Legal Studies Research Paper Series No. 2020-43

THREE PATHOLOGIES OF AMERICAN VOTING RIGHTS ILLUMINATED BY THE COVID-19 PANDEMIC, AND HOW TO TREAT AND CURE THEM

Richard L. Hasen
rhasen@law.uci.edu

University of California, Irvine ~ School of Law

Preliminary draft: June 24, 2020
Forthcoming: *Election Law Journal*
Please do not cite or quote without permission

THREE PATHOLOGIES OF AMERICAN VOTING RIGHTS ILLUMINATED BY THE COVID-19 PANDEMIC, AND HOW TO TREAT AND CURE THEM

RICHARD L. HASEN*

ABSTRACT

The COVID-19 global pandemic, which already has claimed over 100,000 lives in the United States by the end of May 2020, revealed cracks in American economic and social infrastructure. The pandemic also has revealed the inadequacy of the American political infrastructure, in particular, the lack of systematic and uniform protection of voting rights in the United States

The pandemic has illuminated three pathologies of American voting rights that existed before the pandemic and are sure to outlast it. First, the United States election system features deep fragmentation of authority over elections. Second, protection of voting rights in the United States is marked by polarized and judicialized decisionmaking. Third, constitutional protections for voting rights remain weak.

Despite these three pathologies and the Supreme Court's recent decision in RNC v. DNC *concerning Wisconsin ballot receipt deadlines which sided against expanded voting rights, there is room for some hope that at least some courts will provide measure of protection for voting rights during the pandemic. In some of the early COVID-19-related election litigation, courts are putting a thumb on the scale favoring voting rights and enfranchisement in both constitutional and statutory cases. Judges have recognized that the balancing required by the* Anderson-Burdick *test looks radically different when voters cannot easily register and vote in person, and when candidates cannot collect signatures to get on the ballot. In the context of statutory interpretation, some courts seem to be applying without explicit articulation "the Democracy Canon," an old canon of judicial interpretation counseling courts to interpret ambiguous election statutes with a thumb on the scale favoring voting rights. But the picture is mixed, and a number of courts are not adequately accommodating voting rights during the pandemic.*

More significantly, court intervention can only go so far, and long term vigorous judicial protection of voting rights is neither likely nor sufficient to cure American voting rights pathologies. Progress will require more radical change, such as a constitutional amendment protecting the right to vote, requiring national nonpartisan administration of federal elections, and setting certain minimal voter-protective standards for the conduct of state and local elections. Movement toward constitutional amendment is a generational project aimed at entrenching strong voting rights protections against political backlash.

---

* Chancellor's Professor of Law and Political Science, UC Irvine School of Law. Thanks to Ellen Aprill, Sam Bagenstos, Erwin Chemerinsky, Josh Douglas, Ned Foley, Leah Litman, Michael Morley, Rick Pildes, Nick Stephanopoulos, and anonymous reviewers for useful comments and suggestions, and to Timothy Duong for excellent research assistance.

INTRODUCTION

The COVID-19 global pandemic, which already has claimed over 100,000 lives in the United States by late May 2020 (Welna 2020), revealed cracks in American economic and social infrastructure. These include a lack of adequate personal protective equipment for medical personnel; a hodge-podge health care delivery system that leaves many people vulnerable to serious complications from the virus; and the exacerbation of existing societal inequities resulting in disproportionate virus-related harm falling upon the poor, racial minorities, the elderly, and the incarcerated (Jacobs, Richtel, and Baker 2020; Case and Deaton 2020; Rettner 2020; Eligon et al. 2020; Cava 2020; Gutman et al. 2020; Stockman et al. 2020; Park, Meagher, and Li 2020).

The pandemic also has revealed the inadequacy of American political infrastructure, in particular the lack of systematic and uniform protection of voting rights in the United States. For example, whether someone who fears contracting COVID-19 at a polling place will be able to vote by mail successfully in the November 2020 presidential election will depend upon where that person lives; how legislative, administrative, and potentially judicial bodies acting in a highly polarized atmosphere have interpreted laws related to absentee balloting; the ability of local election officials to process an expected flood of requests for absentee ballots; the ability of voters and of the United States postal service to return those ballots before the deadline for receipt; and the capacity for election officials to properly count those votes. The recent fight over a potential delay in the April 7 Wisconsin primary in light of the pandemic—a fight that led to party-line decisions in both the state Supreme Court and United States Supreme Court just before the vote, the closure of 175 out of 180 polling places in the state's most populous county of Milwaukee, and suspicions that some voters and poll workers contracted the virus at polling places—does not instill confidence that American voting rights will be protected in the November 2020 elections (*Wisconsin Legislature* v. *Evers* 2020; *Republican National Committee* v. *Democratic National Committee* 2020 [hereafter, *RNC v. DNC*]; Cotti et al. 2020; Reilly 2020a; Mickle 2020; Wahlberg 2020).

The pandemic has illuminated three pathologies of American voting rights that existed before the pandemic and are sure to outlast it. First, the United States election system features *deep fragmentation of authority over elections*. Not only does the United States use a highly decentralized election system that gives many powers over national elections to state and local bodies; even within the approximately 10,500 bodies expected to run the 2020 election, there is sometimes disagreement over who has decisionmaking authority over voting rights decisions (U.S. Government Accountability Office 2016). In Wisconsin and Ohio, for

example, governors claimed the power to delay primary elections in light of the pandemic. Both efforts led to legislative resistance, lawsuits, and decisions by courts.

Second, protection of voting rights in the United States is marked by *polarized and judicialized decisionmaking*. Some Republican decisionmakers controlling some aspects of American election machinery have pushed for laws and policies that make it harder for some people to register and to vote, leading to a pushback by Democrats and voting rights groups to loosen those restrictions. Often this battle takes the form of unsubstantiated claims of voter fraud, such as President Trump's recent false claims about vote-by-mail (Hasen 2012; Hasen 2020b, Chap. 1; Saul and Epstein 2020a). These politicians often use antifraud messages to justify restrictive voting laws or, in the case of the pandemic, a refusal to modify laws to assure continued access to the ballot. Given the highly litigious nature of American society and American election law in particular, these political fights can wind up in court, and sometimes break along party lines in the courts as well. Protecting voting rights in 2020 America requires a state-by-state slog and often litigation in an uncertain legal environment.

Third, *constitutional protections for voting rights remain weak.* Perhaps the best illustration of the weakness of American voting rights remains the fear (although mercifully not the likelihood) that Republican state legislatures in battleground states could use the pandemic as an excuse to take away the power of voters to choose the state's presidential electors. In *Bush v. Gore*, the 2000 U.S. Supreme Court case which ended a dispute over Florida's electoral votes and handed the presidency to Republican George W. Bush over Democrat Al Gore, the Supreme Court confirmed that under Article II of the United States Constitution, state legislatures can take back from the voters the power to appoint presidential electors (*Bush* v. *Gore* 2000). The concern about the weakness of voting rights protections extends far beyond the electoral college, however, to the ad hoc protection of voting rights through constitutional adjudication under an uncertain balancing test commonly known as the *Anderson-Burdick* test (named after two Supreme Court cases, *Anderson v. Celebrezze* (1983) and *Burdick v. Takushi* (1992)).

Despite these three pathologies, the insufficient progress correcting them twenty years after the Florida debacle culminating in *Bush v. Gore*, and the polarized, disappointing path of the Wisconsin primary and the Supreme Court's decision concerning Wisconsin ballot receipt deadlines, there is room for some hope that even courts which have sometimes broken along partisan and ideological lines will provide a measure of protection for voting rights during the pandemic. In some of the early COVID-19-related election litigation, courts are putting a thumb on the scale favoring voting rights and enfranchisement in both constitutional and statutory cases. Some judges have recognized that the balancing required by the

Anderson-Burdick test looks radically different when voters cannot easily register and vote in person, and when candidates cannot collect signatures to get on the ballot. In the context of statutory interpretation, some courts seem to be applying without explicit articulation "the Democracy Canon," an old canon of judicial interpretation counseling courts to interpret ambiguous election statutes with a thumb on the scale favoring voting rights (Hasen 2010). The litigation has just begun, however, and other courts have pushed back on a muscular role for the courts in protecting voting rights. Courts may not be the savior of voting rights in the 2020 elections.

