interests of slaveholding states in the South.[47] Although southern states had significant strength in Congress because of the Three-Fifths Compromise,[48] the framers never intended for slaves to vote.[49] Because enslaved people could not vote, adopting a popular vote system would lead southern states to lose significant voting power in presidential elections.[50] Lastly, in an era where mass communication in-

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Fullerton, *Bush, Gore, and the 2000 Presidential Election: Time for the Electoral College to Go?*, 80 OR. L. REV. 717, 745 (2001).

[41] *See* Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2527 (2001) (noting that the Electoral College system was created as a compromise on several important considerations).

[42] *See* Matthew J. Festa, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2110–11 (2001) (observing that concerns about the separation of powers drove the drafters of the Constitution to create the Electoral College system).

[43] *See* Whittington, *supra* note 30, at 921–22 (explaining that the Virginia Plan proposed that the President be chosen by a national legislature); Williams & MacDonald, *supra* note 35, at 208–09 (stating that the Virginia Plan, an electoral scheme that places the power to select the President in the hands of Congress, was popular with the southern delegates at the Convention).

[44] *See* Festa, *supra* note 42, at 2110.

[45] *See* Whittington, *supra* note 30, at 925 (observing that many small states worried that a strict popular vote system would favor larger states).

[46] *Id.*

[47] *See* Note, *supra* note 41, at 2527 (stating that the drafters considered the balance of powers between southern slave states and Northern states in creating the Electoral College system).

[48] *See* Berger & Hyman, *supra* note 33, at 117 (observing that the Three-Fifths Compromise gave southern states 47% of representation in the House of Representatives, even though they only composed 41% of the white population). The Three-Fifths Compromise was a constitutional provision that allowed three-fifths of the slave population to be counted for the purpose of allotting congressional representation. *See* U.S. CONST. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons."); Williams & MacDonald, *supra* note 35, at 211–12 (stating that the Three-Fifths Compromise allowed for the counting of enslaved people for purposes of representation in the U.S. House of Representatives).

[49] Williams & MacDonald, *supra* note 35, at 212.

[50] *See* Whittington, *supra* note 30, at 925 (observing that southern states worried that a direct popular vote for the President may leave them at a disadvantage).

frastructure was nonexistent, the drafters feared that most Americans simply could not make an informed choice.[51]

These concerns animated the debates on the presidential electoral structure at the Constitutional Convention.[52] Ultimately, the drafters proposed the Electoral College system to balance these concerns.[53] By taking the power to choose the President from Congress, the system would allow the executive branch to stand on its own footing.[54] The drafters also addressed the concerns of small states and southern slave states.[55] By allotting electoral votes proportionally to congressional representation, the Electoral College would still give large states a significant advantage, given that the Constitution apportioned seats in the House of Representatives based on population.[56] The Electoral College would level this playing field for small states, however, through the addition of two electoral votes, representing the two senators that the Constitution entitles each state to.[57] Southern states, likewise, benefited from this system.[58] The Three-Fifths Compromise gave these states significant representation in Congress.[59] Because the Electoral College allots electoral votes based on congressional representation, the system would allow southern states to have a greater voice in selecting the President.[60] Lastly, the system would alleviate the concern over uninformed voters by giving voting power to individuals in the community who were more knowledgeable about the qualifications of the Presidency.[61]

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[51] *See* Note, *supra* note 41, at 2528 (noting that the drafters of the U.S. Constitution disfavored a popular election system because they feared that voters would not be able to make informed choices about the candidates, given the lack of a mass communications infrastructure at the time).

[52] *See* Festa, *supra* note 42, at 2112–16 (detailing the debates between different members at the Constitutional Convention concerning the best method for selecting the President).

[53] *See* Whittington, *supra* note 30, at 926 (stating that the Electoral College was the best solution to the various concerns of the drafters).

[54] *See id.* at 923 (noting that a President or Vice President selected by Congress could not be genuinely independent from it).

[55] *See* Note, *supra* note 41, at 2527 (arguing that the Electoral College system was a compromise to appease the concerns of smaller states and slave states).

[56] *See id.* at 2528 (stating that small states would be disadvantaged if electoral votes were tied to congressional representation, which is based on population).

[57] *See id.* (noting that the electoral advantage of larger states would be reduced if smaller states could also count the two senators that the Constitution allots each state toward the allotment of presidential electors).

[58] *See* Williams & MacDonald, *supra* note 35, at 202 (observing that the Electoral College system was an appeasement to southern slave states).

[59] *See id.* at 210–12 (noting that the Three-Fifths Compromise meant that southern states were overrepresented in Congress despite their smaller populations).

[60] *See id.* at 212 (observing that the Electoral College system allowed southern slave states to tie their populations of enslaved people to the presidential electoral process even though enslaved people themselves could not vote).

[61] *See* Note, *supra* note 41, at 2527–28 (noting that opposition against direct voting for the President was borne out of the genuine concern that voters would not be able to make an informed choice); Whittington, *supra* note 30, at 926–27 (stating that the drafters hoped that the presidential electors would be more familiar than the average citizen about who might be qualified for the office).

B. Due Process and the Fourteenth Amendment

Congress drafted the Fourteenth Amendment in response to President Andrew Johnson's opposition the nation's anti-slavery and Reconstruction efforts in the aftermath of the Civil War.[62] Robert Owens, a former member of the House of Representatives, wrote the first draft of the amendment.[63] In his draft, Owens wanted to ensure that the newly freed people would be protected from discrimination based on race and that they would have full suffrage by 1874.[64] Although Congress originally considered adopting the Owens draft in its entirety, it later removed the full suffrage guarantee from the amendment's language.[65] Without the guarantee, many in Congress worried that Black Americans would be defenseless against state efforts to maintain slavery in other forms.[66] As a result, Congress adopted the language first proposed by Representative John Bingham of Ohio, which prohibits states from denying individuals due process and equal protection under law.[67] Thus, the Fourteenth

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[62] *See* Berger & Hyman, *supra* note 33, at 127–28 (noting that the Republicans were motivated to enact the Fourteenth Amendment out of their concern that President Johnson was not committed to ending slavery). President Johnson's actions and beliefs drove this concern, namely his belief that Congress lacked the authority to enforce anti-slavery laws in southern states, and his refusal to endorse Black suffrage. Louisa M.A. Heiny, *Radical Abolitionist Influence on Federalism and the Fourteenth Amendment*, 49 AM. J. LEGAL HIST. 180, 192 (2007) (noting that President Johnson supported a strict view of Federalism and, as such, did not think that Congress had the power to enforce anti-slavery measures against southern states). Congress also responded to President Johnson's inertia by passing the Civil Rights Act of 1866 and a second Freedmen's Bureau Bill. *See* Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 548–50 (1989) (discussing Congress's passage of the Civil Rights Act of 1866 and the Second Freedmen's Bureau Act in reaction to President Johnson's inaction and the continuation of racial discrimination through the Black Code and private discrimination).

[63] *See* GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 199–201 (2006) (detailing Robert Owens' introduction of the first draft of the Fourteenth Amendment to Congress, including Congress's initial enthusiastic consideration of the draft and its subsequent decision to drop Owens' suffrage provision from the Fourteenth Amendment).

[64] *Id.* at 198–99. The Owens draft included five sections. *Id.* at 198. The first would bar state and federal governments from discriminating against anyone because of their race, color, or previous condition of servitude. *Id.* The second would grant Black Americans full suffrage after July 4, 1874. *Id.* The third would remove freed slaves from the population counted to determine congressional representation for states that refused to extend suffrage to all citizens. *Id.* The fourth prevented all state and federal governments from paying war debts incurred during the Civil War. *Id.* at 198–99. The fifth granted the federal government the authority to enact any provision of the amendment against states. *Id.* at 199.

[65] *Id.* at 202–03.

[66] *Id.* at 203.

[67] *Id.*; Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 590 (2003) (describing Bingham's seminal contribution to the drafting of section one of the Fourteenth Amendment of the Constitution).

Amendment now guarantees equal protection and due process for all citizens of the United States.[68] The states ratified the amendment in 1868.[69]

The Due Process Clause restrains government action both procedurally and substantively.[70] Procedural due process requires that the government engage in basic procedures before it can deprive a person of their life, liberty, or property.[71] A constitutionally adequate procedure must provide an individual with a notice of the deprivation, and an opportunity to be heard.[72]

Courts often apply the balancing test articulated by the Supreme Court in the 1976 decision in *Mathews v. Eldridge*.[73] In *Mathews*, the plaintiff contested the termination of his Social Security disability benefits.[74] He argued that the

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[68] *See* U.S. CONST. amend. XIV, § 1. ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[69] *See* EPPS, *supra* note 63, at 253 (stating that Congress announced the adoption of the Fourteenth Amendment on July 18, 1868).

[70] *See* CHEMERINSKY, *supra* note 17, § 7.1, at 569 (noting that the Due Process Clause imposes procedural and substantive limits on the government); *see also* Richard B. Saphire & Paul Moke, *Litigating* Bush v. Gore *in the States: Dual Voting Systems and the Fourteenth Amendment*, 51 VILL. L. REV. 229, 269 (2006) (stating that the Due Process Clause, as understood by the Supreme Court, has both a procedural and substantive dimension).

[71] *See* CHEMERINSKY, *supra* note 17, § 7.1, at 569 (stating that procedural due process requires the government to follow certain basic procedures before it can deprive a person of their life, liberty, and property).

[72] *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993) (reaffirming that the Due Process Clause requires that an individual receive notice and an opportunity to be heard before the government deprives them of their property); United States v. Ritchie Special Credit Invs., Ltd., 620 F.3d 824, 835 (8th Cir. 2010) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)) (stating that a party is guaranteed adequate notice and procedure under the Due Process Clause).

[73] *Mathews*, 424 U.S. at 335; *see* Wallace, *supra* note 25, at 654 (noting that the balancing test laid out in *Mathews* is "[t]he seminal test" to determine if the government has violated an individual's procedural due process).

[74] *Mathews*, 424 U.S. at 323–24. The state agency denied the plaintiff's benefits after it examined his records along with medical reports and finding his disability has ceased. *Id.* at 324. The plaintiff contested the termination, but the state agency reaffirmed its initial decision that he was no longer disabled. *Id.* Rather than asking the agency to reconsider its decision, the plaintiff filed a federal action challenging the constitutionality of the administrative procedure to determine whether a beneficiary is still disabled. *Id.* at 324–25.

To qualify for disability benefits, an applicant must first provide medical evidence that they have a physical or mental impairment that prevents them from being able to work. *Id.* at 336. After this initial showing, the agency will periodically investigate a recipient's continuing eligibility by communicating with them by phone or mail regarding their conditions. *Id.* at 337. The agency will also contact the recipient's treating physicians for information regarding the recipient's condition. *Id.* After examining the information from both the recipient and their physicians, the agency may make a tentative decision to terminate the benefits. *Id.* at 337–38. The recipient at this point will have a chance to review medical reports and other evidence in their files, and will have an opportunity to submit more evidence. *Id.* at 338. The state agency then makes a final determination, after which the U.S. Social Security Administration (SSA) will inform the recipient of the decision in writing. *Id.* If the recipient seeks reconsideration and the state agency rules against them, the SSA will review their claim. *Id.* at 339. The recipient will then have a right to an evidentiary hearing before an administrative law judge. *Id.*

government violated his procedural due process when a court denied him an evidentiary hearing before his benefits were terminated.[75] To determine whether the procedures provided to the plaintiff were constitutionally adequate, the Supreme Court considered three factors.[76] First, the Court analyzed the private interest of the individual who will be affected by the government's action.[77] Second, the Court discussed the risk of "erroneous deprivation" by the current procedures, and the value, if any, of additional procedures.[78] Lastly, the Court inquired into the government's interest, which the Court analyzed by examining the burdens on the government if it were to provide the additional procedures.[79] Considering these factors, the Court held that the government could terminate the plaintiff's benefits without having to provide him a prior hearing.[80] In creating this balancing test, the Supreme Court acknowledged that procedural due process was flexible, and its protections must depend on each situation.[81] Thus, lower courts have interpreted this emphasis on flexibility to

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[75] *Id.* at 323.

[76] *Id.* at 335.

[77] *Id.* In examining the plaintiff's private interest, the Court noted that a disability benefits recipient is eligible for many other public and private financial supports "wholly unrelated" to their disability benefits. *Id.* at 340–41. As such, the plaintiff's private interest was not significant because if the plaintiff fell below the level of financial need due to the termination of his disability benefits, he could still access other sources of public and private support based on these financial needs. *Id.* at 342–43.

[78] *Id.* at 335. The Court reasoned that the procedures provided to the plaintiff had a low risk of error and did not need any additional safeguards. *Id.* at 343–47. First, the Court noted that the evidence that the agency relies on are "routine, standard, and unbiased medical reports." *Id.* at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)). Given the reliability of such evidence, the Court reasoned that the risk of error inherent in the decision-making process for disability benefits termination is low. *Id.* Additionally, the Court reasoned that other safeguards provided by the current procedures, such as giving the recipient's representative full access to the information the agency relied on and giving the recipient the opportunity to submit additional evidence and challenge the accuracy of the information in their files, provided further protections that could lower risks of error. *Id.* at 345–46.

[79] *Id.* at 335. The Court assessed the government's interest by examining the costs associated with requiring evidentiary hearings prior to all terminations of disability benefits. *Id.* at 347. First, the Court discussed the financial costs in requiring the agency to provide the hearings. *Id.* The Court noted that the costs will be substantial given that many recipients would demand pre-termination hearings because their benefits will have to continue until the hearing concludes. *Id.* Second, the Court also examined the procedural costs of imposing on administrative agencies procedures required in judicial settings. *Id.* at 348. The Court noted that the point of administrative agencies was to preclude the need to adopt the judicial rules in every setting. *Id.* Thus, the Court emphasized the need to defer to the judgments of the agency. *Id.* at 349. Here, the Court noted that the judiciary need not impose more procedures on the agency because the procedures provided already gave the plaintiff both an effective means to assert his claim prior to administrative actions and a way to obtain evidentiary hearing and judicial review after the agency terminated his benefits. *Id.*

[80] *See id.* at 349 (concluding that the state agency does not need to provide the plaintiff with a prior evidentiary hearing to satisfy due process requirements).

[81] *See id.* at 334 (stating that due process is flexible and different levels of procedural protections might be needed in different situations).

mean that the Constitution does not always require notice and hearing *prior* to the individual's deprivation.[82]

In contrast, under substantive due process, a court inquires whether the government has an adequate justification for taking away a person's life, liberty, or property.[83] To decide whether a justification is adequate, the court first determines which level of scrutiny is necessary.[84] At minimum, a challenged measure must survive rational basis review, whereby the measure must be reasonably related to a legitimate government interest.[85] When a measure infringes on a liberty interest that the court deems fundamental, however, the court subjects it to strict scrutiny.[86] Under strict scrutiny, a measure is valid only when it serves a compelling government interest and is narrowly tailored to serve that interest.[87]

To determine what rights are fundamental, judges must determine whether a liberty interest is so essential that without it neither liberty nor justice would exist, and whether the liberty interest is rooted in the nation's history.[88]

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[82] *See, e.g.*, Raetzel v. Parks/Bellemont Absentee Election Bd., 762 F. Supp. 1354, 1358 (D. Ariz. 1990) (reasoning that a person's right to be heard does not always require prior notice and hearing).

