

CHAPTER 5:

STATE REGULATION OF VOTERS

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I. INTRODUCTION

The right to vote is a fundamental right because it preserves all other rights,¹ but the right is not absolute.² Instead, a state's power to regulate local, state, and federal elections includes the

¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). See *United States v. Classic*, 313 U.S. 299 (1941) (finding the right to vote applies equally to primary and general elections).

power to set voter qualification standards³ and regulate other aspects of a voter's electoral participation. The state's power to regulate voters is, nevertheless, itself limited by state and federal statutory and constitutional provisions.⁴ This chapter examines two issues: voter eligibility requirements and vote weighting.

In general, states can condition the right to vote on the voter's ability to meet the traditional qualification criteria of residence, age, citizenship, and non-felon status and may be able to establish other participation criteria. This chapter analyzes voter eligibility criteria states establish for participation in elections.

State regulation of candidates' and political parties' ballot access, which also implicates voting rights,⁵ is discussed elsewhere in this manual. See Chapter 2: State Regulation of Candidacies and Candidate Ballot Access and Chapter 3: State Regulations that Affect Political Parties.

II. STATE REGULATION OF VOTER ELIGIBILITY

States regulate the right to vote by establishing criteria voters must meet before they can participate in elections. The criteria range from established and traditional categories that many states use to criteria—such as disaffiliation requirements—that are applicable to limited circumstances, such as partisan primary elections. This section discusses the multiple varieties of state regulation of the right to vote and voter participation.

States regulate individual's right to vote to further their interest in:

- electoral integrity⁶
- preventing "party raiding"⁷
- preventing fraud⁸
- limiting governmental participation to individuals who are within the political community
- making sure that all voters understand the nature and effect of voting
- political stability

² See *Bush v. Gore*, 531 U.S. 98 (2000) (holding that individual citizens have no federal constitutional right to vote for presidential electors); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (holding that the fundamental nature of voting does not mean that the right to vote in any manner or to associate for political purposes are absolute). Note that state constitutions are an additional source of voting rights and protections.

³ See U.S. CONST. art. I § 2 and U.S. CONST. amend. XVII.

⁴ State constitutions may offer greater voting rights protections than the U.S. Constitution.

⁵ *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (citing *Williams v. Rhodes*, 393 U.S. 23 (1968)).

⁶ *Burdick v. Takushi*, 504 U.S. 428 (1992).

⁷ *Id.*

⁸ *Marston v. Lewis*, 610 U.S. 679, 680 (1973).

A. TRADITIONAL VOTER CRITERIA

In general, states can freely restrict the right to vote to those individuals who satisfy the traditional voter qualification criteria of age, citizenship, residency, and non-felon status.

1. Age Requirements

The U.S. Constitution prohibits states and the federal government from denying anyone eighteen or older the right to vote because of his age.⁹ Because the Constitution does not establish a minimum voting age, it appears that states may allow minors to vote if the state wishes to do so.

Although states may not use age to disqualify voters who are eighteen or older, in reality, elderly voters are likely to be disenfranchised if they do not qualify for an absentee ballot, are not independently mobile, lack access to transportation, or if the polling place is inaccessible to them.¹⁰

2. Residency Requirements

States typically require prospective voters to satisfy residency requirements before they can register to vote.¹¹ Residency requirements usually encompass three components: geographic residency, bona fide residency status, and durational residency. Special district elections may establish different residency rules than those generally applicable, and are discussed later in this chapter.

a. Geographical Residency Requirements

Geographical residency requirements restrict voting to individuals who live within a political subdivision. Individuals who live outside a political subdivision's boundaries have no constitutional right to vote in its elections, even if they are subject to some of its laws.¹² For example, although the city's policing, business licensing, and sanitary district powers extended

⁹ U.S. CONST. amend. XXVI.

¹⁰ See *N.Y. ex rel. Spitzer v. County of Schoharie*, 82 F. Supp. 2d 19 (N.D. N.Y. 2000) (suing to bring polling places into compliance with the Americans with Disabilities Act).

¹¹ In states without voter registration requirements, residency may need to be established at the polling place before the voter is permitted to vote. The ability of homeless individuals to meet residency requirements may also be litigated. See *Collier v. Menzel*, 176 Cal. App. 3d 24 (Ct. App. 1985) (finding homeless individuals who listed a park as their residence satisfied voter registration requirements notwithstanding the fact that overnight camping in the park was prohibited).

¹² *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (holding that, contrary to the general rules on residency requirements, special district elections may allow non-residents to vote — or prevent some residents from voting). See *supra*, Section IV: Special District Elections.

three miles into the adjacent county, county residents who lived within the overlap zone had no constitutional right to vote in the city's elections.¹³

A locality may allow non-resident landowners to vote in municipal elections at the locality's option.¹⁴

b. Bona Fide Resident Requirements

States have a legitimate interest in limiting voting rights to bona fide residents. Bona fide residency requires more than the voter's presence in the locality by requiring the voter to make the locality her domicile. Domicile is the union of physical residency and the *present intent to remain* in the location indefinitely,¹⁵ or the *absence of a present intent to leave*.¹⁶

A prospective voter's bona fide residency status may be of special concern in areas that experience the significant and regular turn-over of an identifiable population subset compared to the rest of the community, such as communities that are home to colleges, universities, military bases, or federal enclaves.

States may not "fence out" some classifications of residents because of concerns about how the residents will vote.¹⁷ Instead, localities must make individualized determinations as to whether a prospective voter satisfies bona fide residency requirements.¹⁸ To assist them in this determination, states may require prospective voters to demonstrate they are bona fide residents before extending voting rights to them. States may require prospective voter registrants to objectively establish the necessary domiciliary intent by:

- acquiring a dwelling,
- obtaining a driver's license, or
- registering an automobile.¹⁹

¹³ See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

¹⁴ See *Millis v. Bd. of County Comm'rs of Larimer County*, 626 P.2d 652 (Colo. 1981) (holding that the state constitution may permit localities to allow non-resident landowners to vote, but localities are not required to do so). This situation typically arises in resort towns where a significant portion of the property may be owned by non-residents.

¹⁵ *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

¹⁶ See *Putnam v. Johnson*, 10 Mass. 488, 501 (1813) (stating that measuring domicile by the absence of a present intent to leave rather than a present intent of "*always staying there*" best fits the nature of "this new and enterprising country" where youth will settle in a location to see if it fits them, but are open to moving on if a move is to their advantage) (emphasis in original) (citations omitted).