With enough resources, litigation, political will, and luck, the United States will have the capacity to protect voting rights in many places and hold a reasonably fair election in November 2020. That South Korea was able to pull off a national election in the midst of a pandemic without disputes about the conduct of the election and without major health risks shows there is hope (Kuhn 2020; Jeong and Martin 2020).

But the lack of bipartisan consensus to protect voting rights even in a pandemic, inadequate funding for the inevitable ballooning costs of conducting an election in a pandemic, an increasingly polarized judiciary, and the likelihood that the three pathologies of American voting rights protections will survive longer than the coronavirus, demonstrate the need for broader voting rights protections going forward. Federal courts cannot and are unlikely to be the primary source of protection voting rights in the future. Going forward, a cure to the voting rights problem in the United States will require radical change, such as a constitutional amendment protecting the right to vote, requiring national nonpartisan administration of federal elections, and setting certain minimal voter-protective standards for the conduct of state and local elections. Movement toward constitutional amendment is a generational project aimed at entrenching strong voting rights protections against political backlash.

Part I of this Article describes the three pathologies viewed through the lens of the pandemic: fragmentation, polarization and judicialization of election rules, and weak constitutional protections for the right to vote. Part II describes and criticizes the Supreme Court's decision in the Wisconsin primary case and then surveys the early signs that courts have recognized the need to step in to strengthen voting rights during the pandemic in both constitutional and statutory cases. Part III concludes by describing more radical measures to strengthen American voting rights for democracy to survive in pandemic conditions and thrive in more normal times.

I. THREE PATHOLOGIES

A. Fragmentation

Anyone who spends any time studying election law in the United States quickly learns that American elections are hyperdecentralized (Lowenstein et al. 2017, Chap. 6). Rather than having a central national election authority set the rules for the conduct of the election—from the details of voter registration, to the type of voting machinery, to the parameters for counting ballots and considering election disputes—power over elections is divided. Congress gets to set the date for national elections, and it can override state rules on the "manner" in which federal elections are conducted, for example by mandating that states offer voter registration opportunities at all offices in the state that provide public assistance (U.S. Const. art. I § 4; art. II; 52 U.S.C. §20506(2)(A) (2020)). But states set most of the rules for election, often by statutes which delegate some authority to a Secretary of State or other chief election official and vesting much of the power to run elections in county or subcounty election units. These smaller units then administer elections consistent with the requirements of state and federal law (U.S. Government Accountability Office 2016, 6).

State constitutions guarantee certain voting rights and set forth eligibility requirements for voting (Douglas 2014). The U.S. Constitution speaks of voting rights mostly in the negative: it is illegal to bar someone from voting on the basis of race, gender, age of at least 18, or through the use of a poll tax (U.S. Const. amend. XV, XIX, XXVI, XXIV, XIV). The Constitution contains no affirmative right to vote, but it does guarantee due process of law and equal protection of the laws in the Fourteenth Amendment. Equal protection lawsuits have become the primary method by which those seeking the expansion of voting rights seek court relief in federal court (Lowenstein et al. 2017, Chap. 3).

Neither the federal government nor most state governments provide for the automatic registration of eligible voters to vote.[1] Instead, each state has its own rules for voter registration, supplemented by federal mandates. Many states have moved to online voter registration,[2] but not all have.

The COVID-19 pandemic upended the conduct of elections by making it risky for people to congregate in close proximity to one another and to touch common surfaces, normal features of in-person polling place voting (Centers for Disease Control and Prevention. 2020). In a typical polling place, voters queue up to vote, step up to check-in tables, and touch electronic or analog voting machinery to indicate their choices on a ballot. Polling places typically depend upon a cadre

[1] The term automatic voter registration as used in the United States is somewhat misleading. It is not a system in which the government proactively goes out to register all eligible voters. Instead, it is a system in which the government registers voters who "provide the government with information necessary to be registered-even if for some unrelated reason . . . unless expressly told not to" (McGhee and Romero 2020, 5).

[2] "As of January 27, 2020, a total of 39 states plus the district of Columbia offer online voter registration." (National Conference of State Legislatures 2020a).

of volunteers or poll workers paid a small sum, with election officials often drawing from the ranks of older Americans, a group particularly susceptible to serious health consequences from the virus. Election workers in government facilities sometimes sit closely together to process registration cards, absentee ballot requests, absentee ballot envelopes, and completed ballots. Unless a state offers online or in-person same day voter registration, residents who would register to vote in person at a government office such as a state department of motor vehicles may face great difficulty with government offices closed (Levine 2020a, 2020c; Barthel and Stocking 2020).

The pandemic hit the United States hard in March 2020, a time when many states were conducting presidential primary elections (Times Staff and Wire Report 2020; Corasaniti and Saul 2020). On the ballot in some states were not just presidential contests, but also primaries and general elections for federal, state, and local offices. State officials scrambled over what to do to keep voting safe during the pandemic, considering questions from how to sanitize voting machines and handle returned absentee ballots, to the staffing of polling places, to how to efficiently process a flood of absentee ballot requests (Rakich 2020).[3] In Georgia, for example, "more than 1.2 million people requested absentee ballots for the state's June 9 primary—compared to just 36,200 requests for the 2016 presidential primary" (Epstein 2020a).[4]

Some states reached consensus on the delay of March and April elections, but in other states things went much less smoothly. In Ohio, Governor Mike DeWine sought to delay the state's primary, initially claiming he did not have the authority to do so unilaterally. When he was unable to get legislative or judicial action to delay the primary, he caused his health director to declare polling places closed (Smith 2020). This triggered the Ohio Secretary of State to order a delay in the election, and a shift to all-mail balloting. The legislature then stepped in with a different set of rules, and some of the changes spurred lawsuits (Smyth 2020; Rouan 2020). Ohio eventually conducted its elections in late April, mostly by mail. Turnout "was somewhere between disappointing and dismal" (Rakich 2020).

[3] In the 2020 Ohio primary, 1,975,806 Ohio voters requested absentee ballots, compared to 477,844 absentee ballots sent out in the higher turnout 2016 Ohio presidential primary. According to data posted on the website of the Wisconsin Elections Commission, in the 2020 Wisconsin primary, 1,239,611 voters requested absentee ballots, https://elections.wi.gov/node/6862, compared to 845,243 absentee ballots sent in the November 2016 general election for President, https://elections.wi.gov/node/4414.

[4] *See* Wisconsin Election Commission, *April 7 2020 Absentee Ballot Report* 5 (May 15, 2020), https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/May%2020%2C%202020.Final_.pdf ("Absentee ballots cast for the April 2020 election also represented a far greater percentage of the ballots cast than is typical. More than three-quarters of the ballots cast were absentee and more than 60% were delivered by mail. Historically, over 80% of ballots in Wisconsin are cast in person on election day and only 6% are cast as by mail absentee ballots.").

Thousands of absentee ballots requested by Ohio voters failed to arrive in time, leading some Ohio voters to pass on the opportunity to vote or to cast provisional ballots at the few open in-person voting locations (Rowland and Rouan 2020). Election and postal officials traded accusations about who was to blame (Levine 2020b).

Things were even worse in Wisconsin, likely because the Republican-dominated state legislature often clashed with the state's Democratic governor, Tony Evers. In addition to the Democratic primary, the election featured a high-profile state Supreme Court race pitting a liberal endorsed by Democrats against a sitting conservative Supreme Court Justice who had initially been appointed to office by former Republican governor Scott Walker (Epstein 2020b).