[83] *See* CHEMERINSKY, *supra* note 17, § 7.1, at 570 (noting that substantive due process inquires whether the government has an adequate justification for depriving an individual of their life, liberty, or property). Though contested by some as an invented legal doctrine not found in the Constitution, substantive due process is well-established and has been repeatedly affirmed by the Supreme Court. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 411 (2010) (listing the various criticisms that had been leveled against the doctrine of substantive due process by legal scholars); *id.* at 512 (arguing that historical evidence shows that the Due Process Clause in the Fourteenth Amendment includes a substantive dimension); *see also* Albright v. Oliver, 510 U.S. 266, 272 (1994) (recognizing that the Due Process Clause of the Fourteenth Amendment provides both procedural and substantive rights); United States v. Salerno, 481 U.S. 739, 746 (1987) (stating that the Due Process Clause of the Fifth Amendment provides both substantive and procedural protections); Parratt v. Taylor, 451 U.S. 527, 552 (1981) (Powell, J., concurring), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986) (noting that the Due Process Clause of the Fourteenth Amendment can limit state actions substantively).

[84] CHEMERINSKY, *supra* note 17, § 7.1, at 570.

[85] *Id.*

[86] *See* Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 UNIV. S.F. L. REV. 625, 638 (1992) (stating that courts strictly scrutinize government actions that infringe on fundamental rights because the courts presume those actions are unconstitutional).

[87] *Id.*

[88] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (stating that due process protects those fundamental liberty interests that are "deeply rooted in this Nation's history and tradition," and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed'" (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); then citing Palko v. Connecticut, 302 U.S. 319, 325–26 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969))); *see also* Veronica C. Abreu, Note, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment's Due Process Clause*, 44 B.C. L. REV. 177, 181 (2002) (noting that the Supreme Court will examine the fundamentality of a right by examining whether it is so deeply rooted in American history and traditions that it is implicit in the concept of ordered liberty).

For example, in *Washington v. Glucksberg*, the Supreme Court in 1997 refused to invalidate Washington State's anti-euthanasia law.[89] Citing historical evidence, the Court reasoned that the right to commit suicide was not deeply rooted in the nation's history.[90] Accordingly, it was not a fundamental right, and the Court did not subject the statute to strict scrutiny.[91] Alternatively, in *Griswold v. Connecticut*, the Supreme Court in 1965 invalidated a Connecticut law that barred physicians from advising married couples about contraceptives.[92] Although the majority did not apply the Due Process Clause in its ruling, two of the concurring justices did.[93] In his concurrence, Justice Byron White reasoned that the statute violated the plaintiff's substantive due process because it intruded upon marital privacy, which he considered a fundamental liberty interest.[94] Likewise, Justice John Marshall Harlan wrote that he believed the Fourteenth Amendment Due Process Clause would bar the statute because its enactment would violate values he deemed "implicit in the concept of ordered liberty."[95] Because both justices acknowledged that the right to marital privacy was a fundamental right, both agreed with the majority's judgment that the law was unconstitutional.[96] Justice White in particular noted that statutes that intrude upon marital privacy, like the Connecticut anti-contraceptive statute,

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[89] *See* 521 U.S. at 705–06 (holding that Washington's anti-euthanasia law did not offend the Fourteenth Amendment). The statute outlawed the act of promoting suicide, defining the act as involving someone who "causes or aids another person to attempt suicide." *Id.* at 707 (quoting WASH. REV. CODE § 9A.36.060(1) (1994)).

[90] *See id.* at 710 (noting that every state, and most nations, have criminalized assisted suicide throughout history).

[91] *See id.* at 728 (stating that the plaintiff's asserted right to assisted suicide is not a fundamental right protectable under the Due Process Clause).

[92] 381 U.S. 479, 486 (1965). The appellants in this case were the executive and medical directors of a Planned Parenthood center in New Haven, Connecticut. *Id.* at 480. The appellants gave advice to married couples regarding the best methods of contraception. *Id.* Because Connecticut prohibited the use of contraceptives, by providing medical counsel to couples, the appellants acted as accessories and violated the law. *Id.*

[93] *See id.* at 481–82 (declining to apply the Due Process Clause to adjudicate the case); CHEMERINSKY, *supra* note 17, § 10.3, at 850–51 (describing the concurring opinions of Justice White and Justice Harlan). The majority invalidated the Connecticut statute because the statute violated married couples' right to privacy. *Griswold*, 381 U.S. at 485. The majority reasoned that this right to privacy is implied in many specific constitutional amendments, particularly the First, Third, Fourth, and Fifth Amendments. *See id.* at 484–85 (reasoning that several of the Constitution's guarantees have "penumbras" that include an implied right to privacy); CHEMERINSKY, *supra* note 17, § 10.3, at 850 (stating that the Supreme Court concluded that the right to privacy is implicit in a number of constitutional amendments, such as the First, Third, Fourth, and Fifth Amendments).

[94] *See Griswold*, 381 U.S. at 502 (White, J., concurring) (noting that the law deprived couples of their liberty and accordingly violated the Due Process Clause).

[95] *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)).

[96] *Id.*; *id.* at 502 (White, J., concurring).

must be subject to strict scrutiny.[97] Examining the reasons put forth by Connecticut, he concluded that the state failed to demonstrate how barring married couples from having access to contraceptives would serve a legitimate state interest.[98]

Once a court identifies an interest as fundamental, they strictly scrutinize a government measure that infringes on that interest.[99] Under the strict scrutiny standard, the government must first show that the measure furthers a compelling state interest.[100] The Supreme Court has not adopted a formal method to identify when a government interest may be compelling.[101] On some occasions, the Court has identified an interest as compelling because the interest is rooted in the Constitution.[102] For example, in 1984, the Supreme Court in *Roberts v. U.S. Jaycees*, held that a the government's compelling interest in eliminating gender discrimination supported a Minnesota law that prohibited denial of services and participation in public facilities based on sex.[103] In so holding,

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[97] *See id.* at 504 (White, J., concurring) (declaring that statutes that interfere into the private realm of family life have a substantial burden to justify themselves).

[98] *See id.* at 505 (expressing skepticism at Connecticut's stated justifications for the statute). The state argued that the statute served a legitimate government interest in criminalizing illicit sexual relationships. *Id.* Without touching on whether this interest was legitimate, Justice White was skeptical of the claim that banning married couples from using contraceptives served this interest. *Id.* Justice White observed that Connecticut did not ban either the importation or the possession of contraceptives *Id.* Rather, the state only banned others from aiding couples in gaining access to contraceptives. *Id.* As a result, Justice White noted that rather than regulating illicit sexual behaviors, the law only intruded upon the sexual relationships of married couples. *Id.*

[99] *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (requiring that a regulation that infringes on a fundamental right must be narrowly tailored to further only a compelling state interest); Anne Hart, Comment, *An Insufficient Screening: The Constitutionality of Michigan's Newborn Screening Program*, 61 B.C. L. REV. E. SUPP. II.-213, II.-218 (2020), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3862&context=bclr [https://perma.cc/Y6F8-SG3Y] (stating that courts will review violations of fundamental interests under the strict scrutiny standard, requiring the state to justify its action by showing that it is "narrowly tailored to serve a compelling state interest" (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). It is worth noting that *Roe v. Wade* was the first Supreme Court case that required the government to prove that its infringement of a fundamental interest was narrowly tailored to further a compelling government interest. Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283 (2007).

[100] *Roe*, 410 U.S. at 155–56 ("Where certain 'fundamental rights' are involved, the . . . regulation limiting these rights may be justified only by a 'compelling state interest,' . . . ." (citations omitted)); Hart, *supra* note 99, at II.-218.

[101] *See* Fallon, *supra* note 99, at 1321 (characterizing the Supreme Court's approach to identifying compelling government interests as casual).

[102] *See id.* (noting that "courts and commentators have sometimes suggested" that the text of the Constitution supplies the means to identify compelling government interest).

[103] 468 U.S. 609, 623 (1984) (stating that Minnesota has a compelling government interest in the eradication of gender discrimination). The United States Jaycees (Jaycees) was a nonprofit organization dedicated to the development of young men. *Id.* at 612. Although the organization was opened to older men and women, they were classified as "associate members." *Id.* at 613. Associate members, unlike regular members, "may not vote, hold local or national office, or participate in certain leadership training and awards programs." *Id.* The Minneapolis and St. Paul chapters, however, decided to open regular membership to women, which violated the organization's bylaws. *Id.* at 614. Conse-

the Court noted that by targeting gender discrimination, the Act promoted the Equal Protection Clause's interest in dismantling gender-based discrimination.[104] In other instances, the Court has found compelling interests without any constitutional support.[105] For example, in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, the Supreme Court in 1996 reasoned that a compelling government interest in protecting minors supported a federal law requiring cable providers to block certain offensive content from viewers.[106] Unlike *Roberts*, the Court in *Denver* did not cite to any constitutional provision to support its conclusion that protecting minors was a compelling government interest.[107]

In the electoral context, however, the Supreme Court has consistently held that the maintenance of electoral integrity and the prevention of election fraud are compelling government interests.[108] Thus, in upholding a Tennessee statute that barred political speech within one hundred feet of a polling place, the Supreme Court, in *Burson v. Freeman*, concluded in 1992 that the state had a compelling interest in protecting the electoral process against fraud.[109] Similarly,

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quently, the president of the national organization threatened to revoke their charters for both chapters. *Id.* In response, the chapters filed a lawsuit under the Minnesota Human Rights Act, which prohibited, among other things, gender discrimination in places of public accommodation. *Id.* at 614–15. The Minnesota Human Rights Department sided with the chapters and held that the national Jaycees violated the Minnesota Human Rights Act because the Jaycees was a place of public accommodation that engaged in discriminatory conduct. *Id.* at 615. At the Supreme Court, the Jaycees argued that the Act violated the organization's freedom of association, guaranteed under the First Amendment. *Id.* at 612, 618.

[104] *See id.* at 625–26 (describing the Minnesota Human Rights Act as advancing the Equal Protection Clause's interest in dismantling gender-based discrimination).

[105] *See* Fallon, *supra* note 99, at 1322 (noting that the Supreme Court sometimes finds a compelling government interests without any textual basis).

[106] 518 U.S. 727, 755 (1996) (agreeing with the government that protecting children is a compelling interest). The law in question, the Cable Television Consumer Protection and Competition Act of 1992, applied to cable broadcast over "'leased access channels' and 'public, educational, or governmental channels.'" *Id.* at 732. A "leased channel" is a channel that under law the cable company must "reserve for commercial lease by unaffiliated third parties." *Id.* at 734. "'Public, educational, or governmental channels' . . . are channels that" under law must carve out space for public, educational, or governmental programs and purposes. *Id.* (quoting 47 U.S.C. § 531). Here, plaintiffs challenged a provision of the statute that required cable operators to block offensive or sexual materials appearing on leased channels as violative of the First Amendment. *Id.* at 753.

[107] *See id.* at 755 (acknowledging that the government has a compelling interest in protecting children without citing to any constitutional provision to support the claim).

[108] *See* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (stating that the state has a compelling interest in preventing voter fraud); Burson v. Freeman, 504 U.S. 191, 199 (1992) (acknowledging that a state has a compelling interest in preserving the integrity of the election process); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 788–89 (1978) (same); Storer v. Brown, 415 U.S. 724, 730 (1974) (recognizing that a fair and honest election requires "substantial regulation").

[109] 504 U.S. at 199. The plaintiff, a political candidate, brought a claim against a Tennessee statute that established a "campaign-free zone" on election day. *Id.* at 193–94. The statute prohibited the display of campaign signs, the distribution of campaign materials, or solicitation of votes, within one hundred feet of the entrance of a building in which voting takes place. *Id.* The plaintiff claimed that

the Court in 1978, in *First National Bank of Boston v. Bellotti*, recognized that a Massachusetts law restricting corporate speech might be supported by a compelling government interest in protecting electoral integrity, although the Court ultimately struck the law as not narrowly tailored to further that interest.[110]

But it is not enough for the government to identify a compelling government interest.[111] The government next has the burden to show that a measure that infringes on a fundamental interest is no more than necessary, or "narrowly tailored," to further said government interest.[112] Courts often focus on whether a measure is underinclusive or overinclusive, or both, to determine if the measure is "narrow[ly] tailor[ed]."[113]

A government measure is underinclusive if it fails to regulate classes of individuals or activities that are similar to the classes of individuals or activities subject to the measure.[114] For example, in *Kramer v. Union Free School District No. 15*, the Supreme Court held in 1969 that a New York law limiting the right to vote in school district elections violated the Equal Protection Clause because it was not narrowly tailored.[115] The statute in question limited the right to vote only to those who either own property in the school district, or have children enrolled in one of the district's public schools.[116] The state claimed that the law was needed to ensure that franchise is limited only to

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the law violated her constitutional right because it prevented her from communicating with voters. *Id.* at 194.

[110] 435 U.S. at 788–89. The statute in question prohibited banks and corporations from making contributions to influence voters on referendum proposals with the exceptions of issues that "materially affect its business, property, or assets." *Id.* at 767–68. Specially, the statute prohibited banks and corporations from spending to influence referenda regarding taxation. *Id.* The plaintiffs, a group of banking associations and corporations, wanted to spend money to promote their view regarding a referendum on graduated income tax of individuals. *Id.* at 767–69. They argued that the statute abridged their freedom of speech in violation of the First Amendment. *Id.* at 767.

[111] *See Burson*, 504 U.S. at 199 (stating that to survive strict scrutiny, the state must do more than simply assert a compelling state interest).

[112] *See* Roe v. Wade, 410 U.S. 113, 155, 162 (1973) (observing that states can regulate women's access to abortion, but such regulation cannot be greater than necessary to effectuate the state's legitimate interest in protecting pregnant women); Hart, *supra* note 99, at II.-218 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)) (noting that strict scrutiny requires a showing of both a compelling government interest and that the government narrowly tailors its action to advance said interest).

[113] *See* CHEMERINSKY, *supra* note 17, § 9.1, at 701 (noting that the Supreme Court often examines the relationship between an asserted compelling interest and a government measure by focusing on whether the law is underinclusive or overinclusive); Fallon, *supra* note 99, at 1326–28 (listing underinclusiveness and overinclusiveness as elements of a "narrow[ly] tailor[ed]" inquiry).

[114] CHEMERINSKY, *supra* note 17, § 9.1, at 701 (stating that a measure is underinclusive if it is inapplicable to those subject under the measure); Fallon, *supra* note 99, at 1327 (describing an underinclusive measure as one that does not regulate activities that pose similar threats to the government's compelling interests as the activities that the measure regulates).