¹⁷ *Carrington v. Rash*, 380 U.S. 89 (1965).

¹⁸ *Lloyd v. Babb*, 251 S.E.2d 843, 852, 853 (N.C. 1979) (students); *Carrington*, 380 U.S. at 93 (members of the armed forces).

¹⁹ *Dunn v. Blumstein*, 405 U.S. 330, 352 (1972) (explaining that durational residency requirements are unnecessary because fraudulent voters are unlikely to take the steps necessary to establish bona fide residency if their goal is to be present within the jurisdiction only long enough to attempt to throw the election).

At least as early as 1813, students have sued for the right to vote in elections held by the locality where their college is located.²⁰ States take a variety of approaches in deciding whether college students can vote in elections held in the college community. Some states may presume the student's domicile is identical to the student's parents', but allow the student to rebut the presumption.²¹ Others have no such presumption.²²

A key factor in determining the student's voting status is whether the state measures domicile by the intent to remain in the community indefinitely or whether the measure is the lack of a present intent to leave.²³ If an intent to remain is necessary, then students who intend to move after graduation might be unable to form the necessary intent to establish domicile while they are in college, but if the measure is the lack of a present intent to leave, then these students can establish domicile—even if they intend to move immediately after they graduate—because they do not presently intend to leave.²⁴

States may not discriminate based on occupation by denying voting rights to bona fide residents merely because they are in the military, but states may take "reasonable and adequate steps" to ensure that *all* who register are bona fide residents.²⁵ Likewise, states may not deny voting rights to bona fide residents of a federal enclave located within the state boundaries.²⁶

c. Durational Residency Requirements

Durational residency requirements establish the amount of time a new resident must live in the community before becoming eligible to vote in its elections. Durational residency periods may be created specifically by state statute or they may result from the operation of a pre-election registration deadline.

Independent statutory durational residency requirements receive strict scrutiny because they:

- burden the right to vote,²⁷
- burden the right to travel,²⁸ and
- treat newly arrived bona fide residents less favorably than established residents.²⁹

²⁰ See *Putnam v. Johnson*, 10 Mass. 488 (1813) (theological student at Andover sued after being denied the right to vote in elections for governor, lieutenant governor, and state senate).

²¹ See *Lloyd*, 251 S.E.2d at 860 (finding no Equal Protection violation in the rebuttable presumption that the student's domicile is at his parent's house because it is merely a more specialized application of the rule that the individual who wishes to change domicile bears the burden of proving the change and discussing domicile as it pertains to students and other student-voter court cases).

²² *Wilkins v. Bentley*, 189 N.W.2d 423 (Mich. 1971) (finding an Equal Protection violation when voter registrars questioned students to determine if the student successfully rebutted the presumption that her domicile was the same as her parents because other persons registering to vote were not subjected to the questioning).

²³ *Lloyd*, 251 S.E.2d at 860.

²⁴ See *Lloyd*, 251 S.E.2d at 860 (noting that the latter definition is routinely applied to non-students, otherwise many individuals could not establish domicile for voting purposes).

²⁵ *Carrington v. Rash*, 380 U.S. 89 (1965).

²⁶ *Evans v. Cornman*, 398 U.S. 419 (1970).

²⁷ *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972).

²⁸ *Id.* at 341.

Under a strict scrutiny analysis, states cannot justify durational residency requirements on a need for electoral integrity or the necessity of an informed electorate.³⁰ Durational residency requirements do not enhance electoral integrity if the state makes no effort to verify the information given it and if “informed electorate” justifications raise concerns that the state’s true interest is in excluding new voters whose political sensibilities potentially differ from those of longer residents.³¹

States may, however, establish pre-election voter registration deadlines to provide election officials sufficient time to prepare voter records and to protect elections from fraud.³² State voter registration deadlines act as *de facto* durational residency requirements because residents who move into the community after the deadline cannot register to vote in the upcoming election.³³

Federal statutes and Supreme Court decisions set the following parameters on state durational residency requirements:

- *For presidential elections:* state durational residency requirements cannot exceed thirty days, and states must allow voters who move within thirty days of a presidential election to vote in-person or by absentee ballot for president in their old state³⁴
- *For non-presidential elections:* state durational residency requirements of one-year in-state and three-months in-county are unconstitutional,³⁵ but durational residency requirements longer than thirty-days may be constitutional if the state’s election administration needs justify the period. For example, one state’s fifty-day durational residency requirement, which corresponded to its fifty-day voter registration deadline for non-presidential elections, was constitutional because the state’s primary election was late in the year, and the state used volunteer deputy voter registrars whose error-prone work required extra effort by election officials to correct and verify.³⁶ The constitutionality of durational residency requirements whose length is between fifty and ninety days is unknown.

²⁹ *Id.*

³⁰ *Id.* at 345- 46, 355-56.

³¹ *Id.*

³² *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (noting voter registration deadlines reflect the legislature’s judgment of the amount of time necessary to prepare for an election).

³³ State law governs whether a voter who relocates within the state between the closing of voter registration and the election may vote in his old locality.

³⁴ 42 U.S.C. § 1973aa (2000).

³⁵ See *Dunn*, 405 U.S. 330 (finding requirements are excessive burdens on the right to vote and the right to travel).

³⁶ *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam). Note that states with an early voter registration deadline for non-presidential elections more than thirty days before Election Day must maintain separate records for each election and must provide a different ballot for voters who fail to meet the non-presidential deadline but meet the presidential registration deadline.

3. Citizenship Requirements

States may constitutionally restrict the right to vote to citizens,³⁷ although the Constitution does not require it.³⁸ States have an interest in limiting governmental participation to individuals who are within the political community, which does not include non-citizens. Thus, a state did not violate the rights of the non-citizen parents of school-aged children when it denied the parents an opportunity to vote in a local school board election.³⁹

Traditionally, prospective voters have only been asked to affirm their citizenship; they have not been required to document it. Arizona currently requires first time voter-registrants to document their citizenship status.⁴⁰ These requirements are currently being challenged in federal court.⁴¹

4. Non-felon Requirements

In general, states do not violate the U.S. Constitution⁴² if they disenfranchise felons because of their felony conviction. State statutes that restrict the right to vote based on the prospective voter's felon status are analyzed under the rational basis test, which they generally satisfy. For example, states do not violate equal protection guarantees even if they prohibit ex-felons who have completed all of their parole conditions from voting.⁴³ On occasion, however, a felon disenfranchisement statute is found to have no rational relation to any state interest. Such was the case with a state statute that imposed a five-year voter registration ban on newly-released felons who had not registered to vote before their incarceration, but allowed newly-released felons who had registered to vote before their incarceration to resume voting immediately.⁴⁴

Although states vary in their approaches to voting rights for convicted felons, recent trends have expanded voting rights for ex-felons or streamlined the process of restoring an ex-felon's voting rights.⁴⁵

³⁷ *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (finding no Equal Protection violation occurs when non-citizens are not allowed to vote).