Despite the health risks, Evers initially resisted delaying Wisconsin's April 7 election. In the face of increasing difficulties in safely running the primary in person, including the closure of 97 percent of Milwaukee County's polling places, Evers finally pushed for a delay in the election (Reilly 2020a; Mickle 2020). He called a special session of the state legislature, claiming he did not have the power to delay the election on his own. When the legislature refused to act, Evers nonetheless ordered a delay in the election just a day before the election was supposed to take place (Reilly 2020b). Meanwhile, Democrats and voting rights activists had gone to federal court seeking to delay the election and to get further accommodations for the normal voting procedures upended by the pandemic (Mena, de Vogue, and Stark 2020). The federal district court refused to delay the election, but the judge extended the date for the receipt of absentee ballots until February 13 (Richmond 2020).

At the last moment, both the Wisconsin Supreme Court[5] and the United States Supreme Court issued opinions in Republican-backed suits to reverse Evers' delay of the election and the extension of time for the receipt of absentee ballots (*Wisconsin Legislature* v. *Evers* 2020; *RNC v. DNC* 2020). In the state court, the Justices divided along ideological lines in rejecting Governor Evers' attempt to delay the election (Beck and Marley 2020). In the U.S. Supreme Court, the Justices partially reversed the trial court's extension of the deadline for the receipt of absentee ballots. In a 5-4 decision pitting the Court's Republican-appointed Justices against its Democratic-appointed Justices, the Court held that any ballots postmarked by election day would be counted (*RNC v. DNC* 2020, 1208).

Wisconsin election officials struggled to deal with a surge of absentee ballot requests from voters who wished to avoid in-person voting on election day. Voting took place on Election Day, with voters in Milwaukee and elsewhere waiting in long lines to vote (Spicuzza 2020). Many wore masks or other protective

[5] Order, Wisconsin Legislature v. Evers, No. 202AP608-OA, Apr. 6, 2020, https://www.courthousenews.com/wp-content/uploads/2020/04/wis-supreme-primary.pdf.

equipment. It is unclear whether any of the voters or poll workers contracted COVID-19 through their election activities (Cotti et al. 2020; Wahlberg 2020).

Thousands of Wisconsin voters who had requested absentee ballots never received them, and many of those voters likely did not attempt to vote at polling places. Some late-arriving absentee ballots came in with no postmarks, and Wisconsin counties reached different conclusions about whether to count absentee ballots with no postmarks at all (Bice 2020; McCarthy 2020; Gardner, Simmons, and Barnes 2020). This inconsistency in the treatment of absentee ballots surely would have been a basis for post-election lawsuits had any of the election contests been close enough to litigate (*Bush* v. *Gore* 2020).

As a political matter, the Wisconsin Legislature's refusal to delay the election backfired: Democrats were angry about the attempt to make it harder to vote and the party mobilized to request absentee ballots (Pildes and Stewart 2020). This was true even though turnout among minority voters was down: In Milwaukee, "[w]hile white wards had an average of 49 percent voter turnout, Black and Hispanic wards had an average of about 18 percent turnout" (Banerjee and Gall 2020). Some Republican voters found the absentee ballot request process difficult,[6] and turnout among that group was down much more than among Democrats,[7] leading to the election of the Democratic-preferred candidate for the state Supreme Court. Justice Daniel Kelly, who lost the Wisconsin Supreme Court race and who had recused himself from deciding the lawsuit on Governor Evers' election delay, unrecused himself in a separate case seeking to force Wisconsin election officials to undertake an aggressive purge of voters from the state's voting rolls before the November elections (Johnson 2020).

The Wisconsin episode is partly a story about polarized and judicialized decisionmaking, a topic discussed in the next section. But the Wisconsin dispute, and the tamer Ohio disagreement, also illustrate voting rights fragmentation. It was unclear who had the power to delay the election to protect voters' rights in the midst of the emergency. Voters and election officials were at the mercy of state and federal courts, which issued rulings changing the conditions and dates of the Wisconsin election up until the day before the election. Power over voters was divided among the three branches of state government, across counties, and into the federal courts. Whatever one can say about whether and how Wisconsin conducted

[6] "'While Republicans encouraged early and absentee voting, many elderly either did not have the wherewithal to request absentee ballots or the inclination to vote in person on April 7,' said Doug Rogalla, the Republican Party chairman in Monroe County. 'They were confused, afraid and decided to stay home.'" (Epstein and Nagourney 2020.)

[7] "This year, even though neither primary was as competitive as in 2016, turnout was only 13 points lower. On the Republican side, turnout was down 43 percent — unsurprising with an unopposed president on the ballot. In contrast, Democratic voting was down by only 7.6 percent. That's extraordinary, given that the primary between former vice president Joe Biden and Sen. Bernie Sanders (I-Vt.) was not close." (Pildes and Stewart 2020.)

its April 7 election, no person seeking to devise a rational election system strongly protecting voters' rights would have designed anything like what we saw.

B. Polarized and Judicialized Election Decisionmaking

Fragmentation of authority over elections leaves gaps in election and voting procedures, opening the way for polarized decisionmaking over voting rights. The defining feature of election decisionmaking in early twenty-first century United States politics is deep polarization over voting rules, with some Republican officials and leaders favoring laws and procedures that make it harder to register and vote and most Democratic officials and leaders favoring laws making it easier to register and vote (Hasen 2012). Although the Democrats seem mostly united, Republicans have been more divided, with some Republican leaders, for example, supporting expansion of vote-by-mail during the pandemic (Fessler 2020; Erney and Weiser 2020).

The divergent positions about voting rights stem in part from ideological disagreements about the nature of enfranchisement and elections,[8] but they are at least partially strategic; generally speaking Republican elites have pursued a strategy that depends upon appealing to a whiter, older, more rural demographic, and decreasing voting among other groups can favor the parties' electoral chances (LaLoggia 2018). Democrats, in contrast, pursue policies that appeal to a diverse, younger, and urban voters, and see expansion and ease of voting in their electoral interest (Klein 2020).

Stuck in the middle of these voting wars are the voters themselves, who have become more polarized as they hear messages from elites in media and social media about voter fraud and voter suppression. Republican voters are much more likely to believe that voter fraud is a major problem in United States elections, despite strong evidence to the contrary. Democratic voters, seeing efforts by Republicans to make it harder to register and vote, view voter suppression as a much more troubling tactic,[9] sometimes believing such tactics have a larger effect on election outcomes than they actually do (Neely 2020; Cantoni and Pons 2019).

Suppressive voting rules lead to lawsuits not only from Democrats but from nonpartisan voting rights groups as well. Although conservatives often characterize groups like the American Civil Liberties Union as simply doing the bidding of the

[8] Conservatives are much more likely to view elections as a means of making the best policy choices, and see barriers that keep uninformed, irrational, or unmotivated voters as improving that decisionmaking. Liberals are much more likely to view voting as a means for dividing power among political equals and see easing barriers to voting as a means of further such equality. (Hasen 2014).

[9] According to a 2020 NPR/PBS Marist Poll, 24 percent of those surveyed said that voter fraud was the biggest problem facing the election; 16 percent said voter suppression. "In another sign that voters live in very different media bubbles, voter suppression was cited as the greatest threat for Democrats. Voter fraud topped the list for Republicans." (Neely 2020).

Democratic party (Dershowitz 2020), these groups in fact sometimes deviate from Democrats on both strategy and litigation positions.[10] Lawsuits from both Democrats and outside groups in both state and federal courts seek to rely upon U.S. and state constitutional law, as well as the protections of federal and state voting rights statutes, to argue against restrictive voting laws and policies. More recently, outside right-leaning groups raising false and exaggerated claims of voter fraud, mostly allied with the Republican party, have begun intervening in these lawsuits and bringing their own to force new voting rights restrictions, such as voter purges (Ansara 2020).