[115] *See* 395 U.S. 621, 633 (1969) (holding that the statute violated the Equal Protection Clause because the state legislature did not narrowly tailor it).

[116] *Id.* at 622.

those who are interested in school affairs.[117] The Court reasoned that the statute was underinclusive because it excluded classes of individuals who did not own property in the district or have children enrolled in public school, but might be as interested in school affairs as those who do.[118] Consequently, the statute was unconstitutional because Congress did not narrowly tailored it to further the asserted interest.[119]

A measure can also fail the narrowly-tailored prong of the strict scrutiny analysis if it is overinclusive.[120] A measure is overinclusive when it is applied to individuals and activities that are unnecessary to further a compelling government interest.[121] For example, in 1991, in *Simon & Schuster, Inc. v. Member of the New York State Crime Victims Board*, the Supreme Court held that a New York law requiring a criminal's income from literary or other media works describing their crime to be deposited in a fund to compensate the victims of the crime violated the First Amendment.[122] The Court recognized that the state has

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[117] *Id.* at 630–31. The Court expressed some skepticism regarding the state's claim. *Id.* at 631. The Court noted that because the law limited the right to vote to only property owners in the district, or those with children enrolled in the district's schools, the state seemed to be arguing that franchise should be restricted to those whom these elections directly affected, not those who are simply interested in the elections. *Id.* The Court did not analyze the state's interest any further and based the opinion instead on its reasoning that the state did not narrowly tailor the statute to further the state's asserted interests. *See id.* at 632 (stating that the Court will not express any opinion on the legitimacy of the state's interest in limiting franchise to only those directly affected by school district elections).

[118] *See id.* (stating that the statute excluded many individuals who may have an interest in school affairs). The Court listed different types of individuals who cannot vote under the statute, including:

> [S]enior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither own nor lease qualifying property and whose children are too young to attend school; parents who neither own nor lease property qualifying property and whose children attend private schools.

Id. at 630. The Court also held that the statute was overinclusive because the individuals covered by the statute might not have a direct interest in school affairs. *Id.* at 632. Because overinclusiveness will be discussed below, the discussion regarding the overinclusive element in this case has been excluded. *See infra* notes 120–127 and accompanying text.

[119] *Kramer*, 395 U.S. at 633.

[120] *See* CHEMERINSKY, *supra* note 17, § 9.1, at 701 (stating that the Supreme Court will evaluate whether a law is overinclusive to determine if the law is narrowly tailored); Fallon, *supra* note 99, at 1328 (suggesting that because strict scrutiny requires states to narrowly tailor their laws to advance a compelling interest, laws that are overly broad and/or overinclusive are unconstitutional).

[121] *See* CHEMERINSKY, *supra* note 17, § 9.1, at 702 (stating that a government measure is overinclusive if it regulates more people than necessary to effectuate a compelling government interest); Fallon, *supra* note 99, at 1328 (noting that the Supreme Court's demand that a government measure is not overinclusive is "symmetrical[]" to its demand that a measure is not underinclusive).

[122] 502 U.S. 105, 123 (1991). The statute at issue, also known as the "'Son of Sam' law," required incomes derived from a criminal's description of his crimes in a movie, book, magazine article, or other media, to be deposited in an escrow fund. *Id.* at 108–09. A victim who suffered damages as a result of the criminal's activity could then bring a civil action in court to sue for compensation from the fund. *Id.* at 109. The statute defined a criminal as "any person convicted of a crime . . . and any person who has voluntarily and intelligently admitted the commission of a crime for which such per-

a compelling interest both in ensuring victims of a crime are compensated, and in preventing criminals from profiting from their crimes.[123] But the Court did not find that the law was narrowly tailored to further these interests because the law was overinclusive.[124] The Court reasoned that the law was overinclusive because it not only targeted those who were convicted or accused of crimes, but also anyone who mentioned past criminal activities in their works.[125] Therefore, the Court noted that the statute as applied would encompass a broad category of literature that discusses past crimes, but does not allow criminals to benefit from their criminal activities or compensate victims.[126] Because the law was broader than necessary to effectuate the state's asserted interest, it failed to survive strict scrutiny and accordingly violated the First Amendment.[127]

In summary, to determine if strict scrutiny is appropriate, a court must determine whether plaintiff asserted a fundamental interest.[128] If the interest is fundamental, the court will strictly scrutinize the government's action to determine if it serves a compelling government interest and is narrowly tailored to serve said interest.[129] Even if the government could demonstrate a compelling government interest, the government's action still violates the Due Process Clause if the scope of the action is broader or lesser than needed to serve its interests.[130]

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son is not prosecuted." *Id.* at 110 (emphasis omitted) (quoting N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1991)).

[123] *See id.* at 120 (agreeing that the state has a compelling interest in ensuring that a victim of a crime is compensated from the profits derived from the crime). The state argued that it had an interest in preventing criminals from profiting from their crimes before victims can receive compensation. *Id.* at 119. The Court noted that there was no compelling state interest in preventing criminals from benefiting from storytelling. *Id.* This is because the state could not explain why it has a greater interest in compensating the victims with profits derived from storytelling compared to other assets. *Id.* As such, the Court concluded that there was no compelling interest in limiting the state's concern that victims are compensated only to profits derived from storytelling. *Id.* at 120–21.

[124] *See id.* at 121 (describing the law as being overinclusive, as the Court analyzed whether the statute was narrowly tailored to further the asserted compelling interest).

[125] *Id.* The Court noted that the statute would have affected figures such as Malcolm X, Henry David Thoreau, and St. Augustine, who all mentioned past criminal activities in their works. *Id.*

[126] *Id.* at 122.

[127] *Id.* at 123.

[128] *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (stating that government actions that interfere with an individual's fundamental rights will be subject to heightened scrutiny); Reno v. Flores, 507 U.S. 292, 302 (1993) (describing the Due Process Clause as prohibiting the government from infringing on fundamental rights).

[129] *Glucksberg*, 521 U.S. at 720; Griswold v. Connecticut, 381 U.S. 479, 504 (1965) (White, J., concurring).

[130] *See Simon & Schuster*, 502 U.S. at 123 (expressing that New York's Son of Sam law was broader than necessary to effectuate the compelling interest of preventing criminals from benefitting from their crimes because the statute would cover any work of literature where the author has committed a crime in the past without consideration for when the crime was committed or what type of crime was committed); *see supra* note 122 and accompany text (providing more information about the New York's Son of Sam statute).

C. The Fourteenth Amendment and the Right to Vote

Up until the 1960s, the courts considered constitutional challenges to electoral practices nonjusticiable political questions by the courts.[131] The Supreme Court, however, reversed this stance in 1962 in *Baker v. Carr*.[132] In *Baker*, the petitioner challenged the legislative apportionment scheme of the Tennessee General Assembly.[133] The petitioner alleged that the Tennessee General Assembly's apportionment scheme denied voters Equal Protection under the Fourteenth Amendment because it reduced their voting power.[134] Although the district court held that it lacked jurisdiction to adjudicate the petitioner's case because the petitioner's suit presented a nonjusticiable political question, the Supreme Court reversed, holding that the petitioner's allegation of an Equal Protection violation was justiciable.[135]

Subsequently, federal courts have primarily used the Equal Protection Clause to challenge state action during elections, although some have also applied the Due Process Clause to adjudicate voting rights challenges.[136] Subsection 1 describes how courts have addressed cases challenging voting laws un-

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[131] *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) (holding that the constitutionality of unfair congressional districting is a nonjusticiable political question that the federal courts should not adjudicate); *see also* Festa, *supra* note 42, at 2129, 2133 (noting that for a period, constitutional questions about the way a state conducts its election were considered nonjusticiable political questions by the courts). Justiciability deals with which matters a federal court can hear and decide and which the court must dismiss. CHEMERINSKY, *supra* note 17, § 2.3, at 47. The political question doctrine limits courts from ruling on matters even if the court has jurisdiction on the matter and the matter is otherwise justiciable. *Id.* at 135. The Supreme Court stated that courts will not hear these matters because the Constitution committed them to the political branches. *See id.* (noting that the constitutional issues on certain matters should be interpreted by the political branches, namely by Congress and the President).

[132] *See* Festa, *supra* note 42, at 2133–34 (stating that the Supreme Court in *Baker* recognized that a challenge to the apportionment scheme of the Tennessee legislature was justiciable).

[133] Baker v. Carr, 369 U.S. 186, 187 (1962). Apportionment of the Tennessee General Assembly is based on the number of qualified voters, which is counted every ten years. *Id.* at 188. In 1901, the Tennessee General Assembly decided to no longer count the number of qualified voters every ten years, and instead apportioned their General Assembly based on the number of people listed in the federal census in 1901. *Id.* at 191. Since 1901, the state legislature had not passed any new attempts to reapportion the General Assembly. *Id.* Accordingly, the apportionment scheme of the Tennessee General Assembly reflected, at this time, the number of voters in 1901. *Id.* at 192.

[134] *See id.* at 187–88 (alleging that the Tennessee General Assembly's action devalued the petitioner's vote).

[135] *See id.* at 209 (describing that the district court refused to adjudicate the case because the case implicated a political question concern); *id.* at 237 (stating that the petitioner's asserted right is justiciable under the Fourteenth Amendment).

[136] *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (concluding that requiring voters to pay a poll tax before they can vote violates voters' Equal Protection rights); Reynolds v. Sims, 377 U.S. 533, 566 (1964) (holding that state laws that do not treat all voters similarly violates the Equal Protection Clause of the Fourteenth Amendment); *see also* Roe v. Alabama *ex rel.* Evans, 43 F.3d 574, 580–81 (11th Cir. 1995) (per curiam) (holding that a state court's order requiring the state to count certain absentee ballots that did not comply with state law requirements violated the Due Process Clause); Griffin v. Burns, 570 F.2d 1065, 1078 (1st Cir. 1978) (applying the Due Process Clause to strike down a state court's order invalidating absentee ballots in a primary election).

der the Equal Protection Clause.[137] Subsection 2 surveys how courts have approached voting rights cases under both the procedural and substantive understandings of the Due Process Clause.[138]

1. Equal Protection and Voting Rights

The Equal Protection Clause was enacted as part of the Fourteenth Amendment along with the Due Process Clause.[139] The clause prohibits states from treating similarly situated groups of citizens differently.[140] After *Baker*, the Supreme Court relied almost entirely on the Equal Protection Clause to invalidate restrictive voting laws.[141] For example, the Court held in 1964 in *Reynolds v. Sims* that the Alabama Legislature's new legislative districting scheme violated the Equal Protection Clause.[142] The Court reasoned that the right to vote is a fundamental right, which cannot be infringed by governmental dilution or debasement of the vote.[143] The Court thus held that a constitutionally sufficient districting scheme requires that the population of each electoral district is substantially equal with each other.[144] Likewise, in *Harper v. Virginia State Board of Elections*, the Supreme Court held in 1966 that Virginia's poll tax violated the Equal Protection Clause of the Fourteenth Amendment because the regulation allowed Virginia to discriminate invidiously against voters based on wealth.[145]

Later, the Supreme Court developed a balancing test for Equal Protection challenges to voting restrictions, commonly known as the "*Anderson-Burdick*

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[137] *See infra* notes 139–161 and accompanying text.

[138] *See infra* notes 162–188 and accompanying text.

[139] *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without *due process of law*; nor deny to any person within its jurisdiction the *equal protection of the laws*." (emphasis added)).

[140] *See id.* (prohibiting states from depriving an individual equal protection under the law); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)) (holding that the Equal Protection Clause requires states to treat similarly situated citizens similarly).

[141] *See* Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 161 (2015) (stating that the Equal Protection Clause dominated courts' assessment of voting rights challenges).

[142] 377 U.S. 533, 568 (1964). The plaintiffs alleged that the Alabama Legislature based its legislative districting scheme on the 1900 federal census, even though the state constitution "require[s] . . . that the legislature be reapportioned" every ten years. *Id.* at 540. The plaintiffs asserted that because the population had grown significantly from 1900 to 1960, this districting scheme violated the Equal Protection Clause of the Fourteenth Amendment because it seriously discriminated against voters from certain counties. *Id.*

[143] *See id.* at 555 (stating that vote dilution could deny suffrage just like a direct restriction on the right to vote).

[144] *Id.* at 559.

[145] 383 U.S. 663, 666, 668 (1966) (concluding that the Equal Protection Clause bars any requirement of payment to participate in the electoral process because it discriminates voters based on wealth).

balancing test."[146] It was named after two major Supreme Court decisions—*Anderson v. Celebrezze*, decided in 1983, and *Burdick v. Takushi*, decided in 1992.[147] In *Anderson*, the Supreme Court invalidated an Ohio filing deadline for independent candidates in a presidential election as violative of the candidate's and voters' First and Fourteenth Amendment rights.[148] In contrast, in *Burdick*, the Supreme Court upheld a Hawaii statute that prohibited write-in voting, holding that the regulation did not violate voters' First and Fourteenth Amendment rights.[149] In both of these decisions, the Supreme Court reasoned that although the right to vote is fundamental, not all voting regulations are constitutionally suspect.[150] Rather, given the importance of voting, there must be "substantial regulation" to protect the integrity of the electoral system.[151]

Thus, in *Anderson*, the Court noted that the states' asserted interests were insufficient to overcome the magnitude of the petitioner's interests because it substantially burdens independent voters.[152] Moreover, the Court took into consideration the fact that the dispute revolved around a presidential election.[153] Ohio's voting regulations thus did not only restrict the rights of Ohio

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[146] *See* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 674 (2017) (expressing that a balancing test for Equal Protection actions in the voting context, often known as the *Anderson-Burdick* test, eventually evolved). Both cases held that the election laws at issue violated the First and Fourteenth Amendments, rather than specifically mentioning the Equal Protection Clause. *See* Burdick v. Takushi, 504 U.S. 428, 430 (1992) (discussing Hawaii's election statute as possibly violating the First and Fourteenth Amendments); Anderson v. Celebrezze, 460 U.S. 780, 786 n.7 (1983) (stating that the Court grounded its conclusion on the First and Fourteenth Amendment generally, and not the Equal Protection Clause). Most commentators, however, have categorized the *Anderson-Burdick* test as an Equal Protection analysis. *See, e.g.*, Foley, *supra*, at 674 (describing the *Anderson-Burdick* test as the product of the evolution of Equal Protection jurisprudence in election law).

[147] Foley, *supra* note 146, at 674–75.

[148] *Anderson*, 460 U.S. at 789, 806. The petitioner announced his candidacy for President of the United States as an independent on April 24, 1980. *Id.* at 782. His supporters could meet all of Ohio's substantive requirements to have the petitioner's name placed on the ballot for the general election. *Id.* But, because the deadline to meet these substantive requirements was March 20th, the petitioner did not meet the deadline to qualify to have his name placed on the ballot. *Id.*

[149] *Burdick*, 504 U.S. at 441–42. The petitioner was a voter who, in 1986, asked Hawaii state officials about the possibility of write-in voting. *Id.* at 430. The Hawaii Attorney General informed the voter that the Hawaii Constitution did not provide a write-in option. *Id.* The petitioner filed a lawsuit in the district court, requesting that he be given the opportunity to vote for candidates who are not listed on the ballots in future elections. *Id.*

[150] *See id.* at 433 (citing Storer v. Brown, 415 U.S. 724, 730 (1974)) (noting that although the right to vote is fundamental, it is not absolute and a fair election may require substantial regulations); *Anderson*, 460 U.S. at 788 (citing *Storer*, 415 U.S. at 730) (same).

