

THE DEAD VOTER RULE

David Horton

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David Horton*

In November 2020, more than 100,000,000 Americans voted before Election Day. Although this surge was a product of the pandemic, early and absentee voting have been rising in popularity for decades. However, this gap between when ballots are cast and when they are counted creates a problem: an increasing number of people vote and then die before the polls open.

The question of whether to count these ballots is unexplored, unsettled, and evolving. Once, most states rejected them under a principle that I call the dead voter rule (DVR). The rationale for the DVR is that (1) absentee ballots are deemed to be “cast” on Election Day and (2) citizens who have died are not qualified to vote at this crucial time. Although several states have eliminated the DVR in recent decades, the doctrine remains the majority approach.

This Article examines the unusual intersection of the “voting wars” and the law of the dead. First, it analyzes whether the DVR violates the U.S. Constitution. It explains that a constitutional challenge to the DVR would raise complex issues about posthumous rights, justiciability, and the degree of scrutiny that governs a doctrine that can either be seen as disenfranchising citizens or closing a loophole that would permit otherwise ineligible voters to cast a ballot. Second, the Article considers the policy justifications for the DVR. It concludes that the principle’s logic—that only the living can vote—is unpersuasive. We do not honor voting instructions in an estate plan because decedents cannot make informed choices and to avoid administrative costs. Yet these concerns do not apply to people who are alive when they fill out their ballots. Thus, the Article urges states to abolish the DVR.

INTRODUCTION

In September 2020, Amber Pflughoeft, who lived in a small Wisconsin town, cast her first vote in a presidential election.¹ Amber, who was twenty, was battling cancer.² But despite being hospitalized, she took her civic duty seriously, studying both major party candidates’ positions and debating her friends on social media.³ As her mother recalled, Amber “wanted to make . . . a difference,” and when she placed her ballot in the mail, she “beamed with pride.”⁴ As doctors and nurses swirled around her, “she was telling [them], ‘I voted.’”⁵ A few days later, she died.⁶

American law and culture usually honor the wishes of the recently departed. For instance, the organizing principle of the field of wills and trusts is testamentary freedom: the idea that “an owner is entitled to dispose of his

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1. See Casey Tolan, *A 20-Year-Old Woman Cast Her Ballot Early Before Dying of Cancer. Her State Will Throw It Out*, CNN (Oct. 31, 2020, 8:15 AM), <https://www.cnn.com/2020/10/31/politics/voter-death-election-count-invs/index.html>.

2. *Id.*

3. *See id.*

4. *Id.*

5. *Id.*

6. *Id.*

property as he pleases in death as in life.”⁷ Thus, if Amber had made an estate plan, a probate court could not have second-guessed her decisions,⁸ and if she had died intestate, Wisconsin law would have distributed her assets in accordance with her “probable intent.”⁹ Similarly, by merely placing a sticker on her driver’s license, Amber could have made a commitment to donate her organs that no one else could override.¹⁰ Finally, friends and family often carry out less formal expressions of a decedent’s desires. For example, burial instructions are usually obeyed even though they are not legally binding.¹¹ Indeed, in Amber’s case, her loved ones did exactly what she wanted: they postponed her funeral to late 2021 to avoid health risks from the pandemic.¹²

Nevertheless, in one important way, Amber’s autonomy ended with her life. Wisconsin is one of several jurisdictions that follow a doctrine that I call the dead voter rule (DVR). Its electoral code provides that if “a person casting an absentee ballot . . . has died before the date of the election, the inspectors or board of absentee ballot canvassers shall return the ballot.”¹³ Thus, although Amber’s vote mattered deeply to her, it did not count.

The DVR is an increasingly important phenomenon. Since the 1970s, the U.S. has been drifting “in the direction of convenience voting and away from the traditional polling place.”¹⁴ Many states carve out generous early in-person

7. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975); see also *In re Estate of Feinberg*, 919 N.E.2d 888, 895 (Ill. 2009) (describing the powerful “public policy in support of testamentary freedom”); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) (“[U]nder a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power.”).

8. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) (“American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property.”).

9. Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 789 (2012); see also WIS. STAT. ANN. § 852.01 cmt. (West 2020) (explaining that the objective of the intestacy statute is “to anticipate the wishes of the people who die having made no testamentary disposition”).

10. See WIS. STAT. ANN. § 157.06(5)(1), (8) (West 2020) (allowing donors to showcase their intent to make an anatomical gift by “[a]ffixing to . . . [their] driver’s license or identification card a statement or symbol” and also providing that “a person other than the donor may not make, amend, or revoke an anatomical gift”). For other examples of the law’s respect for decedents, see DON HERZOG, DEFAMING THE DEAD 220 (2017) (“After you die, the law will respect not just the terms of your will, but also in some settings your privacy, and more. The criminal law will take an interest in anyone desecrating your corpse, and your close survivors will win a tort action against any such miscreant.”).

11. See, e.g., *Cohen v. Guardianship of Cohen*, 896 So. 2d 950, 953 (Fla. Dist. Ct. App. 2005) (“The majority position appears to be that such provisions are not binding and that the next of kin have a superior right to determine the place and method of burial.”) (quoting WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON WILLS § 16.19 (3d ed. 1982)).

12. Amber Rose Plughoeft (*Pflughoeft*), PHILLIP FUNERAL HOME, <https://memorials.phillipfuneralhome.com/amber-pflughoeft/4346603/> (last visited Oct. 4, 2021).

13. WIS. STAT. ANN. § 6.21 (West 2020); see also *infra* Part I.B.

14. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 484 (2003).

voting periods,¹⁵ allow “[n]o-[e]xcuse [a]bsentee [v]oting,”¹⁶ or mail ballots to all registered voters.¹⁷ Thus, the amount of people who express their preferences before Election Day has steadily climbed.¹⁸ Then, in 2020, fear of COVID-19 exposure sent early voting rates off the charts.¹⁹ Indeed, of the 160,000,000 Americans who participated in the general election, a staggering 101,453,111 did so before the polls opened.²⁰ Some experts believe that, although these numbers will drop once coronavirus subsides, “[t]he genie is . . . out of the bottle,” and convenience voting will become the norm.²¹ If so, the DVR could possibly even tip the scales of a contest. After all, “[e]very election year, somewhere in the country there is a state legislative race (or some other form of local election) that gets decided by just a handful of votes.”²² Or as one

15. See *Early Voting In-Person Voting*, NAT'L CONF. OF STATE LEGISLATURES (June 11, 2021), <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx> (noting that for statewide general elections, only “[f]ive states do not offer pre-Election Day in-person voting options” and that “[e]arly voting periods range in length from three days to [forty-five] days”); Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 214 (2020) (“Over the week or two before Election Day, sixteen states establish voting centers throughout each county at which any county resident may cast a ballot, to make early voting even easier.”).

16. See *States with No-Excuse Absentee Voting*, NAT'L CONF. OF STATE LEGISLATURES (May 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx> (“[Thirty-four] states and Washington, D.C., do not require an excuse from those who wish to vote absentee or by mail.”).

17. See *id.*

18. Michael P. McDonald, *A Brief History of Early Voting*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/a-brief-history-of-early_b_12240120 (“Since the early 1990s, the number [of] voters who cast their ballots prior to Election Day has steadily risen from less than a tenth to about a third.”).

19. See, e.g., Joey Garrison, *Voter Turnout 2020: Early Voting Tops 100 Million Ballots Cast*, USA TODAY (Nov. 3, 2020, 6:49 PM), <https://www.usatoday.com/story/news/politics/elections/2020/11/03/voter-turnout-2020-early-voting-tops-100-million/6133004002/> (“Most states expanded mail-voting opportunities amid the coronavirus pandemic and several others extended in-person early voting periods from four years ago.”).

20. *2020 General Election Early Vote Statistics*, U.S. ELECTIONS PROJECT (Nov. 23, 4:21 PM), <https://electproject.github.io/Early-Vote-2020G/index.html>; see also Olivia B. Waxman, *The 2020 Election Set a Record for Voter Turnout. But Why Is It Normal for So Many Americans to Sit Out Elections?*, TIME (Nov. 5, 2020, 9:24 AM), <https://time.com/5907062/record-turnout-history/>.

21. Matt Vasilogambros, *Lawmakers Push to Preserve Pandemic Voting Access*, PEW (Dec. 3, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/12/03/lawmakers-push-to-preserve-pandemic-voting-access> (quoting Connecticut Secretary of State Denise Merrill); see also Sam Levine & Alvin Chang, *Democrats Took a Risk to Push Mail-In Voting. It Paid Off*, THE GUARDIAN (Dec. 3, 2020), <https://www.theguardian.com/us-news/2020/dec/03/democrats-mail-in-voting-2020-election-analysis> (“The success of mail-in voting this year could mean that more people will vote by mail in the future.”).

22. EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 2* (2016). For example, in 2020, the margin in Iowa’s Second Congressional District between Democrat Rita Hart and Republican Mariannette Miller-Meeks was just six votes. See Ryan J. Foley, *Iowa Democrat Asks House to Review 6-Vote Race, Cites Errors*, AP NEWS (Dec. 22, 2020), <https://apnews.com/article/election-2020-iowa-mariannette-miller-meeks-elections-iowa-city-b0b8ddb4e878a54fce078ac116e3eb76>. Two early ballots in the district were discarded due to the voters’ deaths. See Tom Barton, *Miller-Meeks’ Attorney Looking for Rejected Ballots in Contested Iowa U.S. House Race*, QUAD-CITY TIMES (Mar. 26, 2021), https://qctimes.com/news/local/updated-miller-meeks-attorney-looking-for-rejected-ballots-in-contested-iowa-u-s-house-race/article_59fa4fed-2f71-5503-abfb-95c8eefc7ec6.html. In an even more remarkable outcome, the mayoral race in Dickinson, Texas ended in a

journalist put it, given that “an average of 455 voting-age people die in Florida every day, and that the 2000 [presidential] election was decided by . . . 537 votes, dead votes . . . could become a meaningful bloc.”²³

Nevertheless, much about the DVR remains unclear. Although it has received some recent media attention,²⁴ it has flown underneath the scholarly radar. Except for a student note published a decade ago,²⁵ the doctrine does not appear in the literature on absentee voting.²⁶ Likewise, only a handful of cases and state Attorney General opinions have tried to explain the rationale for the principle.²⁷ No court has considered whether the DVR is constitutional. And roughly half the states have no law on point whatsoever. For example, as a Connecticut judge observed while resolving a challenge to an election that hinged on two votes, “no statutory authority, or any authority of any kind, exists

tie, and the winner was chosen by drawing a ping pong ball out of a hat. See Nick Natario, *We Have a Winner! Dickinson Names New Mayor in Ping Pong Ball Draw*, ABC13 (Jan. 7, 2021), <https://abc13.com/politics/dickinson-names-new-mayor-in-ping-pong-ball-draw/9449295/>; cf. *Keyes v. Gunn*, 890 F.3d 232, 233 (5th Cir. 2018) (arising from a state legislative contest in Mississippi in which “[t]he election resulted in a tie vote: 4,589 votes for each of the two candidates”).

23. Allen G. Breed, “Ghost” Votes Lead to Ballot Debate, HOUS. CHRON., (Nov. 1, 2004), <https://www.chron.com/news/nation-world/article/Ghost-votes-lead-to-ballot-debate-1983513.php>.

24. For media coverage of the topic, see *If You Die Before Election Day, Does Your Early Ballot Count? That Depends*, L.A. TIMES (Oct. 20, 2020, 4:15 AM), <https://www.latimes.com/world-nation/story/2020-10-20/early-ballots-voters-die-before-election-day>; Emma Austin, *Fact Check: If You Cast an Absentee Ballot but Die Before Election Day, Will Your Vote Count*, LOUISVILLE COURIER J. (Nov. 1, 2020, 8:55 PM), <https://www.courier-journal.com/story/news/politics/elections/2020/11/01/what-happens-cast-absentee-ballot-but-die-before-election-day/6102767002/>; Jessie Balmert, *What Happens if an Absentee Voter Dies Before Election Day in Ohio?*, CINCINNATI ENQUIRER (Nov. 2, 2020, 11:15 AM), <https://www.cincinnati.com/story/news/politics/elections/2020/11/02/what-happens-if-absentee-voter-dies-before-election-day-ohio/6122503002/>; Jerry Davich, *An 82-Year Old Hobart Woman Died Two Days After Voting Early. Now Her Ballot is Going to Be Purged.*, CHI. TRIB. (Oct. 27, 2020, 1:31 PM), <https://www.chicagotribune.com/suburbs/post-tribune/opinion/ct-ptb-davich-early-voting-ballots-not-counted-after-voter-deaths-st-1-20201027-fiw23dvozbv7dounljwc6vi3i-story.html>; Kristen Lowe, *If You Die Before Election Day, Does Your Vote Count?*, NBC25 NEWS (Oct. 21, 2020), <https://nbc25news.com/news/local/what-happens-if-you-die-before-election-day>.

25. See Krysta R. Edwards, Note, *The Vote from Beyond the Grave*, 51 WM. & MARY L. REV. 1583, 1606–07 (2010) (arguing that Congress should establish a uniform rule that states must count absentee ballots cast by voters who die before Election Day).

26. Several scholars have explored the advantages and drawbacks of absentee voting. See, e.g., Mindy Acevedo et al., *Ensuring Equal Access to the Mail-In Ballot Box*, 68 UCLA L. REV. DISCOURSE 4, 20 (2020) (surveying ways to ensure that voters can use mail-in ballots effectively); Annie Barouh, *A New Old Solution: Why the United States Should Vote by Mail-In Ballot*, 18 SEATTLE J. FOR SOC. JUST. 243, 256, 264–65 (2020) (arguing that mail-in ballots are more reliable than voting machines and permit voters to make more thoughtful decisions); Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 481 (2005) (examining the special problems that arise from nursing home residents voting absentee); Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J.L. & POL. 39, 78–79 (2010) (“Absentee voting is popular, but experience demonstrates that the benefits that come with convenience must be balanced against the potential for fraud, coercion, and error.”); Sal H. Lee, Note, *Judicial Review of Absentee Voting Laws: How Courts Should Balance State Interests Against the Fundamental Right to Vote Going Forward*, 105 IOWA L. REV. 799, 825 (2020) (arguing that courts should be more hostile to restrictions on absentee voting); cf. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 652–53 (2007) (discussing security protocols for absentee ballots in the context of state voter photo-identification requirements). However, none of them has examined the DVR.

27. See *infra* Part I.B.

that governs whether an election official should count, or not count, the otherwise valid absentee ballot of a voter who dies prior to election day.”²⁸

This Article fills that gap. It begins by exploring the complications that would arise from a complaint alleging that the DVR violates the U.S. Constitution.²⁹ It reveals that such a claim would face long odds. For one, courts generally hold that “constitutional rights cannot be violated after death.”³⁰ As a result, although the ability to cast a ballot is sacrosanct, it is not obvious that the DVR causes a constitutional injury. Also, even if a lawsuit could overcome that obstacle, state restrictions on absentee voting are often subject to the toothless rational basis test.³¹ Finally, a judge might conceptualize the DVR in one of two dueling ways: either as a draconian measure that disenfranchises citizens or as a way of closing a loophole and barring ineligible people from voting. Thus, if an attempt to overturn the DVR could even be brought at all, it might trigger strict or intermediate scrutiny but would most likely only need to survive rational basis review.

This segues into the Article’s second objective, which is to demonstrate that the DVR lacks a solid policy foundation. The only justification that states have ever offered for the doctrine is that because absentee ballots are deemed to be cast when the polls open and individuals who have died are not qualified to vote, “the absentee ballot of any such person should not be counted.”³² But this makes no sense. Although nobody can vote years after their death by leaving instructions in their estate plan, the reasons for barring this practice do not apply to individuals who are alive when they fill out their ballots.³³ Moreover, the Article reveals that other rationales that a proponent of the DVR might offer—such as administrative convenience and fraud prevention—are similarly hollow. Thus, the DVR would likely flunk strict or intermediate scrutiny, and there is even a remote possibility that it would not pass the rational basis test. Accordingly, either by litigation or through lawmakers recognizing its defects, the DVR should be eliminated.

Three quick points deserve mention at the outset. First, I will often use the words “early,” “absentee,” and “mail-in” to describe the same form of voting. Counterintuitively, most states classify “early in-person voting as ‘absentee

28. *Green v. Vazquez*, No. CV106013904S, 2010 WL 4227123, at *20 (Conn. Super. Ct. Sept. 17, 2010).

29. Because of space constraints, I will not analyze state constitutional challenges to the DVR. However, because “state constitutions go well beyond the U.S. Constitution in discussing the right to vote,” this issue is worth considering in the future. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 104 (2014).