³⁸ See Elise Brozovich, *Prospects for Democratic Change: Non-Citizen Suffrage in America*, 23 Hamline J. Pub. L. & Pol'y 403 (discussing the history of non-citizen voting in the United States).

³⁹ *Skaft v. Rorex*, 553 P.2d 830 (1976).

⁴⁰ *Ariz. Rev. Stat. Ann. § 16-152(A)(23)* (2007) (arising pursuant to Proposition 2000, which was a 2004 voter initiative.)

⁴¹ *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) (upholding trial court's denial of preliminary injunction to prevent the state from requiring new voter registration applicants to present proof of citizenship).

⁴² The state constitution may offer greater voting rights protections to non-felons than the U.S. Constitution.

⁴³ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

⁴⁴ *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Commw. Ct. 2000), *aff'd per curiam*, 783 A.2d 763 (Pa. 2001) (finding no rational basis to condition voting on the voter's registration date).

⁴⁵ For additional information on state approaches to voting rights for felons, see THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2007), available at <http://www.sentencingproject.org/pdfs/1046.pdf>.

B. NON-TRADITIONAL VOTER CRITERIA

States also regulate—or have regulated—voter participation by qualifications or requirements that go beyond the traditional age, residency, citizenship, and non-felon status classifications discussed above. The most common of these other criteria are:

- wealth,
- literacy,
- capacity,
- party affiliation,
- voter identification, and
- satisfaction of absentee voter requirements.

Some of these requirements or conditions have been declared unconstitutional or prohibited by federal statutes, as will be discussed, below.

1. Wealth Requirements

A voter's wealth has no relationship with the voter's ability to participate intelligently in voting.⁴⁶ State restrictions that condition voting on satisfying wealth-based requirements—such as the payment of a poll tax—are unconstitutional.⁴⁷ In addition, the Voting Rights Act explicitly prohibits states from conditioning voting on the payment of poll taxes.⁴⁸

2. Literacy Requirements

The Voting Rights Act prohibits states from conditioning voting rights on the voter's ability to pass a literacy test⁴⁹ or other test.⁵⁰

3. Capacity Requirements

The limits on a state's ability to disenfranchise voters because of the voter's mental capacity have not been clearly established. States have a compelling interest in making sure that all voters understand the nature and effect of voting, and state statutes or constitutions may

⁴⁶ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (classifying wealth along with race, creed, or color as improper means to qualify voters).

⁴⁷ U.S. CONST. amend. XXIV.

⁴⁸ 42 U.S.C. § 1973h (2000).

⁴⁹ 42 U.S.C. § 1973b (2000). Note that prior to the VRA, literacy tests were declared constitutional if they were applied in a non-discriminatory fashion. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959) (holding that non-discriminatory literacy tests serve the state's rational interest in the intelligent use of the ballot and do not violate Equal Protection).

⁵⁰ 42 U.S.C. § 1973aa (2000).

specify whether persons adjudicated mentally incompetent can or must be disenfranchised.⁵¹ In general, otherwise eligible voters, who have been adjudicated mentally incompetent, should not lose the right to vote without due process, including notice and the opportunity to be heard.⁵² The state's failure to provide due process to voters who are the subject of incapacity hearings may be unconstitutional.⁵³

State statutes that selectively disenfranchise the incapacitated are vulnerable to an equal protection challenge. For example, a state statute that disenfranchised all individuals under guardianship because of mental illness, even if they understood the nature and effect of voting, but did not disenfranchise individuals under guardianship because of mental retardation, regardless of its severity, violated equal protection guarantees.⁵⁴

At least one court has held that courts conducting incapacity determinations must make individual determinations regarding the subject's ability to understand the nature and effect of voting, and should not allow mental illness or any other label to serve as a proxy for the individual's ability to participate in the electoral process.⁵⁵

4. Party Affiliation Requirements

Some states require voters to declare a political party affiliation or their non-affiliated status when they register to vote. The affiliation information is used to determine the voter's eligibility to vote in primary elections. These states frequently seek to protect their interest in political stability by imposing deadlines voters must meet if they wish to change their party affiliation—that is, to disaffiliate with their existing political party and affiliate with a different party—and participate in their new political party's primary election.⁵⁶

A state's voter disaffiliation requirement's constitutionality is assessed by the burden it imposes on the voter's right to associate for political purposes to elect the preferred political party's nominee.⁵⁷ Using this criteria, an eleven-month disaffiliation requirement was constitutional because a voter could vote in a different political party's primary every year as long as the voter met the registration deadline,⁵⁸ but a twenty-three-month disaffiliation requirement was unconstitutional because it "locked" the voter into a now unwanted party affiliation and prevented the voter from voting in her new party's primary during an entire primary cycle.⁵⁹

⁵¹ See WASH. CONST. art. VI, § 3 (amended 1988); WASH. REV. CODE ANN. § 11.88.010(2), (5) (West 2007). See also *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (noting problems with statutes that attempt to classify the mental disorders that can lead to disenfranchisement).

⁵² See WASH. REV. CODE ANN. § 11.88.010 (West 2007); *Rowe*, 156 F. Supp. 2d at 47.

⁵³ See *Rowe*, 156 F. Supp. 2d 35.

⁵⁴ *Id.* at 52.

⁵⁵ *Id.* at 55.

⁵⁶ States may also condition a candidate's ability to switch political parties or run as an independent. See *supra* Chapter 2: State Regulation of Candidacies and Candidate Ballot Access for additional information.

⁵⁷ *Kusper v. Pontikes*, 414 U.S. 51 (1973).

⁵⁸ *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

⁵⁹ *Kusper*, 414 U.S. 51.