[151] *See Burdick*, 504 U.S. at 433 (quoting *Storer*, 415 U.S. at 730) (emphasizing that "there must be a substantial regulation of elections if they are to be fair" (quoting *Storer*, 415 U.S. at 730)); *Anderson*, 460 U.S. at 788 (quoting *Storer*, 415 U.S. at 730) (same).

[152] *See Anderson*, 460 U.S. at 790–91 (explaining how a March deadline might substantially burden independent candidates and voters compared to those who belong to the major parties).

[153] *See id.* at 794–95 (noting that the state's regulation in a presidential election implicates unique national interests).

voters, it also placed a significant restriction on the electoral process of the country.[154] In contrast, in *Burdick*, the Court noted that despite the lack of a write-in option, political candidates in Hawaii have several options to gain access to the ballot.[155] Therefore, the regulation did not impose a significant burden on petitioner.[156] Because the burden was minimal, the Court held that Hawaii's regulatory interests were sufficient to justify its voting regulation.[157]

As a result of these cases, courts balance the extent of the injury to the plaintiff's rights with the state interests to determine whether an election regulation violates the First and Fourteenth Amendment.[158] A regulation that imposes a substantial burden on voting rights is strictly scrutinized.[159] But if a regulation imposes only nominal and nondiscriminatory burdens to the voters' rights, the regulation is constitutionally adequate.[160] Thus, the *Anderson-Burdick* test gives a significant amount of deference to state authority to regulate its own elections.[161]

2. Due Process and Voting Rights

Although the Supreme Court has not applied the Due Process Clause in voting rights cases, some lower federal courts have.[162] In 1978, the First Circuit Court of Appeals in *Griffin v. Burns* affirmed the district court's invalida-

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[154] *Id.* at 795.

[155] *Burdick*, 504 U.S. at 435. Three main mechanisms exist to allow a political candidate to appear on a ballot. *Id.* First, a party can file a petition 150 days before the primary election, then any person can file sixty days before the primary certifying that they are qualified for office and that they are a member of the party they want to represent. *Id.* Second, candidates can show up on the ballot by being part of established parties—Republican, Democrat, and Libertarian. *Id.* Third, a candidate may appear on the ballot by applying for a nonpartisan ballot. *Id.* at 436.

[156] *Id.* at 437.

[157] *See id.* at 439 (reasoning that because the petitioner's interests were minimal, Hawaii does not need to establish a compelling interest).

[158] *See Burdick*, 504 U.S. at 434 (stating that a court considering challenges to voting regulations must balance the plaintiff's asserted injury under the First and Fourteenth Amendment, and the state's interest justifying the burden imposed by its regulation); *Anderson*, 460 U.S. at 789 (noting that a court may only determine if voting regulation is constitutionally suspect by balancing the extent of the individual's injury and the state's interests).

[159] *See Burdick*, 504 U.S. at 434 (stating that if a voting regulation severely restricts voters' rights, the regulation cannot be broader than necessary to advance the state's compelling interest); *supra* note 87 and accompanying text (providing a definition of "strict scrutiny"); *see also* Foley, *supra* note 146, at 675 (noting that if a voting regulation imposes a heavy burden, then the court will subject the voting regulation to strict scrutiny).

[160] *See Burdick*, 504 U.S. at 434 (stating that reasonable, nondiscriminatory voting regulations are justifiable by state regulatory interests); *Anderson*, 460 U.S. at 788 (same).

[161] *See* Anthony J. Gaughan, *Notice, Due Process, and Voter Registration Purges*, 67 CLEV. ST. L. REV. 485, 512 (2019) (stating that the *Anderson-Burdick* test is deferential to legislative judgment).

[162] *See* Gaughan, *supra* note 161, at 511 (noting that most plaintiffs in voting rights cases have based their challenges on Equal Protection grounds); Wallace, *supra* note 25, at 655 (observing that the Supreme Court has never ruled on how due process applies in a voting context).

tion of an order from the Rhode Island Supreme Court declaring over one hundred mail-in ballots in a municipal primary election invalid.[163] Although the voters had voted by mail after state officials informed them that it was lawful,[164] the Rhode Island Supreme Court held that state laws did not allow for mail-in ballots in primary elections.[165] The First Circuit applied the Due Process Clause and reasoned that courts can apply the Due Process Clause to election challenges where the election process fails to afford voters "fundamental fairness."[166] The court held that the invalidation of the mail-in votes after voters relied on instructions from state officials was fundamentally unfair, because voters could not foresee that the state's instructions were incorrect.[167]

In contrast, in 1995, the Eleventh Circuit Court of Appeals in *Roe v. Alabama* ex rel. *Evans* affirmed a district court's stay of a state court order requiring Alabama to count absentee ballots that did not completely satisfy the state's requirements.[168] In its decision, the Eleventh Circuit noted that retroactively validating ballots that did not meet absentee voting requirements implicated issues of fundamental fairness that violate the Due Process Clause of the Fourteenth Amendment.[169] The court reasoned that counting the contested ballots would be unfair in two ways.[170] First, it would dilute the votes of the people who met the requirements for absentee voting or who voted in person.[171]

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[163] 570 F.2d 1065, 1068, 1078 (1st Cir. 1978).

[164] *Id.* at 1067. Rhode Island law allowed absentee and mail-in voting for all elections, but did not specify whether the term "'elections' . . . extended to the party primaries" as well. *Id.* The Secretary of State and other officials, believing that the law applied to primaries, advertised and issued mail-in and absentee ballots for the primary election. *Id.*

[165] *Id.* at 1068.

[166] *See id.* at 1078 (reasoning that the entire election process, including administrative and judicial remedies, violates the Due Process Clause if it fails to afford fundamental fairness).

[167] *See id.* at 1076 (holding that the court would not invalidate the petitioner's claim based on the assertion that the petitioner should have foreseen that the Rhode Island Supreme Court would have invalidated their votes).

[168] 43 F.3d 574, 583 (11th Cir. 1995) (per curiam). Under Alabama law, a person voting absentee must first execute an affidavit in the presence of a notary public, or before two witnesses eighteen-years or older. *Id.* at 577. In an Alabama statewide election in 1994, the state discarded over one thousand ballots for failing to meet the state's affidavit requirements. *Id.* at 578. After the election, two voters who used absentee ballots filed a lawsuit in the Circuit Court for Montgomery County, Alabama. *Id.* The Montgomery County Circuit Court submitted an order requiring the state to count some of the absentee ballots that the government had thrown out for noncompliance. *Id.* In response, another voter filed a lawsuit in the U.S. District Court for the Southern District of Alabama asking for an injunction against the counting of the ballots. *Id.* at 579. The district court granted the injunction, holding that the Montgomery court strayed from normal state practice. *Id.* The district court ordered the government to preserve the contested ballots, but required the Secretary of State to refrain from certifying election results based on the counting of the contested ballots. *Id.*

[169] *See id.* at 580–81 (agreeing with the plaintiffs that allowing contested ballots to be counted implicates issues of fundamental fairness because it departs from previous state electoral practices).

[170] *See id.* at 581 (observing that allowing for the contested ballots to be counted would have two major effects on the fairness and the propriety of the election).

[171] *Id.*

Second, changing the rules after the election would disenfranchise voters who might have voted but for the burdens imposed by the affidavit rules.[172]

Other courts have also adjudicated voting rights cases under the Due Process Clause, albeit on procedural due process grounds.[173] In *Williams v. Taylor*, the Fifth Circuit Court of Appeals in 1982 held that a Mississippi election board's refusal to give plaintiff, a felon, notice and hearing before disenfranchising him did not violate his constitutional right to due process under the Fourteenth Amendment.[174] Applying *Mathews*, the court first considered the plaintiff's private interest.[175] First, the court observed that the plaintiff's private interest in retaining the right to vote was less than the voting interests of nonfelons, because section two of the Fourteenth Amendment allows states to disenfranchise felons.[176] Second, the court examined whether requiring notice and hearing before disenfranchisement would add value to the present procedures.[177] The Court noted that the primary purpose of a pre-disenfranchisement notice and hearing procedure was to ensure that the election board identified the right voter to disenfranchise under the Mississippi statute.[178] This purpose, according to the court, was adequately served by the present procedures.[179] Lastly, the court noted that mandating a hearing before the election board could disenfranchise felons would burden the state substantially in time and

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[172] *Id.*

[173] *See* Wallace, *supra* note 25, at 658 (stating that multiple lower federal courts have applied the balancing test from *Mathews v. Eldridge* to evaluate procedural restrictions to voting); *supra* notes 71–82 and accompanying text (providing information about the *Mathews* balancing test).

[174] *See* 677 F.2d 510, 515 (5th Cir. 1982) (affirming the district court's grant of summary judgment and dismissing the plaintiff's constitutional challenge against the election board for lack of notice and hearing). The plaintiff, a felon, registered to vote from 1962 to 1979. *Id.* at 512. In 1979, the Election Board (the Board) disenfranchised the plaintiff after an anonymous person left the plaintiff's conviction records in front of the county courthouse. *Id.* at 513. The Board learned through these records that plaintiff was convicted of grand larceny in 1967. *Id.* Under a Mississippi statute, someone who has been convicted of burglary or theft cannot register to vote. *Id.*

[175] *Id.* at 514 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[176] *See* U.S. CONST. amend. XIV, § 2 (stating that states may lose representation in Congress if they disenfranchise any male resident, unless the individual has participated in rebellions or other criminal activities); *Williams*, 677 F.2d at 514 (reasoning that the Constitution distinguishes between the right to vote for felons from that of nonfelons because the Constitution allows states to prohibit or classify felons for voting restriction purposes if the restrictions are rationally related to legitimate government interests).

[177] *Williams*, 677 F.2d at 515.

[178] *Id.*

[179] *Id.* The court also mentioned and laid out the various mechanisms that the present procedures provide to disenfranchised individuals to protest their denial from voter registration. *Id.* The court concluded that these mechanisms were sufficient to ensure that the state would not erroneously deprive nonfelons from voting. *Id.* Because the present procedures adequately identified and excluded felons from voter registration, the court concluded that requiring notice and hearing before disenfranchisement would not add more value to the current statutory scheme. *Id.*

resources.[180] Because of the plaintiff's reduced private interest, the adequacy of the present procedures, and the substantial burden on the state, the court held that a notice and hearing procedure before disenfranchisement was not required under the Due Process Clause.[181]

In contrast, the U.S. District Court for the Northern District of Georgia in *Martin v. Kemp*, in 2018, held that plaintiffs who challenged Georgia's disqualification of absentee ballots with mismatched signatures were likely to succeed on procedural due process grounds.[182] Applying *Mathews*, the court first noted that the plaintiff had a significant private interest in their fundamental right to vote.[183] Then, the court observed that although the procedures currently used by Georgia might not create a great risk of erroneous deprivation, allowing voters to address signature mismatch could add valuable safeguards against disenfranchisement.[184] Lastly, the court dismissed the state's concern that forcing it to provide an opportunity for addressing the signature mismatch would substantially burden its interest in maintaining electoral integrity.[185] The court explained that the state did not provide evidence demonstrating why this additional procedural safeguard would impose a substantial burden, especially as the state already provided notice and hearing to voters to contest disqualification on eligibility grounds.[186]

Although underutilized, these cases demonstrate that the Due Process Clause is not inapplicable in voting rights cases.[187] Rather, courts can and have applied the Due Process Clause to strike down patently unfair voting laws.[188]

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[180] *See id.* (reasoning that mandating a hearing before any action by the election board would cost the state time and money and would not guarantee that the law would only exclude felons any more than under the current procedures).

[181] *See id.* (concluding that the plaintiff's due process challenge failed on the merits).

[182] Martin v. Kemp, 341 F. Supp. 3d 1326, 1340 (N.D. Ga. 2018). Under Georgia law, when a voter applies for an absentee ballot, the registrar will compare the signature on the application with the signature on the voter registration card. *Id.* at 1330. The process repeated once more after the voter sent in their absentee vote. *Id.* If the registrar determines that the signature does not match either on the application, or later, on the ballot itself, the application or ballot will be rejected. *Id.* There is no procedure through which a voter can challenge a registrar's determination that the signatures are mismatched. *Id.* at 1331.

[183] *See id.* at 1338 (noting that the plaintiff's private interest implicates the fundamental right to vote and accordingly must be given substantial weight); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (articulating the three factors that the Supreme Court considered when examining the plaintiff's procedural due process claim in *Mathews*).

[184] *Martin*, 341 F. Supp. 3d at 1339 (recognizing that although the current procedures do not pose a large risk of erroneous deprivation, permitting absentee voters to address signature discrepancies would significantly improve the safeguards against disenfranchisement).

[185] *Id.*

[186] *See id.* (finding that additional procedures for absentee voters to address signature mismatch would be minimal considering that Georgia provides notice and hearing for people who challenge the disqualification of their ballots on eligibility ground).

[187] *See* Tolson, *supra* note 141, at 161 (expressing that the Supreme Court has primarily relied on the Equal Protection Clause to review voting laws); Wallace, *supra* note 25, at 655 (noting that alt-

II. STATE LEGISLATURES' PLENARY POWER TO CHOOSE THE MANNER OF SELECTING PRESIDENTIAL ELECTORS IS NOT UNLIMITED

Article II of the Constitution vests state legislatures with the authority to select presidential electors.[189] This power is plenary, and the Constitution does not require states to give voters the right to directly select their preferred candidate for President.[190] All states, however, have given their citizens the right to vote for presidential electors.[191] When a state government confers the right to vote for presidential electors to its citizens, that right is fundamental and protectable under the Fourteenth Amendment of the Constitution.[192]

Because a state's decision to appoint presidential electors after an election has taken place interferes with voting rights, it is important to discuss the tension between the state's plenary authority to regulate presidential elections and the constitutional restraints on that power.[193] Section A of this Part discusses the scope of the legislature's authority to select the manner of choosing presidential electors under Article II of the Constitution.[194] Section B of this Part examines how federal courts have applied the Fourteenth Amendment to restrain states from interfering with voters' rights.[195] In particular, Section B considers

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hough the Supreme Court has never directly addressed a voting right challenge under the Due Process Clause, lower federal courts have applied the clause when reviewing voting laws).

[188] *See* Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978) (concluding that not counting votes submitted by voters who followed erroneous instructions from the Secretary of State was fundamentally unfair and violated the Due Process Clause); *Martin*, 341 F. Supp. 3d at 1338–39 (N.D. Ga. 2018) (holding that Georgia's signature verification procedure for absentee ballots was deficient and violated voters' rights under the Due Process Clause).