Even before the coronavirus hit, election litigation was on track to hit a record. Election litigation has nearly tripled in the post-2000 period compared the pre-2000 period, and it hit a record high in the 2018 midterm elections (which is somewhat surprising, given that midterm election years usually show lower rates of litigation) (Hasen 2020b, 56). Now, with everything upended by COVID-19, a continued surge in litigation is inevitable, both over disputes in applying existing rules in the pandemic as well as over new rules enacted to deal with the pandemic itself. As of June 2020, there were 127 virus-related election suits filed across 38 states and the District of Columbia. (Levitt 2020). The parties already had been

[10] For example, the Democratic Party's key law firm, Perkins Coie, has filed litigation seeking court orders allows the unlimited collection of absentee ballots from voters when such collection of ballots (sometimes pejoratively referred to as "ballot harvesting") is prohibited or limited by state law. For example, see complaints filed by the firm, which has represented not just the Democratic Party but also some Democratic Party-aligned groups as well as some civil rights organizations: Complaint at 33-35, 37-38, 41, Lewis v. Hughes, No. 5:20-cv-0577, May 11, 2020, https://www.democracydocket.com/wp-content/uploads/sites/41/2020/05/01-Complaint-for-Declaratory-and-Injunctive-Relief.pdf (challenging Texas limitations on third party collection of absentee ballots); Complaint at 24-25, 32-35, 37-44, Middleton v. Adino, No.___, Doc. X, (W.D. Tex. May 1, 2020), https://www.democracydocket.com/wp-content/uploads/sites/41/2020/05/2020-05-01-SC-Federal-Four-Pillars-Complaint-FINAL.pdf (challenging South Carolina law limiting campaign workers and volunteers from collecting completed absentee ballots); Complaint at 3, 6-7, 12-25, DSCC v. Simon, No. 62-CV-20-585 (Minn. 2d Jud. Dist. , Jan. 7, 2020), https://www.democracydocket.com/wp-content/uploads/sites/41/2020/02/2020-01-17-MN-Voter-Assistance-and-Ballot-Collection-Complaint.pdf (challenging Minnesota limits on the collection of absentee ballots). In contrast, according to an email dated June 13, 2020 on file with the author from Dale Ho, the Director of the ACLU's voting rights project, the ACLU has been involved in only two suits claiming that limits on third party ballot collection are illegal, and both of those cases have focused on how such limits affect participation of voters of color.

For reasons I explain in more in Richard L. Hasen, *Will California's "Ballot Harvesting" Law Create a Crop of Trouble*, L.A. LAWYER (forthcoming 2020), states have a legitimate antifraud and voter confidence interest in preventing the unlimited collection of absentee ballots. So long as we continue to have a functioning postal system which thereby allows voters to return absentee ballots easily by mail, such laws should be upheld even in a pandemic unless plaintiffs can demonstrate a severe burden on groups of voters who may face special difficulties returning absentee ballots.

raising millions of dollars for voting litigation, and have dedicated additional amounts toward the litigation once the virus hit (Isenstadt 2020).

The dispute and litigation over the April 2020 Wisconsin primary described in the last section is hardly the only example of polarized and judicialized decisionmaking in the COVID-19 era. Much of the litigation so far has concerned the rules for the casting and counting of absentee ballots, whose use is expected to surge in the November 2020 elections.

Consistent with the fragmentation described above, consider disputes over who and how vote-by-mail will take place in November 2020. About one-third of American states require an excuse before an eligible voter may vote by mail (National Conference of State Legislatures 2020b). Texas is an excuse-only state, and one excuse that allows absentee voting is that "the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health" (Tex. Election Code Ann. § 82.002; §§ 82.001-82.007). In litigation pitting the state of Texas against some of its counties, the Texas Supreme Court ruled that lack of immunity to the virus and fear of contracting it at the polling place is not a basis for voting absentee under the statute (*In re State of Texas* 2020). A federal appeals court also rejected constitutional challenges to Texas's absentee ballot rules, which allow only voters over the age of 65 to vote by mail without an excuse (*Texas Democratic Party* v. *Abbott* 2020).

Some states also have strict identification requirements for those voting by mail that seem exceptionally onerous during a pandemic, such as the requirement that an absentee voter obtain the signature of two witnesses. In Oklahoma, the state Supreme Court, with a majority of justices appointed by Democratic governors, issued an 5-2 decision suspending the requirement that absentee voters obtain the signature of a notary confirming identity before being able to voting absentee (*League of Women Voters of Oklahoma* v. *Ziriax* 2020).[11] Just a few days after the decision, the Republican-majority Oklahoma legislature, along party lines, restored the requirement, although they included a suspension of the notarization requirement if 45 days before the election the governor had declared a state of emergency (Hoberock 2020). Even under emergency conditions, voters will still need to provide a photocopy of an accepted photo identification to have their absentee vote count (Hoberock 2020).

[11] All four state Supreme Court Justices originally appointed by a Democratic governor voted not to apply the notarization requirement to absentee ballots. Two of the three Justices originally appointed by a Republican governor dissented, with the other Republican-appointed Justice siding with the majority. On the partisan affiliation of the governors appointing the Justices, see Ballotpedia, "Oklahoma Supreme Court," https://ballotpedia.org/Oklahoma_Supreme_Court (last visited May 12, 2020).

As the number of COVID-19-related lawsuits continued to balloon in spring 2020, the general contours of the fights have emerged: Democrats and their allies on the left, along with good government groups, have fought both to suspend or strike down onerous voting rules, mostly supported by Republicans, in light of the pandemic and to litigate against certain COVID-19-related voting changes such as the closure of polling places.

C. Weak Constitutional Protections for the Right to Vote

The third pathology of the American election system illuminated by the coronavirus pandemic is the United States Constitution's weak protection for voting rights.

Consider first the Electoral College. Rather than choosing the winner of United States presidential elections by popular vote, the Constitution assigns to each state a number of electoral college votes equal to their number of congressional representatives and members of Congress (U.S. Const., art. II). The winner of a majority of electoral college votes becomes the President. Article II of the Constitution gives each state legislature the power to set the rules for assigning the state's electors, and all state legislatures currently give voters the opportunity to vote for the assignment of those electors (*Bush* v. *Gore* 2020, 104).

A recurring question arising during the disputed 2000 presidential election between Bush and Gore over Florida's 25 electoral college votes concerned the right of Florida state courts, consistent with the state constitution's protection for voting rights, to change deadlines and offer rules for resolving disputes over the recounting of ballots marked using poor voting technology (Smith 2001). Lawyers representing Bush and his allies took the position that under Article II only the state *legislature* may set the rules for choosing presidential electors, and that state courts usurped that power in setting new rules for resolving the dispute over Florida's electors. Gore and his allies argued that state courts did not violate Article II by resolving these disputes consistent with the state constitution because doing so did not make new rules but instead interpreted the legislature's own rules for conducting the election.

The United States Supreme Court recognized but sidestepped this issue in a unanimous decision in *Bush v. Palm Beach County Canvassing Board*, a 2000 case that the Court decided before the famous 2000 *Bush v. Gore* decision (*Bush* v. *Palm Beach County Canvassing Board*). In the *Palm Beach* case, the Court sent back to the Florida Supreme Court for clarification the state high court's decision extending the time for Gore to protest the initial election count. The Supreme Court asked whether the Florida court relied, perhaps impermissibly, upon the state constitution in granting Gore the extension (Hasen 2012, 208 n. 57). In the later *Bush v. Gore* decision, three Justices who also joined in the majority holding that a Florida court-ordered recount procedures violated the Equal Protection Clause of the Fourteenth

Amendment joined in a separate concurrence stating that the judicially-crafted recount procedures were not set by the legislature and therefore violated Article II (*Bush* v. *Gore*, 104-05, 111).

Although the *Bush v. Gore* majority decision did not reach the Article II question, the Court did state that legislatures have the power to take back their right to choose presidential electors at any time:

> When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated").

(*Bush* v. *Gore*, 104).

That Supreme Court statement recognized the fundamental weakness of American voting rights in presidential elections. By legislative fiat, an entire state's voters could be disenfranchised from voting for President consistent with the United States Constitution. And yet as astounding as that statement was in 2000, until the COVID-19 pandemic it was hard to imagine the circumstances under which a legislature would risk the wrath of disenfranchising voters by doing so.