III. VOTER REGISTRATION

In most, but not all, states, prospective voters must register to vote in advance of the election and by a state-set deadline.⁶⁰ Although states regulate and administer voter registration—generally at the local level—voter registration must conform to federal constitutional protections and federal statutes. Failure to allow otherwise qualified individuals to register to vote can void an election.⁶¹ Although federal regulation of voter registration is extensive, states have some latitude to customize their registration requirements to meet local needs. For example, a fifty-day pre-election new voter registration cut-off for voting in state and local elections was found constitutional because the state demonstrated that, given the requirements in its election code, it needed that much time to produce accurate voter lists for use in the upcoming election.⁶²

A. FEDERAL REGULATION OF STATE VOTER REGISTRATION

The federal government regulates state voter registration processes through statutory provisions in the:

- Voting Rights Act (VRA),⁶³
- National Voter Registration Act of 1993 (NVRA),⁶⁴
- Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),⁶⁵
- Help America Vote Act (HAVA),⁶⁶
- Americans with Disabilities Act (ADA),⁶⁷ and, to a lesser extent,⁶⁸
- Rehabilitation Act (RA),⁶⁹ and
- Voting Accessibility for the Elderly and Handicapped Act (VAEHA).⁷⁰

⁶⁰ As of January 30, 2007, North Dakota does not require voters to register and Maine, Minnesota, and Wisconsin allow for some form of same-day registration at the polling place registration. For a list of state voter registration deadlines, see ELECTION ASSISTANCE COMMISSION, STATE VOTER REGISTRATION DEADLINES, http://www.eac.gov/register_vote_deadlines.asp (last visited January 30, 2007).

⁶¹ *Hamer v. Campbell*, 358 F.2d 215 (1st Cir. 1966) (using the court's equitable powers to set aside an election that the federal district court should have enjoined for the locality's failure to allow qualified individuals to register to vote).

⁶² *Burns v. Fortson*, 410 U.S. 686 (1973).

⁶³ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C. §§ 1973–1973bb-1 (2000 & Supp. IV 2004)).

⁶⁴ Pub. L. 103-21, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg to gg-10 (2000 & Supp. IV 2004)).

⁶⁵ Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 18 U.S.C. §§ 608-09, 39 U.S.C. § 3406 & 42 U.S.C. §§ 1973ff to ff-6 (2000 & Supp. IV 2004)). See *infra*, Subsection 2 Expanding voter registration opportunities for UOCAVA's impact on voter registration.

⁶⁶ Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-545 and 36 U.S.C. §§152601-611 (Supp. IV 2004)).

⁶⁷ 42 U.S.C. §§ 12101-12213 (2000 & Supp. IV 2004).

⁶⁸ Lesser because the Americans with Disabilities Act generally offers greater protections than these earlier statutes.

⁶⁹ 29 U.S.C. §§ 701-796 (2000).

⁷⁰ 42 U.S.C. §§ 1973ee-1 to 6 (2000).

Because voter registration is a threshold voting requirement in most states, the inability to register results in the prospective voter's disenfranchisement. These federal statutes expand the franchise by removing barriers that prevent or prohibit otherwise qualified⁷¹ individuals from registering to vote or maintaining their registration status. They accomplish this by:

1. prohibiting discrimination,
2. expanding voter registration opportunities, and
3. regulating voter registration databases, including purges of voter registration records.

Although plaintiffs suing under these statutes are likely to sue in federal court, state courts should be cognizant of the federal statutory requirements because any state court-imposed voter registration-related remedy should not conflict with federal requirements. In addition, some challenges to state voter registration processes might be filed in state court.

1. Prohibiting Discrimination

The Voting Rights Act (VRA)⁷² explicitly prohibits all states from denying an otherwise qualified individual the opportunity to register to vote solely on account of race, color, or previous condition of servitude.⁷³ Under a separate provision, the VRA requires states and localities covered by Section Five⁷⁴ to obtain preclearance for proposed changes in voting practices, laws, or regulations,⁷⁵ including preclearance for voter registration changes that are necessary to comply with federal legislation.⁷⁶ The VRA also requires all states and localities to provide bilingual voter registration materials and assistance in completing them to members of single language minority population groups that meet size, illiteracy, and limited English proficiency criteria.⁷⁷ Finally, the VRA requires states to allow otherwise eligible prospective voters to register for the presidential election up until thirty days before the election.⁷⁸

⁷¹ See *Kramer v. Union Sch. Dist.* (finding that, “[a]s long as the election is not one of special interest, any classification restricting the [voting] franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest).

⁷² Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C. §§ 1973–1973bb-1 (2000)).

⁷³ See also U.S. CONST. amend. XV, § 1.

⁷⁴ 42 U.S.C. § 1973c (2000). See U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, SECTION 5 COVERED JURISDICTIONS, available at http://www.usdoj.gov/crt/voting/sec_5/covered.htm

(listing the states currently covered by Section 5: Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina and Texas and parts of Virginia, North Carolina, California, Florida, New York, South Dakota, Michigan, and New Hampshire).

⁷⁵ 42 U.S.C. § 1973c (2000).

⁷⁶ 42 U.S.C. § 1973c (2000) (permitting either the Justice Department or the U.S. District Court for the District of Columbia to provide preclearance). See *Young v. Fordice*, 520 U.S. 273 (1997) (holding that discretionary choices made during an attempt to comply with federal legislation, here the National Voter Registration Act, require VRA preclearance).

⁷⁷ 42 U.S.C. § 1973aa-1a (2000) (covering all states wherein single language minority population groups meeting the requisite criteria reside).

⁷⁸ 42 U.S.C. 1973aa-1 (2000).

Lawsuits challenging a state's implementation of or compliance with the VRA are generally brought by the U.S. Attorney General or private citizens suing in federal district court.⁷⁹ If a state or locality is subject to the VRA preclearance requirements, then state courts hearing collateral cases should, as applicable, order that any proposed remedy receive preclearance before it is implemented.⁸⁰

2. Expanding Voter Registration Opportunities

Several federal statutes are designed to expand voter registration opportunities.

The National Voter Registration Act of 1993 (NVRA)⁸¹ requires states to:

- allow qualified citizens to register to vote in federal elections when they apply for a driver's license,⁸²
- automatically use a driver's license change of address form to update the driver's voter registration record unless the driver opts out,⁸³
- offer voter registration by mail for federal elections,⁸⁴ and
- provide voter registration forms at all state-funded offices that provide public assistance or services to persons with disabilities.⁸⁵

The U.S. Attorney General or private citizens enforce the NVRA by suing in federal district court.⁸⁶ The NVRA allows attorney fee awards to prevailing parties other than the United States.⁸⁷

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)⁸⁸ requires states to accept and process otherwise valid absentee voter applications received from uniformed and overseas voters⁸⁹ if the application is received at least thirty days before a federal election.⁹⁰ The

⁷⁹ 42 U.S.C. 1973a (2000).