[189] *See* U.S. CONST. art. II, § 1, cl. 2 (giving states the authority to choose how they will select presidential electors); McPherson v. Blacker, 146 U.S. 1, 25 (1892) (stating that the legislature has the "plenary authority" to decide the manner with which to select presidential electors).

[190] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2321 (2020) (observing that most states directly selected presidential electors in early American history); Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (stating citizens do not have the right to directly select presidential electors under the Constitution).

[191] *See Chiafalo*, 140 S. Ct. at 2321 (acknowledging that almost every state in the U.S. selected presidential electors through state-wide popular elections by the nineteenth century); Baten v. McMaster, 967 F.3d 345, 349 (4th Cir. 2020), as amended (July 27, 2020) (observing that almost every state but South Carolina selected presidential electors through popular vote by 1832, with South Carolina adopting the system after the Civil War); Lyman v. Baker, 954 F.3d 351, 364 (1st Cir. 2020) (citing *Bush*, 531 U.S. at 104) (explaining that although the Constitution gives states the authority to choose the manner with which to select presidential electors, most states eventually favored the popular vote system).

[192] *See* U.S. CONST. amend. XIV, § 1 (prohibiting states from depriving its citizens of due process of law and requiring states to provide its citizens with equal treatment under the laws); *Bush*, 531 U.S. at 104 (stating that once state legislatures confer the right to vote for presidential electors to its citizens, the right becomes fundamental).

[193] *See infra* notes 249–301 and accompanying text (analyzing why direct appointment of presidential electors after an election violates the Due Process Clause of the Fourteenth Amendment).

[194] *See infra* notes 197–222 and accompanying text.

[195] *See infra* notes 223–248 and accompanying text.

the limitations of the Equal Protection Clause as a restraining mechanism, and how the Due Process Clause will provide courts with an important tool to restrain state legislative authority where Equal Protection is unavailable.[196]

A. The Authority of State Legislatures Under Article II

There is little evidence that the drafters of the Constitution had a specific meaning in mind for the term "Legislature" when they vested the authority to select presidential electors in state legislatures in Article II.[197] Early in the nation's history, there were no judicial decisions interpreting the scope of legislative authority under Article II, Section 1.[198]

During the Civil War, courts were asked for the first time to interpret the word "legislature" when nineteen states passed "'soldier voter' laws," which allowed soldiers to cast a vote in any statewide elections.[199] Some state supreme courts held that such a law violated their state constitutions,[200] while others concluded that the law was permissible.[201] Many courts limited these

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[196] *See infra* notes 228–248 and accompanying text.

[197] *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct . . . ."); Richard L. Hasen, *When "Legislature" May Mean More Than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599, 607–08 (2008) (noting that the constitutional question regarding whether the word "Legislature" in Article II, Section 1, is unsettled); Saul Zipkin, Note, *Judicial Redistricting and the Article I State Legislature*, 103 COLUM. L. REV. 350, 358 (2003) (stating that there was no judicial interpretation of the word "legislature" in either Article I, Section 4, or Article II, Section 1, for at least eighty years after the ratification of the Constitution).

[198] Zipkin, *supra* note 197, at 358.

[199] *Id.* at 358–59. At the time, many state constitutions included provisions that could be read to require voters to vote within their state or town. Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 765 (2001). During the Civil War, many soldiers could not comply with that requirement because they were often fighting outside of their home state. *Id.*

[200] *See* Smith, *supra* note 199, at 766 (stating that although under severe pressures to rule otherwise, states supreme courts from Michigan, New Hampshire, California, Pennsylvania, and Connecticut held that the soldier voter law was inconsistent with their state constitution). The Michigan Supreme Court, for example, held that the soldier voter law violated the state constitution. *See* People *ex rel*. Twitchell v. Blodgett, 13 Mich. 127, 160 (1865) (concluding that the law was inconsistent with the state constitution and therefore void). The Michigan Constitution at that time specified that a voter had to be a white male who was twenty-one years old or older and a "reside[nt] in [Michigan for] three months, and in the township or ward in which he offers to vote ten days next preceding such election." *See id.* at 153–54 (describing the elector requirements of the Michigan Constitution). Judge Issac Christiancy rejected the plaintiff's interpretation of the state constitution that suggested the state constitution only prescribed a "period of residence" requirement and did not prohibit voters from being able to vote in places outside of their towns. *Id.* at 154–55. Judge Christiancy noted that such a reading strains the plain meaning of the text, which plainly imposed a location requirement. *Id.* at 155.

[201] *See* Smith, *supra* note 199, at 766 (noting that state supreme courts in Iowa, Ohio, and Wisconsin did not find their states' soldier voter law to be inconsistent with the state constitution). The Wisconsin Supreme Court, for example, held that a state law allowing soldiers who were qualified to vote in the state to cast their ballot in the state's general election even if they were absent from the state. State *ex rel.* Chandler v. Main, 16 Wis. 398, 411 (1863). The constitutional provision at issue

early decisions, however, to state elections.[202] In a 1864 advisory opinion, the Vermont Supreme Court became the first court to discuss a state soldier voter law as applied in federal elections.[203] The court held that although the law violated the Vermont Constitution with respect to state elections, it did not violate the state constitution in regard to federal elections.[204] The court reasoned that because Vermont ratified its constitution before the formation of the United States, the Vermont Constitution did not address the issue of federal elections.[205] The court's emphasis on the inapplicability of the state constitution to regulate federal elections provides strong support for the idea that the state legislature alone possesses full discretion to regulate federal elections.[206]

The first Supreme Court case to address the scope and definition of "Legislature" under Article II was *McPherson v. Blacker*, decided in 1892.[207] In *McPherson*, the Supreme Court rejected a challenge to Michigan's electoral scheme whereby the state allotted presidential electors based on the state's congressional district.[208] The Court reasoned that the Constitution did not specify any particular method for selecting presidential electors, but instead gave

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stated that qualified Wisconsin voters were "entitled to vote at the polls which may be held nearest their residence . . . provided, that no person shall vote for county officers out of the county in which he resides." *Id.* at 415 (emphasis omitted). The Wisconsin Supreme Court held that this provision did not exclude a person from voting outside of the county they reside. *Id.* Rather, it only barred people from voting for candidates in a county that they do not reside in. *Id.* As such, a state law allowing individuals to cast their ballots in the state even if, at the time, they were absent from the state, would not violate the state constitution. *Id.* at 411, 422.

[202] Smith, *supra* note 199, at 767.

[203] *Id.* The statute at issue allowed qualified voters serving in the military to participate in both state and federal elections regardless of whether the voter is within or without the state. *Id.*; *see also* Zipkin, *supra* note 197, at 359 (stating that the Vermont Supreme Court issued its opinion on the issue after the governor asked the court for an opinion on the constitutionality of the state's soldier voting law).

[204] Smith, *supra* note 199, at 767.

[205] *See id.* (stating that the Vermont Constitution is "'entirely silent upon the subject' of federal elections, and had 'never been understood by [the] legislature as affect[ing]' them" (alteration in original) (footnote omitted)); Zipkin, *supra* note 197, at 359 (same).

[206] *See* Zipkin, *supra* note 197, at 359 (noting that the Vermont Supreme Court might be the first court to articulate the idea that state legislatures possess unconstrained discretion to direct the manner of presidential elections).

[207] *See* 146 U.S. 1, 24–26 (1892) (quoting U.S. CONST. art. II, § 1, cl. 2) (discussing the meaning and scope of Article II, Section 1 in regard to legislative authority to control the manner of selecting presidential electors).

[208] *Id.* at 24, 42. The Michigan statute specified that an elector and an alternate elector shall be chosen in each of the state's twelve congressional districts. *Id.* at 24 Additionally, an elector and alternative elector at large shall be chosen in each of the districts. *Id.* The two districts as defined in the Act include the eastern electoral district, formed by consolidating the first, second, sixth, seventh, eighth, and tenth congressional districts, and the western electoral district, formed by consolidating third, fourth, fifth, ninth, eleventh, and twelfth congressional districts. *Id.* at 5.

state legislatures the "plenary authority" to determine the method for selecting presidential electors.[209]

Two recent Supreme Court decisions also touched upon state legislatures' authority to select the manner of choosing state electors—*Bush v. Gore*, decided in 2000, and *Chiafalo v. Washington*, decided in 2020.[210] In *Bush*, the Supreme Court reversed a ruling from the Florida Supreme Court requiring a manual recount of votes not counted by voting machines during the 2000 presidential election in Florida.[211] The Court held that the Florida Supreme Court's ruling violated the Equal Protection Clause of the Fourteenth Amendment because the Florida Court failed to provide a uniform standard for recounting the ballots.[212] Notably, the concurring opinion by Chief Justice William Rehnquist,

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[209] *Id.* at 25; *see also* Festa, *supra* note 42, at 2127 (stating that *McPherson* was a landmark case that recognized states' absolute authority to decide the manner of choosing presidential electors).

[210] Chiafalo v. Washington, 140 S. Ct. 2316, 2324 (2020); Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

[211] *Bush*, 531 U.S. at 110. On November 8, 2000, the Florida Division of Elections reported the total vote tally, giving President George W. Bush a victory over his Democratic rival, Vice President Al Gore. *See generally* CHEMERINSKY, *supra* note 17, § 10.8, at 929 (describing the events leading up to *Bush v. Gore*). Because the difference between Bush and Gore was less than 1.2%, Al Gore immediately requested a machine recount, as Florida law entitled him to do, in four counties. *Id.* The recount narrowed Bush's lead to about 327 votes. *Id.* Gore then requested a recount by hand in those counties. *Id.* During this time, the Florida Secretary of State refused to extend the filing deadline for county vote totals beyond November 14th. *Id.* The Florida Supreme Court, however, extended the deadline to November 26th. *Id.* at 929–30. On appeal, the U.S. Supreme Court vacated and remanded the Florida Supreme Court's extension after finding that the Florida court based its decision on uncertain legal ground. *Bush*, 531 U.S. at 101. The Florida Supreme Court once again restated the date on remand. *Id.* On November 26th, the Florida Elections Canvassing Commission certified the election results and affirmed Bush's victory. *Id.* Gore contested the decision, challenging the Nassau County and Palm Beach County Canvassing Board's determination that 3,300 votes cast in the election were not legal votes, and Miami-Dade's failure to conduct a manual recount of 9,000 votes. *Id.* at 101–02. On appeal, the Florida Supreme Court affirmed the lower court's ruling that the noncounting of the 3,300 was valid but ruled in Gore's favor and ordered the manual recount of the 9,000 votes. *Id.* at 102. Additionally, the court also identified 215 votes from Palm Beach County and 168 votes from Miami-Dade County from the earlier manual recount and ordered that these votes be included in Gore's total vote tally. *Id.* at 102–03. Moreover, the court also ordered the manual recount of all undervotes in other Florida counties. *Id.* at 100.

Bush and his running mate Dick Cheney filed an emergency application with the U.S. Supreme Court seeking to stop this order. *Id.* They argued that the Florida Supreme Court's order created a new standard for resolving electoral contests for the presidential election, thus violating Article II, Section 1 of the Constitution. *Id.* at 103. They also alleged that the Florida Supreme Court's failure to promulgate a standard for recount violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* It should be noted that the Supreme Court stated in *Bush* that its opinion was "limited to the present circumstances." *Id.* at 109. Thus, some commentators have suggested that the Court meant to limit the precedential value of the opinion. *See, e.g.*, Chad Flanders, *Please Don't Cite This Case! The Precedential Value of* Bush v. Gore, 116 YALE L.J. POCKET PART 141 (2006), http://yalelawjournal.org/forum/please-dona8217t-cite-this-case-the-precedential-value-of-bush-v-gore [https://perma.cc/23SX-ESGM] (noting that the Supreme Court's use of limiting language suggests that the Court intended to nullify the opinion's holding).

[212] *Bush*, 531 U.S. at 110.

joined by Justices Antonin Scalia and Clarence Thomas, touched on whether the Florida Supreme Court's action violated Article II, Section 1 of the Constitution.[213] In his opinion, Chief Justice Rehnquist first acknowledged that the Court typically defers to state court interpretations of state laws.[214] Chief Justice Rehnquist also stated, however, that the Court will not exercise such deference where the Constitution has delegated power to a specific branch of state government.[215] Because Article II, Section 1 of the Constitution gives state legislatures the authority to choose the manner of selecting presidential electors, Chief Justice Rehnquist reasoned that the text of Florida's voting law was more significant to the Florida Supreme Court's analysis than the state court's interpretation of it.[216] Like the Vermont Supreme Court in its 1864 advisory opinion, the concurring opinion in *Bush* acknowledged the legislature's supreme role in regulating elections under Article II, one that ranks above the Florida Supreme Court's nominal role as interpreter of Florida law.[217]

In *Chiafalo*, the Supreme Court considered whether states could enforce penalties against presidential electors who failed to vote for the candidate they had pledged to vote for, who are known as faithless electors.[218] The plaintiffs, a group of Democrat electors from the state of Washington who pledged to vote for Hillary Clinton, argued that Washington's faithless electors law would violate the Constitution, which the plaintiffs argued gives presidential electors discretion to vote however they like.[219] The Court rejected this argument and

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[213] *See generally id.* at 112–22 (Rehnquist, C.J., concurring) (explaining how the Florida Supreme Court's action contravened Article II, Section 1).

[214] *Id.* at 112.

[215] *Id.*

[216] *Id.* at 112–13. The opinion reasoned that the Florida election statute set strict deadlines and gave the Secretary of State discretion to decide whether to accept or reject late tallies of votes past the deadline. *Id.* at 118. By requiring the inclusion of late vote tallies, the Florida Supreme Court rendered pointless the statutory deadline and the Secretary of State's discretion pointless. *Id.* Moreover, the opinion noted that a reasonable reading of the Florida statute does not allow for the counting of improperly marked votes. *Id.* at 119. The Florida Court's reading of the statute as requiring the counting of all votes, even improperly marked ones, contradicted the plain words of the statutory text. *Id.*

[217] *See id.* at 112 (refusing to defer to the judgment of the Florida Supreme Court's interpretation of Florida law because Article II, Section 1 gives the law itself value independent from the court's interpretation of it); *supra* notes 202–206 and accompanying text (discussing the Vermont Supreme Court's opinion regarding its state legislature's authority to regulate federal elections).