30. *Martin v. Unknown U.S. Marshals*, 965 F. Supp. 2d 502, 543 (D.N.J. 2013).

31. *See, e.g., Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020).

32. *See Commonwealth of Va., Off. of the Att’y Gen., Opinion Letter on Absentee Ballots—Voter Deceased Prior to Election Day* (Oct. 26, 1959) [hereinafter Virginia Opinion Letter]; *see also infra* Part I.B.

33. *See infra* Part I.B.

voting’ and the voter technically casts an ‘absentee ballot.’”³⁴ Indeed, when a voter goes to the polls before Election Day, she “is simply applying for and completing an absentee voting application and ballot at the same time.”³⁵ Likewise, for my purposes, there is no meaningful difference between absentee and mail-in votes: both “are paper ballots hand-marked by the voter.”³⁶

Second, I acknowledge that the DVR’s importance pales in comparison to recent developments in election law. Since I started working on the Article, the U.S. Supreme Court has gutted the Voting Rights Act in *Brnovich v. Democratic National Committee*,³⁷ and several Republican-led state legislatures have passed onerous new voting laws.³⁸ These blockbuster changes are far more likely to affect future elections than the comparatively niche issue of predeceasing absentee voters.

Third, I will treat the DVR as a bipartisan issue. Admittedly, this may be blinking reality: As I will discuss, because Democrats were more likely than Republicans to vote by mail in 2020,³⁹ the DVR probably applied more often to people on the left. However, given the singular nature of the cycle—including the pandemic and President Trump’s demonization of mail-in ballots⁴⁰—it is unclear whether this pattern will hold. As a result, I will analyze

34. League of United Latin Am. Citizens of Iowa v. Pate, 950 N.W.2d 204, 215 n.3 (Iowa 2020). State statutes often refer to early in-person voting as “[a]bsentee voting in person.” ALASKA STAT. ANN. § 15.20.061 (West 2020); see MINN. STAT. ANN. § 203B.081 (West 2020); VA. CODE ANN. § 24.2-701.1 (West 2020); see also Brief Amicus Curiae of Tennessee Amici Curiae Tennessee Senators Mark S. Norris, Sr. et al. at *25, Ohio Democratic Party v. Husted, No. 16-3561, 2016 WL 3579873 (6th Cir. July 1, 2016) (“It is well-known that early in-person voting is a form of absentee voting.”); Memorandum from Frank LaRose, Ohio Sec’y of State, to County Boards of Elections (Sept. 28, 2020), <https://www.ohiosos.gov/globalassets/elections/directives/2020/dir2020-21.pdf> (“Early in-person voting is a form of absentee voting under Ohio law.”).

35. N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 332 n.4 (M.D.N.C. 2016), *rev’d and remanded sub nom.* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016); cf. Paul Gronke, *Early Voting Reforms and American Elections*, 17 WM. & MARY BILL RTS. J. 423, 424–25 (2008) (using “early voting” as a “blanket term used to describe any system where voters can cast their ballots before the official election day” and acknowledging that the phrase “covers a bewildering array of different electoral systems”).

36. Linda Qiu, *Fact-Checking Falsehoods on Mail-In Voting*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/article/fact-checking-mail-in-voting.html>. Admittedly, some states apply slightly different rules to mail-in and absentee ballots. See, e.g., *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 606 (8th Cir. 2020) (explaining that, under Missouri law, “while absentee voters may return their ballots by mail or in person[,] . . . mail-in voters may return their ballots only through United States Postal Service (USPS) mail”). But these distinctions do not affect the DVR, and so they are irrelevant for my discussion.

37. See 141 S. Ct. 2321, 2349–50 (2021).

38. See Horus Alas, *Report: Republican-Led State Legislatures Pass Dozens of Restrictive Voting Laws in 2021*, U.S. NEWS & WORLD REP. (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> (describing a Brennan Center for Justice study “finding that as of mid-June, 17 states had passed 28 laws making it harder for constituents to vote in 2021”).

39. See *infra* text accompanying notes 69–75.

40. See Russell Berman, *The Republicans Telling Their Voters to Ignore Trump*, THE ATL. (June 5, 2020), <https://www.theatlantic.com/politics/archive/2020/06/trump-republicans-vote-mail-arizona-florida/612625/>.

the DVR as though it is a neutral principle of election administration rather than a politically fraught measure such as voter ID or absentee ballot signature requirements.

The Article contains two parts. Part I surveys absentee voting in general and the DVR specifically. It demonstrates that many states discard ballots cast by early voters who die before Election Day. Yet, it also reveals that there has never been a satisfactory explanation for this harsh outcome. Part II explains that a constitutional challenge to the DVR would raise unsettled questions, including who can vindicate a deceased voter's rights and what level of scrutiny would apply. Finally, it argues that, because the doctrine's costs outweigh its benefits, there is a glimmer of a possibility that it might be unconstitutional, and in any event, states should abandon it.

I. DEAD VOTERS

This Part lays a foundation for the rest of the Article. It begins by describing convenience voting, which soared to new heights during the 2020 election. It then examines the DVR, which is a little-noticed corollary of this trend.

A. *Absentee Voting*

Absentee voting began inauspiciously. It emerged during the Civil War when several states allowed their far-flung soldiers to vote in the 1864 presidential contest.⁴¹ Eventually, lawmakers extended the privilege of “absent” voting to civilians. Between 1896 and 1917, sixteen jurisdictions passed absentee voting legislation.⁴² Yet, most of these laws were limited and riddled with cumbersome requirements. For example, some statutes applied exclusively to railroad employees,⁴³ or did not permit absentee voting in primary elections,⁴⁴ or insisted that a voter mail her ballot from within the state where she resided.⁴⁵ In Georgia, absentee ballots were only available to people who were “required by regular business and habitual duties” to be outside of their home precinct on

41. See Duncan Campbell Lee, *Absent Voting*, 16 J. SOC'Y COMPAR. LEGIS. 333, 334 (1916).

42. See P. Orman Ray, *Absent Voting*, 11 AM. POL. SCI. REV. 116, 116–17 (1917); ROBERT C. BROOKS, *POLITICAL PARTIES AND ELECTORAL PROBLEMS* 413 (1st ed. 1923) (describing how calls to permit absentee voting “acquir[ed] additional momentum after our entrance into the war, when it was made use of by many states to enfranchise their citizens absent on military or naval service”).

43. See Ray, *supra* note 42, at 116.

44. See P. Orman Ray, *Absent Voters*, 8 AM. POL. SCI. REV. 442, 443 (1914); BROOKS, *supra* note 42, at 416.

45. See Ray, *supra* note 44, at 442–43. Because most early absentee voting statutes were designed to allow voters to register their preferences in person in a different part of the state where they lived, “casting ballots by mail was not the norm.” ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 150 (2000). *But see* Lee, *supra* note 41, at 338–39 (noting that North Dakota permitted “voting by post”); Ray, *supra* note 42, at 117 (describing Virginia’s statute, which “made [it] possible for a Virginia voter to ‘vote by mail’ in practically any part of the civilized world”).

Election Day.⁴⁶ Likewise, in Texas, a voter needed to appear “before the county clerk and mark his [absentee] ballot.”⁴⁷

However, even in this primitive form, absentee voting could sway an election. For instance, Kansas’s absentee voter statute became effective in 1912.⁴⁸ In that year’s gubernatorial contest, Democrat George H. Hodges defeated Republican Arthur Capper by a grand total of twenty-nine votes.⁴⁹ As P. Orman Ray wrote two years later in the *American Political Science Review*: Because about 5,000 voters cast absentee ballots, “the potential[] of the ‘mail vote’ can easily be understood.”⁵⁰

As the decades marched on, absentee voting progressed in fits and starts. In the 1920s and 1930s, several courts held that absentee voting legislation violated state constitutional provisions that prescribed secret ballots and in-person voting.⁵¹ Likewise, California voters rejected proposed absentee ballot measures in 1914, 1917, 1918, and 1920.⁵² Finally, New Jersey and Indiana repealed their absentee voting laws citing disuse, the cost of printing ballots, and concern about fraud.⁵³ However, the pendulum soon swung in the other direction. California, Maryland, Michigan, and New York amended their constitutions to eliminate any tension with absentee voting.⁵⁴ In the 1944 presidential election, which was held during World War II, more than 2,500,000 soldiers cast absentee ballots.⁵⁵ Soon, a plurality of states had adopted laws that

46. HELEN M. ROCCA, A BRIEF DIGEST OF THE LAWS RELATING TO ABSENTEE VOTING AND REGISTRATION 24 (1928).

47. *In re State*, 602 S.W.3d 549, 558 (Tex. 2020).

48. See Ray, *supra* note 44, at 443.

49. See WILLIAM FRANK ZORNOW, KANSAS: A HISTORY OF THE JAYHAWK STATE 221 (1957).

50. Ray, *supra* note 44, at 443. Conversely, in New York City in 1922, just 329 of 2,300,000 eligible voters used an absentee ballot. See Hayward, *supra* note 26, at 56–57; cf. BROOKS, *supra* note 42, at 418 (reporting that absentee voters cast only 161 of the 28,293 ballots in Douglas County, Nebraska’s 1922 primary).

51. For instance, in *Clark v. Nash*, the Kentucky Supreme Court held that the state’s absentee ballot law was inconsistent with section 147 of the state constitution, which declared that “[a]ll elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited.” *Clark v. Nash*, 234 S.W. 1, 2 (Ky. 1921) (quoting KY. CONST. § 147). As the court explained, the legislature had passed the statute in haste and thus “overlooked this provision.” *Id.* (reasoning that a ballot cannot be “‘marked’ by each voter in ‘private at the polls’ if his ballot is received by him in a foreign state and there marked and mailed back to the clerk as provided by the absent voters law”); see also *Thompson v. Scheier*, 57 P.2d 293, 304 (N.M. 1936) (finding that the absentee voter statute “is unconstitutional, in that it permits voters to vote otherwise than by personally casting their ballots in the precinct of their residence”); *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924) (“However laudable the purpose of the act . . . , it cannot be sustained. If it is deemed necessary that such legislation be placed upon our statute books, then an amendment to the Constitution must be adopted permitting this to be done.”).

52. See Edward B. Moreton, Jr., *Voting by Mail*, 58 S. CAL. L. REV. 1261, 1264–65 (1985).

53. See Hayward, *supra* note 26, at 57 & n.102.

54. See John A. Lapp, *Absent Voting*, 10 AM. POL. SCI. REV. 114, 114–15 (1916); P. O. Ray, *Absent-Voting Laws*, 18 AM. POL. SCI. REV. 321, 321 (1924); P. Orman Ray, *Recent Primary and Election Laws*, 13 AM. POL. SCI. REV. 264, 269–70 (1919).

55. See JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS 11 (2006).

facilitated voting for “the sick, business travelers, and people who could provide valid reasons for being out of state.”⁵⁶

Then, in the late twentieth century, three innovations transformed the way that elections are conducted. First, in 1978, California enacted no-excuses absentee voting legislation, making “absentee ballot[s] . . . available to any registered voter.”⁵⁷ By the mid-1980s, absentee voting had increased by more than 400% in the Golden State, and Hawaii, Maine, and Washington had also adopted no-excuses policies.⁵⁸ Second, starting with Oregon in 1995, three jurisdictions took the next step and began holding all-mail elections.⁵⁹ In these states, “registered voters receive a ballot by mail two to three weeks prior to an election,” giving them a comfortable window in which to deliberate, make their choices, and return their votes.⁶⁰ Third, many states adopted early in-person voting.⁶¹ By opening polling stations in October and keeping them running on weekends, these states expanded the franchise and helped avoid long lines on Election Day.⁶² Collectively, these laws pioneered the concept of “convenience voting”—the idea that absentee ballots were not emergency measures reserved for people with genuine Election Day conflicts, but rather “benefit[s] to be extended to anyone.”⁶³

Over time, convenience voting became interwoven into the election machinery. More than half of the U.S. now permits no-excuses absentee voting.⁶⁴ By 2004, voters cast 20% of all ballots before the polls opened.⁶⁵ By 2008, that figure had climbed to 30%.⁶⁶ In 2018, 42,400,000 voters received a ballot in the mail and 30,400,000 returned it.⁶⁷ Thus, for an ever-expanding class of Americans, “election day’ is a historical relic.”⁶⁸

56. *Id.*

57. *Stebbins v. White*, 235 Cal. Rptr. 656, 659 (Ct. App. 1987).

58. Moreton, Jr., *supra* note 52, at 1263 n.9, 1272.

59. See COLO. REV. STAT. ANN. § 1-7.5-104 (West 2020); OR. REV. STAT. ANN. § 254.465 (West 2020); WASH. REV. CODE ANN. § 29A.40.010 (West 2020); Timothy Egan, *Living Rooms Replace Polling Booths in Oregon’s Mail-In Senate Election*, N.Y. TIMES (Nov. 21, 1995), <https://www.nytimes.com/1995/11/21/us/living-rooms-replace-polling-booths-in-oregon-s-mail-in-senateelection.html>.

60. Barouh, *supra* note 26, at 256.

61. See Olivia B. Waxman, *This Is How Early Voting Became a Thing*, TIME (Nov. 6, 2020, 8:31 AM), <https://time.com/4539862/early-voting-history-first-states/>.

62. See *Early Voting In-Person Voting*, *supra* note 15.

63. FORTIER, *supra* note 55, at 16.

64. See MATTHEW J. STREB, *RETHINKING AMERICAN ELECTORAL DEMOCRACY* 21 (3d ed. 2016) (reporting that twenty-seven states and the District of Columbia have no-excuse absentee ballot laws).

65. McDonald, *supra* note 18.

66. *Id.*

67. Nichelle Williams, *Vote by Mail Trends and Turnout in Six Election Cycles: 2008–2018*, U.S. ELECTION ASSISTANCE COMM’N (Oct. 22, 2020), <https://www.eac.gov/vote-mail-trends-and-turnout-six-election-cycles-2008-2018>.

68. Gronke, *supra* note 35, at 424.

Then, in 2020, two events scrambled voting patterns beyond recognition. First, the COVID-19 pandemic made absentee voting seem less like a luxury and more like a necessity. A whopping 101,453,111 citizens—nearly two-thirds of all voters—cast early ballots, including 65,642,049 mail ballots and 35,811,062 early in-person votes.⁶⁹ The number of absentee ballots submitted in fiercely contested Pennsylvania jumped by nearly 3,000% relative to the last presidential election, and battlegrounds Georgia, North Carolina, and Wisconsin reported increases of between 600% and 800%.⁷⁰

Second, early voting became a partisan issue. Previously, the consensus had been that voting by mail attracted seniors and rural voters and thus skewed slightly to the right.⁷¹ Indeed, Republicans spearheaded Arizona’s mail-voting regime, which traditionally accounts for 80% of the votes in the state.⁷² Likewise, in Florida, absentee voting has long been common “especially with older GOP voters.”⁷³ But for months, President Trump and his surrogates assailed mail voting as “a scam” that would lead to “the greatest Riggged Election” in history.⁷⁴ The idea that absentee ballots were toxic resonated with Trump’s base. In states that track the party affiliation of voters, “registered Democrats cast nearly eight million more mail ballots than Republicans”⁷⁵

After the dust from the election settled, some experts and officials predicted that “mail-in voting is here to stay.”⁷⁶ For one, because the pandemic forced many states to establish the infrastructure for voters to participate remotely, officials are well-positioned to extend those measures to future elections.⁷⁷ In addition, studies found that about 40% of mail voters had not

69. 2020 *General Election Early Vote Statistics*, *supra* note 20.

70. See *Share of Absentee Ballots Requested in Select States for the 2020 Presidential Election in the United States, As a Share of 2016 Absentee Ballots*, STATISTA (Nov. 12, 2020), <https://www.statista.com/statistics/1184283/presidential-election-absentee-ballots-requested-share-2016-ballots-us/>.

71. See Berman, *supra* note 40; Michael Wines, *As Trump Disputes Election Results, Republicans Target Voting by Mail*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2020/12/10/us/mail-voting-absentee.html> (“[C]onventional political wisdom holds that Republicans traditionally have voted by mail more often than Democrats.”). But see Lee Drutman, *There Is No Evidence That Voting by Mail Gives One Party an Advantage*, FIVETHIRTYEIGHT (May 12, 2020, 6:00 AM), <https://fivethirtyeight.com/features/there-is-no-evidence-that-voting-by-mail-gives-one-party-an-advantage/> (“Numerous studies have arrived at the same conclusion: Voting by mail doesn’t provide any clear partisan advantage.”).