⁸⁰ See *Hathorn v. Lovorn*, 457 U.S. 255 (1982) (holding that state courts had the power to order VRA preclearance before a remedy was implemented).

⁸¹ Pub. L. 103-21, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg to gg-10 (2000 & Supp. IV 2004)). This Act is better known by its "motor voter" nickname. The Act is not applicable in states that do not require registration to vote in federal elections or which permit polling-place registration on Election Day.

⁸² 42 U.S.C. § 1973gg-3 (2000).

⁸³ 42 U.S.C. § 1973gg-3(d) (2000).

⁸⁴ 42 U.S.C. § 1974gg-4 (2000).

⁸⁵ 42 U.S.C. §§ 1973gg-5(a)(2)(A), (B) (2000).

⁸⁶ 42 U.S.C. § 1973gg-9 (2000) (stating private individuals must follow notice requirements before they can sue in court).

⁸⁷ 42 U.S.C. § 1973gg-9(c) (2000).

⁸⁸ Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 18 U.S.C. §§ 608-09, 39 U.S.C. § 3406 & 42 U.S.C. §§ 1973ff to ff-6 (2000 & Supp. IV 2004)).

⁸⁹ FEDERAL VOTING ASSISTANCE PROGRAM, U.S. DEP'T OF DEF., UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT (UNOCAVA) <http://www.fvap.gov/laws/uocavadefinition.html> (last visited July 15, 2007) (defining overseas citizens as U.S. citizens who reside outside the United States, and uniformed services members as U.S. citizens who are members of the Army, Air Force, Navy, Marine Corps, Coast Guard, the commissioned corps of the Public Health Service or National Oceanic and

U.S. Attorney General enforces UOCAVA through civil actions for declaratory or injunctive relief brought in federal district court.⁹¹

The Help America Vote Act (HAVA)⁹² sets forth the following requirements for state processing of voter registration applications for federal elections:

- states cannot accept or process voter registration applications for federal elections unless the applicant included her driver's license number if she has one, the last four digits of her social security number if she has no driver's license number, or affirmatively attests that she has neither a driver's license nor a social security number,⁹³
- if the voter attests she has neither a driver's license nor a social security number, then the state must issue a unique voter identification number,
- if the mail-in application does not contain all the required voter registration information, then the state cannot process the voter registration application, but should notify the applicant of this disposition.⁹⁴

HAVA limits enforcement actions to civil lawsuits requesting injunctive or declaratory relief filed in federal district court by the U.S. Attorney General.⁹⁵

The final set of federal statutes attempt to remove barriers that make it difficult for individuals with disabilities to access registration locations or understand and complete registration forms without some type of accommodation.⁹⁶ In chronological order,⁹⁷ these statutes are the:

- Voting Accessibility for the Elderly and Handicapped Act (VAEHA),⁹⁸ and
- Americans with Disabilities Act (ADA).⁹⁹

The voter registration-related provisions of the Voting Accessibility for the Elderly and Handicapped Act¹⁰⁰ require states to:

Atmospheric Administration, or the merchant marine, and their spouses and dependent family members).

⁹⁰ 42 U.S.C. § 1973ff-1(2) (Supp. IV 2004).

⁹¹ 42 U.S.C. § 1973ff-4 (Supp. IV 2004).

⁹² Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-545 and 36 U.S.C. §§152601-611 (Supp. IV 2004)) (requiring states to be able to identify voters who registered by mail but did not provide the required identification so that precinct workers can request the necessary identification – even if the state does not require identification from all voters).

⁹³ 42 U.S.C. § 15483(a)(5)(A) (Supp. IV 2006)

⁹⁴ 42 U.S.C. § 15483(b)(4)(B) (Supp. IV 2006).

⁹⁵ 42 U.S.C. § 15512 (Supp. IV 2004).

⁹⁶ See Joan L. O'Sullivan, *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 J. Health Care L. & Pol'y 325 (2001) (discussing the impediments disabled or frail elderly face in voting).

⁹⁷ The Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C), is actually the oldest federal statute in this category, but it was never very effective in protecting voting-related activities because its provisions prohibiting states from denying services on account of disability were narrow, (29 U.S.C. § 701 (2000)), and superseded by the ADA. Rehabilitation Act-based suits are rare and the Act will not be discussed further in this chapter. See Christina J. Weis, note, *Why the Help America Vote Act Fails to Help Disabled Americans Vote*, 8 N.Y.U.J. Legis. & Pub. Pol'y 421, 427 (2004-2005).

⁹⁸ 42 U.S.C. § 1973ee-1 to 6 (2000).

⁹⁹ 42 U.S.C. §§ 12101-12213 (2000 & Supp. IV 2004).

- offer a “reasonable number” of permanent voter registration facilities accessible by the elderly and the handicapped unless each voter can register by mail or in their residence,¹⁰¹ and
- provide large print and TDD devices at voter registration sites.¹⁰²

The VAEHA provides a restricted private cause of action for declaratory or injunctive relief against a non-compliant state or political subdivision.¹⁰³

In the voter registration context, ADA’s prohibitions on discrimination against disabled individuals on account of their disabilities in the provision of public services, programs, or activities,¹⁰⁴ and in the enjoyment of goods, services, facilities, privileges, advantages or accommodations provided to the public¹⁰⁵ typically involve challenges to the accessibility of voter registration offices or the election officials’ failure to read or otherwise provide registration forms accessible to individuals with vision impairments or learning disabilities.¹⁰⁶

The ADA permits private causes of action as well as suits by government officials.

3. Regulating Voter Registration Databases

HAVA requires states to establish and maintain a single, uniform, centralized, interactive, statewide voter registration database in which every voter’s registration record has a unique identification number.¹⁰⁷ Voting registration records become outdated when voters move without transferring their registration, die, or become ineligible because of a felony conviction or mental incapacity adjudication.¹⁰⁸ To avoid problems associated with outdated voter registration information, many states periodically purge their voting registration records of ineligible voters.¹⁰⁹ HAVA specifies that voters may be removed from the registration list only in accordance with the provisions of the NVRA.¹¹⁰ States are free to conduct voter registration purges so long as they comply with the following requirements imposed by the NVRA:

¹⁰⁰ 42 U.S.C. § 1973ee-1 to 6 (2000).