With the pandemic arising during an era of hyperpolarization, it is much easier to imagine legislative reclamation of the right to appoint presidential electors directly. Consider especially swing states such as Wisconsin, Pennsylvania, Michigan, and North Carolina with narrow Democratic majorities among voters but Republican majorities in state legislatures (in part thanks to gerrymandering efforts at the beginning of the decade). Perhaps at the urging of President Trump, these Republican legislatures might be tempted to take back their power and appoint their electors directly for Trump rather than allowing the election to go forward (Stern 2020; Hasen 2020c).

Trump could claim that votes conducted in those states were at risk of being manipulated by fraud. Or, perhaps more realistically, state or federal courts could order loosening of election procedures to assure adequate voting rights in light of the pandemic. These legislatures could claim, echoing the *Bush v. Gore* concurrence, that these new procedures violate their powers under Article II and

seek to cancel the election and appoint electors directly.[12] And while each of these states (although not Florida) has a Democratic governor who could argue a right to veto legislation taking back the power to appoint electors, Republican legislators could try unilaterally to appoint electors (Hasen 2019).[13] If there are competing

[12] This precise issue arose at a May 4, 2020 Ohio State University conference on potential election disputes in 2020. As a reporter described one exchange:

> Later in the nearly five-hour discussion, Michael Morley, a Florida State University law professor, made a telling point that suggested that the Democrats' intention to protect the vote in the Pennsylvania scenario could backfire. Any major last-minute voting extension was likely not only to be rejected by federal courts-following the U.S. Supreme Court's Wisconsin primary ruling, he said. But that last-minute change also could give the GOP-led legislature a legal excuse and argument to act on its own to certify a pro-Trump slate of electors-and send it to Congress without the Democratic governor's signature.
>
> "You could imagine situations where the legislature is stepping in to say 'We are appointing a slate of electors reflecting what we perceive to be the accurate outcome based on the election as it was conducted in accordance with state statute—not with what appears to be this judicial deviation from state statute,'" Morley said.

(Rosenfeld 2020). For a summary of the conference by Professor Edward B. Foley, one of its organizers, see (Hasen 2020e).

[13] The complex question whether state legislatures could act without state governors in reclaiming the right to appoint presidential electors directly would depend in part on the extent to which the reference to state legislatures in Art. II (appointing electors "in such Manner as the Legislature thereof may direct") includes the normal legislative process (including gubernatorial veto) or only the actions of the body known as the state legislature in each state. A somewhat related issue arose in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015). In *Arizona*, the state legislature challenged the ability of voters acting through the initiative process to take away the power from the state legislature to draw legislative districts for congressional races. Article I, Section 4 of the Constitution gives state legislatures the power to set rules for congressional elections. In a 5-4 opinion by Justice Ruth Bader Ginsburg joined by the Court's liberals and swing Justice Anthony Kennedy, the Court held that the term "legislature" should be read broadly to include the state's normal legislative process, including its initiative process.

Justice Kennedy has since retired, and a majority of the Court today could well side with Chief Justice John Roberts' dissent in *Arizona.* That dissent read the term "legislature" to refer to the legislative body, and at least to preclude a redistricting process that excluded the legislature from being part of the decisionmaking body. (*Arizona*, 2686-87 (Roberts, C.J., dissenting)). In an earlier case relied upon by both the majority and dissent in *Arizona*, *Smiley v. Holm* (1932), the Supreme Court held it did not violate Article I, section 4 for a state "to apply the usual rules of its legislative process—including a gubernatorial veto—to election regulations prescribed by the legislature." (*Arizona*, 2687).

slates of electors, this would create a new mess that would have to be resolved by Congress or the Supreme Court (Foley 2019).

A legislative reclamation of the power to choose presidential electors directly could usher in a period of civil unrest in the United States, a very worrying scenario which has raised great concerns among election law scholars and others. But I raise the point now not to discuss the instability triggered by an electoral college reclamation, but to highlight the essential fragility of presidential voting rights illuminated by the pandemic.

The electoral college example is only the most dramatic way in which the United States Constitution offers weak protection for voting rights. As already noted, the United States Constitution does not contain an affirmative right to vote; indeed the initial Constitution did not guarantee the direct election of either the President or United States Senators. Instead, over time amendments to the Constitution have limited the ability to engage in discrimination against groups of voters on the basis of certain characteristics.

Litigation under most of these constitutional amendments has been modest at best. There is almost no litigation expanding voting rights on the basis of gender or age; some of the COVID-19-related lawsuits filed over excuse-only absentee balloting have included claims of age discrimination under the Twenty-Sixth Amendment because these laws typically exempt older voters from having to provide an excuse to receive such a ballot (Hasen and Litman 2020; Fish 2012; Bromberg 2019; *Texas Democratic Party* v. *Abbott* 2020).

For decades the Supreme Court refused to enforce the Fifteenth Amendment's prohibition on race discrimination in voting, and it took Congress's passage of the 1965 Voting Rights Act to begin winding down the Jim Crow era of mass disenfranchisement of African-American voters in the South (Keyssar 2009). And it was also not until the 1960s that the Supreme Court started reading the Fourteenth Amendment's Equal Protection Clause to provide some guarantee of equal protection in voting. These cases include those establishing the one person, one vote rule for redistricting and limitations on the use of poll taxes in state elections (the Twenty-Fourth Amendment applied only to federal elections) (Hasen and Litman 2020).

Today, much election litigation in federal court over voting rules such as those affected by the COVID-19 pandemic involve Equal Protection litigation.

Whether a Court majority would read *Arizona*, *Smiley*, and other precedents to give the governor the right to veto a legislative decision to reclaim its powers to choose presidential electors under its analogous Article II powers seems likely given this set of cases seems likely but uncertain. The stronger argument is that when the legislature "directs" the "manner" of appointing electors, it acts through ordinary legislation with the ordinary gubernatorial veto. But the Supreme Court could view things differently, or even decide that this is a political question left to Congress when it chooses which electoral college votes to count.

Most contemporary courts view these cases primarily through what has come to be known as the *Anderson-Burdick* balancing test, one which weighs the burdens on voters' rights by a particular voting law or practice against asserted state interests; the heavier the burden on voters' rights recognized by the court, the stricter the judicial scrutiny. Part II.B describes the ad hoc nature of the balancing test as courts have considered coronavirus-related challenges to election laws and procedures.

This kind of ad hoc balancing of rights is much weaker than that which would occur if the U.S. Constitution contained an affirmative right to vote or if courts otherwise read it as guaranteeing more robust voting rights. And even this ad hoc balancing has recently come under attack by conservative judges as too protective of voter interests, suggesting its future status is precarious. A newly-appointed judge to the United States Court of Appeals for the Sixth Circuit, Chad Readler, has taken the position that a flexible balancing of rights and interests leaves too much discretion to judges (*Daunt* v. *Benson* 2020, 423-26). Judge Readler advocates that the test be replaced with one much more deferential to the state (and therefore less protective of voting rights) (*Daunt* v. *Benson* 2020, 425-26).

Judge William Pryor of the United States Court of Appeals for the Eleventh Circuit has gone even further, suggesting that some of these voting rights cases raise non-justiciable political questions that federal courts cannot decide. In *Jacobson v. Florida Secretary of State*, Judge Pryor wrote for the appeals panel that none of the plaintiffs in the lawsuit had standing to challenge a law giving the party receiving the most votes in the most recent gubernatorial election the opportunity to have its candidates listed first on the ballot. The lawsuit relied upon social science evidence suggesting that being listed on the ballot first confers some advantage among voters. Judge Pryor then wrote a separate concurrence for himself alone taking the position that whether the ballot order rule discriminated against parties or voters raised a nonjusticiable political question. (*Jacobson* v. *Florida Secretary of State* 2020, *3-4, *14).

Relying upon the Supreme Court's recent decision in *Rucho v. Common Cause* holding that courts cannot hear cases arguing that partisan gerrymandering violates the U.S. Constitution, Judge Pryor argued that *Anderson-Burdick* was inapplicable because there are no judicially manageable standards to judge when any party's advantage from being listed first on the ballot is so great as to be unconstitutional (*Jacobson* v. *Florida Secretary of State* 2020, *18-19).