72. See Berman, *supra* note 40.

73. *Id.*

74. *Id.*

75. Wines, *supra* note 71. Likewise, a survey by the Pew Research Center found that a mere 17% of voters who backed President Joe Biden voted on Election Day. *The Voting Experience in 2020*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/> [hereinafter *Pew Study*].

76. Jessica Hill, *Mail-In Voting Was Popular in Places Like Cape Cod in 2020. Is It Here to Stay?*, CAPE COD TIMES (Dec. 29, 2020, 5:22 PM), <https://www.capecodtimes.com/story/news/2020/12/21/massachusetts-mail-voting-popular-2020-here-stay/3954808001/> (quoting Barnstable Town Clerk Ann Quirk).

77. See, e.g., Erin Tiernan, *Vote by Mail Could Be Here to Stay in Massachusetts*, BOS. HERALD (Nov. 8, 2020, 7:35 PM), <https://www.bostonherald.com/2020/11/08/vote-by-mail-could-be-here-to-stay-in->

voted that way before and that more than 94% rated casting a ballot as “easy.”⁷⁸ As the clerk of a Michigan town elaborated, “[p]eople find it convenient[, and] . . . I don’t see it ratcheting down lower than 50 percent of votes in future elections.”⁷⁹ And finally, as one political commentator observed, “it’s really hard to give voters an option to make voting easier and then take it away.”⁸⁰

Accordingly, even after the pandemic, absentee voting may continue to rival or even surpass Election Day voting. But, as the next Part describes, the expanding gulf between when ballots are cast and when they are counted gives rise to a difficult question: Should states honor the preferences of early voters who pass away before the polls open?

B. *The DVR*

This Part surveys the DVR. It first demonstrates that most states once disqualified absentee ballots that were cast by voters who died before Election Day. It then reveals that a few jurisdictions have abandoned this harsh doctrine. Finally, it reports data about how often officials have invoked the rule in recent elections.

1. *The Evolution of the Rule*

The first mention of the DVR of which I am aware appears in New Hampshire’s 1921 absentee voting law.⁸¹ Section 14 of the statute specified that “[n]o ballot mailed or delivered under the provisions hereof shall be counted if the officers charged with the duty of counting the same are cognizant of the fact that the voter has died prior to the opening of the polls on the day of election.”⁸²

Shortly thereafter, Texas enacted legislation that went even further. Instead of following New Hampshire’s lead and discarding absentee ballots when officials knew about a voter’s demise, Lone Star lawmakers flatly declared that absentee ballots cast by decedents “shall not be counted.”⁸³

massachusetts/ (quoting an election official as saying that “legislation to make permanent pandemic-era expansions in mail-in voting could be coming ‘very, very soon’”).

78. *Pew Study*, *supra* note 75.

79. *Wines*, *supra* note 71.

80. Miles Parks, *A Look at Whether This Year’s Mail-In Voting Habits Will Stick*, NPR (Nov. 20, 2020, 3:58 PM), <https://www.npr.org/2020/11/20/937200994/a-look-at-whether-this-year-s-mail-in-voting-habits-will-stick>; *see also* Vasilogambros, *supra* note 21 (“The pandemic made clear just how much voters appreciate having choices in casting a ballot . . .” (quoting Maryland Delegate Eric Luedtke)).

81. *See In re Op. of the Justs.*, 113 A. 293, 294 (N.H. 1921) (considering a law that sought to empower “absent voters and voters who by reason of physical disability are unable to vote in person”).

82. *Id.* at 296.

83. *Williams v. Huntress*, 272 S.W.2d 87, 90 (Tex. 1954).

With little fanfare, the DVR became the runaway majority approach. Indeed, by the 1990s, it had spread to Arkansas,⁸⁴ Colorado,⁸⁵ Delaware,⁸⁶ Florida,⁸⁷ Hawaii,⁸⁸ Idaho,⁸⁹ Illinois,⁹⁰ Indiana,⁹¹ Iowa,⁹² Kansas,⁹³ Kentucky,⁹⁴ Maryland,⁹⁵ Massachusetts,⁹⁶ Minnesota,⁹⁷ Mississippi,⁹⁸ Missouri,⁹⁹ Montana,¹⁰⁰ New Jersey,¹⁰¹ New York,¹⁰² North Carolina,¹⁰³ Pennsylvania,¹⁰⁴ South Dakota,¹⁰⁵ Tennessee,¹⁰⁶ Virginia,¹⁰⁷ and Wisconsin.¹⁰⁸

Three points about the DVR deserve emphasis. First, its rationale is a rank formalism. Technically, the doctrine combines two principles of election law. Principle one is that a person must be “qualified” to vote, which generally requires her to be at least eighteen years old, a U.S. citizen, a resident of the

84. See 2013 Ark. Acts 6131, *repealed by* ARK. CODE ANN. § 7-5-416(c) (West 2020).

85. See COLO. REV. STAT. ANN. §§ 1-13.5-1010(1), 31-10-1008 (West 2020).

86. See DEL. CODE ANN. tit. 15, § 5514(d) (West 2020).

87. See State *ex rel.* Peacock v. Latham, 170 So. 475, 480 (Fla. 1936) (dicta).

88. See HAW. REV. STAT. ANN. § 15-13 (West 2018), *repealed by* 2019 Haw. Sess. Laws 49.

89. See IDAHO CODE ANN. § 34-1009 (West 2003), *repealed by* 2004 Idaho Sess. Laws 714.

90. See 10 ILL. COMP. STAT. ANN. §§ 5/19-11, 5/20-11 (West 2020).

91. See IND. CODE ANN. § 3-11-10-23 (West 2019), *repealed by* 2019 Ind. Acts 278.

92. See IOWA CODE ANN. § 53.32 (West 2020).

93. See KAN. STAT. ANN. § 25-1136(c) (West 2020).

94. See Commonwealth of Ky., Off. of the Att’y Gen., Opinion Letter 77-667 (Nov. 3, 1977).

95. See 2002 Md. Laws 2331, *repealed by* 2015 Md. Laws 26.

96. See MASS. GEN. LAWS ANN. ch. 54, §§ 25B, 100 (West 2019), *repealed by* 2020 Mass. Acts 207.

97. See MINN. STAT. ANN. § 203B.25 (West 2010), *repealed by* 2010 Minn. Laws 135.

98. See State of Miss., Off. of the Att’y Gen., Official Attorney General’s Opinion 89-830 (Dec. 10, 1989) [hereinafter Mississippi Opinion Letter].

99. See MO. ANN. STAT. §§ 115.293(2), 115.302(15) (West 2020).

100. See MONT. CODE ANN. § 13-13-204(3) (West 2005), *repealed by* 2005 Mont. Laws 1236.

101. See N.J. STAT. ANN. §§ 19:58-27, 63-21 (West 2020).

102. See N.Y. ELEC. LAW § 8-506(1)(c) (McKinney 2020).

103. North Carolina has not adopted the DVR by statute, regulation, or judicial decision. However, authorities in the state apparently take the position that “if you’re no longer alive before election day, then you, technically, would not be qualified to vote.” Nick Ochsner, *A Bladen Co. Voter Died Before Election Day. His Absentee Ballot Still Counted*, WBTV (Feb. 13, 2019, 4:44 PM), <https://www.wbvtv.com/2019/02/13/bladen-co-voter-died-before-election-day-his-absentee-ballot-still-counted/> (quoting North Carolina State Board of Elections spokesman Pat Gannon).

104. See 25 PA. STAT. AND CONS. STAT. ANN. § 3146.8(d) (West 2020).

105. See S.D. CODIFIED LAWS §§ 12-19-9.2, 12-19-49 (2020).

106. See TENN. CODE ANN. § 2-6-120 (West 1993), *repealed by* 1994 Tenn. Pub. Acts 640 (deleting the DVR).

107. See Virginia Opinion Letter, *supra* note 32.

108. See WIS. STAT. ANN. § 6.88 (West 2020). For one of the first laws to buck the trend, see N.D. CENT. CODE ANN. § 16.1-07-12 (West 2020) (“The subsequent death of an absentee voter after having voted by absentee ballot does not constitute grounds for rejecting the ballot.”); 1995 N.D. Laws 643 (demonstrating that the state had been following this rule before the 1990s).

state,¹⁰⁹ and—most importantly for my purposes—*alive*.¹¹⁰ Principle two is that no matter when someone returns her absentee ballot, it is not “cast” until Election Day.¹¹¹ Thus, as the Florida Supreme Court opined in 1936, a citizen who dies before the polls open lacks the credentials to vote:

No ballots have been cast nor will be cast by absentee voters until [Election Day] arrives. The law has merely provided for the accommodation of those who will not be present at their respective election precincts on that day that they may prepare a ballot which will be cast for them on that day, but, if a person preparing such a ballot and depositing it to be cast as the law directs should die before election day, the authority vested in the county judge to cast that ballot for such elector will cease to exist.¹¹²

More than fifty years later, this wooden logic still held sway. In 1989, a Mississippi Attorney General Opinion distilled it to a pithy sentence, concluding that only “qualified elector[s]” may vote, and a decedent “is no longer a qualified elector.”¹¹³

Second, most states have followed New Hampshire’s model and only disqualify voters who have been *proven* to be dead before the tallying of the ballots.¹¹⁴ Occasionally, a dispute pivots on this issue. For example, in 1991, a

109. See, e.g., CAL. CONST. art. II, § 2(a) (“A United States citizen 18 years of age and resident in this State may vote.”); IND. CONST. art. II, § 2(a) (“A citizen of the United States who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election.”); KY. CONST. § 145 (“Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter.”); ALASKA STAT. ANN. § 15.05.010 (West 2020) (conferring voting rights on registered eighteen-year-old or older citizens who have “been a resident of the state and of the house district in which the person seeks to vote for at least 30 days just before the election”).

110. See, e.g., *Gross v. West*, 283 S.W.2d 358, 361 (Ky. 1955) (“The qualified voter must be alive”); *Hollifield v. Vickers*, 162 S.E.2d 905, 907 (Ga. Ct. App. 1968) (declaring that “[a] name of a deceased cannot vote”). The National Voter Registration Act requires states to make “a reasonable effort to remove the names of [decedents] from the official lists of eligible voters.” 52 U.S.C. § 20507(a)(4). Thus, every jurisdiction has adopted a procedure for purging the names of people who have passed away. See, e.g., ALA. CODE § 17-4-6.1(b) (1975) (“To facilitate the continuous maintenance of the computerized statewide voter registration list, each county board of registrars shall investigate signed, written reports from a member of an elector’s family that the elector is deceased.”); 10 ILL. COMP. STAT. ANN. 5/4-14.1 (West 2020) (“[I]t is the duty of the county clerk to examine, monthly, the records deposited in his or her office . . . that relate to deaths in the county, and to cancel the registration of any person who has died during the preceding month.”); WASH. REV. CODE ANN. § 29A.08.510 (West 2020) (“[E]ach county auditor may also use government agencies and newspaper obituary articles as a source of information for identifying deceased voters and canceling a registration.”).

111. See *State ex rel. Peacock v. Latham*, 170 So. 475, 480 (Fla. 1936).

112. *Id.*; see also Virginia Opinion Letter, *supra* note 32 (“It is obvious that a person who has died cannot vote on election day”).

113. Mississippi Opinion Letter, *supra* note 98.

114. See, e.g., COLO. REV. STAT. ANN. §§ 1-13.5-1010(1), 31-10-1008 (West 2020); DEL. CODE ANN. tit. 15, § 5514(d) (West 2020); HAW. REV. STAT. ANN. § 15-13 (West 2018), *repealed by* 2019 Haw. Sess. Laws 49; IDAHO CODE § 34-1009 (West 2003), *repealed by* 2004 Idaho Sess. Laws 714; 10 ILL. COMP. STAT. ANN. §§ 5/19-11, 5/20-11 (West 2020); IND. CODE ANN. § 3-11-10-23 (West 2019), *repealed by* 2019 Ind. Acts 278; IOWA CODE ANN. § 53.32 (West 2020); KAN. STAT. ANN. § 25-1136(c) (West 2020); MASS. GEN. LAWS ANN. ch. 54, §§ 25B(q), 100 (West 2019), *repealed by* 2020 Mass. Acts 207; MINN. STAT. ANN. § 203B.25 (West 2010), *repealed by* 2010 Minn. Laws 135; MO. ANN. STAT. §§ 115.293(2), 115.302(15) (West 2020); N.J. STAT.

New Jersey city council race came down to the wire.¹¹⁵ After a recount, the board of elections certified 2,973 votes for one candidate, Gerard Ryan, and 2,969 votes for another, Noel Siegel.¹¹⁶ Siegel filed a contest on several grounds, including the fact that a voter had given his absentee ballot to his messenger and then died on the eve of the election.¹¹⁷ A New Jersey appellate court rejected the challenge, noting that the Garden State's DVR only applies when "it shall be made to appear by due proof to the county board that an absentee voter . . . has died."¹¹⁸ Because there was "no proof that the [b]oard was aware of [the voter's] death," the judges held that it "properly counted his ballot."¹¹⁹

Third, over the last twenty years, the DVR has begun to loosen its grip. The catalyst for this change is unclear, but it may have been the 2000 presidential election. As is well-known, on Election Day that year, Republican George W. Bush led Democrat Al Gore in the tipping point state of Florida by only a handful of the 5,800,000 votes cast.¹²⁰ However, a recount uncovered thousands of ballots where the intent of the voter was unclear.¹²¹ Although the Florida Supreme Court ordered an additional manual recount of certain ballots, the U.S. Supreme Court reversed, bringing the contest to an end.¹²² These extraordinary events inspired lawmakers to take a hard look at the "nuts-and-bolts" of election administration.¹²³

During this period, some legislatures began to retreat from the DVR. In 2004, Idaho repealed its dead voter statute.¹²⁴ A year later, Florida amended its elections code to specify that a vote "shall be counted even if the elector dies after mailing the ballot but before election day"¹²⁵ and Montana followed suit.¹²⁶

ANN. §§ 19:58-27, 19:63-21 (West 2020); 25 PA. STAT. ANN. AND CONS. STAT. ANN. § 3146.8(d) (West 2020); S.D. CODIFIED LAWS §§ 12-19-9.2, 12-19-49 (2020); WIS. STAT. ANN. § 6.88 (West 2020). *But see* 2013 Ark. Acts 6131; MONT. CODE ANN. § 13-13-204(6) (2019), *repealed by* 2005 Mont. Laws 1236.

115. *See In re* Gen. Election of Nov. 5, 1991 for Off. of Twp. Comm. of Twp. of Maplewood, Essex Cty., 605 A.2d 1164, 1166 (N.J. Super. Ct. Law. Div. 1992).

116. *Id.*

117. *See id.* at 1182.

118. *Id.* (quoting N.J. STAT. ANN. § 19:57-30 (West 2008)).

119. *Id.*

120. *See* Bush v. Gore, 531 U.S. 98, 100–01 (2000) (per curiam).

121. *See id.* at 101–03.

122. *See id.* at 111.

123. *See* SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 at 48 (2001). For example, in 2002, Congress passed the Help America Vote Act (HAVA). *See* Pub. L. No. 107-252, § 303(a)(1)(A), 116 Stat. 1666, 1708–09 (codified at 52 U.S.C. § 21083(a)(1)(A)). Among other things, HAVA "provid[ed] funding for states . . . to phase out antiquated and unreliable technology such as punch card machines." Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 15 (2007).

124. *See* 2004 Idaho Sess. Laws 714

125. FLA. STAT. ANN. § 101.6103(8) (West 2020); 2005 Fla. Laws 2614.

126. *See* MONT. CODE ANN. § 13-13-204(6) (West 2020) ("If an elector votes by absentee ballot and the ballot has been mailed to or received by the election administrator but the elector dies between the time of balloting and [E]lection [D]ay, the deceased elector's ballot must be counted."); 2005 Mont. Laws 1236.

Virginia and Minnesota then jettisoned the DVR in 2010,¹²⁷ as did Arkansas in 2013,¹²⁸ Maryland in 2015,¹²⁹ Hawaii and Indiana in 2019,¹³⁰ and Massachusetts in 2020.¹³¹

To be clear, not every state tilted in this direction. In 2008, the South Carolina Attorney General endorsed the DVR for familiar reasons. As the state AG explained: “[E]ven though absentee ballots are prepared and received prior to the date of the election, they are not officially cast until Election Day. If the voter submitting the absentee ballot dies prior to the date of the election, the voter lacks the qualifications to be an elector.”¹³² Thus, even though the DVR does not apply as broadly as before, it remains the dominant approach.

2. *Data on Dead Voters*

How often does the DVR kick in? Data reported by election officials suggests that it is a small but visible part of the electoral landscape.