¹⁰¹ 42 U.S.C. § 1973ee-2 (2000).

¹⁰² 42 U.S.C. § 1973ee-3 (2000).

¹⁰³ 42 U.S.C. § 1973ee-4 (2000) (requiring the elderly or disabled plaintiff to first notify the state’s chief election officer of the non-compliance and then wait forty-five days before bringing suit).

¹⁰⁴ 42 U.S.C. § 12182 (2000).

¹⁰⁵ *Id.*

¹⁰⁶ Lawsuits brought under the ADA have tended to supersede those brought under the VAEHA as well as the Rehabilitation Act. See 28 C.F.R. § 35.150 (requiring the program as a whole, and not each individual facility, to be accessible).

¹⁰⁷ 42 U.S.C. § 15483 (Supp. IV 2004) (exempting states from this requirement that do not require voter registration to vote in federal elections).

¹⁰⁸ State law determines whether and for how long voting eligibility is lost under either of these two circumstances. See *Peace and Freedom Party v. Shelley*, 8 Cal. Rptr. 3d 497 (Ct. App. 2004) (discussing how a voter registration database can contain outdated information and the appropriate basis on which to measure a political party’s public support for primary election ballot access).

¹⁰⁹ An improper or illegal purge can affect the results of the subsequent election. See *Crow v. Bryan*, 113 S.E.2d 104 (Ga. 1960) (holding election must be rerun because an illegal voter registration purge eliminated more voters than the margin of victory).

¹¹⁰ 42 U.S.C. § 15482 (Supp. IV 2004).

- make “reasonable” efforts to purge *only* ineligible persons from voter registration database,
- do not purge a voter solely for failure to vote, and
- provide notice to purge-eligible voters before purging their names from the registration database.

In some states, local voting officials conduct the purges, while in others the purge is conducted at the state level, and in still others, it is a joint effort.¹¹¹

B. STATE VOTER REGISTRATION COMPLIANCE CHALLENGES

Prospective voters who attempt to register to vote and are denied may sue claiming they met the qualification criteria. If the voter met all the criteria,¹¹² including registration deadlines, the court can issue a writ of mandamus ordering the registrar to add the voter to the rolls.

Some states allow registered voters or local officials to file a pre-election challenge to another voter’s registration eligibility.¹¹³ In general, challenges must target individual voters and not voters as a class.¹¹⁴ State law determines where and how voter registration challenges, which are generally administrative processes, are heard. Depending on the state or the size of the locality, challenges may be heard by the local board of elections or another local official. Resolution of the challenge occurs after the challenged voter is given notice and a hearing, and failure to provide such due process can be a civil rights violation.¹¹⁵ State law determines the extent of an appeals process.¹¹⁶ In addition, the state code may authorize sanctions against challengers who bring willful and malicious challenges.¹¹⁷

Because voter registration challenges are usually administrative processes, court involvement should be limited or nonexistent unless:

- the voter registration challenge statute itself is challenged,

¹¹¹ ELECTIONLINE.ORG, “ASSORTED ROLLS: STATEWIDE VOTER REGISTRATION DATABASES UNDER HAVA,” 5 (June 2005), available at <http://electionline.org/Portals/1/Assorted%20Rolls.pdf>.

¹¹² Some localities may allow homeless individuals to register to vote and identify a voting precinct based on the location where the individual spends most nights. See *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (noting voter registration deadlines reflect the legislature’s judgment of the amount of time necessary to prepare for an election).

¹¹³ See WIS. STAT. ANN. § 6.48 (2003); R.I. GEN. LAWS § 17-9.1-28 (2007); and, WASH. REV. CODE ANN. §§ 29A.08.810 - .850 (West 2007). See *infra* Chapter 7: Election Day for additional information on Election Day challenges to an individual’s eligibility to vote,.

¹¹⁴ *Lloyd v. Babb*, 251 S.E.2d 843, 852 (N.C. 1979) (noting domicile of student voters must be individually ascertained and cannot be a group determination).

¹¹⁵ See *Charfauros v. Bd. of Elections*, 249 F.3d 941 (9th Cir. 2000) (holding a § 1983 action was permitted and the elections board was ineligible for qualified immunity for its part in voter registration challenges that were decided with improper notice, no-pre-election appeal, and where equal protection was violated in identifying the challenged individuals).

¹¹⁶ See R.I. GEN. LAWS § 17-9.1-30 (2007).

¹¹⁷ R.I. GEN. LAWS § 17-9.1-29 (2007).

- a voter seeks a writ of mandamus to compel election officials to permit her registration, or
- the court is authorized by state law to hear allegations involving an election official's abuse of discretion or other official malfeasance or misfeasance.

IV. ABSENTEE VOTING

States also regulate voting opportunities, as when they establish criteria voters must meet to qualify for an absentee ballot. The U.S. Constitution protects qualified voters' right to vote in-person on Election Day, but it does not protect a right to vote by absentee ballot.¹¹⁸ Instead, a state's interest in electoral integrity allows it to condition absentee voting consistent with federal statutory requirements¹¹⁹ and the protections offered by the state constitution.

State and federal absentee voting statutes—and, increasingly, state early voting statutes—dictate the eligibility requirements for and circumstances under which voters may cast a ballot other than in-person on election day. Although all states offer absentee voting under some circumstances,¹²⁰ states can limit its availability because of its greater potential for fraud. State regulation of absentee voting is not subject to strict scrutiny review.¹²¹

For a more detailed discussion of absentee voting, see Chapter Nine.

V. VOTE WEIGHTING

In addition to regulating voter participation, state regulations impact how the cast vote is weighted; that is, how much strength an individual vote has to influence the election's outcome. Federal constitutional equal protection guarantees require that each vote be equally weighted,¹²² which allows each voter to influence the election to the same degree as every other voter. Equal vote weighting—the “one person-one vote” principle—is implemented through

¹¹⁸ Griffin v. Roupas, 385 F.3d 1128 (7th Cir. 2004).

¹¹⁹ Under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), states cannot deny military personnel, overseas civilians, and their dependents who have been bona fide residents of the state and who meet voter registration deadlines an absentee ballot for federal elections because of their overseas location or military status. See *supra*, Chapter 1: Federal Regulation of State and Local Electoral Practices for more information on UOCAVA.