The bottom line is that protection of voting rights in the United States is not robust, a fact sadly illuminated by the current pandemic. Conservative judges appear poised to erode judicial protections for voting rights even further. Fragmentation of authority, polarization and judicialization of voting rights, and weak constitutional protections have meant that whether and how voters will be able to cast a meaningful ballot in the November 2020 elections depends upon many

factors outside the control of voters themselves and not part of any rational strategy to protect voters' rights.

II. TREATMENT: EARLY JUDICIAL DECISIONMAKING DURING THE COVID-19 PANDEMIC

Courts are just beginning to address election-related issues in light of the COVID-19 pandemic, both as litigants debate the application of existing laws and rules in light of the coronavirus and as courts consider legal challenges to virus-related executive, legislative, and administrative election changes (Levitt 2020).

This Part begins by examining the Supreme Court's decision in *RNC v. DNC*, focusing in particular on the Court's sloppy and cavalier attitude toward voting rights. Following the Supreme Court's troubling decision in the Wisconsin primary case, the early results in lower courts—as I write in the midst of the election season and pandemic—are mixed. As the rest of this Part shows, some courts are putting a thumb on the scale favoring voting rights and enfranchisement in both constitutional and statutory cases, while other courts are less willing to do so.

A. The Supreme Court's Decision in RNC v. DNC

The United States Supreme Court's decision in *RNC v. DNC* was the Court's first ruling in a COVID-10 related case (Coyle 2020), and it is deeply troubling. The 5-4 ruling split the Court along party and ideological lines. It is more worrisome for how the Court decided the issues in the case and what it portends for future voting rights claims before the Court than for the majority's actual holding.

The federal district court in an April 2, 2020 opinion set out the pertinent background. "Contrary to the view of at least a dozen other states, as well as the consensus of medical experts across the country as to the gathering of large groups of people, the State of Wisconsin appears determined to proceed with an in-person election on April 7, 2020. In the weeks leading up to the election, the extent of the risk of holding that election has become increasingly clear, and Wisconsin voters have begun to flock to the absentee ballot option in record numbers." (*Democratic National Committee* v. *Bostelmann* 2020, *1).

In three consolidated cases, plaintiffs claiming an unconstitutional burden on their right to vote under the Equal Protection Clause sought a variety of emergency injunctive remedies including delaying the election in light of the pandemic, extending the deadline for the receipt of absentee ballots and absentee ballot requests, and loosening the requirements for witness and proof of identification requirements. The district court stated that holding the April 7 election in the midst of the pandemic could raise risks of both disenfranchisement and the spread of COVID-19, and that it would be difficult for hard-working Wisconsin election administrators to "thread the needle to produce a reasonable

voter turnout and no dissemination of COVID-19." However unlikely this outcome may be, or ill-advised in terms of the public health risks and the likelihood of a successful election, the only role of a federal district court is to take steps that help avoid the impingement on citizens' rights to exercise their voting franchise as protected by the United States Constitution and federal statutes. (*Democratic National Committee* v. *Bostelmann* 2020, *1-21).

After an extensive factual and legal analysis of the changed circumstances in Wisconsin, the court refused to delay the election, believing that this remedy was beyond the power of the federal court in these circumstances. The court, applying *Anderson-Burdick* balancing, nonetheless granted some relief which effectively extended the deadline for absentee voters. After stating that "the evidence is nearly overwhelming that [state election officials], local election units and poll workers will need additional time to address the avalanche of absentee ballots, still arriving daily, much less to do so safely[,]" the court extended the deadline for receipt of absentee ballots from 8 pm on April 7 to 4 pm on April 13. Thus, under the district court's order, a voter conceivably could have voted on April 8-12, after the April 7 election, so long as the ballot arrived by 4 pm on April 13. Although state election officials did not object to counting ballots postmarked by April 7 and arriving by April 13, the court did "*not* add a postmarked-by date requirement . . . . No persuasive evidence suggests that further altering the statutory requirements will impose tangible benefits or harms." (*Democratic National Committee* v. *Bostelmann* 2020, *14-16, *18, *20).

The court also granted other relief, including extending the deadline for the receipt of absentee ballots and requiring election officials to accept an unwitnessed absentee ballot that "contains a written affirmation or other statement by an absentee voter that due to the COVID-19 pandemic, he or she was unable to safety obtain a witness certification despite his or her reasonable efforts to do so . . . ." (*Democratic National Committee* v. *Bostelmann* 2020, *18, *20).

The Republican National Committee and others sought emergency relief from the United States Court of Appeals for the Seventh Circuit. The appeals court refused to stay the district court order extending the deadlines related to absentee ballots, but reversed as to the district court's suspension of the witness requirement.[14] Republicans then went to the Supreme Court as to the absentee ballot receipt deadline.

On April 6, 2020, the day before the primary, the Supreme Court on a party-line vote partially reversed the trial court, requiring any ballots received or

[14] Citing the *Anderson-Burdick* balancing test, the court wrote: "This court is concerned with the overbreadth of the district court's order, which categorically eliminates the witness requirement applicable to absentee ballots and gives no effect to the state's substantial interest in combatting voter fraud." Democratic Nat'l Comm. v. Bostelmann, No. 20-1538, Doc. 30, Apr. 3, 2020, at 3, https://www.scribd.com/document/454890107/Dnc-v-Bostlemann.

postmarked by April 7 to be counted (*RNC v. DNC* 2020). The Court characterized the case as presenting "a narrow, technical question about the absentee ballot process." The Court described the case as involving whether "absentee ballots now must be mailed and postmarked by election day, Tuesday April 7, as state law would necessarily require, or instead may be mailed or postmarked after election day, as long as they are received by Monday, April 13." That statement, and another one describing the district court's order as "allowing ballots to be mailed and postmarked after election day," was quite odd, as neither state law nor the district court imposed a postmark requirement for the receipt of absentee ballots. (*RNC v. DNC* 2020, 1206-08).

The Court wrote that the district court's order "fundamentally alter[ed] the nature of the election," and three times it noted that plaintiffs had not asked for a chance in the absentee ballot receipt deadline in their preliminary injunction papers. This point too was odd. As the dissent noted, the relief had been requested orally before the district court as fast-moving events transpired. The dissent questioned whether the majority was raising a forfeiture argument, and the majority responded that it raised the point (three times) not because it was "necessarily forfeited," but to show that "plaintiffs themselves did not see the need to ask for such relief." As noted, plaintiffs did ask for the relief orally. (*RNC v. DNC* 2020, 1207, 1210)

The Court then turned to the timing of the Court's order close to the election, citing a concept that I have dubbed "the *Purcell* Principle" counseling against last-minute judicial changes in election rules because of the risk of confusion to voters and election administrators (Hasen 2015, 427; *RNC v. DNC* 2020, 1207). It held that the district court's order of relief so close to the election "contravened this Court's precedents." (*RNC v. DNC* 2020, 1207).

Although the Court saw fit to mention three times that plaintiffs had not sought this relief in their preliminary injunction papers filed in district court, the Court did not once see fit to use the word "pandemic" or to even describe the nature of plaintiff's equal protection claim as one involving a burden on the fundamental right to vote. Instead, the Court characterized the case as narrow and technical. It criticized the plaintiffs for failing to produce "probative evidence" in the district court "that these voters would be in a substantially different position from late-requesting voters in other Wisconsin elections with respect to the timing of their receipt of absentee ballots" (*RNC v. DNC* 2020, 1207). But the district court had made specific findings in this regard that diligent voters would not be able to receive ballots in a timely fashion given the pandemic (*Democratic National Committee* v. *Bostelmann* 2020, *17). The Court did not defer to these factual findings as it would ordinarily do unless the findings were "clearly erroneous" (*Cooper* v. *Harris* 2017, 1468).

The Court concluded by calling the dissent's "rhetoric . . . entirely misplaced" and again stressing that it was addressing a "narrow question" that

"should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID-19 are appropriate. That point cannot be stressed enough" (*RNC v. DNC* 2020, 1207).