[218] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020). Prior to the presidential election, Washington required political parties to nominate a slate of electors. *Id.* at 2322. On election day, the slate of electors from the winning party will be appointed to vote in the Electoral College. *Id.* Each elector must pledge, before their appointment, to vote for the presidential and vice-presidential candidate of the party that nominated them. *Id.* Failure to comply with this pledge leads to a civil sanction of up to $1,000. *Id.*

[219] *Id.* at 2322. In the 2016 presidential election, voters in Washington state voted for Hillary Clinton over Donald Trump. *Id.* at 2322. The state appointed the plaintiffs as electors, and they pledged to vote for Hillary Clinton in the Electoral College. *Id.* The plaintiffs, however, cast their votes for Colin Powell, hoping that they could convince electors from states where President Trump won to vote for someone else. *Id.*

affirmed that Washington could enforce penalties against faithless electors.[220] In so holding, the Court reaffirmed that Article II, Section 1 gives state legislatures broad authority in choosing presidential electors.[221] Inherent in this power, the Court reasoned, is the authority to impose conditions on the electors, including the power to take away the electors' voting discretion.[222]

B. The Fourteenth Amendment as a Restraint on State Legislatures' Authority Under Article II

Since the Supreme Court's decision in *Baker v. Carr* in 1962, the Court has consistently intervened when state legislatures restricted the voting right of their citizens.[223] In issuing these opinions, the Court has acknowledged time and again that state legislatures have full authority to choose how they want to select presidential elects.[224] Yet, once a state has conferred a right to vote for president to its citizens it becomes fundamental and falls under the protections of the Fourteenth Amendment.[225] Subsection 1 discusses the restraint imposed by the Equal Protection Clause and its limitations in cases where a state legislature enacts a uniformly applicable voting restriction.[226] Subsection 2 considers the Due Process Clause and explains how it can be an important restraint where Equal Protection is unavailing.[227]

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[220] *Id.* at 2323.

[221] *Id.* at 2324.

[222] *Id.* The Court gave some examples of these conditions, including requiring the elector to live in the state where he or she casts his or her vote or requiring that an elector pledge to cast the ballot for his or her party's presidential candidate. *Id.*

[223] *See* Baker v. Carr, 369 U.S. 186, 237 (1962) (expressing that federal courts have jurisdiction to review voting regulations); Festa, *supra* note 42, at 2134 (describing the Supreme Court's increased intervention in voting rights cases); Tolson, *supra* note 141, 165–66 (explaining that in the 1960s and 1970s, the Supreme Court began to invalidate more restrictive voting laws).

[224] *See Chiafalo*, 140 S. Ct. at 2324 (affirming that the Constitution gives state legislatures broad authority to determine the manner of selecting presidential electors); Bush v. Gore, 531 U.S. 98, 104 (2000) (Rehnquist, C.J., concurring) (per curiam) (explaining that the Constitution provides state legislatures with the plenary authority to choose how they want to select presidential electors).

[225] *See Bush*, 531 U.S. at 104 (majority opinion) (per curiam) (expressing that once state legislatures give people the right to vote, that right becomes a fundamental right); Williams v. Rhodes, 393 U.S. 23, 29 (1968) (emphasizing that other provisions of the Constitution restrains states' extensive authority to regulate presidential elections); Festa, *supra* note 42, at 2135 (same); Tolson, *supra* note 141, at 169 (stating that the Court will carefully scrutinize state laws that affect voters' right to participate in presidential elections once a state grant its citizens such a right).

[226] *See infra* notes 228–238 and accompanying text.

[227] *See infra* notes 239–248 and accompanying text.

1. Equal Protection and its Limitations

The Supreme Court has primarily intervened through the mechanism of the Equal Protection Clause.[228] The Equal Protection Clause prohibits states from treating two groups of similarly situated people differently without justification.[229] In the voting rights context, the Supreme Court eventually developed the *Anderson-Burdick* test to analyze voting rights challenges under the Equal Protection Clause.[230] Under the test, federal courts examine whether voting restrictions treat similarly situated voters differently by balancing the interests of the voter against the state interests allegedly advanced by the restriction.[231] Because the Court must balance the interests of the voters, it will strictly scrutinize voting regulations that pose a substantial burden on the rights of voters.[232]

Although the Equal Protection Clause is a powerful tool for both the Supreme Court and lower federal courts to examine restrictive voting laws, the reach of the clause is limited.[233] As a threshold matter, an Equal Protection challenge to a voting law requires the plaintiff to show that one class of voters

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[228] *See* U.S. CONST. amend. XIV, § 1 (expressing that states cannot deny anyone within it equal protection under the law); Gaughan, *supra* note 161, at 511 (observing that most plaintiffs who challenged restrictions on voting rights have relied on the Equal Protection Clause of the Fourteenth Amendment); Tolson, *supra* note 141, at 161 (stating that the Equal Protection framework has dominated the way courts assessed voting regulations).

[229] *See* U.S. CONST. amend. XIV, § 1 (prohibiting states from denying equal treatments to its citizens); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)) (stating that under the Equal Protection Clause, states must treat similarly situated citizens alike). The Equal Protection Clause does not require that groups of similarly situated people must be identical in every way. *See* Natasha L. Carroll-Ferrary, Note, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated,"* 51 N.Y.L. SCH. L. REV. 595, 596 (2006) (stating that similarly situated groups of people only need to share common traits that entitle them to similar treatment). Rather, groups of people can be similarly situated for Equal Protection purposes if they are similar in ways relevant to the challenged government action. Mun. Revenue Servs., Inc. v. McBlain, 347 F. App'x 817, 825 (3d Cir. 2009) (quoting Startzell v. City of Philadelphia, 533 F.3d 183, 203 (3d Cir. 2008)) (articulating that two groups of people are similarly situated under the Equal Protection Clause if their similarities are relevant to the case); Klinger v. Dep't of Corr., 31 F.3d 727, 732 (8th Cir. 1994) (inquiring whether plaintiff is similarly situated to another group of individuals in ways relevant to the regulation challenged).

[230] *See* Foley, *supra* note 146, at 674 (explaining that over time the Supreme Court developed the *Anderson-Burdick* test to analyze voting rights claims under the Equal Protection Clause); *supra* notes 148–157 and accompanying text (discussing the *Anderson* and *Burdick* cases in more depth).

[231] *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (requiring that courts balance the plaintiff's constitutional injury with the state's interest that the regulation would advance); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (noting that a court may determine the constitutionality of a voting regulation by balancing the extent of the individual's injury and the state's interests).

[232] *See Burdick*, 504 U.S. at 434 (stating that if a voting regulation cannot be broader than necessary to advance the state's compelling interest); *see also* Foley, *supra* note 146, at 675 (observing that that the court will strictly scrutinize a voting regulation that poses a substantial burden on voters).

[233] *See infra* notes 234–235 and accompanying text (detailing the limitations of the Equal Protection Clause).

is treated differently from another similarly situated class of voters.[234] If a state legislature passes a voting restriction that applies uniformly to all voters, then an Equal Protection challenge is less likely to prevail.[235]

For example, in his concurrence in *Crawford v. Marion County Election Board*, decided in 2008, Justice Scalia agreed with the Supreme Court's decision to uphold Indiana's voter ID requirement against an Equal Protection challenge.[236] Justice Scalia observed that the voter ID requirement did not violate the Equal Protection Clause because it was a generally applicable law that the state imposed on all voters.[237] Although he acknowledged that some voters, such as the elderly or the homeless, were burdened by the law, Justice Scalia concluded that without a showing that the law discriminated against certain voters, Equal Protection was unavailable.[238]

2. The Promise of Due Process

The Due Process Clause, unlike the Equal Protection Clause, applies even when the state enacts and applies the law uniformly because the clause focuses on whether the state deprives a right with sufficient justification, rather than whether the state treats all citizens equally.[239] The Due Process Clause protects citizens from state deprivation of a fundamental right without justification.[240]

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[234] *See* Keevan v. Smith, 100 F.3d 644, 648 (8th Cir. 1996) (requiring plaintiffs to prove, as a threshold, that they were treated differently compared to other similarly situated individuals); *Klinger*, 31 F.3d at 731 (articulating that an Equal Protection analysis requires a plaintiff to first demonstrate that they were treated differently from other similarly situated groups).

[235] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 206 (2008) (Scalia, J., concurring) (emphasizing that the state applied the voter ID law generally without differentiating any voters).

[236] *Id.* at 204. In *Crawford*, the plaintiffs challenged an Indiana voter ID requirement enacted by Indiana. *Id.* at 185 (majority opinion). The plaintiffs challenged the law under the Fourteenth Amendment and alleged that the law burdened several groups of voters, including the elderly, the homeless, and people "with a religious objection to being photographed." *Id.* at 186–89, 199. The Court applied the *Anderson-Burdick* test to find that the state's interests in preventing election fraud, election modernization, and preserving voter confidence, were sufficiently compelling to justify the law. *Id.* at 191. Although the Court acknowledged that some voters might be burdened by the law, the Court held that the plaintiffs did not provide enough evidence to show that the burdens were so excessive that they should outweigh the state's interests. *Id.* at 202–03. Thus, on balance, given the state's compelling interests and the fact that the laws did not excessively burden the impacted voters, the Court held that the law did not violate the Fourteenth Amendment. *Id.* at 203.

[237] *See id.* at 206 (Scalia, J., concurring) (establishing that ordinary burden on voters that the state imposes on everyone would not constitute a constitutionally excessive burden).

[238] *See id.* at 207 (emphasizing that a voter who seeks to challenge a voting law has no valid claim under the Equal Protection Clause if the legislature did not act with discriminatory intent).

[239] *See* CHEMERINSKY, *supra* note 17, § 10.1, at 827–28 (explaining that Due Process is a better ground to sue when a law deprives a fundamental right to everyone, but Equal Protection might be more applicable if the law denies the right to only a select group of citizens).

[240] *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (articulating that the Due Process Clause protects rights that are fundamental from government interference); Maehr v. U.S. Dep't of State, 5 F.4th 1100, 1117 (10th Cir. 2021) (explaining that a court examining a substantive due process claim must first determine whether the right at stake is fundamental); *see also* Powers v. Harris,

Where a state interferes or deprives its citizens of a fundamental right, federal courts will strictly scrutinize the state's action, requiring not only that the state has a compelling interest, but that it narrowly tailored its action to advance said interest.[241]

Because the Due Process Clause does not require a showing of differential treatment between similarly situated groups, it can be a constitutional safeguard against voting restrictions with uniform applicability.[242] In *Griffin v. Burns*, decided by the First Circuit in 1978, and *Roe v. Alabama* ex rel. *Evans*, decided by the Eleventh Circuit in 1995, neither of the defendant states, Rhode Island and Alabama, treated similarly situated groups of voters differently.[243] Rather, both states tossed out the disputed ballots because the ballots did not comply with certain requirements that the state imposed on all voters.[244] As such, instead of relying on the Equal Protection Clause, both courts analyzed the facts under the Due Process Clause, looking particularly at whether the state acted in ways that were patently unfair.[245] For both courts, state actions

379 F.3d 1208, 1215 (10th Cir. 2004) (emphasizing that the Equal Protection Clause only applies when the government treats two groups of people differently); Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the "Equalerty" of the Substantive Due Process Clause*, 12 J.L. & SOC. CHALLENGES 220, 239 (2010) (observing that the Due Process Clause provides protection where the Equal Protection Clause cannot reach).

[241] *See* Roe v. Wade, 410 U.S. 113, 155–56 (1973) (requiring Texas to demonstrate that its criminalization of abortion was supported by a compelling interest and was narrowly tailored to support that interest); Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780, 782 (9th Cir. 2014) (stating that an Arizona law prohibiting bail for all criminal inmates who were undocumented immigrants violated the inmates' substantive due process rights because it was not narrowly tailored to support the state's compelling interest); United States v. Brandon, 158 F.3d 947, 957 (6th Cir. 1998) (explaining that because the right to bodily autonomy is important, the government's desire to medicate a pre-trial detainee against his will must be strictly scrutinized).

[242] *See Glucksberg*, 521 U.S. at 720 (describing the Due Process Clause as protective of fundamental rights from government restrictions); *Powers*, 379 F.3d. at 1215 (stating that the Equal Protection analysis requires plaintiff to show that the government treats two similar groups of people differently); *see also* CHEMERINSKY, *supra* note 17, § 7.1, at 570 (explaining that the substantive due process doctrine inquires into whether the government adequately justified government measures that interfered with a citizen's life, liberty, and property).

[243] *See* Roe v. Alabama *ex rel.* Evans, 43 F.3d 574, 578 (11th Cir. 1995) (per curiam) (stating that Alabama tossed out over a thousand mail-in votes for failure to follow the state's mail-in voting requirements); Griffin v. Burns, 570 F.2d 1065, 1068, 1078 (1st Cir. 1978) (describing the Rhode Island Supreme Court's decision to invalidate one hundred votes by mail for violating the state's voting law).

[244] *See Alabama* ex rel. *Evans*, 43 F.3d at 578 (describing Alabama's decision to invalidate the disputed absentee ballots for failing to complete the state's affidavit requirement); *Griffin*, 570 F.2d at 1068 (recounting the Rhode Island Supreme Court's decision to invalidate over one hundred absentee ballots because the court concluded that there was no legal authority to allow voters to cast absentee votes during a primary election).

[245] *See Alabama* ex rel. *Evans*, 43 F.3d at 580–81 (examining whether the state's decision to count votes that did not satisfy the mail-in voting requirements was fair); *Griffin*, 570 F.2d at 1078 (stating that the electoral process violates the Due Process Clause if it fails to afford fundamental fairness for voters).

that retroactively affects voters' rights after an election has taken place violates the Due Process Clause because those actions are fundamentally unfair.[246]

It is important to note that neither court considered the elements of strict scrutiny under substantive due process, namely the compelling interest and narrowly tailored elements.[247] Their willingness to rely on the Due Process Clause, however, illustrates that federal courts might be open to applying the clause to protect the interests of voters.[248]

III. Post-Election Direct Appointment of Presidential Electors Would Violate the Due Process Rights of Voters

As discussed, the Constitution grants state legislatures plenary authority to regulate presidential elections under Article II, Section 1.[249] Nevertheless, this authority is not unlimited.[250] State legislatures, in the exercise of this authority, might not be bound by either their state's constitution or state supreme court decisions.[251] Yet, state legislatures cannot exercise their Article II, Section 1 authority in ways that violate by other provisions of the Constitution.[252]

Although the Constitution does not guarantee a right to vote in presidential elections, once a state legislature confers to its population that right, it be-

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[246] *See Alabama* ex rel. *Evans*, 43 F.3d at 581 (concluding that allowing the state to count votes that did not meet the mail-in voting requirements would be fundamentally unfair); *Griffin*, 570 F.2d at 1076–78 (holding that the state court's invalidation of mail-in ballots was fundamentally unfair and therefore violated the Due Process Clause).

[247] *See Alabama* ex rel. *Evans*, 43 F.3d at 580–81 (looking only at whether the state's decision was fair); *Griffin*, 570 F.2d at 1078 (stating, without elaborating further, that government action can violates voters' due process if it is unfair).

[248] *See* Wallace, *supra* note 25, at 655 (explaining that the Supreme Court has never applied the Due Process Clause to examine voting challenges). *But see Alabama* ex rel. *Evans*, 43 F.3d at 580–81 (invalidating the counting of votes that did not satisfy the requirements of the state voting laws under the Due Process Clause); *Griffin*, 570 F.2d at 1076–78 (stating that the invalidation of mail-in ballots after a primary election violated the Due Process Clause).