After every national election, the U.S. Election Assistance Commission (EAC) publishes the Election Administration and Voting Survey (EAVS) Report.¹³³ This spreadsheet includes county-by-county breakdowns of absentee ballot rejections, including the reason for discarding the votes.¹³⁴

After the 2018 midterm elections, the EAVS Report listed 3,320 absentee ballots that officials tossed because the voter had died before Election Day.¹³⁵ This number understates the prevalence of the DVR because 740 out of the 6,460 counties and municipalities did not respond to questions about the issue.¹³⁶ Yet in this partial snapshot, the DVR accounted for 1.5% of absentee

127. See MINN. STAT. ANN. § 203B.25 (West 2009), *repealed by* 2010 Minn. Laws 135; VA. CODE ANN. § 24.2-709(D) (West 2020) (“[A]n absentee ballot returned by a voter . . . who dies prior to the counting of absentee ballots on [E]lection [D]ay shall be counted . . .”).

128. See ARK. CODE ANN. § 7-5-416(c) (West 2020) (“If any person casting an absentee ballot dies before the polls open on election day, his or her vote shall be accepted by the county clerk . . .”).

129. See MD. CODE ANN., ELEC. LAW § 11-303.1 (West 2020) (“A ballot properly cast by a voter who dies before the ballot is canvassed shall be counted in full unless a law or regulation requires that the ballot be fully or partially rejected for a reason unrelated to the death of the voter.”).

130. See HAW. REV. STAT. ANN. § 15-13 (West 2018), *repealed by* 2019 Haw. Sess. Laws 49; IND. CODE ANN. § 3-11-10-23 (West 2019), *repealed by* 2019 Ind. Acts 3810.

131. See 2020 Mass. Acts 115 (“The absentee or early ballot of any voter who was eligible to vote at the time the ballot was cast shall not be deemed invalid solely because the voter became ineligible to vote by reason by death after casting the ballot.”).

132. State of S.C., Off. of the Att’y Gen., Opinion Letter to Ms. Andino as to Whether or Not to Count an Absentee Ballot Cast by a Voter Who Died After Submitting the Ballot (Oct. 23, 2008) [hereinafter South Carolina Opinion Letter].

133. See *Studies and Reports*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/research-and-data/studies-and-reports> (last visited Oct. 6, 2021).

134. The data file is available at *Surveys and Data*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys> (last visited Oct. 6, 2021). For 2018, information on absentee ballots rejected because of the voter’s death appears in column C4.

135. *Id.*

136. *Id.*

ballot rejections, which was roughly the same as the percentage of votes that were discarded for failing to comply with ballot signature or first-time voter ID requirements.¹³⁷

As this Article entered the editing stage, the EAC released the EAVS Report for the 2020 general election. It reveals that states rejected 6,599 ballots under the DVR. Again, this tally is incomplete: 1,347 of 6,423 localities provided no data. This sharp increase in rejected ballots likely stems from the surge in absentee voting. In 2018, voters cast 30,400,000 votes by mail,¹³⁸ whereas that figure soared to nearly 69,500,000 in 2020.¹³⁹ Likewise, the pandemic may also have contributed to the increase in early voter deaths.

Table 1: Ballots Rejected Because of Voter's Death

State [†]	2018	2020
	Midterms	General Election
Arizona ^{††}	46 ^{††}	49
Arkansas ^{††}	8 ^{††}	36 ^{††}
California ^{††}	198 ^{††}	612 ^{††}
Colorado	11	30
Delaware	1	74
District of Columbia	3	†††
Florida ^{††}	52 ^{††}	108
Hawaii	†	5 ^{††}
Idaho	13	8 ^{††}

137. See *Rejected Absentee/Mail-In Ballots in the 2016 and 2018 Elections*, BALLOTPEDIA, https://ballotpedia.org/Rejected_absentee/mail-in_ballots_in_the_2016_and_2018_elections (last visited Oct. 6, 2021).

138. *Vote by Mail Trends and Turnout in Six Election Cycles: 2008-2018*, U.S. ELECTION ASSISTANCE COMM'N (Oct. 22, 2020), <https://www.eac.gov/vote-mail-trends-and-turnout-six-election-cycles-2008-2018>.

139. U.S. ELECTION ASSISTANCE COMM'N, *ELECTION ADMINISTRATION AND VOTING SURVEY 2020 COMPREHENSIVE REPORT: A REPORT FROM THE U.S. ELECTION ASSISTANCE COMMISSION TO THE 117TH CONGRESS* 12 (2021), https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf.

Illinois	†	82††
Indiana††	26††	236††
Iowa	49	244
Kansas	16	47††
Kentucky	15	35
Maine	†	68††
Massachusetts	45	50
Michigan	1,429	3,450
Minnesota	50	119
Mississippi	†	2
Missouri	44	130
Nebraska	31	96
Nevada	25	22
New Hampshire	11	98
New York	964	688††
Ohio	58	3
South Dakota	4	28
Texas††	79††	50††
Utah††	24††	30
Washington	54	29
West Virginia	2	5
Wisconsin	62	165
Total	3,320	6,599

† The following states reported zero ballot rejections due to the voter's death in 2018: Alabama, Alaska, Hawaii, Louisiana, Mississippi, North Dakota, Oregon, Tennessee, and Wyoming. In the following states, every county reported either "data not available" or "does not apply": Connecticut, Georgia, Illinois, Maine, Maryland, Montana, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia.

†† Not all counties within the state reported data.

††† The following states reported zero ballot rejections due to the voter's death in 2020: Alaska, Louisiana, North Dakota, Oklahoma, and Wyoming. In the following states, every county reported either "data not available" or "does not apply": Alabama, Connecticut, Georgia, Maryland, Montana, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia.

The data also reveals that the DVR is more pervasive than is commonly believed. News stories on the topic claim that fifteen states disregard ballots cast by predeceasing voters.¹⁴⁰ Likewise, my research found sixteen jurisdictions that have either adopted the doctrine by statute or Attorney General opinion.¹⁴¹ Conversely, in the 2018 EAVS Report, twenty-seven states rejected votes cast by people who died before election day, and the 2020 EAVS Report puts the number at thirty.¹⁴² Oddly, some of these jurisdictions, such as Florida, Hawaii, and Idaho, have purportedly abandoned the DVR.¹⁴³ Similarly, in some jurisdictions where my research did not uncover a formal legal rule on point, local officials seem to march to the beat of their own drummer. For instance, in 2018, Santa Clara County, California, which has a population of about 2,000,000, applied the DVR seventy-two times.¹⁴⁴ Conversely, the total number of ballots rejected because of an early voter's death in Los Angeles, Sacramento, San Diego, and San Francisco Counties—areas with a combined 15,000,000 residents—was nine.¹⁴⁵ These statistics raise the disquieting possibility that the DVR is being applied haphazardly to some voters within certain states and not others.

140. See Austin, *supra* note 24.

141. See *supra* Part I.B.1; Austin, *supra* note 24. Because Hawaii, Indiana, and Massachusetts jettisoned the rule in the past three years, this number was twenty as of 2018. See *2020 General Election Early Vote Statistics*, *supra* note 20.

142. See *Surveys and Data*, *supra* note 134.

143. See *supra* text accompanying notes 124, 126, and 128. Oddly, Hawaii reported no data in 2018 (when it still followed the DVR) and five rejected ballots in 2020 (after it had supposedly repealed the doctrine).

144. *Surveys and Data*, *supra* note 134.

145. *Id.*

To summarize, because only the living can vote, many states reject absentee ballots cast by voters who die before Election Day. Indeed, during every national election, thousands of ballots fall prey to the DVR. Yet, as I discuss next, this harsh rule is both potentially unconstitutional and definitely bad policy.

II. ABOLISHING THE DVR

This Part seeks to eliminate the DVR. It does so by evaluating two related theories: that the doctrine is unconstitutional and that it is normatively flawed. Part II.A begins by describing why a constitutional challenge to the DVR would encounter powerful headwinds, such as the tradition of deferring to state limits on absentee voting and the difficulty of identifying a suitable plaintiff. These sections are exploratory: their goal is to think through the mind-bending dilemmas that would flow from such a claim. Part II.B, on the other hand, argues that because there is no persuasive justification for the DVR, there is a faint chance that it might be unconstitutional and, in any event, ought to be repealed.

A. *The U.S. Constitution*

Constitutional challenges to state election rules feature a clash of critical values. On the one hand, the U.S. Constitution allows states to set the “Times, Places and Manner of holding Elections”¹⁴⁶ and to “determin[e] the qualifications of voters.”¹⁴⁷ In turn, states must promulgate detailed regulations if “order, rather than chaos, is to accompany the democratic processes.”¹⁴⁸ But on the other hand, “[i]t is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’”¹⁴⁹ Indeed, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.”¹⁵⁰ As a result, “[t]he First and Fourteenth Amendments prohibit states from placing burdens on citizens’ right to vote that are not reasonably justified by ‘important regulatory interests.’”¹⁵¹

146. U.S. CONST. art. I, § 4, cl. 1.

147. *Lassiter v. Northhampton Cnty. Bd. of Elections*, 360 U.S. 45, 51 (1959); U.S. CONST. art. I, § 2, cl. 1.

148. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

149. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

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

151. *DCCC v. Ziri*, 487 F. Supp. 3d 1207, 1229 (N.D. Okla. 2020) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983)). Traditionally, plaintiffs argued that voting regulations violated the Fourteenth Amendment’s Equal Protection Clause. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“[T]his Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”). Today, equal protection claims often revolve around the “uniformity principle”: the idea that states cannot “provid[e] materially different treatment to similarly situated groups of

To resolve this conflict between state power and voters' rights, courts assess election rules under the *Anderson-Burdick* test.¹⁵² They begin by deciding whether a regulation "severely burdens" voters' rights.¹⁵³ If so, then strict scrutiny applies, and the law "must be 'narrowly drawn' to advance a [goal of] compelling importance."¹⁵⁴ Conversely, a rational basis-esque review applies if there is "no burden on the 'right to vote' at all."¹⁵⁵ Finally, for rules that fall between these poles, judges apply a kind of intermediate scrutiny and balance the "character and magnitude of the asserted injury" against "the precise interests put forward by the State as justifications for the burden imposed by its rule."¹⁵⁶

voters participating in the same election." Michael T. Morley, *Bush v. Gore's Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 261 (2020); see also *Browning v. Sarasota All. for Fair Elections*, 968 So. 2d 637, 653 (Fla. Dist. Ct. App. 2007), *aff'd in part*, 28 So. 3d 880 (Fla. 2010) (citing "the important public policy of election law uniformity"). In the dead voter context, a plaintiff might try to show that officials do not apply the doctrine evenhandedly to all predeceasing absentee ballots for the reasons I have discussed in Part I.B.2 and will revisit in Part II.B.2. Cf. *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011) (finding an equal protection violation when a county "treated some miscast provisional votes more favorably than others"); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (finding the same when the use of different voting systems with varying error rates meant that "people in different counties have significantly different probabilities of having their votes counted").

Alternatively, plaintiffs sometimes assert that a rule impermissibly burdens the First Amendment's fundamental right to vote. See, e.g., *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1092 (N.D. Ala. 2020), *appeals dismissed sub nom.* *People First of Ala. v. Sec'y of State for Ala.*, No. 20-13695-GG, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), and No. 20-13695-GG, 2020 WL 7028611 (11th Cir. Nov. 16, 2020). More specifically, "voters have a First Amendment right 'to associate for the advancement of political beliefs—a freedom likewise protected by the Fourteenth Amendment 'from infringement by the states.'" *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968)). As I explain in Part II.A.1, a judge could either decide that the DVR significantly burdens the right to vote or does not affect the right at all. See *infra* Part II.A.I.

152. See *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring). The rule gets its name from *Anderson*, 460 U.S. 780 (1983) and *Burdick*, 504 U.S. 428 (1992).

153. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 193 (M.D.N.C. 2020) (quoting *Fusaro v. Cogan*, 930 F.3d 241, 257 (4th Cir. 2019)), *reconsideration denied*, No. 1:20CV457, 2020 WL 6591396 (M.D.N.C. Sept. 30, 2020). Examples of severe burdens "include laws that condition the right to vote on property ownership or payment of a poll tax." *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008).

154. *Richardson v. Tex. Sec'y of State*, 485 F. Supp. 3d 744, 792 (W.D. Tex. 2020) (quoting *Burdick*, 504 U.S. at 434).

155. *Donald J. Trump for President v. Boockvar*, 502 F. Supp. 3d 899, 919 (M.D. Pa. 2020) (quoting *Donald J. Trump for President v. Boockvar*, 493 F. Supp. 3d 331, 383–84 (W.D. Pa. 2020)), *aff'd sub nom.* *Donald J. Trump for President v. Sec'y of Pa.*, 830 F. App'x 377 (3d Cir. 2020).

156. *Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020) (quoting *Burdick*, 504 U.S. at 434). Voters usually enjoy more success when they bring as-applied challenges to election rules, rather than facial challenges. See, e.g., *Brakebill v. Jaeger*, 905 F.3d 553, 558 (8th Cir. 2018). Yet this is because the burden of regulation tends to fall unevenly among different subgroups, which makes it hard to "justify broad relief that invalidates the requirements on a statewide basis as applied to all voters." *Id.*; see also *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (explaining that an as-applied challenge is more likely to prevail because "[t]he right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily"). However, because the DVR extends across-the-board to a readily-identifiable class—people who have died before Election Day—it is likely just as vulnerable to a facial challenge as an as-applied challenge.

1. *Absentee Voting*

However, courts have traditionally deferred to restrictions on absentee voting. This norm began in 1969 with the Supreme Court's decision in *McDonald v. Board of Election Commissioners of Chicago*.¹⁵⁷ Inmates awaiting trial at a Chicago jail sought to overturn an Illinois law that only allowed certain classes of people—such as those who were travelling or “physically incapacitated”—to vote absentee.¹⁵⁸ The Court began by stating the general principle that voting is “a basic, fundamental right,” and thus state statutes that “invade or restrain them must be closely scrutinized.”¹⁵⁹ Nevertheless, the Court held that “there is nothing in the record to indicate that the Illinois statutory scheme has an impact on [the inmates’] ability to exercise the fundamental right to vote.”¹⁶⁰ Indeed, the Court continued, it was “not the right to vote that is at stake here but a claimed right to receive absentee ballots.”¹⁶¹ Because there was no evidence that Illinois had “absolutely prohibited” the inmates from voting, the Court applied rational basis review and upheld the law simply because it was not “arbitrary.”¹⁶²

But five years later, in *O'Brien v. Skinner*, the Justices were more skeptical of a limit on absentee voting.¹⁶³ New York's absentee voting statute only allowed a prisoner to cast a ballot if he was confined “in a county in which he does not reside.”¹⁶⁴ The Court read *McDonald* narrowly, emphasizing that the opinion rested on the inmates' failure to prove that absentee voting was their *only* path to the ballot box.¹⁶⁵ In the Court's eyes, the New York law was different—and thus unconstitutional—because people who were jailed in the county where they lived had demonstrated that the law *totally precluded* them from voting.¹⁶⁶

For practical reasons, *McDonald's* legacy proved to be mightier than *O'Brien's*. Absentee voting laws rarely *completely* disenfranchise prospective voters. Instead, even if they exclude certain classes of people or encumber absentee ballots with formal requirements, people who cannot vote absentee

157. 394 U.S. 802 (1969).

158. *See id.* at 803.

159. *Id.* at 807 (quoting *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966)).

160. *Id.*

161. *Id.*

162. *Id.* at 808–09, 808 n.7.

163. *See O'Brien v. Skinner*, 414 U.S. 524, 529 (1974) (finding that the strict compelling-state-interest test must be applied to reviews of limitations on absentee voting, which differs from previous courts applying rational basis review). The Court also foreshadowed a retreat from some of *McDonald's* bolder statements in *Goosby v. Osser* by suggesting that it might strike down a Pennsylvania statute that “absolutely prohibit[ed]” certain people from voting. 409 U.S. 512, 521 (1973).

164. *O'Brien*, 414 U.S. at 528.

165. *Id.* at 529–30.