Justice Ginsburg's dissent for the Court's four liberal Justices sounded a very different tone. It began by noting the public health crisis of the pandemic, the deaths in Wisconsin, and the surge in absentee ballot requests "resulting in a severe backlog of ballots requested but not promptly mailed to voters." The dissent then described the *Anderson-Burdick* balancing of interests conducted by the district court (*RNC v. DNC* 2020, 1208-09 (Ginsburg, J., dissenting)). The dissent characterized as "novel" the postmark requirement imposed by the Court majority, given the lack of a postmark requirement under both state law and within the district court decision. The dissent feared that the Court's order would result in "massive disenfranchisement" for voters whose timely requests for absentee ballots could not be counted in time. It noted that the *Purcell* Principle was aimed at stopping confusion, arguing that the majority's order issued literally hours before voting was set to begin "is sure to confound election officials and voters." (*RNC v. DNC* 2020, 1209-10 (Ginsburg, J., dissenting)).

Turning to the merits, the dissent stated that the concerns about extending the deadline paled "in comparison to the risk that tens of thousands of voters will be disenfranchised." The dissent wrote that it was "wrong" to say the question was "narrow and technical" when it was "a matter of the utmost importance—to the constitutional rights of Wisconsin citizens, the integrity of the State's election process, and in this most extraordinary time, the health of the Nation." "The question here is whether tens of thousands of Wisconsin citizens can votes safely in the midst of the pandemic . . . . With the majority's stay in place, that will not be possible. Either they will have to brave the polls, endangering their own and others' safety. Or they will lose their right to vote, through no fault of their own" (*RNC v. DNC* 2020, 1211 (Ginsburg, J., dissenting); see also Foley 2020, 56).

It is very easy to criticize the Court's 5-4 decision—with all the Republican-appointed Justices siding with Republicans to not allow the late-arriving ballots to count, and all the Democratic-appointed Justices dissenting and siding with Democrats—as simply the product of partisan infighting.[15] At best, the decision could charitably be explained as reflecting the Justices' ideological rather than partisan commitments: As Professor Richard Pildes told the *New York Times*: "I'd say 'liberal' judges are more comfortable with federal courts crafting what they see as pragmatic, ad hoc responses to extraordinary election circumstances . . . while 'conservative' judges believe that federal courts should retain as much of the pre-

[15] The next few paragraphs draws from (Hasen 2020f).

existing rule structure — such as that absentee ballots must be postmarked on or before Election Day — as possible" (Liptak 2020; see also Foley 2020, 12).

The Court reached the wrong decision, but the matter is closer than it might appear. While the district court did not frame it this way, that court essentially extended the absentee voting period for a few additional days, allowing anyone who received a ballot to vote after the April 7 election day so long as the ballot was received before April 13. There is much to be said for courts sticking to the rules as written before the election, because later decisions by courts can help (and be seen as helping) one side or another; and clear election rules should be followed barring extraordinary circumstances.

The main error in the Court's decision was its failure to recognize the truly extraordinary circumstances of the pandemic's effect on the public health, and the failure of political actors in Wisconsin (primarily the Republican legislature, but also the Democratic governor who inexplicably dragged his feet until at the very last minute seeking to postpone the election) to act. This put many voters who did not receive absentee ballots in the horrible position of having to choose serious health risks or become disenfranchised. Further, application of the *Purcell* Principle—even if accepted in ordinary times—should be suspended when an emergency not of the parties' own making causes a court to issue a last minute election order that prevents voter disenfranchisement.

But the Court's decision is far from the worst of what the Court did; much of the disenfranchisement in Wisconsin is at the foot of Wisconsin political actors (and the Wisconsin Supreme Court, which also along party lines split over the Governor's last minute attempt to try to delay the election). Far worse than its decision was the reasoning set forth in its brief opinion.

As noted, the majority opinion was exceedingly sloppy in both half-relying upon the failure of plaintiffs to not raise a request for the absentee ballot deadline relief granted by the district court in its papers and mischaracterizing the district court order and state law regarding postmarks. The inclusion of the postmark requirement created a great deal of confusion and inconsistency in the administration of the election.[16] The only reason this inconsistency did not matter is because the election was not close.

Beyond the sloppiness, and most troubling, is the cavalier nature of the Supreme Court's opinion. It ignored the pandemic and treated the situation as ordinary litigation in an ordinary time. It failed to even mention the voting rights that the plaintiffs were seeking to vindicate. The opinion sent a message that the Court cares little about the voting rights of people in the state, especially African-American voters in Milwaukee who had been facing great risk related to the virus.

[16] The postmark requirement also ignored the reality that many pieces of mail lack postmarks. At the very least, the Court should have ordered any ballots arriving by April 8, the day after the election, to count as they had to have been mailed by Election Day.

In this extraordinary time of a pandemic, the Supreme Court chose to vote remotely for safety reasons while denying some Wisconsin voters a chance to do the same.

Not only did the Court's opinion show a nonchalance about the importance of voting rights in the most dire circumstances. It demonstrated that the Court majority could not build a bridge for a unanimous compromise opinion. The signal it sends is that there may well be have partisan warfare at the Court over election issues in the upcoming election, which is already shaping up to be one conducted under conditions of deep polarization and a pandemic.

B. Constitutional Balancing in Election Cases in Light of COVID-19

Following the Supreme Court's decision in *RNC v. DNC*, lower courts have split. Some have shown much more understanding of the pandemic's effect on voting rights and much more willingness to do something about it, despite their usual partisan divides, but other courts have not seen the pandemic as a reason for modifying election rules that have become burdensome. These latter cases are profoundly troubling: courts should be putting a thumb on the scale to favor voters, especially when voting rights are threatened by external stresses like a pandemic.

As the Wisconsin litigation in the district court demonstrated, *Anderson-Burdick* offers the typical framework for constitutional adjudication over COVID-19-related challenges to election rules. That is, plaintiffs argue that either the application of existing election procedures in light of the pandemic infringes on the fundamental right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment or that changes to election procedures to cope with the pandemic constitutes an infringement.

Anderson-Burdick is a flexible, sliding-scale balancing test: the more severe the burden on the right to vote, the stronger the government interest that the state must supply to justify the infringement. Judicial and scholarly critics have noted that *Anderson-Burdick* balancing can be ad hoc and the results unpredictable; my own earlier work has criticized the balancing test for putting a greater evidentiary burden on plaintiffs to prove their burdens than for the state to justify its interests and prove that its laws are necessary to meet those asserted interests (Morley 2015, 282-83, 297; Foley 2013; Elmendorf and Foley 2008, 513; Hasen 2006, 879-88).

As explained above, *Anderson-Burdick* balancing is far from the strongest way for the government to protect voting rights in the contemporary United States. It might be far more effective to require heightened scrutiny for every election law that burdens voters. But, to paraphrase Donald Rumsfeld, voting rights litigators must go into battle with the constitutional framework they have, not the framework they might want or wish to have at a later time. And flexibility is the key benefit of *Anderson-Burdick* in the context of the pandemic: what ordinarily might appear to be a minor burden on voters, such as returning absentee ballots by a set deadline,

becomes a severe burden when voters, through no fault of their own, cannot vote safely in person and cannot receive an absentee ballot to return by the set deadline.

This point is correct even though ordinarily there may be no constitutional right to vote by absentee ballot or through some other particular mechanism: once the state offers the ability to vote in an election, it cannot impose through a law or policy, or the law or policy's implementation,[17] severe burdens on voting rights on certain groups of voters, such as those voters most susceptible of contracting the virus or those who followed state procedures but were denied the ability to safely cast a ballot (Watts 2014). If voters face a real risk of disenfranchisement through no fault of their own because of the pandemic, the *Anderson-Burdick* balancing test permits courts to fashion an appropriate remedy (Stephanopoulos 2020).[18] Courts should be ready to protect voting rights through reasonable accommodations to voting rules and the expansion and protection of voting opportunities, balancing the needs of states to administer their elections in an efficient way in the midst of a pandemic.