[249] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2324 (2020) (affirming that "Article II, § 1 . . . gives the States far-reaching authority over [the appointment of] presidential electors"); Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (noting that individuals do not have a right to vote in presidential elections unless state legislatures give them that ability); McPherson v. Blacker, 146 U.S. 1, 25 (1892) (stating that the legislature has "plenary authority" to decide the manner with which to select presidential electors).

[250] Williams v. Rhodes, 393 U.S. 23, 29 (1968) (expressing that a state's authority to regulate presidential elections does not give it immunity from the constraints of other constitutional provisions); Festa, *supra* note 42, at 2135 (same); Tolson, *supra* note 141, at 169 (articulating that the Court will subject state regulations that interfere with voters' rights under strict scrutiny).

[251] *See Bush*, 531 U.S. at 112–13 (Rehnquist, C.J., concurring) (emphasizing that state legislation, under Article II, Section 1, has "independent significance" and that federal courts do not have to defer to state courts' interpretation of the law as final); Zipkin, *supra* note 197, at 359 (describing the Vermont Supreme Court's conclusion the Vermont Constitution does not bind state laws concerning presidential and congressional elections).

[252] *See Rhodes*, 393 U.S. at 29 (noting that the states' authority to regulate presidential elections are subject to other constitutional limits).

comes a fundamental right and is protectable under the Fourteenth Amendment.[253] A right is fundamental if it is deeply rooted in the nation's history, and is so essential that without it neither liberty nor justice would exist.[254] The right to vote is a fundamental right.[255] As a right that has long been recognized both in the text of the Constitution and Supreme Court case law, the right to vote is deeply rooted in the nation's history.[256] Moreover, as a means through which citizens can select their leaders and hold them accountable, voting rights are absolutely essential to the preservation of liberty and justice.[257]

Because voting is a fundamental right, federal courts will strictly scrutinize any actions by a state that interferes with the right to vote.[258] When reviewing a state action that restricts the right to vote, courts are not limited only to the right to cast a ballot.[259] Rather, the right to vote is expansive, and includes the right to have one's vote counted fairly.[260] Post-election changes to voting rules could qualify as an infringement on voting rights, and thus a Fourteenth Amendment violation, because they could unfairly affect the way votes

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[253] *See Bush*, 531 U.S. at 104 (stating that once the state legislature grants people the right to vote for President, the right becomes fundamental); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (emphasizing that no other right is more important than the right to vote); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (identifying the right to vote as a right that preserves other civil rights).

[254] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (holding that the Due Process Clause of the Fourteenth Amendment protects rights that are deeply rooted in the nation's history and is "implicit in the concept of ordered liberty" (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)).

[255] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (citing *Yick Wo*, 118 U.S. at 370) (emphasizing that the Supreme Court has long recognized that the right to vote is a fundamental right).

[256] *See* U.S. CONST. amend. XIV (prohibiting restrictions on voting based on race); *id.* amend. XIX (prohibiting state or federal interference with voting rights based on gender); *id.* amend. XXIV (banning the use of a poll tax); *id.* amend. XXVI (expressing that neither state nor federal governments can prevent any voters who are at least eighteen years old from voting because of their age); Reynolds v. Sims, 377 U.S. 533, 555 (1964) (explaining that the right to vote is essential to a functioning democratic society); *Yick Wo*, 118 U.S. at 370 (describing the right to vote as a fundamental right because it safeguards other civil rights).

[257] *See* CHEMERINSKY, *supra* note 17, § 10.8, at 908–09 (stating that the right to vote is fundamental because it gives the people the right to select their government and hold them accountable, which is an essential feature in democratic societies).

[258] *See Bush*, 531 U.S. at 105–06 (holding that the recount mechanism ordered by the Florida Supreme Court failed to satisfy the requirements of the Equal Protection Clause); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (considering the plaintiff's voting right claim under the First and Fourteenth Amendments); Griffin v. Burns, 570 F.2d 1065, 1077–78 (1st Cir. 1978) (invalidating a judicial order infringing on voting rights under the Due Process Clause).

[259] *See Reynolds*, 377 U.S. at 554–55 (noting that the right to vote includes more than the "right to put a ballot in a box" (quoting United States v. Mosley, 238 U.S. 383, 386 (1915)); Sarah Milkovich, Note, *Electoral Due Process*, 68 DUKE L.J. 595, 613 (2018) (stating that the right to vote includes the right to cast a ballot, the right to have one's vote unaltered or undestroyed, the right for one's vote to be counted, and the right for one's vote to not be diluted).

[260] *See Reynolds*, 377 U.S. at 554 (citing *Mosley*, 238 U.S. at 386) (stating that the right to vote includes the right to have one's vote counted).

are counted.[261] The Supreme Court has invalidated such laws before, specifically in *Bush v. Gore* in 2000, where judicial order allowing for inconsistent recount procedures following the presidential election violated the Equal Protection Clause.[262] Likewise, the First and Eleventh Circuits have used the Due Process Clause to invalidate post-election judicial orders that changed the ways votes were counted.[263] Not only do courts have the power to intervene, but also they have shown a willingness to do so under both the Equal Protection and Due Process Clauses.[264]

If a Republican-led state legislature had relented under pressure from President Trump and directly appointed pro-Trump presidential electors in contradiction of state election results, these states would have invalidated the votes of millions of citizens.[265] Such an impact on the counting of the votes—or lack thereof—would infringe on voters' fundamental right to vote.[266] Consequently, that state's decision would be subject to Fourteenth Amendment

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[261] *See* U.S. CONST. amend. XIV, § 1 (forbidding states from depriving their citizens of life, liberty, and property without due process, and from denying people within its jurisdiction equal protection of law); *Bush*, 531 U.S. at 105, 110 (ordering a vote recount to stop after holding that the recount process failed to satisfy the requirements of the Equal Protection Clause); Roe v. Alabama *ex rel.* Evans, 43 F.3d 574, 583 (11th Cir. 1995) (per curiam) (requiring the state to stop counting ballots that did not satisfy the state's signature rule after finding that counting those ballots would violate the Due Process Clause); *Griffin*, 570 F.2d at 1077–78 (affirming the district court's judgment after concluding that the state supreme court's invalidation of votes violated the Due Process Clause).

[262] 531 U.S. at 105, 110. The Supreme Court invalidated the Florida Supreme Court's order because the order did not impose a uniform standard for recount. *Id.* at 105–06. The Court held that the lack of uniform standards meant that each county could conduct its recount differently, thus leading to unequal treatment of votes. *Id.* at 106.

[263] *Alabama* ex rel. *Evans*, 43 F.3d at 583; *Griffin*, 570 F.2d at 1077–78.

[264] *See, e.g.*, *Bush*, 531 U.S. at 110 (invalidating the Florida Supreme Court's order to recount ballots in the 2000 presidential election for violating the Equal Protection Clause of the Fourteenth Amendment); *Griffin*, 570 F.2d at 1068, 1078 (affirming the district court's order requiring Rhode Island to count absentee ballots and holding that post-electoral changes that affect the votes already cast violates the Due Process Clause of the Fourteenth Amendment).

[265] *See* Gellman, *supra* note 1 (discussing the Trump campaign's plan to convince state legislatures to invalidate the election results through direct appointment of electors); Michael McDonald, *2020 General Election Early Vote Statistics*, U.S. ELECTIONS PROJECT, https://electproject.github.io/Early-Vote-2020G/index.html [https://perma.cc/9X9C-SXDD] (Nov. 23, 2020) (providing the total early votes cast in the 2020 General Election). In Georgia, for example, over four million people voted early in the election. *Id.* In Pennsylvania, close to three million voters cast their ballots early. *Id. See generally* James M. Lindsay, *The 2020 Election by the Numbers*, COUNCIL ON FOREIGN RELS. (Dec. 15, 2020), https://www.cfr.org/blog/2020-election-numbers [https://perma.cc/2FF7-NL4K] (breaking down the 2020 election data and providing a big picture view of interesting developments in the election).

[266] *See Reynolds*, 377 U.S. at 554 (stating that the right to vote includes the right to have one's vote counted); Milkovich, *supra* note 259, at 595 (same); *see also* Tolson, *supra* note 141, at 160–61 (emphasizing that the Supreme Court recognized the right to vote in federal elections as a fundamental right).

challenges.[267] Although these challenges were traditionally made under the Equal Protection Clause, it would not be applicable in this case.[268] To succeed in an Equal Protection challenge, the plaintiffs will have to show that the state has treated them differently from other voters.[269] When a state action affects every voter in the state equally, the plaintiff will not have a basis on which to challenge the action under the Equal Protection Clause.[270] When a state acts to ignore the popular vote to directly appoint electors, it ignores the votes of *all* voters, and the Equal Protection Clause cannot be a remedy.[271]

The Due Process Clause, therefore, would be the only constitutional safeguard against such an action, because it does not require a showing that one group of voters is treated differently from others.[272] Rather, a due process challenge only looks to whether the state has an adequate justification to infringe on the fundamental right.[273] State disregard of the popular vote in the 2020 presidential election would have triggered a due process analysis because all states have given their citizens the right to a popular vote in presidential election, making the right to vote fundamental.[274] Further, unless a state could have

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[267] *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (considering the plaintiff's voting right claim under the First and the Fourteenth Amendment); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (reviewing a state's election law under the Equal Protection Clause).

[268] *See* Gaughan, *supra* note 161, at 511 (noting that most plaintiffs have challenged voter regulations under the Equal Protection Clause since the 1960s); Tolson, *supra* note 141, at 161 (stating that the Equal Protection framework has dominated how courts assess laws governing voting).

[269] *See* CHEMERINSKY, *supra* note 17, § 9.1.2, at 697 (explaining that an Equal Protection analysis inquires whether the government has sufficient justification to distinguish among different groups of people); Foley, *supra* note 146, at 683–84 (stating that an Equal Protection challenge requires a showing that the state subjected one group of voters to dissimilar treatment).

[270] *See* Foley, *supra* note 146, at 685 (observing that the Equal Protection Clause cannot be invoked where a state treats all voters alike).

[271] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 206 (2008) (Scalia, J., concurring) (contending that a voting law that affects all voters generally should not be analyzed under the Equal Protection Clause); Keevan v. Smith, 100 F.3d 644, 648 (8th Cir. 1996) (holding that plaintiffs who wish to invoke the Equal Protection Clause must show that they are subject to differential treatment); Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994) (stating that the Equal Protection Clause imposes a requirement on the plaintiff demonstrate they were treated differently from other groups).

[272] *See* Foley, *supra* note 146, at 656 (suggesting that the Due Process Clause might provide an alternative to an Equal Protection analysis in election challenges).

[273] *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (requiring that a regulation that infringes on a fundamental right must be narrowly tailored to further only a compelling state interest); Hart, *supra* note 99, at II.-218 (stating that courts will review violations of fundamental interests under the strict scrutiny standard, requiring the state to justify its action by showing that it is "narrowly tailored to serve a compelling state interest" (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)); *see also* Foley, *supra* note 146, at 656 (noting that the Due Process Clause provides an alternative analytical framework to the Equal Protection Clause).

[274] *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (reasoning that when a state legislature grants its citizens the right to participate and vote in presidential elections, that right is protected under the Fourteenth Amendment); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (emphasizing that no other right is more important than the right to vote); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (expressing that the right to vote is an important means to protect other civil liberties); Hart, *supra*

shown that the action was narrowly tailored to further a compelling government interest, a state legislature's decision to ignore the voters' will and directly appoint pro-Trump electors would have violated the Due Process Clause.[275]

If voters challenged such an action, the state would have first demonstrated that it had a compelling government interest in bypassing the voters' will.[276] As predicted by Barton Gellman in *The Election That Could Break America*, pro-Trump state legislatures perpetrated misinformation that the election was fraudulent.[277] A state legislature likely would have justified their direct appointment of pro-Trump electors with a compelling government interest in preserving the integrity of the electoral system, and the desire to protect the system from election fraud.[278] The Supreme Court has consistently held that states have a compelling interest in protecting their election system from fraud.[279] Thus, the state would have likely satisfied its first burden to prove that its action is supported by a compelling government interest.[280]

But it is not enough for the state to show that its action is supported by a compelling government interest.[281] States also have the burden to show that a

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note 99, at II.-218 (stating that courts will review infringement of fundamental rights under the strict scrutiny standard).

[275] *See* Burson v. Freeman, 504 U.S. 191, 199 (1992) (stating under strict scrutiny, the state must show that it has narrowly tailored a regulation to achieve a compelling state interest); *Roe*, 410 U.S. at 155 (same).

[276] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 786 (1978) (citing Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)) (articulating that the state must first justify that its regulation serves a compelling state interest); Fallon, *supra* note 99, at 1321–22 (listing the "compelling interests" as being the first element in a substantive due process analysis).

[277] Gellman, *supra* note 1; *see also* John Haughey, *DeSantis Calls on GOP-Led States Where Biden Won Contested Vote to Send "Faithless Electors" to Electoral College*, CTR. SQUARE (Nov. 6, 2020), https://www.thecentersquare.com/florida/desantis-calls-on-gop-led-states-where-biden-won-contested-vote-to-send-faithless-electors/article_f054001a-207a-11eb-a116-b7b568f82c76.html [https://perma.cc/EUE2-WYWH] (detailing Governor DeSantis's call for Republican-led state legislatures to directly appoint their own electors regardless of the election's result).

[278] *See* Gellman, *supra* note 1 (positing that the state legislature might use fraud as the pretext for directly appointing its own electors).

[279] *See* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (stating that the state has a compelling interest in preventing voter fraud); *Burson*, 504 U.S. at 199 (acknowledging that a state has a compelling interest in preserving the integrity of the election process); *Bellotti*, 433 U.S. at 788–89 (same); Storer v. Brown, 415 U.S. 724, 730 (1974) (recognizing that a fair and honest election requires "substantial regulation").

[280] *See Purcell*, 549 U.S. at 4 (stating that the state has a compelling interest in preventing voter fraud); *see also* Gellman, *supra* note 1 (suggesting that Republican-led state legislatures might argue that direct appointment was necessary to remedy fraud).

[281] *See Burson*, 504 U.S. at 199 (noting that it is not enough for the State to "assert a compelling state interest" to survive strict scrutiny); Hart, *supra* note 99, at II.-218 (stating that courts will review violations of fundamental interests under the strict scrutiny standard, requiring the state to justify its action by showing that it is "narrowly tailored to serve a compelling state interest" (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

measure is narrowly tailored to further that interest.[282] Courts commonly look at the degree to which a government measure is underinclusive or overinclusive to determine whether it is narrowly tailored.[283] A measure is underinclusive if it fails to regulate individuals or activities similar to those subject to the measure.[284] In contrast, a measure is overinclusive if it regulates individuals or activities that would not be necessary to effectuate the compelling government interest.[285]

After the 2020 election, a state legislature would have had trouble showing that its decision to bypass the election results and directly appoint presidential electors was narrowly tailored.[286] Such an action would have been clearly overinclusive.[287] There was no evidence of widespread and systematic fraud in the 2020 presidential election.[288] Indeed, both federal and state officials attested that the election was one of the safest in American history, despite the unprecedented impact of COVID-19.[289] Thus, it is difficult to see how

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[282] *See Burson*, 504 U.S. at 199 (requiring the State to show that its regulation is "necessary to serve the asserted interest"); *Bellotti*, 435 U.S. at 786 (citing Buckley v. Valeo, 424 U.S. 1, 25 (1976)) (stating that the State must "employ means" that are narrowly tailored to support the asserted state interest).