166. *Id.* at 530–31; *see also id.* at 532 (Marshall, J., concurring) (reasoning that *McDonald* featured a “relatively trivial inconvenience encountered by a voter unable to vote by absentee ballot when other means of exercising the right to vote [were] available”).

can usually vote in person.¹⁶⁷ Therefore, in a flurry of cases upholding limits on absentee voting, courts cited *McDonald* for the broad proposition that “there is no fundamental right to vote by absentee ballot.”¹⁶⁸

This understanding of *McDonald* took center stage in 2020, when COVID-19 unleashed a tsunami of litigation about absentee voting rules. Plaintiffs across the nation argued that the states needed to loosen the reins on absentee voting to accommodate the hazards of voting in person. These lawsuits targeted Alabama’s requirement that absentee ballot applications include a photo ID,¹⁶⁹ Arizona’s and Ohio’s policies of rejecting absentee ballots that lack proper voter signatures,¹⁷⁰ Tennessee’s insistence that certain first-time voters appear at the polls on Election Day,¹⁷¹ Texas’s rule that only people age sixty-five and over can vote by mail,¹⁷² South Carolina’s mandate that absentee ballots be witnessed,¹⁷³ and nearly every aspect of Georgia’s absentee voting system.¹⁷⁴

Courts disagreed about whether *McDonald* still required absentee voting laws to receive rational basis review unless they made voting impossible. For example, the Seventh Circuit upheld Indiana’s Election Day deadline for receiving absentee ballots, opining that because voters could always show up at the polls, the cutoff was constitutionally valid simply because it was “supported by a rational basis.”¹⁷⁵ The Fifth Circuit put it even more succinctly: “*McDonald* lives.”¹⁷⁶ But other judges held that restrictions on absentee ballots were far more burdensome during the crisis because they forced people to vote in

167. *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004).

168. *Id.* at 1370; *see also* *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (rejecting the idea that there is “a blanket right of registered voters to vote by absentee ballot”); *Dekom v. New York*, No. 12-CV-1318 (JS) (ARL), 2013 WL 3095010, at *16 (E.D.N.Y. June 18, 2013) (finding that the State’s interest in avoiding the expense and hassle of making absentee ballots available for certain elections outweighs the plaintiffs’ interest in voting), *aff’d*, 583 F. App’x 15 (2d Cir. 2014); *Fritzsche v. Md. State Bd. of Elections*, 916 A.2d 1015, 1022 (Md. 2007) (refusing to invalidate state law that mandated that absentee ballots be mailed no later than the day before the election). *But cf.* *Doe v. Walker*, 746 F. Supp. 2d 667, 681 (D. Md. 2010) (holding that although there is no “fundamental right to vote by absentee ballot,” an unreasonable state deadline for voting absentee is unconstitutional).

169. *See* *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020), *appeals dismissed sub nom.* *People First of Ala. v. Sec’y of State for Ala.*, No. 20-13695-GG, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), *and* No. 20-13695-GG, 2020 WL 7028611 (11th Cir. Nov. 16, 2020) (“[P]hoto ID law is more burdensome as applied to vulnerable voters during a pandemic.”).

170. *See* *Ariz. Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1081 (D. Ariz. 2020); *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 732 (S.D. Ohio 2020).

171. *See* *Memphis A. Phillip Randolph Inst. v. Hargett*, 485 F. Supp. 3d 959, 971 (M.D. Tenn. 2020), *vacated*, 2 F.4th 548 (6th Cir. 2021).

172. *See* *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 402 (5th Cir. 2020).

173. *See* *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *1 (D.S.C. May 25, 2020).

174. *See* *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1277–79 (N.D. Ga. 2020).

175. *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020); *see also* *Mays v. LaRose*, 951 F.3d 775, 791 (6th Cir. 2020) (“Ohio’s generally applicable deadline for requesting absentee ballots is constitutional because it imposes only a minimal burden on [Plaintiffs’] right to vote”); *Hobbs*, 485 F. Supp. 3d at 1093 (reasoning that although voting is a crucial right, “[t]here is no corresponding right to vote absentee”).

176. *Tex. Democratic Party*, 961 F.3d at 406.

person and “place themselves at risk of contracting a potentially terminal infection.”¹⁷⁷ Accordingly, these courts found that limits on absentee voting burdened the fundamental right to vote and qualified for intermediate scrutiny.¹⁷⁸ Thus, the law is in flux.

Making matters even hazier, a court would likely conceptualize the DVR in one of two diametrically opposed ways. A sympathetic judge could see the doctrine as the rare state regulation that falls under *O’Brien* rather than *McDonald*. Indeed, the principle does not merely make casting a ballot harder by imposing a formal requirement or a deadline. Instead, for people who die before Election Day and *cannot* show up at the polls, the doctrine *bars voting*. Thus, the logic continues, because the DVR “absolutely prohibit[s]” decedents from casting ballots, it significantly burdens the fundamental right to vote and must survive strict or at least intermediate scrutiny.¹⁷⁹

But a hostile court could also spin these facts in the opposite direction. If it were not for a state’s generosity in making absentee ballots available, it would be *impossible* for decedents to vote. Arguably, then, dead voters would be trying to exploit a loophole. They are demanding what courts uniformly say does not exist: the “right” to vote absentee.¹⁸⁰ And by denying them something to which they were never entitled, the DVR would not burden the fundamental right to vote and therefore would only need to pass the rational basis test.

Finally, one wild card remains. So far, I have assumed that a court would analyze the DVR as an election regulation subject to *Anderson-Burdick* balancing. But states also enjoy the “constitutional authority to establish qualifications (such as citizenship) for voting.”¹⁸¹ If a judge classified the DVR as a voter qualification, there is little instructive precedent. In *Harper v. Virginia State Board of Elections* and *Kramer v. Union Free School District No. 15* the Court effectively required states to deem all adult citizen residents of a jurisdiction to be qualified

177. *Richardson v. Trump*, 496 F. Supp. 3d 165, 181 (D.D.C. 2020), *appeal dismissed sub nom.* *Richardson v. Biden*, No. 20-5367, 2021 WL 672397 (D.C. Cir. Feb. 8, 2021).

178. *See* *Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 128 (D.D.C. 2020), *appeal dismissed*, No. 20-5353, 2021 WL 672395 (D.C. Cir. Feb. 10, 2021); *Richardson v. Tex. Sec’y of State*, 485 F. Supp. 3d 744, 776 (W.D. Tex. 2020); *Jones v. U.S. Postal Serv.*, 488 F. Supp. 3d 103, 139 (S.D.N.Y. 2020), *order clarified*, No. 20 CIV. 6516 (VM), 2020 WL 6554904 (S.D.N.Y. Sept. 29, 2020).

179. Even courts that upheld state rules that made it harder to vote absentee acknowledged that a regulation that made it impossible to vote would qualify for searching review. *See, e.g., Tex. Democratic Party*, 961 F.3d at 404 (“The plaintiffs are welcome and permitted to vote, and there is no indication that they ‘are in fact absolutely prohibited from voting by the State.’” (quoting *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 808 n.7 (1969))); *Mays*, 951 F.3d at 787 (“Because Plaintiffs are not totally denied a chance to vote by Ohio’s absentee ballot deadlines, strict scrutiny is inappropriate.”).

180. *See, e.g., Mays*, 951 F.3d at 792 (“[I]here is no constitutional right to an absentee ballot.”); *Hobbs*, 485 F. Supp. 3d at 1093 (reasoning that although “[v]oting is a fundamental right, . . . [t]here is no corresponding right to vote absentee”).

181. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013); *see also supra* text accompanying note 147.

voters.¹⁸² Yet neither case speaks to ballots cast by decedents. A closer analogue to the DVR may be *Holt Civic Club v. City of Tuscaloosa*, in which the Court applied the rational basis test to Alabama statutes that defined the boundaries of residency for the purposes of municipal elections.¹⁸³ Arguably, the DVR presents a similar question—one that centers on temporal, not geographic scope—and thus would also only need to withstand rational basis review. In sum, it is unclear what degree of scrutiny the DVR would trigger. Moreover, as I explain next, the fact that it impacts *decedents* poses special problems.

2. *Plaintiffs*

Because the DVR applies to people after they die, it is unclear who would be able to challenge it. This Subpart discusses three potential plaintiffs: the decedent's personal representative, a candidate who lost a close election, and a living voter with a terminal diagnosis.

a. *Estates*

One possibility is for a deceased voter's personal representative to request an injunction against the state discarding the voter's ballot. But because constitutional rights terminate at death, this claim would almost certainly fail.¹⁸⁴

The U.S. legal system has never made it easy to sue on behalf of a decedent. Under the ancient rule of abatement, suits for “personal wrongs,” such as those for physical injuries or breach of a contract to marry, ended with the plaintiff's life.¹⁸⁵ Conversely, claims to recover property or financial harm did not evaporate.¹⁸⁶ Instead, the executor or administrator stepped into the decedent's shoes and tried to win damages for the estate.¹⁸⁷ Eventually, states softened the abatement doctrine by passing survival statutes, which “allow the personal representative of the deceased to bring an action for the injuries sustained by the decedent before death.”¹⁸⁸ However, many of these laws contain gaping

182. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (“the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials”).

183. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70-71 (1978).

184. *State v. Powell*, 497 So. 2d 1188, 1190 (Fla. 1986).

185. See, e.g., *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 756-57 (1877) (“[B]y the common law no civil action lies for an injury which results in death”); *Shafer v. Grimes*, 23 Iowa 550, 553 (1868) (“[I]njuries merely personal . . . die with the person”); *Smith v. Sherman*, 58 Mass. (1 Cush.) 408, 413 (1849) (“[A]n action will not lie, by the administrator of a deceased person, for breach of promise of marriage.”).

186. See, e.g., *Gee v. Bess*, 132 S.W.2d 242, 243 (Mo. Ct. App. 1939) (explaining that claims for “property rights” do not abate).

187. See, e.g., *Kirby v. Clark*, 1 Root 389, 389 (Conn. Super. Ct. 1792) (“The action lies in favor of the administrator for goods taken and converted by the defendant in the lifetime of his intestate.”).

188. E.g., *Developments in the Law: Damages—1935-1947*, 61 HARV. L. REV. 113, 166 (1947).

holes.¹⁸⁹ For instance, some deny recovery in tort cases for a decedent's pain and suffering.¹⁹⁰ Moreover, defendants usually cannot be held accountable for actions taken *after* a plaintiff has passed on. Consider defamation. The Restatement (Second) of Torts provides that “[o]ne who publishes defamatory matter concerning a deceased person is not liable.”¹⁹¹ As a Louisiana appellate court explained, although false statements may blacken a person's reputation, “[o]nce a person is dead, there is no extant reputation to injure.”¹⁹² In these ways, “personal” causes of action still “die[] with the plaintiff.”¹⁹³

Even more to the point, some courts have declared that a decedent “has no constitutional rights.”¹⁹⁴ Estates of murder victims or people killed by the police sometimes allege under 42 U.S.C. § 1983 that officials either failed to investigate the incident or conspired to cover it up.¹⁹⁵ Instead of claiming that the government violated the plaintiff's rights while she was alive, these causes of action focus on conduct that occurred when she “was already deceased.”¹⁹⁶

189. See, e.g., ALA. CODE § 6-5-462 (2021) (abating tort claims that have not been filed); Nordwall v. PHC-Las Cruces, Inc., 960 F. Supp. 2d 1200, 1244 (D.N.M. 2013) (determining that intentional tort claims abate).

190. See, e.g., ARIZ. REV. STAT. ANN. § 14-3110 (West 2021) (“[U]pon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed.”); CAL. CIV. PROC. CODE § 377.34 (West 2021) (prohibiting the recovery of “damages for pain, suffering, or disfigurement”); *Peklun v. Tierra Del Mar Condo. Ass'n*, 119 F. Supp. 3d 1361, 1372 (S.D. Fla. 2015) (holding that “[w]hile survivors may recover the survivors' mental pain and suffering, loss of the deceased's earnings from the date of injury to the date of death, and for medical or funeral expenses,” there is no “cause of action for the pain and suffering of a decedent” (quoting *Degraw v. Gualtieri*, No. 8:11-CV-720-EAK-MAP, 2013 WL 3462332, at *3 (M.D. Fla. July 9, 2013))). Not every state follows this rule. See, e.g., *Nelson v. Dolan*, 434 N.W.2d 25, 30 (Neb. 1989) (“[W]e have long permitted a decedent's estate to recover for the conscious physical pain and suffering the decedent endured after a negligently inflicted injury . . .”).

191. RESTATEMENT (SECOND) OF TORTS § 560 (AM. L. INST. 1977) (“One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives.”); *Saari v. Gillett Commc'ns of Atlanta, Inc.*, 393 S.E.2d 736, 737 (Ga. Ct. App. 1990) (“There is no common law right of action for defamation of a deceased person.”). *But see* 10 R.I. GEN. LAWS ANN. § 10-7.1-1 (West 2021) (creating a cause of action for decedents who “have been slandered or libelled in an obituary or similar account in any newspaper or on any radio or television station within three (3) months of his or her date of death”).

192. *Johnson v. KTBS, Inc.*, 39,022 (La. App. 2 Cir. 11/23/04); 889 So. 2d 329, 332. *But see* Lisa Brown, Note, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1528 (1989) (“False statements about dead people can affect several discrete interests beyond a decedent's reputation. These interests include the feelings of the decedent's family and the economic effects that defamatory statements have on the decedent's estate or on the family's business.”).

193. *Jacobs ex rel. Estate of Jacobs v. Evangelical Lutheran Good Samaritan Soc'y*, 849 F. Supp. 2d 893, 901 (D.S.D. 2012) (quoting *Deal v. Northwood Child.'s Home Soc'y, Inc.*, 608 N.W.2d 922, 924 (Minn. Ct. App. 2000)).

194. *Infante v. Dignan*, 782 F. Supp. 2d 32, 38 (W.D.N.Y. 2011).

195. See, e.g., *Judge v. City of Lowell*, 160 F.3d 67, 76 (1st Cir. 1998), *overruled on other grounds by Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61 (1st Cir. 2004); *Ford v. Moore*, 237 F.3d 156, 165 (2d Cir. 2001); *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979); *Guyton v. Phillips*, 606 F.2d 248, 250 (9th Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 749 (10th Cir. 1980).

196. *Cook v. City of Dallas*, No. 3:12-CV-03788-P, 2014 WL 12820618, at *6 (N.D. Tex. Mar. 25, 2014), *aff'd sub nom. Cook v. Hopkins*, 795 F. App'x 906 (5th Cir. 2019). When the wrongdoing occurred during a decedent's life, courts look to state law to decide whether claims survive. See 42 U.S.C. § 1988; *Robertson v. Wegmann*, 436 U.S. 584, 588–90 (1978) (holding that a § 1983 claim for bad faith criminal

And they have uniformly failed.¹⁹⁷ Section 1983 only permits a “person” to seek redress for constitutional torts.¹⁹⁸ But as the Fourth Circuit held in *Whitehurst v. Wright*, “After death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived.”¹⁹⁹

Cases like *Whitehurst* insulate the DVR from a lawsuit filed by a decedent’s personal representative. Indeed, in this context, the potentially unconstitutional conduct—refusing to tally the ballot—always occurs after the voter has passed away. Accordingly, because constitutional rights cease “once [a] person has died,”²⁰⁰ the DVR does not cause a cognizable injury.

In addition, seen through a certain prism, this result is defensible. It is hard to pinpoint the harm to the decedent, who will not discover that a state has invalidated her vote. Consider Trixie Porter, who died one hour after finalizing her absentee ballot.²⁰¹ North Carolina, where Trixie lived, follows the DVR.²⁰² But from Trixie’s perspective, did it matter that her ballot was invalid? Trixie’s daughter did not think so. As she remarked, Trixie “went to her grave not knowing any different.”²⁰³ Arguably, if the law does not always permit an estate to recover damages for pain and suffering that the decedent *did* experience during life, it would be perverse to allow an executor or administrator to vindicate a “wrong” that the decedent did not realize she had suffered.

prosecution abated under a Louisiana law that only allows claims for property damage to pass to an estate); *Grandbouche v. Clancy*, 825 F.2d 1463, 1465 (10th Cir. 1987) (“[Q]uestions of survivorship in *Bivens* suits are decided by looking to state law.”).

197. See, e.g., *Judge*, 160 F.3d at 72; *Ford*, 237 F.3d at 165; *Whitehurst*, 592 F.2d at 841; *Guyton*, 606 F.2d at 251; *Silkwood*, 637 F.2d at 749.

198. 42 U.S.C. § 1983 (authorizing lawsuits by “any citizen of the United States or other person within the jurisdiction thereof [for] the deprivation of any rights, privileges, or immunities secured by the Constitution and laws”).