¹²⁰ Absentee voting for elections for federal offices must be offered to uniformed military members and their dependents and overseas civilians and their dependents under the provisions of UOCAVA.

¹²¹ See *Burdick v. Takushi*, 504 U.S. 428, 432 (1992) (stating that Supreme Court cases “do not so hold” that all laws that impose “any burden upon the right to vote must be subject to strict scrutiny”). See *infra* Chapter 6: Election Administration for additional information on absentee voting.

¹²² *Reynolds v. Sims*, 377 U.S. 533 (1964).

requirements that legislative districts represent the same population.¹²³ In general, legislative districts are reapportioned every ten years following the federal census.

Vote “dilution” occurs when a legislative district’s population is larger than the population contained in other legislative districts represented in the same political body.¹²⁴ Voters who live in the larger district(s) have “diluted”—or weaker—votes because more of their votes are required to elect the representative from their district compared to the number of votes required to elect a representative from a smaller district. The population equality necessary to satisfy equal protection guarantees varies based on whether the office is federal, state, or local.¹²⁵

Challenged districting decisions are subjected to strict scrutiny. Courts look at the following factors in determining if the districting plan is constitutional:

- the state’s justification for the population variances,¹²⁶ and
- whether the state has proven it made a good faith attempt to achieve mathematically exact apportionment in its congressional districts.

¹²³ *Wesberry v. Sanders*, 376 U.S. 1 (1964) (congressional districts); *Reynolds v. Sims*, 377 U.S. 533 (1964) (state legislative districts); *Avery v. Midland County*, 390 U.S. 474 (1968) (local government legislative offices).

¹²⁴ For example, at one time, ten states had congressional districts that differed in population size by more than 400,000 people, and two of those states had congressional districts whose populations varied by more than 600,000 people. See *Wesberry v. Sanders*, 376 U.S. 1, 49 (1964) (Harlan, J., dissenting) (appendix):

State Name	Largest District	Smallest District	Population Differential
Arizona	663,510	198,236	465,274
Colorado	653,954	195,551	458,403
Florida	660,345	237,235	423,110
Georgia	823,680	272,154	551,526
Indiana	697,567	290,596	406,971
Maryland	711,045	243,570	467,475
Michigan	802,994	177,431	625,563
Ohio	726,156	236,288	489,868
Tennessee	627,019	223,387	403,632
Texas	951,527	216,371	735,156

¹²⁵ Judicial elections may be exempt from the one-person one-vote criteria because they are not representational in nature. See *State ex rel. Sullivan v. Hauerwas* 36 N.W.2d 427 (Wis. 1949) (explaining why a gubernatorial appointment to the appeals court did not need to be from within the boundaries of the newly redistricted congressional district).

¹²⁶ *Kirkpatrick v. Preisler*, 394 U.S. 526, 532 (1969) (finding the state’s justifications--avoiding the fragmentation of distinct economic and social groupings, practical political considerations, and a desire to avoid fragmenting political subdivisions--insufficient to support the population variances). See also *Karcher v. Daggett*, 462 U.S. 725, 740 (suggesting that consistently applied, non-discriminatory legislative policies, including compactness and respect for municipal boundaries can justify some variance in population).

Courts prefer to invalidate unconstitutional apportionment plans and require the legislative body to devise a new, constitutional plan.¹²⁷ When the apportionment plan is declared unconstitutional too close to an election for a new plan to be devised and implemented, courts may take a different approach, such as:

- imposing a court-ordered redistricting plan, if one is available or can be designed in time, or
- allowing the election to proceed under the unconstitutional plan.¹²⁸

Voter approval does not legitimize an unconstitutional redistricting plan.¹²⁹

A. CONGRESSIONAL DISTRICTS

Equal protection guarantees require congressional representatives to be elected from equally populated districts,¹³⁰ with no amount of population deviation automatically considered *de minimus*.¹³¹

B. STATE OFFICES

Equal protection guarantees require state legislative districts to contain substantially equal populations. Strict population equality is unnecessary because requiring it could impair the normal functioning of state government.¹³² State legislative districting decisions are judged based on whether they effectuate legitimate considerations tied to a rational state policy,¹³³ which may include accommodating historical and pre-existing political boundaries.¹³⁴ States with bicameral legislatures must apportion the districts from which each side is elected on a population basis.¹³⁵

Deviations from the one-person, one-vote rule may also be acceptable in unique circumstances, such as when state statutes require a majority of both the city and county voters to approve a county charter revision—even if the revision otherwise received a majority of the combined vote totals—because the revision affects each locality differently.¹³⁶

¹²⁷ Historically, most reapportionment challenges have been heard by federal courts, although they can be heard in state court. State courts may have additional latitude to issue remedies than federal courts do.

¹²⁸ See *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713 (1964).

¹²⁹ *Id.* at 737 n.30 (noting that voter support for an initiative-based districting plan did not cure its unconstitutionality (quoting *Lisco v. Love*, 219 F. Supp 922 (1964) (Doyle, J., dissenting)).

¹³⁰ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

¹³¹ *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). See also *Karcher v. Daggett*, 462 U.S. 725 (1983) (finding that population deviations of less than one percent require justification).

¹³² *Mahan v. Howell*, 410 U.S. 315 (1973).

¹³³ *Id.* at 325.

¹³⁴ *Brown v. Thomson*, 462 U.S. 835 (1983).

¹³⁵ *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹³⁶ See *Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977).

C. LOCAL OFFICES

Equal protection guarantees require local government officials to be elected from equally weighted population districts, if districts are used.¹³⁷ Local legislative districts may exhibit greater population deviations than those permitted for congressional districts, especially if the deviations are based on political subdivisions¹³⁸ because requiring strict population equality might impair the normal functioning of local government.¹³⁹ In general, states do not need to justify local governmental district population deviations of less than ten percent.¹⁴⁰

Improper vote weighting claims now often occur in contexts outside of traditional legislative districting claims, including challenges to voting technologies based on their disparate error rates.¹⁴¹

VI. SPECIAL DISTRICT ELECTIONS

States and localities establish special districts to manage narrow activities—such as water, pollution, or pest control—that disproportionately affect landowners in a limited geographic area.¹⁴² Special districts do not act legislatively and do not perform traditional government functions, such as running schools. Special districts are usually funded through taxes or assessments on the land within the district.