[283] *See* CHEMERINSKY, *supra* note 17, § 9.1, at 701 (noting that the Supreme Court often examines the relationship between an asserted compelling interest and a government measure by focusing on "the degree to which a law is underinclusive and/or overinclusive"); Fallon, *supra* note 99, at 1327–28 (expressing that a narrowly tailored law cannot be either underinclusive or overinclusive).

[284] *See* CHEMERINSKY, *supra* note 17, § 9.1, at 701 (stating that a measure is underinclusive if it is inapplicable to people similarly situated to those subject under the measure); Fallon, *supra* note 99, at 1327 (describing a measure as underinclusive if it does not govern activities that present similar threats to the government's compelling interests as the activities that the measure regulates).

[285] *See* CHEMERINSKY, *supra* note 17, § 9.1, at 702 (stating that a government measure is overinclusive if it regulates individuals who are unnecessary to effectuate a compelling government interest); Fallon, *supra* note 99, at 1328 (noting the Supreme Court's demand that a government measure overinclusive is consistent with its demand that a measure is not underinclusive).

[286] *See infra* notes 286–298 and accompanying text (providing reasons why direct appointment is not narrowly tailored to the state's asserted interest in preserving electoral integrity).

[287] *See* CHEMERINSKY, *supra* note 17, § 9.1, at 702 (stating that if the government regulates individuals who are unnecessary to promote a compelling government interest, then the measure is likely overinclusive).

[288] *See* Nick Corasaniti, Reid J. Epstein & Jim Rutenberg, *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES, https://www.nytimes.com/ 2020/11/10/us/politics/voting-fraud.html [https://perma.cc/2PDN-55RS] (Sept. 23, 2021) (detailing the *New York Times*' communications with state and local officials who reported that there were no evidence of election fraud); Alison Durkee, *"No Evidence" of Election Fraud in Battleground States, Statistical Analysis Finds as Trump Continues False Claims*, FORBES (Feb. 19, 2021), https://www.forbes.com/sites/alisondurkee/2021/02/19/no-evidence-of-election-fraud-in-battleground-states-statistical-analysis-finds-as-trump-continues-false-claims/?sh=5d97e2bb3315 [https://perma.cc/BA87-YX2M] (reporting that an analysis conducted by the MITRE Corporation showed that there were no evidence of election fraud in eight battleground states in the 2020 presidential election).

[289] *See* Emily DeCiccio, *"There Is Absolutely No Merit to Any Claims of Widespread Voter Fraud," Arizona Secretary of State Says*, CNBC, https://www.cnbc.com/ 2020/11/05/there-is-absolutely-no-merit-to-any-claims-of-widespread-voter-fraud-arizona-secretary-of-state-says.html [https://perma.cc/E249-B5AP] (Nov. 5, 2020) (describing Arizona's Secretary of State's refutation of

the small number of actual frauds that occurred could justify invalidating the votes of millions of citizens.[290] Such an action therefore would be overinclusive because it seeks to take away the votes of not only those who had committed fraud, but also of the millions who followed the law and voted legally.[291]

The state may have countered that direct appointment was necessary because of the unprecedented number of mail-in ballots cast in 2020.[292] The state

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claims of widespread voter fraud in her state); Claire Helm, *Georgia SOS Reports No Voter Fraud Discovered with Signature Audit*, WGXA NEWS (Dec. 29, 2020), https://wgxa.tv/news/beyond-the-podium/georgia-sos-reports-no-voter-fraud-discovered-with-signature-audit [https://perma.cc/Y3RX-PKLE] (stating that after a signature audit, Georgia's Secretary of State reported no changes to the election results); Eric Tucker & Frank Bajak, *Repudiating Trump, Officials Say Election "Most Secure,"* ASSOCIATED PRESS (Nov. 13, 2020), https://apnews.com/article/top-officials-elections-most-secure-66f9361084ccbc461e3bbf42861057a5 [https://perma.cc/S4PA-NB42] (reporting that a coalition of state and federal officials repudiated President Trump's claims that the election was fraudulent).

[290] *See* Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/ [https://perma.cc/EHC8-M2X7] (detailing an analysis showing the rarity of incidents of fraudulent voting); David Trilling, *Voter Fraud, Perceptions and Political Spin: Research Roundup*, JOURNALIST'S RES. (Feb. 12, 2017), https://journalistsresource.org/politics-and-government/voter-fraud-perceptions-political-spin/ [https://perma.cc/956C-CWC8] (citing to a study completed by researchers at Arizona State University, that found an alleged 2,068 cases of fraud between 2000 and 2012).

[291] *See* CHEMERINSKY, *supra* note 17, § 9.1, at 702 (stating that a government measure is overinclusive if it regulates individuals "who need not be included" to effectuate a compelling government interest); *see also* Masood Farivar, *How Widespread Is Voter Fraud in the US?*, VOA (Sept. 13, 2020), https://www.voanews.com/2020-usa-votes/how-widespread-voter-fraud-us [https://perma.cc/8CMV-RZ4U] (noting that there is no hard evidence that there is widespread voter fraud).

[292] *See* Hans A. von Spakovsky & Kaitlynn Samalis-Aldrich, *More Examples of Election Fraud Prove the Left Is in Denial About It*, HERITAGE FOUND. (Oct. 15, 2020), https://www.heritage.org/election-integrity/commentary/more-examples-election-fraud-prove-the-left-denial-about-it [https://perma.cc/ADJ9-486B] (suggesting that liberals deliberately ignored evidence of election fraud, including fraudulent mail-in ballots). Because of the COVID-19 pandemic, a significant number of voters voted by mail. *See 3. The Voting Experience in 2020*, PEW RSCH. CTR. (Nov. 20, 2020), https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/ [https://perma.cc/PH6X-HB7T] (noting that roughly about 54% of voters voted in person in November, compared to 46% who voted by mail-in ballots); Elaine Kamarck, Yousef Ibreak, Amanda Powers & Chris Stewart, *Voting by Mail in a Pandemic: A State-by-State Scorecard*, BROOKINGS (Oct., 2020), https://www.brookings.edu/research/voting-by-mail-in-a-pandemic-a-state-by-state-scorecard/ [https://perma.cc/7YE5-EAZS] (describing the COVID-19 pandemic as disruptive of the state electoral process and connecting the pandemic's presence to the need for mail-in voting). Many commentators, including President Trump and other Republican officials, have falsely claimed that increased mail-in voting will lead to wide-spread electoral fraud. *See* Nolan D. McCaskill, *Trump's False Election Fraud Claims Fuel Michigan GOP Meltdown*, POLITICO, https://www.politico.com/news/2021/07/30/michigan-gop-trump-election-fraud-501701 [https://perma.cc/CV4U-CWVJ] (July 30, 2021) (describing several Michigan Republican leaders and activists claiming that the 2020 presidential election was fraudulent); Miles Parks, *Why Is Voting by Mail (Suddenly) Controversial? Here's What You Need to Know*, NPR (June 4, 2020), https://www.npr.org/2020/06/04/864899178/why-is-voting-by-mail-suddenly-controversial-heres-what-you-need-to-know [https://perma.cc/A8A4-QKBB] (detailing allegations made by both President Trump and Republican members of Congress regarding the con-

could have asserted that mail-in ballots are much more susceptible to frauds, and an avalanche of mail-in ballots therefore significantly damaged the integrity of the election as a whole.[293] As such, the state could allege that direct appointment was necessary to ensure that the results of the election reflected the results of the actual, nonfraudulent votes.[294] The merits of the claim regarding mail-in voting aside, even if it were true, the measure would be overinclusive.[295] Although a significant number of voters cast their ballots by mail in 2020, the majority of voters voted in person.[296] Invalidating in-person ballots alongside mail-in ballots would require the state to infringe on the rights of voters who do not pose a threat to the state's asserted interest in electoral integrity.[297] Because a state legislature following the 2020 election would have

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nection between mail-in voting and electoral fraud); J.D. Prose, *GOP State Lawmakers File Lawsuit to Have Mail-In Voting Tossed Out. Who Is Suing*, GOERIE, https://www.goerie.com/story/news/2021/09/03/pa-elections-republicans-mail-in-voting-lawsuit/5715544001/ [https://perma.cc/BE76-R5UF] (Sept. 3, 2021) (reporting that Pennsylvania Republican lawmakers filed a lawsuit to eliminate mail-in voting in Pennsylvania). One important reason why President Trump and Republican state and federal leaders distrusted voting by mail was because of their belief that mail-in voting heavily favored Democrats. *See* Reid J. Epstein & Stephanie Saul, *Does Vote-by-Mail Favor Democrats? No. It's a False Argument by Trump.*, N.Y. TIMES, https://www.nytimes.com/2020/04/10/us/politics/vote-by-mail.html [https://perma.cc/4T9X-5GS2] (Apr. 10, 2020) (reporting on President Trump and several Republican state and federal officials' statements expressing their beliefs that voting by mail heavily disfavors Republicans). There is no evidence, however, that mail-in voting heavily favors Democrats. *See id.* (noting that no expert who has examined the claim that mail-in voting favors Democrats found evidence to support the claim).

[293] *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 735 (2021), *cert. denied*, 209 L. Ed. 2d 172 (2021) (Thomas, J., dissenting) (stating the mail-in voting poses a greater risk for fraud than in-person voting); Petition for Writ of Certiorari at 4, Donald J. Trump for President, Inc. v. Boockvar, No. 20-845 (2021), 2020 WL 7643099, *cert. denied sub nom. Degraffenreid*, 209 L. Ed. 2d 172 (suggesting that mail-in voting is a significant source of voter fraud); *see also* Reality Check Team, *US Election 2020: Do Postal Ballots Lead to Voting Fraud?*, BBC NEWS (Nov. 6, 2020), https://www.bbc.com/news/world-us-canada-53353404 [https://perma.cc/CVW9-GP2C] (detailing President Trump's accusations leading up to the 2020 election that mail-in ballots are fraudulent).

[294] *See* Gellman, *supra* note 1 (noting that the state legislature might use fraud as a pretext for directly appointing its own electors).

[295] *See infra* notes 296–298 and accompanying text (laying out the reasons for why mail-in ballot frauds is not a good reason to justify direct appointment of electors).

[296] *See 3. The Voting Experience in 2020*, *supra* note 292 (reporting that close to half of voters voted by mail in the 2020 presidential election).

[297] *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 121–22 (1991) (noting that a law governing publication of true crime works was overinclusive because it captured works of literature that would not affect the state's goal of ensuring that crime victims received compensation from the fruit of the crime); CHEMERINSKY, *supra* note 17, § 9.1, at 702 (explaining that the government cannot include individuals who do not need to be included in its regulatory scheme if including them would not advance a compelling government interest); Fallon, *supra* note 99, at 1327–28 (identifying underinclusiveness and overinclusiveness as elements of the "narrow[ly] tailor[ed]" inquiry).

failed to satisfy its burden to show that direct appointment was narrowly tailored, the state would have failed the Due Process analysis.[298]

As such, if challenged, a federal court would likely find that the state legislature's decision to bypass the election's results by directly appointing presidential electors is unconstitutional under the Due Process Clause of the Fourteenth Amendment.[299] As demonstrated by the 2021 capital riots, disinformation about the validity of presidential elections is inflammatory, and in future elections may push state legislatures to supplant the popular vote when selecting electoral college members.[300] For this reason, constituents, activist groups, and legislators should look to the Due Process Clause as a protection against such intervention by state legislatures in future presidential elections.[301]

CONCLUSION

Despite a deadly riot at the Capitol that killed five people, Congress, in the early morning of January 7, 2021, certified the election results and officially recognized Joe Biden and Kamala Harris as President and Vice President of the United States. Mr. Gellman's prediction that state legislatures would go rogue, ignore the people's choice for President, and directly appoint presidential electors never materialized. But, as some continue to question the validity of the 2020 presidential election results, state legislatures across the country have introduced new measures to restrict voters' participation. These measures prove that legislative efforts to challenge or bypass election results in future presidential elections are likely to happen. Thus, the use of post-election legislative direct appointment of presidential electors to bypass election results remains a possibility.

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[298] *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (requiring that states justify any infringement on a fundamental right by showing that its action is narrowly tailored to support a compelling state interest); Fallon, *supra* note 99, at 1273 (explaining that the "narrowly tailored" requirement is a component of the strict scrutiny analysis).

[299] *See supra* notes 276–298 and accompanying text (analyzing why a federal court is likely to consider post-election direct appointment of presidential electors unconstitutional under the Due Process Clause of the Fourteenth Amendment).

[300] *See* Bill McCarthy, *Misinformation and the Jan. 6 Insurrection: When 'Patriot Warriors' Were Fed Lies*, POLITIFACT (June 30, 2021), https://www.politifact.com/article/2021/jun/30/misinformation-and-jan-6-insurrection-when-patriot/ [https://perma.cc/WV5A-R259] (investigating how misinformation led Trump supporters to storm the Capitol Building on January 6th); James Oliphant & Chris Kahn, *Half of Republicans Believe False Accounts of Deadly U.S. Capitol Riot—Reuters/Ipsos Poll*, REUTERS, https://www.reuters.com/article/us-usa-politics-disinformation/half-of-republicans-believe-false-accounts-of-deadly-u-s-capitol-riot-reuters-ipsos-poll-idUSKBN2BS0RZ [https://perma.cc/7Z7A-6AH6] (Apr. 5, 2021) (describing how false information continues to influence Trump supporters' view about the insurrection).

[301] *See supra* notes 251–298 and accompanying text (arguing that the Due Process Clause is the most effective constitutional safeguard against direct appointment of electors after an election).

If one or multiple state legislatures were to directly appoint their preferred slate of presidential electors contrary to the results of their elections, lawsuits will make their way to federal courts across the country. Although Article II, Section 1 of the Constitution gives state legislatures full discretion to conduct presidential elections, such discretion is subject to the constraint of other provisions in the Constitution. In particular, the Supreme Court has consistently intervened where states exercise their authority in ways that interfere with voters' rights under the Fourteenth Amendment.

Thus, plaintiffs should bring arguments under the Fourteenth Amendment of the Constitution. The Equal Protection Clause would be unavailable here because it requires a showing that one group of voters has been treated differently, and the disregard of the popular vote impacts all state citizens. The Due Process Clause, however, is an effective means to challenge such action because it only requires a showing that the government interfered with a fundamental right, including the right to vote in presidential elections. In analyzing this claim, federal courts, and likely the Supreme Court itself, will strictly scrutinize the states' action, and states will find it difficult to prove it was narrowly tailored to achieve a compelling government interest.

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