199. *Whitehurst*, 592 F.2d at 840; see also *Judge*, 160 F.3d at 76 n.15 (“[W]e note . . . that all of the actions that form the basis of [the plaintiff’s] claims occurred subsequent to [the decedent’s] death. At that time, [the decedent] had no rights of which he could be deprived.”); *Ford*, 237 F.3d at 165 (“Even if there were a viable claim against [the defendant] for conduct after [the decedent’s] death, the death would have extinguished any claim of [the decedent’s]”); *Guyton*, 606 F.2d at 250; *Jay v. Harris*, No. C 07-01544 MHP, 2007 WL 2019563, at *2 (N.D. Cal. July 9, 2007) (“The law . . . does not provide remedy for those decedents whose deaths—rightly or wrongly—were not investigated.”); *Estate of Conner ex rel. Conner v. Ambrose*, 990 F. Supp. 606, 618 (N.D. Ind. 1997) (“It is clear that § 1983 does not provide a cause of action on behalf of a deceased based upon alleged violations of the deceased’s civil rights which occurred after his death.”); *Martin v. Unknown U.S. Marshals*, 965 F. Supp. 2d 502, 543 (D.N.J. 2013) (“[A] person’s constitutional rights cannot be violated after death.”). But see *Fred O. Smith, Jr., The Constitution After Death*, 120 COLUM. L. REV. 1471, 1479–86 (2020) (arguing that these cases were wrongly decided).

200. *Soto v. City of Paterson*, No. 18-11311-SDW-SCM, 2019 WL 4686809, at *3 (D.N.J. Sept. 26, 2019) (quoting *Hauptmann v. Wilentz*, 570 F. Supp. 351, 367 n.15 (D.N.J. 1983)).

201. *Breed*, *supra* note 23.

202. See *supra* text accompanying note 103.

203. *Breed*, *supra* note 23.

b. Candidates

Another option would be for a candidate who was deprived of crucial votes to try to overturn the DVR. However, this approach is also flawed.

In general, “[C]onstitutional rights are personal and may not be asserted vicariously.”²⁰⁴ However, the doctrine of third-party standing carves out an exception to this principle when a litigant establishes three things:

The litigant must have suffered an “injury in fact,” thus giving him or her a “sufficiently concrete interest” in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party’s ability to protect his or her own interests.²⁰⁵

A politician seeking to represent dead voters fits these criteria like a glove. First, she would have suffered an “injury in fact” because she has been deprived of “the emoluments of office.”²⁰⁶ Second, she would satisfy the “close relation” test because her interest is “dependent upon those who wish to vote for h[er].”²⁰⁷ And although the “hindrance” element can be a sticking point when candidates seek to represent voters—after all, what stops the voters from suing?²⁰⁸—courts routinely find it to be met when the third party is deceased.²⁰⁹

Moreover, one high-profile case suggests that third parties can step into the shoes of decedents whose constitutional rights have been violated. In *Hodel v. Irving*, Congress had passed the Indian Land Consolidation Act, which mandated that small interests in Native American land would escheat to the tribe rather than pass by will or intestacy.²¹⁰ Three members of the Oglala Sioux Tribe died and were unable to transmit real property to their loved ones.²¹¹

204. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *see also* *Febo v. Alameda Cnty. Sheriff’s Dep’t*, No. 19-CV-00803-HSG, 2019 WL 3323094, at *2 (N.D. Cal. July 24, 2019) (observing that people usually cannot “complain about the deprivations of the constitutional rights of others”).

205. *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citations omitted); *see also* *Ark. Right to Life State Pol. Action Comm. v. Butler*, 983 F. Supp. 1209, 1218 (W.D. Ark. 1997) (noting that courts consider “the relationship of the litigant to the person whose right he seeks to assert[] and the ability of the third party to assert his own right” (quoting *Irving v. Clark*, 758 F.2d 1260, 1267 (8th Cir. 1985), *aff’d sub nom. Hodel v. Irving*, 481 U.S. 704 (1987))), *aff’d and remanded*, 146 F.3d 558 (8th Cir. 1998).

206. *Gunaji v. Macias*, 31 P.3d 1008, 1014 (N.M. 2001).

207. *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973); *see also* *Pa. Psychiatric Soc’y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 n.10 (3d Cir. 2002) (“[C]andidates for public office may be able to assert the rights of voters.”); *Piccolo v. N.Y.C. Campaign Fin. Bd.*, No. 05 CV 7040(GBD)(MHD), 2007 WL 2844939, at *11 (S.D.N.Y. Sept. 28, 2007) (holding that a candidate for mayor of New York “has standing to assert the constitutional rights of voters in this context”).

208. *See, e.g., Somers v. S.C. State Election Comm’n*, 871 F. Supp. 2d 490, 498 (D.S.C. 2012) (denying third-party standing to a candidate when “[s]he has not shown that any . . . [v]oter wishes to assert his or her rights”).

209. *See, e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (“[The decedent’s] failure to assert a claim in his own right ‘stems from disability,’ not ‘disinterest,’ for [the decedent] died . . . many years before the current controversy arose.” (citation omitted) (quoting *Miller v. Albright*, 523 U.S. 420, 450 (1998) (O’Connor, J., concurring))).

210. *Hodel*, 481 U.S. at 709.

211. *Id.*

Their heirs and beneficiaries sued, arguing that the statute had violated the three deceased tribe members' Fifth Amendment rights by taking their property without just compensation.²¹² Although the deprivation occurred after the tribe members had passed away, the Eighth Circuit held that the plaintiffs had third-party standing to address this injury:

[The] decedent[s] cannot rise from the grave to assert [their] own rights. The right to pass property by devise or inheritance, however, cannot truly be exercised until death; seemingly the right must contemplate not just, for example, the writing of the will but also the disposition of the property according to the wishes expressed therein. If heirs and devisees do not have standing to assert their decedents' rights during settlement of estates, rights of devise and inheritance become mirages shimmering in life but vanishing at death upon attempted use.²¹³

The Supreme Court affirmed, noting that the deceased tribe members could not assert their own constitutional claims “[f]or obvious reasons.”²¹⁴

There is the germ of an argument that *Hodel* “makes it ‘clear [that] decedents have . . . constitutional right[s]’” when a third party’s interests are also at stake.²¹⁵ In fact, such an exception would dovetail with the goals of the abatement doctrine.²¹⁶ The rule that estates cannot pursue “personal” claims is prudential. It wastes the resources of the judicial system to try to reimburse a decedent for the private agony of physical harm, the embarrassment of a tarnished reputation, or the frustration of being victimized by a postdeath conspiracy.²¹⁷ Indeed, as one federal judge put it, if a plaintiff has died, “[A]ny damage award would not compensate him for his injuries, because the cruel fact is that he is no longer present”²¹⁸ But if a living person’s rights have been

212. *Id.* at 709–10. Usually, a decedent’s personal representative files a takings claim on behalf of the estate. *See, e.g.*, 29A C.J.S. *Eminent Domain* § 578 (2021) (“Executors or administrators may initiate proceedings in their own names to recover damages for taking of decedents’ property that occurred during the decedents’ lifetimes.”); *Turnacliff v. Westly*, 546 F.3d 1113, 1119 (9th Cir. 2008); *Grass Valley Terrace v. United States*, 69 Fed. Cl. 506, 510 & n.7 (2006) (collecting authority); *Tumidajewicz v. City of Chicopee*, 231 N.E.2d 926, 927 (Mass. 1967). However, under the unique rules that governed the inheritance of the Native American land that was the subject of the lawsuit, the deceased tribe members did not have personal representatives. *See Hodel*, 481 U.S. at 711. As a result, the heirs and beneficiaries were the only possible plaintiffs. *Id.*

213. *Irving v. Clark*, 758 F.2d 1260, 1267 (8th Cir. 1985), *aff’d sub nom. Hodel*, 481 U.S. 704.

214. *Hodel*, 481 U.S. at 711, 717–18.

215. *Libertarian Nat’l Comm., Inc. v. Fed. Election Comm’n*, 930 F. Supp. 2d 154, 170 (D.D.C. 2013), *aff’d*, No. 13–5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014).

216. *Smith*, *supra* note 199, at 1475.

217. *See supra* text accompanying notes 186–88.

218. *Brown v. Morgan Cnty.*, 518 F. Supp. 661, 664 (N.D. Ala. 1981); *see also Sullivan v. Delta Air Lines, Inc.*, 52 Cal. Rptr. 2d 662, 664 n.3 (Cal. Ct. App. 1996) (“It does not seem reasonable that an estate should be enhanced by the value placed by a jury upon the pain and suffering experienced by a dead man. The deceased bore the pain and suffering and he is the only one who should be compensated.” (quoting Lawrence Livingston, *Survival of Tort Actions: A Proposal for California Legislation*, 37 CALIF. L. REV. 63, 73–74 (1949))), *rev’d*, 935 P.2d 781 (Cal. 1997).

impaired, then a case no longer involves metaphysical harm, and it would be unjust to slam the courthouse door.²¹⁹

However, on closer inspection, this theory is unpersuasive. It conflates *standing* to pursue a claim with the *existence* of the cause of action itself. Indeed, the mere fact a candidate enjoys the ability to vindicate a voter's rights does not mean that the voter *has* any rights to vindicate.²²⁰

One case has untangled these concepts. In *Libertarian National Committee, Inc. v. Federal Election Commission*, Raymond Burrington executed a will leaving roughly \$200,000 to the Libertarian National Committee, Inc. (LNC).²²¹ After Burrington passed away, the Federal Election Commission (FEC) took the position that the Federal Election Campaign Act (FECA) required the LNC to receive the bequest in several annual payments, rather than in one lump sum.²²² The LNC argued that this interpretation of the FECA violated Burrington's First Amendment rights.²²³ A federal court in the District of Columbia first held that the LNC had third-party standing and could "assert the First Amendment interests of Burrington."²²⁴ Critically, however, the court then found that Burrington *had no such interests*.²²⁵ Indeed, as the court put it, the FEC's reading of the FECA did not harm Burrington because he "is now deceased, so he currently cannot exercise any First Amendment right[s]."²²⁶

Likewise, a political candidate who demonstrates that she has third-party standing to represent voters has only won half the battle. She still must demonstrate that the voters suffered a constitutional deprivation after they died. And for the reasons I have discussed, there is no way around that brick wall.

c. *Living Voters*

Finally, living but terminally ill people could file a pre-Election Day lawsuit. This tactic would avoid the objection that the dead do not have constitutional rights but would raise justiciability issues.

219. Cf. *Brown*, *supra* note 192 (advocating for the recognition of a cause of action for posthumous defamation because "[f]alse statements about dead people can affect several discrete interests[,] . . . includ[ing] the feelings of the decedent's family and . . . the family's business").

220. To be sure, a third party can redress a violation of someone else's constitutional rights when the third party herself has not suffered a constitutional injury. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 410, 416 (1991) (holding that "a criminal defendant has standing to raise the equal protection rights of a juror excluded from service"); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1359 (2000) (noting that in *Powers* "the defendant's own constitutional rights were not necessarily infringed"). Yet I am aware of no authority that the arrow runs in the other direction and a third party can redress the constitutional rights of someone who has suffered no constitutional injury.

221. *Libertarian Nat'l Comm., Inc. v. Fed. Election Comm'n*, 930 F. Supp. 2d 154, 156, 170 (D.D.C. 2013), *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014).

222. *Id.* at 155-56.

223. *Id.*

224. *Id.* at 163.

225. *See id.* at 169.

226. *Id.*

To sidestep the problems mentioned above, plaintiffs could try to repackage the harm caused by the DVR. Elderly or gravely sick people could argue that the doctrine deters them from trying to participate in the democratic process.²²⁷ Arguably, voting is an exercise in futility if the state is likely to discard the ballot. This cohort could analogize to cases that acknowledge that voter ID requirements are troubling because they *indirectly* disenfranchise citizens:

[S]ome people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote, and a few who have a photo ID but forget to bring it to the polling place will say what the hell and not vote, rather than go home and get the ID and return to the polling place.²²⁸

Admittedly, judges routinely uphold these laws on the grounds that their benefits outweigh their costs.²²⁹ But for my purposes, the relevant point is that soon-to-be-dead voters can attack a regulation on the grounds that it simply “discourage[s] them] from voting.”²³⁰

However, a preemptive attack by living voters would face standing problems. Article III of the U.S. Constitution limits the judicial power to “adjudicating actual ‘cases’ and ‘controversies.’”²³¹ To fit within these parameters, a plaintiff must prove, among other things, that she has experienced an injury in fact that is “actual or imminent, not conjectural or hypothetical.”²³² The “imminence” requirement can be the downfall of pre-Election Day challenges because it can be unclear who, if anyone, will be affected by the targeted state rule.²³³ For example, in *Anderson v. Raffensperger*, a group of voters and political organizations sued shortly before the 2020 presidential election, demanding that Georgia officials adopt a series of measures designed to reduce wait times at the polls.²³⁴ The plaintiffs asserted that these steps were necessary because the state’s June 2020 primary had been marred by long lines.²³⁵ A federal district court dismissed the complaint for lack of standing, reasoning that “[t]he predictive value of Georgia’s past elections is simply too limited to tell us (with the requisite certainty) what will happen in November.”²³⁶

227. Cf. Edwards, *supra* note 25, at 1606 (arguing that Congress should abolish the DVR because “[e]lderly and terminally ill voters will continue to demand their right to representation if they believe that their vote will be counted along with the others”).

228. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008).

229. See, e.g., Crawford, 553 U.S. at 204; Common Cause/Ga. v. Billups, 554 F.3d 1340, 1353 (11th Cir. 2009).

230. Majority Forward v. Ben Hill Cnty. Bd. of Elections, 512 F. Supp. 3d 1354, 1371 (M.D. Ga. 2021).

231. A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co., 925 F.3d 1205, 1210 (11th Cir. 2019).

232. Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).

233. See, e.g., Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 203 (2011) (“[T]he identity of those who will be harmed by the challenged practice is unknown prior to the election.”).

234. Anderson v. Raffensperger, 497 F. Supp. 3d 1300, 1304 (N.D. Ga. 2020).

235. *Id.* at 1304–07.

236. *Id.* at 1309.

Similarly, officials might argue that an effort by living voters to overturn the DVR involves mere “[a]llegations of possible future injury.”²³⁷ Of course, no voter will be able to prove that she *will* die before Election Day and thus be disenfranchised. Moreover, the state could even question the sincerity of the plaintiff’s assertion that the DVR deters her from casting a ballot. Indeed, there is something inherently contradictory about taking the time and trouble to initiate litigation that revolves around the assertion that you cannot take the time and trouble to vote. Thus, there is no guarantee that this strategy would work.

In sum, a constitutional challenge to the DVR would blaze a trail through newly unsettled terrain. It is unclear how a court would assess such a claim and who would even bring it. With that in mind, the next Section critiques justifications for the DVR. It does so to consider how the doctrine would fare if a constitutional challenge survived to the point where a court applied either strict or intermediate scrutiny or, as is more probable, rational basis review. Also, by ventilating the policy underpinnings of the principle, it evaluates whether legislatures should abolish it.

B. *Rationales for the DVR*

A court evaluating the constitutionality of the DVR and a legislature deciding whether to retain the doctrine must examine its normative underpinnings. To be sure, this inquiry would be refracted through divergent lenses. First, on the off chance that a judge decided that strict or intermediate scrutiny governed, she would “balance any burden on the right to vote imposed by the [rule] against the government’s asserted interests as justifications for imposing that burden.”²³⁸ Under strict scrutiny, the DVR would “only be upheld if it is ‘narrowly drawn to advance a state interest of compelling importance,’”²³⁹ whereas intermediate scrutiny involves determining whether the doctrine’s costs outweigh its benefits.²⁴⁰ Second, in the far more likely event that rational basis review applied, the court would employ an “extraordinarily permissive . . . standard”²⁴¹ that merely requires the state to demonstrate that the law “bear[s] some rational relationship to a legitimate state purpose.”²⁴²

237. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 150 (1990)).

238. *Fish v. Schwab*, 957 F.3d 1105, 1127–28 (10th Cir. 2020).

239. *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

240. *See, e.g., Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020) (“Only where the State’s interests outweigh the burden on the plaintiff’s right to vote do voting restrictions not offend the Equal Protection Clause.”).

241. Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 580 (2018).

242. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70 (1978).

Third, the legislature would simply decide whether the rule is good policy. But even though the scales would be calibrated differently, each analysis hinges on the DVR's benefits and costs.

Against this backdrop, this Section argues that the DVR is misguided. Its only articulated justification—that decedents are not “qualified” to vote on Election Day—is unsatisfying. To be sure, there are compelling reasons to prevent people from voting by proxy from beyond the grave. But votes cast by living individuals who *then* die are manifestly different. Moreover, although a proponent of the DVR might also claim that it helps officials administer the election and prevents fraud, these arguments are not persuasive. Thus, the doctrine would probably flunk strict and intermediate scrutiny, and there is even a very faint possibility that it does not have a rational basis.²⁴³ Alternatively, lawmakers should jettison the rule.