The unique nature of special districts may allow them to establish voting eligibility criteria for elections to their governing boards that might ordinarily be unconstitutional. For example, voting in special district elections may be restricted to landowners, excluding bona fide residents who rent, or extended to corporations.¹⁴³

Voter qualification standards for special interest elections are subject to rational basis review, and will be upheld unless the challenger can prove the requirement is completely irrelevant to the state's objective.¹⁴⁴ Denying voting to residents who are merely "affected" by the district's

¹³⁷ *Avery v. Midland County*, 390 U.S. 474 (1968). Note that local government officials may be elected on an "at-large" basis in which districts are not used.

¹³⁸ *Id.*

¹³⁹ *Mahan v. Howell*, 410 U.S. 315 (1973).

¹⁴⁰ *Brown v. Thomson*, 462 U.S. 835 (1983).

¹⁴¹ *See, e.g., Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002). *See also Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) (finding an Equal Protection violation based on different voting technologies, but the state had already agreed to discontinue the use of punch card voting equipment); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc) (per curiam) (refusing to postpone gubernatorial recall election using previously decertified machinery because the election had already begun once absentee ballots were issued).

¹⁴² City bond issue elections do not qualify as special interest elections because they broadly affect all the city residents. *See Cipriano v. City of Houma*, 95 U.S. 70 (1969) (revenue bond elections); *City of Phoenix v. Kolodziejek*, 399 U.S. 204 (1970) (general obligation bonds).

¹⁴³ *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

¹⁴⁴ *Id.* at 730.

operations is not an equal protection violation¹⁴⁵ if the costs and benefits of decisions made by the elected special district officials disproportionately accrue to landowners.¹⁴⁶ In addition, the state can allow in-state non-resident landowners to vote in a special district election while not extending the vote to out-of-state non-resident landowners because the in-state landowners may rationally have different interests than their out-of-state neighbors.¹⁴⁷

School board elections¹⁴⁸ and general revenue bond elections¹⁴⁹ are not special district elections in which voting can be restricted to landowners. Instead, these types of elections implicate traditional government functions and restrictions on voting rights are reviewed under strict scrutiny.

VII. LEGAL ISSUES AND CONSIDERATIONS

Challenges to state regulation of the right to vote and voting opportunities are likely to take one of two forms. The first is a compliance-based challenge that generally occurs when a prospective voter claims that she satisfied all voter requirements, but was denied an opportunity to register to vote. The second type of challenge claims that the challenged state regulations or apportionment plans are unconstitutional under the state or the U.S. Constitution, or violate federal statutes.¹⁵⁰

A. COMPLIANCE-BASED CHALLENGES

Voters may raise claims that they met voter registration requirements but were nonetheless denied the opportunity to register,¹⁵¹ or that another voter does not meet registration requirements. Because voter registration is an administrative process, the aggrieved individual may need to pursue available administrative review processes before filing a lawsuit.

If the court finds the voter met the registration requirements, it can issue a writ of mandamus to compel election officials to register the voter.

B. CONSTITUTIONAL AND STATUTORY CHALLENGES

State regulation of voter qualifications is sometimes challenged on state or federal constitutional or federal statutory grounds.

¹⁴⁵ *Id.*

¹⁴⁶ *Millis v. Bd. of County Comm. of Larimer County*, 626 P.2d 652 (Colo. 1981).

¹⁴⁷ *Id.*

¹⁴⁸ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

¹⁴⁹ *City of Phoenix, Ariz. v. Kolodziejski*, 399 U.S. 204 (1970).

¹⁵⁰ Many challenges based on federal constitutional or statutory grounds will likely be filed in federal court.

¹⁵¹ See *infra* Chapter 7: Election Day for additional information.

State statutes that impose voter qualifications other than the traditional categories of age, residency, citizenship, and non-felon status, are not presumed constitutional,¹⁵² but neither do they automatically receive strict scrutiny.¹⁵³ Instead, state laws that impose reasonable and non-discriminatory restrictions on voting rights are constitutional if they support important regulatory interests.¹⁵⁴ State laws that impose severe restrictions on the right to vote, on the other hand, receive strict scrutiny and must be narrowly tailored to advance a compelling state interest, such as guarding against party splintering and electoral integrity.¹⁵⁵

To the extent that challenges to particular state regulations can be categorized, state absentee ballot regulations do not receive strict scrutiny, but the state's legislative district apportionment scheme is evaluated under the strict scrutiny standard.

Federal statutes that protect voting rights include the Voting Rights Act of 1965,¹⁵⁶ the National Voter Registration Act of 1993,¹⁵⁷ the Uniformed and Overseas Absentee Voting Act,¹⁵⁸ the Voting Accessibility for the Elderly and Handicapped Act of 1984,¹⁵⁹ and the Americans with Disabilities Act.¹⁶⁰ For more information on these statutes, see Chapter 1: Federal Regulation of State and Local Electoral Practices.

¹⁵² *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969).

¹⁵³ *See Burdick v. Takushi*, 504 U.S. 428, 433, 434 (1992).

¹⁵⁴ *Id.* at 434.

¹⁵⁵ *Id.*

¹⁵⁶ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C. §§ 1973–1973bb-1 (2000 & Supp. IV 2004)) (prohibiting discrimination based on race, creed, or color, bans literacy or other tests or devices as a condition of voting, and prohibits election-related procedures or policies that operate to discriminate, even if the discrimination is unintentional and naming covered jurisdictions which are required to gain preclearance for any voting-related policy or procedural change or to provide bi-lingual ballots and election materials to non-native English speakers if the language minority meets specified criteria).

¹⁵⁷ Pub. L. 103-21, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg to gg-10 (2000 & Supp. IV 2004)). This statute is best known as the “Motor Voter” law because among its provisions is one that allows an individual to register to vote at state driver’s licensing centers.

¹⁵⁸ Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 18 U.S.C. §§ 608-09, 39 U.S.C. § 3406 & 42 U.S.C. §§ 1973ff to ff-6 (2000 & Supp. IV 2004)) (requiring states to allow overseas civilians or out-of-state military residents, whether overseas or not, to vote in federal elections by absentee ballot in most circumstances).

¹⁵⁹ 42 U.S.C. §§ 1973ee-1 to 6 (2000).

¹⁶⁰ 42 U.S.C. §§ 12101-12213 (2000 & Supp. IV 2004).