1. Voter Qualifications

As mentioned, the DVR supposedly arises from the technicality that absentee ballots are not effective until Election Day. Thus, the syllogism continues, because states do not allow decedents to vote, a person who casts an early ballot and then dies “lacked the qualifications to vote when he or she cast the vote.”²⁴⁴ This Section exposes the flaws in this theory.

A primer on voter qualifications can frame this discussion. As noted above, states can “impose certain qualifications on and regulate access to the franchise.”²⁴⁵ Sadly, voter qualifications are synonymous with voter

243. Every once in a blue moon, courts either imply or hold that election laws lack a rational basis. For example, in *Florida Democratic Party v. Scott*, Hurricane Matthew tore through the Gulf Coast five days before Florida's voter registration deadline. Fla. Democratic Party v. Scott, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016). State law did not permit officials to postpone the deadline due to an emergency. *See id.* at 1257. A federal judge found that this rubric severely burdened the right to vote, applied strict scrutiny, and granted an injunction giving citizens more time to register. *See id.* at 1257–59. Then, in dicta, the court opined that Florida's approach would flunk the rational basis test, noting that it made no sense for the state “to refuse to extend the voter registration deadline when the state already allows the Governor to suspend or move the election date due to an unforeseen emergency.” *Id.* at 1257.

Likewise, in 2011, Wisconsin adopted a photo ID rubric that was riddled with exclusions and caveats. *See One Wis. Inst., Inc. v. Nichol*, 155 F. Supp. 3d 898, 903 (W.D. Wis. 2015). One such rule was that “[a] student ID card, alone among the sorts of photo ID that Wisconsin accepts, is not sufficient for voting unless the student also shows proof of current enrollment.” *Luft v. Evers*, 963 F.3d 665, 677 (7th Cir. 2020). The Seventh Circuit held that this aspect of the law lacked a rational basis, noting that “[n]o other category of acceptable identification—including for drivers, military members, passport holders, or veterans—depends on ongoing affiliation of any sort.” *Id.*; *see also* *Priorities USA v. State*, 591 S.W.3d 448, 454 (Mo. 2020) (en banc) (invalidating portion of Missouri's photo ID law that required voters “to sign an ambiguous, contradictory statement under oath and subject to the penalty of perjury” under rational basis test).

244. South Carolina Opinion Letter, *supra* note 132.

245. *Greidinger v. Davis*, 988 F.2d 1344, 1349 (4th Cir. 1993).

suppression: with only opening the polls to “white, land-owning men,”²⁴⁶ racist poll taxes and literacy tests,²⁴⁷ bitter contemporary controversies over photo ID mandates,²⁴⁸ and disenfranchising noncitizens²⁴⁹ and felons.²⁵⁰ Despite this checkered past and present, many voter qualifications are supposed to serve a valuable goal: “[P]romoting intelligent and responsible exercise of the franchise.”²⁵¹ For example, the minimum voting age of eighteen arguably reflects “the principle that [children] are incapable of making a rational political choice.”²⁵² Likewise, courts have held that some residency requirements weed out those “who have no intention of establishing a permanent [home] in the area, and hence have little incentive, interest or opportunity to become informed voters.”²⁵³ Thus, at least in theory, qualifications limit voting to people who can make sober and thoughtful decisions.

Although there is a vast scholarship on voter qualifications, one such mandate has flown below the radar: the mandate that voters be alive.²⁵⁴ For some readers, the fact that no one can vote from the grave might seem obvious. But the issue is not that simple. U.S. law confers tremendous power upon the dead. An owner’s dominion over her property after death is nearly “as absolute

246. Audrey Paige Sauer, Note, *Privacy or the Polls: Public Voter Registration Laws as a Modern Form of Vote Denial*, 61 WM. & MARY L. REV. 1473, 1477 (2020).

247. See, e.g., *Williams v. Mississippi*, 170 U.S. 213, 221, 223 (1898) (upholding a poll tax and a literacy test from constitutional challenge).

248. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (upholding an Indiana statute that required people voting in person to present a government-issued photo identification).

249. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996); 18 U.S.C. § 611 (making it a crime for noncitizens to vote in federal elections); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1117 (1977) (assessing the argument that “aliens lack the knowledge to vote intelligently”); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993) (“[T]he current blanket exclusion of noncitizens from the ballot is neither constitutionally required nor historically normal.”).

250. See, e.g., *Jones v. Governor of Fla.*, 975 F.3d 1016, 1031 (11th Cir. 2020) (“Like requiring voters to prove their identity, requiring felons to complete their full criminal sentences ‘falls squarely within the state’s power to fix core voter qualifications.’” (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 409 (9th Cir. 2012) (en banc), *aff’d sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013))); Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 136 (2013) (“[T]he commission of (or failure to commit) a crime does not rationally relate to intelligent use of the ballot . . .”).

251. *Oregon v. Mitchell*, 400 U.S. 112, 242 (1970) (Brennan, J., concurring in part and dissenting in part); see also *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (expressing skepticism of voter qualifications that “[are] not germane to one’s ability to participate intelligently in the electoral process”).

252. *The Need for Reform of Ex-Felon Disenfranchisement Laws*, 83 YALE L.J. 580, 586 (1974). But see Joshua A. Douglas, Essay, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63, 72 (2017) (arguing that lowering the voting age would enfranchise a class of people who are “competent enough to make democratic decisions and ha[ve] a sufficient, actual stake in the outcome”).

253. *Wright v. Blue Mountain Hosp. Dist.*, 328 P.2d 314, 320 (Or. 1958); cf. *Dunn v. Blumstein*, 405 U.S. 330, 334, 356 (1972) (striking down Tennessee’s durational residency requirement that voters “must have been a resident for a year in the [s]tate and three months in the county” despite the state’s claim that “a longtime resident is ‘more likely to exercise his right [to vote] more intelligently’”).

254. See *supra* text accompanying note 110.

as [her] right to convey it during [her] life time.”²⁵⁵ She can disinherit her minor children,²⁵⁶ condition someone’s inheritance on them joining a particular religion²⁵⁷ or marrying a certain type of person,²⁵⁸ and make dispositions that are “unreasonable, unjust, injudicious, or cruel.”²⁵⁹ Likewise, after the widespread repeal of the rule against perpetuities,²⁶⁰ settlors can establish dynasty trusts that last until “the 114,500 beneficiaries could not even squeeze into Michigan Stadium or the Rose Bowl for a college football game.”²⁶¹ Accordingly, it is not too far-fetched to imagine a decedent trying to create a “testamentary ballot”²⁶² or a “a will stating that he would like to vote Republican after his death.”²⁶³

However, these posthumous voters would be as incapable of making educated choices as infants and people who do not live in the state where they wish to vote. Indeed, “reflective voting requires a knowledge of current

255. *In re Caruthers’ Est.*, 151 S.W.2d 946, 948 (Tex. Civ. App. 1941); see also RAY D. MADOFF, IMMORTALITY AND THE LAW 7 (2010) (“American law has moved over the years to grant more rights to the dead.”); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2003) (“Property owners have the nearly unrestricted right to dispose of their property as they please.”); ELLAS CLARK ET AL., CASES AND MATERIALS ON GRATUITOUS TRANSFERS: WILLS, INTERSTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS, AND ESTATE AND GIFT TAXATION 1 (3d ed. 1985) (“In a capitalistic economy based on the institution of private property owners have the widest possible latitude in disposing of their property in accordance with their own wishes whether they be wise or foolish.”); Langbein, *supra* note 7, at 491 (“[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.”).

256. See, e.g., Michael J. Higdon, *Parens Patriae and the Disinherited Child*, 95 WASH. L. REV. 619, 621 (2020) (“In forty-nine states, parents have the right ‘to disinherit their children and grandchildren for any reason or no reason’” (quoting Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 131 (2008))). Australia and England have family maintenance regimes, which allow judges to rewrite an estate plan to give a testator’s kin “adequate maintenance whenever his will does not provide it.” Joseph Laufer, *Flexible Restraints on Testamentary Freedom—a Report on Decedents’ Family Maintenance Legislation*, 69 HARV. L. REV. 277, 282–85 (1955). In addition, civil law jurisdictions shield children from disinheritance by giving them a minimum “forced share.” Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 n.3 (1996).

257. See, e.g., *In re Estate of Laning*, 339 A.2d 520, 521–23 (Pa. 1975) (enforcing a condition that beneficiaries be “members in good standing of the Presbyterian Church”).

258. See, e.g., *In re Estate of Feinberg*, 919 N.E.2d 888, 891 (Ill. 2009) (involving an estate plan in which “any such descendant who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within one year of marriage would be ‘deemed deceased for all purposes of this instrument as of the date of such marriage’”); *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 826 (Ohio Ct. Com. Pl. 1974) (upholding a provision that required the testator’s sons to each marry “a Jewish girl whose both parents were Jewish” within seven years of the testator’s death to receive their shares of the residue).

259. *Smith v. Smith*, 25 A. 11, 19 (N.J. Prerog. Ct. 1891).

260. See, e.g., Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005) (reporting that almost half the states have abolished the rule against perpetuities).

261. Lawrence W. Waggoner, *Message to Congress: Halt the Tax Exemption for Perpetual Trusts*, 109 MICH. L. REV. FIRST IMPRESSIONS 23, 24 (2010).

262. Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1282.

263. Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 778 (2009).

circumstances,”²⁶⁴ but the dead suffer from a crippling informational disadvantage. Their views are frozen in amber: they cannot learn, debate, or change their minds. As one estate planning treatise puts it, “the judgment of a mediocre mind” in the present day is “preferable to the guess in 1960 of the greatest [person] who ever lived.”²⁶⁵

Moreover, a decedent’s vote might be tainted by moral hazard. Unlike a living person, a “decedent does not have to live with the consequences of his decision.”²⁶⁶ At minimum, the freedom to wield “power without responsibility” might cause an individual not to take voting seriously.²⁶⁷ At the extreme, there are scattered and infamous examples of people who have used their estate plans to try to accomplish bizarre goals that they did not pursue during life, such as requiring their executor to destroy their money²⁶⁸ or house²⁶⁹ or to create an amphitheater that is closed to the public and filled with bronze statues of their family.²⁷⁰ In the voting context, this nihilistic streak could lead to “spite votes,” where a decedent deliberately selects a candidate that she believes is unfit or reprehensible.²⁷¹

Finally, allowing ballots to be cast from the grave would create line-drawing and administrative problems. For how long would a posthumous right to vote last? If there was no cap, then “after a few generations, dead voters would outnumber the living.”²⁷² Similarly, without a probate court looking over the shoulder of the third party casting the decedent’s vote, there would be no way to ensure fidelity to the decedent’s wishes.²⁷³ Given these concerns, it is easy to see why the dead are not qualified to vote.

Nevertheless, the DVR conflates these decedents—who wish to vote *after* their death—with *living* people who exercise the franchise and *then* pass away. Linguistically, both groups may be “dead voters,” but that is where their

264. Sherman, *supra* note 262; *see also* Smolensky, *supra* note 263, at 779 (“[C]ircumstances change over time and these changes are not experienced by the dead.”).

265. W. BARTON LEACH & JAMES K. LOGAN, CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING 241–42 (1961); *see also* John H. Langbein, Essay, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1110–11 (2004) (“The living donor can always change his or her mind, as he or she observes the consequences of an unwise course of conduct . . .”).

266. Smolensky, *supra* note 263, at 779; Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 13 (1992) (“Living persons suffer the consequences that follow from their actions; dead persons do not.”).

267. Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 72 (1999) (quoting M. Meston, *The Power of the Will*, 1982 JURID. REV. 172, 173).

268. *In re Scott’s Will*, 93 N.W. 109, 109 (Minn. 1903).

269. *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 213 (Mo. Ct. App. 1975).

270. *Kirk-Session of United Free Church v. M’Caig’s Trs.* (1915) S.C. 426, 426–27 (Sess.) (Scot).

271. *See* Sherman, *supra* note 262, at 1283 (“A posthumous voter may be less reflective because she does not have to suffer the consequences of her vote if her preferred candidate wins.”).

272. *Id.* at 1282 n.45.

273. For similar reasons, states generally preclude agents under a power of attorney from casting votes in the name of an incapacitated principal. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-102 (2021); FLA. STAT. ANN. § 709.2201(3)(c) (West 2021); GA. CODE ANN. § 10-6B-40(h)(3) (2021); N.M. STAT. ANN. § 1-1-5.5 (West 2021).

similarities end. Unlike a testator who writes voting instructions into her will, an absentee voter who dies before the polls open is no different than any other early voter. Until she casts her ballot, she can absorb new data and make a decision that reflects the present state of the world.²⁷⁴

Also, soon-to-be-dead voters are unlikely to make rash or malicious choices. This risk arises in estate planning because testators and settlors are contemplating a world in which they no longer exist. Conversely, at least some absentee voters who die before Election Day are not aware of their imminent demise, and thus fill out their ballots believing that they will have to live under the policies enacted by the winners of the election. These votes are as likely to be sincere as any others.

And what about the terminally ill, who might know that they will not survive until the polls open? If anything, anecdotal evidence suggests that their awareness of their own mortality makes them perceive voting as especially *sacred*. Recall Amber Pflughoeft, who I mentioned in the Introduction, who found profound comfort in voting during her final days.²⁷⁵ Likewise, in mid-November 2020, Sara Knotts, the Elections Director for Brunswick County, North Carolina, tweeted that she had disqualified the absentee ballot cast by her own recently deceased mother.²⁷⁶ Knotts wrote that it was the “[h]ardest thing [she’s] done as an elections administrator” because her mom insisted on voting even though she “was under hospice care.”²⁷⁷ These examples support the common sense notion that the dying take democracy seriously.

Finally, in sharp contrast to allowing the already dead to vote, honoring absentee ballots cast by living people who then die is straightforward. It authorizes one final vote, not an entitlement that decedents might try to exercise in perpetuity. And because a living voter exercises her own rights, rather than delegating the task, there is no need for state oversight to prevent a third party from hijacking the ballot.

To conclude, the factors that make the dead unqualified to vote do not apply to living absentee voters who pass away before Election Day. In turn, this makes the supposed normative foundation of the DVR disputable.

274. Of course, as the Seventh Circuit has observed, people who cast an absentee ballot “vote before election day, often weeks before, . . . [and thus] are deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign.” *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). But this is true of anyone who votes early—not just people who cast absentee ballots and die before the election.

275. See *supra* text accompanying notes 1–6.

276. Paul Woolverton, ‘Hardest Thing I’ve Done’—North Carolina Elections Director Blocked Her Deceased Mom’s Ballot, *FAYETTEVILLE OBSERVER* (Nov. 17, 2020, 10:33 AM), <https://www.fayobserver.com/story/news/2020/11/17/north-carolina-elections-director-blocked-her-dead-mothers-vote-to-comply-with-election-law/6311518002/>.

277. *Id.*

2. *Administrative Convenience*

States often claim that limits on voting help the election run smoothly.²⁷⁸ But as this section explains, the DVR has the opposite effect: not only is it hard to implement, but it generates arbitrary results.

Officials often successfully defend election restrictions on the grounds of practical necessity.²⁷⁹ After all, the logistics of democracy are daunting. Even before Election Day, officials must prepare the poll books, test the voting equipment, identify defective absentee ballots (and, in some states, give the voter an opportunity to cure the problem), and assist early in-person voters.²⁸⁰ Thus, in *Crawford v. Marion County Election Board*, the U.S. Supreme Court held that an Indiana statute requiring in-person voters to show a photo ID was justified by “the interest in orderly administration and accurate recordkeeping.”²⁸¹

More recently, in *Mays v. LaRose*, the Sixth Circuit cited similar reasons to uphold a law that effectively precluded certain people from voting.²⁸² Prisoners who were arrested shortly before Election Day challenged an Ohio statute that required voters to request an absentee ballot no later than three days before the polls opened but exempted those who were unexpectedly hospitalized.²⁸³ The prisoners argued that because they would not be able to vote in person, absentee ballots were their only access to the franchise.²⁸⁴ Although the court admitted that the deadline and exemption both burdened the right to vote and discriminated against a class of voters, it nevertheless determined that Ohio’s interests were more compelling:

[T]he State and its regional election boards possess limited resources devoted to elections. These election boards have many tasks that they must complete in the days before an election and on Election Day. If Ohio required its election boards to process absentee ballots from jail-confined electors in the

278. See, e.g., *Richardson v. Trump*, 496 F. Supp. 3d 165, 186 (D.D.C. 2020); *Vote Forward v. DeJoy*, 490 F. Supp. 3d 110, 121–23 (D.D.C. 2020), *appeal dismissed*, No. 20-5353, 2021 WL 672395 (D.C. Cir. Feb. 10, 2021); cf. *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719, 736 (S.D. Ohio 2020) (asserting that Ohio’s signature-matching process “promotes orderly election administration”).

279. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008); see also *Mays v. LaRose*, 951 F.3d 775, 791 (6th Cir. 2020).

280. See Defendant Secretary of State Frank LaRose’s Opposition to Plaintiffs’ Motion for Preliminary Injunction at 30–31, *League of Women Voters of Ohio v. LaRose*, 489 F. Supp. 3d 719 (S.D. Ohio 2020) (No. 20-CV-3843).

281. *Crawford*, 553 U.S. at 196.

282. See *Mays*, 951 F.3d at 791.

283. *Id.* at 780.

284. *Id.* at 780–81.

days just before an election and on Election Day, it would frustrate the boards' ability to accomplish these tasks²⁸⁵

Perhaps, then, similar arguments could buttress the DVR.

Yet that theory is exactly backwards. The DVR does not create administrative efficiencies. It creates administrative *costs*. Indeed, it forces busy officials to verify that absentee voters are still alive by cross-referencing county death certificates against voter rolls.²⁸⁶ This is “a laborious process.”²⁸⁷ According to Greg Walker, a Republican state senator from Indiana, “It’s a good way to make an error, it’s painstaking, it takes documentation, . . . [i]t’s a lot of extra work[] [and] [i]t’s difficult to know if you’ve done th[e] job successfully.”²⁸⁸ Thus, abolishing the DVR—not preserving it—would facilitate election management.

Even worse, the DVR is impossible to implement evenhandedly. First, the doctrine is much more likely to disqualify mail-in ballots than early in-person votes. Mail-in ballots can be pulled from the system if the voter passes away, but “most of the new ‘in-person’ early voting is being done on machines with no paper ballot to tell how those people voted.”²⁸⁹ Thus, as one journalist noted: “[I]f a person in Florida casts an early ballot, then is run over by a truck right outside the polling place, there’s no way to rescind the vote. But the vote of a Florida soldier who mails an absentee ballot . . . [and] then is killed in action[] won’t . . . count[].”²⁹⁰

285. *Id.* at 787. *But see* *Obama for Am. v. Husted*, 697 F.3d 423, 432 (6th Cir. 2012) (rejecting the argument that “halting in-person early voting at 6:00 p.m. on the Friday before the election is necessary to give local county boards of elections enough time to prepare for Election Day.”).

286. *See* Associated Press, *Some States Count Ballots if Voter Dies Before Election Day*, NBC NEWS (Oct. 20, 2020, 6:53 AM), <https://www.nbcnews.com/politics/2020-election/some-states-count-ballots-if-voter-dies-election-day-n1243975> (“[I]f the state’s election commission receives records of county death certificates, and those records are run against the statewide voter registration system.”).

287. Matt McKinney, *What Happens if You Vote Absentee in Indiana, Then Die Before Election Day?*, WRTV (Oct. 20, 2020, 2:06 PM), <https://www.wrtv.com/news/election-2020/indiana-elections/what-happens-if-you-vote-absentee-in-indiana-then-die-before-election-day>.

288. *Id.*

289. *See* Breed, *supra* note 23; *see also* Chris Wilson, *Can a Dead Woman Vote?: Will the Late Florence Steen’s Absentee Ballot Count in South Dakota’s Primary?*, SLATE (May 14, 2008, 6:54 PM), <http://www.slate.com/id/2191402> (“Absentee ballots are collected by county auditors and remain sealed until the election, so if an absentee voter dies prior to the election, then her ballot is never opened.”).

290. Breed, *supra* note 23; *see also* Anne Allred & Erin Richey, *Does an Early Vote Count if the Voter Dies Before Election Day?*, KSDK (Nov. 2, 2020, 6:24 PM), <https://www.ksdk.com/article/news/politics/elections/verify-illinois-missouri-if-an-early-voter-dies-before-election-day/63-9b03d2e3-6c17-4b7b-8fef-76e816d955a5> (“Voters who cast an absentee ballot on a machine at their election authority or a satellite voting location [in Missouri] might have their vote recorded that day. In that case, it wouldn’t be rejected if they died before Election Day.”). In fact, this “cruel inconsistency” was the driving force behind Virginia’s recent choice to abandon the DVR. Michael Sluss, *Delegate Seeks to Fix Absentee Vote Inequality*, ROANOKE TIMES (June 6, 2019), https://roanoke.com/archive/delegate-seeks-to-fix-absentee-vote-inequality/article_9c48bce0-b2b6-5b46-99e3-1b9898c15db3.html. As the election official who spearheaded this effort argued, “If you can’t take the vote out of the machine, then it’s not fair to pull the [paper] ballot of a voter who dies before Election Day.” *Id.* (quoting Phyllis Booze, a voter registrar in Botetourt County).

Second, the DVR treats ballots differently based on the timing of the voter's death. Votes cast shortly before Election Day are likely to be counted. For example, in the 2008 presidential election, Madelyn Dunham, Barack Obama's grandmother, died after mailing her absentee ballot.²⁹¹ Because of intense media interest in the story, Hawaii's chief election official held a press conference to reassure the public that he would honor Dunham's vote.²⁹² However, he explained that he was able to do so because Dunham passed away before the state department of health could update its "official list of the names of deceased persons" for the election.²⁹³ He could not extend the same courtesy to individuals who had died earlier.²⁹⁴

Finally, there is evidence that these distinctions create unequal voting opportunities. Once again, consider data from the 2018 midterms. In Michigan, ten counties with a combined total of 129,260 registered voters did not report a single deceased absentee voter.²⁹⁵ Conversely, Macomb County, which is home to 628,623 registered voters, discarded 205 ballots because the voter had passed away.²⁹⁶ In addition, in Nevada, Carson City County only has 2.7% of the number of registered voters as Clark County but identified more dead absentee voters.²⁹⁷ Finally, in New York, three counties with roughly similar populations—Suffolk, Queens, and Kings—respectively flagged 1, 189, and 476 deceased voters.²⁹⁸ For these reasons, the DVR is not just hard to implement, but appears to make the exercise of "[a] voter's right to vote . . . hinge on random chance."²⁹⁹

291. Chris Wilson, *Obama's Grandmother's Vote Barely Made the Cut*, SLATE (Nov. 4, 2008, 4:05 PM), <https://slate.com/news-and-politics/2008/11/obama-s-grandmother-s-vote-barely-made-the-cut.html>.

292. *Id.* At the time, Hawaii followed the DVR. *See id.* It has since abandoned the doctrine. *See supra* text accompanying note 130.

293. Wilson, *supra* note 291; *see also* Nick Ochsner, *A Bladen Co. Voter Died Before Election Day. His Absentee Ballot Still Counted*, WBTV (Feb. 13, 2019, 4:44 PM), <https://www.wbvtv.com/2019/02/13/bladen-co-voter-died-before-election-day-his-absentee-ballot-still-counted/> ("[E]lections officials are rarely able to catch someone's absentee ballot who died before election day because of the time it takes to process death records."); Austin, *supra* note 24 ("The problem, though, is that the election board may not be aware if a person who sent in an absentee ballot dies before Election Day.")

294. *See* Wilson, *supra* note 291.

295. The counties are Alcona, Alger, Arenac, Crawford, Dickinson, Gogebic, Iron, Menominee, Montmorency, and Osceola. U.S. ELECTION ASSISTANCE COMMISSION, *supra* note 134.

296. *Id.*

297. *See id.*

298. *Id.*; *see* *Suffolk County, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/suffolkcountynyork/HCN010212> (last visited Oct. 15, 2021) (listing Suffolk County's population as 1,476,601); *Queens County, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/queenscountynyork> (last visited Oct. 15, 2021) (listing Queens County's population as 2,253,858); *Kings County, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/kingscountynyork/PST045219> (last visited Oct. 15, 2021) (listing Kings County's population as 2,559,903).

299. *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 48 (S.D.N.Y. 2020).

3. Preventing Fraud

Finally, there is the great boogeyman of the 2020 presidential election: fraud. This issue became politically supercharged before the contest, when President Trump alleged that mail-in ballots were going to lead to “fraud like you’ve never seen,”³⁰⁰ and afterwards, as he refused to accept the results as legitimate.³⁰¹ Yet this section asserts that even though preventing wrongdoing might justify the DVR under rational basis review, it is not a convincing rationale for any other purpose.

In general, deterring voter fraud is a worthy goal. Fake ballots “drive[] honest citizens out of the democratic process and breed[] distrust of our government.”³⁰² As a result, courts have held that discouraging fraud is a sufficient state interest to justify photo ID requirements for voting in person.³⁰³ Also, during the pandemic, some judges found that concerns about malfeasance outweighed “minor burden[s]” imposed by various absentee ballot regulations.³⁰⁴ Notably, these courts did not require states to substantiate their allegations about voter fraud with concrete proof. As the Iowa Supreme Court explained while upholding a law that prevented county personnel from correcting mistakes on absentee ballot applications, “That the statute was not passed in response to evidence of actual fraud is a factor to consider, but it has little significance when, as here, the statute’s burdens are so minimal.”³⁰⁵ These cases reveal that when the level of scrutiny is low, officials barely need to do more than recite the words “voter fraud.”

However, when the level of judicial review rises, courts are more demanding. Instead of merely asking “whether the [state’s] proffered interests are legitimate in the abstract,” judges “ask whether the concrete evidence demonstrates that ‘those interests make it necessary to burden the plaintiff’s rights’ in this case.”³⁰⁶ Thus, they refuse to credit the argument that a rule combats election-related wrongdoing when officials possess no proof that fraud

300. Nicholas Riccardi, *Here’s the Reality Behind Trump’s Claims About Mail Voting*, ASSOCIATED PRESS (Sept. 30, 2020), <https://apnews.com/article/virus-outbreak-joe-biden-election-2020-donald-trump-elections-3e8170c3348cc3719d4bc7182146b582>.

301. See, e.g., Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html>.

302. Purcell v. Gonzalez, 549 U.S. 1, 4 (2006).

303. See, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196 (2008); Lee v. Va. State Bd. of Elections, 843 F.3d 592, 606 (4th Cir. 2016).

304. DCCC v. Ziriax, 487 F. Supp. 3d 1207, 1237 (N.D. Okla. 2020).

305. League of United Latin Am. Citizens of Iowa v. Pate, 950 N.W.2d 204, 210 (Iowa 2020); cf. Am. C.L. Union of N.M. v. Santillanes, 546 F.3d 1313, 1323 (10th Cir. 2008) (“In requiring the City to present evidence of past instances of voting fraud, the district court imposed too high a burden on the City.”).

306. Fish v. Schwab, 957 F.3d 1105, 1133 (10th Cir. 2020) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)); cf. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 246 (4th Cir. 2014) (“North Carolina asserts goals of electoral integrity and fraud prevention. But nothing in the district court’s portrayal of the facts suggests that those are anything other than merely imaginable.”).

has occurred.³⁰⁷ For example, the Tenth Circuit struck down a Kansas law that required people to provide documentary proof of citizenship when registering to vote because the record was devoid of suggestions “that the integrity of Kansas’s electoral process had been threatened.”³⁰⁸ In the same vein, a federal judge in South Carolina rejected the state’s assertion that its witnessing requirement for absentee ballots helped deter bogus votes because there was “scant underlying evidence of any absentee ballot fraud.”³⁰⁹

Under this stark dichotomy, the DVR would likely survive rational basis review. A state might argue that the doctrine furthers election integrity by weeding out ballots that are accessible to wrongdoers. Unlike a living voter, a decedent cannot come forward if her ballot is never delivered or disappears. In fact, during the 2020 general election, a Colorado man named Barry Morphey—who has been accused of murdering his wife—“told investigators he sent in his wife’s mail-in ballot with a Trump vote because he figured she would’ve voted for him.”³¹⁰ Although officials discarded the ballot because it lacked a signature,³¹¹ the story illustrates that third parties have an opportunity to commandeer decedents’ votes.

But both under more rigorous constitutional scrutiny and as a general principle, voter fraud is insufficient to bolster the DVR. Despite the example above, voter fraud of any kind is vanishingly rare. According to a study by the Brennan Center for Justice, people are more likely to be struck by lightning than to impersonate another voter.³¹² Even the conservative Heritage Foundation, which maintains a voter fraud database, lists only 204 cases involving absentee ballots out of 250 million votes cast.³¹³ Similarly, *The Washington Post* analyzed 14.6 million votes in three states that conduct elections entirely by mail and found just 372 *possible* cases of fraud.³¹⁴ Finally, if “dead voters” of any kind were linked to fraud, this connection would have surfaced in 2020. Indeed, after

307. See, e.g., *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *20 (D.S.C. May 25, 2020); *DSCC v. Simon*, No. 62-CV-20-585, 2020 WL 4519785, at *27 (Minn. Dist. Ct. July 28, 2020) (noting that there were only 130 voter fraud convictions in Minnesota between 2009 and 2018 out of more than 10 million votes cast).

308. *Fish*, 957 F.3d at 1134.

309. *Middleton v. Andino*, 488 F. Supp. 3d 261, 300 (D.S.C. 2020).

310. Gabrielle Fonrouge, *Colorado Man Accused of Missing Wife’s Death Cast Trump Vote in Her Name*, N.Y. POST (May 14, 2021, 4:57 PM), <https://nypost.com/2021/05/14/colorado-man-accused-of-wifes-death-cast-trump-vote-in-her-name/>.

311. *Id.* (indicating that the ballot included Barry Morphey’s signature as a witness but not his wife’s).

312. JUSTIN LEVITT, BRENNAN CTR. FOR JUST., *THE TRUTH ABOUT VOTER FRAUD 4* (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf.

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

314. *Id.*

President Trump's false claims that "thousands of dead people voted,"³¹⁵ Texas Lieutenant Governor Dan Patrick offered a reward of up to \$1,000,000 for tips that led to voter fraud convictions.³¹⁶ But all that emerged were empty allegations that "ha[ve] been repeatedly debunked by election officials."³¹⁷ Thus, the DVR's link to preventing wrongdoing is extremely tenuous.

CONCLUSION

On October 13, 2020, eighty-two-year-old Janice Lawrence, who had been diagnosed with liver cancer, demanded to vote.³¹⁸ Despite the pain and the cold, she would not be deterred:

Three family members lifted her into the car. In a wheelchair, shrouded in a face mask, a hooded sweater and two blankets, Lawrence had to wait outside for 45 minutes. She never complained. Instead, she managed to give a thumbs up.

Once inside the building, Lawrence slouched in her wheelchair in front of a voting machine. Her son helped her cast a ballot. Afterward, she shared a satisfied smile while proudly clutching a large red, white and blue sign: I VOTED.³¹⁹

Two days later, Lawrence died.³²⁰ Because her home state of Indiana follows the DVR, her ballot was "removed from the system."³²¹

But it is the DVR—and not ballots like Lawrence's—that should be expunged from American elections. As early in-person and absentee voting become a staple of our democracy, the time has come to abolish a doctrine that disenfranchises thousands of people and yet serves no worthy objective.

315. See Tom Perkins, *The Dead Voter Conspiracy Theory Peddled by Trump Voters, Debunked*, GUARDIAN (Nov. 18, 2020, 8:00 AM), <https://www.theguardian.com/us-news/2020/nov/18/dead-voter-conspiracy-theory-debunked>.

316. Shawn Mulcahy, *There's No Evidence of Widespread Voter Fraud, but Dan Patrick Is Encouraging People to Report It with up to a \$1 Million Reward*, TEX. TRIB. (Nov. 10, 2020, 4:00 PM), <https://www.texastribune.org/2020/11/10/texas-dan-patrick/> (explaining that Texas's Lieutenant Governor offered generous financial rewards for providing a tip that leads to a voter fraud conviction).

317. See McKenzie Sadeghi, *Fact Check: Voter Fraud Claims in Nevada Based on Failed Lawsuit*, USA TODAY (Feb. 14, 2021, 3:25 PM), <https://www.usatoday.com/story/news/factcheck/2021/02/05/fact-check-viral-post-makes-false-claims-nevadas-election/4392902001/>.

318. Jerry Davich, Opinion, *Two Days Before Her Death, a Hobart Grandmother Cast a Ballot in Person as Her Final Civic Duty*, CHI. TRIB. (Oct. 22, 2020, 6:56 AM), <https://www.chicagotribune.com/suburbs/post-tribune/opinion/ct-ptb-davich-hobart-grandmother-insists-to-vote-early-before-dying-st-20201022-ootxy6ccjbes3df2sj3xp4oxrq-story.html>.

319. *Id.*

320. *Id.*

321. Davich, *supra* note 24.