A Sixth Circuit panel made up of a Bush appointee, an Obama appointee, and a Trump appointee unanimously recognized this point in a recent unpublished decision involving Michigan's law requiring candidates for certain state and national offices to collect sufficient signatures to appear on the ballot. The district court had ordered a reduction by 50 percent of the number of signatures required, an extension of the filing deadline, and the collection of the signatures through email. The court unanimously agreed that in analyzing the burden of Michigan's longstanding ballot access law on candidates and voters under *Anderson-Burdick*, the pandemic context was crucial:

---

[17] On poll worker error as a burden on voters under *Anderson-Burdick*, see Watts 2014.

[18] Dean Amar and Professor Mazzone miss this fundamental point in arguing that plaintiffs in the Wisconsin primary case could not assert that their constitutional rights were violated by the failure to extend the deadline for the receipt of absentee ballots. (Amar and Mazzone 2020). The authors claim that "even-handed" election regulations are constitutional under the Supreme Court's opinion in *Crawford v. Marion County Election Board* (2008). Amar and Mazzone write: "In rejecting the challengers' claims, six justices (including Justice Stevens) agreed that, at the very least, 'even-handed restrictions' promoting the 'integrity and reliability of the electoral process itself' satisfy constitutional standards."

But that was not the nature of the constitutional claim in Wisconsin. It was not about the law as written but the law as implemented. The claim was that some Wisconsin voters, following existing Wisconsin law on the receipt of absentee ballots, through no fault of their own were going to be disenfranchised because they would not receive their absentee ballot in time and in-person voting was too dangerous. As the Supreme Court explained in *Bush v. Gore*, (2000, 104-05), "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."). Some state limitations on voting also raise due process concerns, especially when state actors act in a partisan manner, as Professor Foley has argued. (Foley 2017).

> In deciding this claim, the district court properly applied the *Anderson-Burdick* test, which applies strict scrutiny to a State's law that severely burdens ballot access and intermediate scrutiny to a law that imposes lesser burdens. The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored *to the present circumstances*. Thus, the State's strict application of the ballot-access provisions is unconstitutional as applied here.

(*Esshaki* v. *Witmer* 2020, *1).

The panel did divide along ideological lines about the permissible scope of the injunction. The conservative majority held that the specific changes to Michigan's code ordered by the district court exceeded its powers. "By staying the compulsory part of the injunction but upholding the prohibitive part, we are instructing the State to select its own adjustments so as to reduce the burden on ballot access, narrow the restrictions to align with its interest, and thereby render the application of the ballot-access provisions constitutional under the circumstances." The more liberal, partially dissenting judge would have upheld the district court's injunction in its entirety. But all the judges agreed that the pandemic had to be taken into account in the constitutional balancing and that existing state procedures had to give way for protection of voting rights. (*Esshaki* v. *Witmer* 2020, *2-*3).

The Sixth Circuit is not the only court that has read signature gathering requirements as imposing too onerous a standard on candidates and voters in light of the pandemic. Along similar lines, a federal district court modified the signature requirements for a Utah gubernatorial candidate to appear on the Republican Party primary ballot because her signature gathering was interrupted by the pandemic (*Garbett* v. *Herbert* 2020). The Court found the burden on the candidate's First Amendment rights "severe" under the *Anderson-Burdick* test in light of the pandemic, and as a remedy it required the collection of a pro rata number of signatures based on the total number of available days to gather signatures taking the state's stay-at-home order into account (*Garbett* v. *Herbert* 2020, *12, *17-18). The Supreme Judicial Court of Massachusetts issued a similar decision, reducing the number of signatures required for candidates to qualify for the ballot, and allowing the submission of electronic signatures (*Goldstein* v. *Secretary of the*

Commonwealth 2020). The court recognized that burdens that were not severe during ordinary times became severe during the pandemic. (See also Hasen 2020a.)

As the Wisconsin case shows, pandemic-related election issues go beyond ballot access. A federal district court in Virginia approved a consent decree eliminating the witness requirement for the return of absentee ballots required by Virginia law (*League of Women Voters of Virginia* v. *Virginia State Board of Elections* 2020). The court carefully analyzed the consent decree after the Republican Party of Virginia pointed to the potential for collusion between the voting rights plaintiffs and the government, headed by Democrats. In holding the agreement fair, the court applied the *Anderson-Burdick* balancing test in light of the pandemic. "In ordinary times, Virginia's witness signature requirement [for absentee ballots] may not be a significant burden on the right to vote. But these are not ordinary times . . . . Notwithstanding the proffered steps which could be taken to mitigate the risks to health in having somebody witness one's absentee ballot, many would be dissuaded from exercising their vote both on account of the remaining health risks and required steps to mitigate them-again, especially those who are elderly, immunocompromised, or otherwise at grave risk from the virus" (*League of Women Voters of Virginia* v. *Virginia State Board of Elections* 2020, *8).

A federal district court in New York, applying *Anderson-Burdick*, restored the state's presidential primary vote to the ballot after the state had cancelled the election once Joe Biden became the effective nominee of the Democrats for president. The court noted that although the nomination had essentially been settled, the primary resulted in the choosing of delegates for the party convention and the loss of the election would severely burden associational rights. "[T]he removal of presidential contenders from the primary ballot not only deprived those candidates of the chance to garner votes for the Democratic Party's nomination, but also deprived their pledged delegates of the opportunity to run for a position where they could influence the party platform, vote on party governance issues, pressure the eventual nominee on matters of personnel or policy, and react to unexpected developments at the Convention. And it deprived Democratic voters of the opportunity to elect delegates who could push their point of view in that forum." Although the state had cancelled the primary in light of the pandemic, and the court accepted protecting the public from the spread of COVID-19 as an important state interest, it found that cancelling would not meaningfully advance that interest. The court showed skepticism of a COVID-19-related excuse to curtail voting rights (*Yang* v. *Kellner* 2020, *9, *11).

Despite these victories, not all the judicial opinions have engaged in careful balancing of rights and interests. Both the Sixth Circuit and Fifth Circuit issued troubling rulings about voting rights protections during the pandemic.

In *Thompson v. DeWine*, a Sixth Circuit panel issued a stay of a district court order modifying the rules for Ohio petition circulators to quality measures for the ballot during the pandemic. Dismissing the realities of how the pandemic had essentially ended successful petitioning activity, the court held the law requiring wet (not electronic) signature collection during a period of partial state closures imposed only a minor burden on plaintiffs (*Thompson* v. *DeWine* 2020, *3, *4).

The panel distinguished the Sixth Circuit's earlier *Esshaki* case, which had eased ballot access rules for party and candidate qualification in Michigan, on grounds that Ohio's stay-at-home order did not formally ban First Amendment activity like petition circulating. It noted that Ohio was beginning to lift its stay-at-home order, suggesting without evidence that petition circulators would have an easier time collecting signatures in Ohio than in Michigan as the pandemic spread in both states. Most importantly, the Sixth Circuit held that the district court exceeded its powers in granting plaintiffs a remedy. "The broader point is that the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections. And because that's where the decision-making authority is, federal courts don't lightly tamper with election regulations. These concerns are magnified here where the new election procedures proffered by Plaintiffs threaten to take the state into unchartered waters."[19] Although *DeWine* was about a relatively minor election issue, it signals that federal courts should be extremely reluctant to alter election rules burdening voters even in the midst of a pandemic. (*Thompson* v. *DeWine* 2020, *3, *4, *6).

A recent Fifth Circuit decision is even more unfortunate. In *Texas Democratic Party v. Abbott*, a Fifth Circuit panel granted a stay of a district court's order that had granted a preliminary injunction and held as likely unconstitutional Texas's rules for casting absentee ballots. Texas allows anyone 65 years old or older to vote by mail without an excuse, but under its statutes (as described in the next subpart) lack of immunity from COVID-19 and fear of contracting the disease at the polling place is not a valid excuse to vote by mail (*Texas Democratic Party* v. *Abbott* 2020). The lower court held the law likely failed under *Anderson-Burdick*, but the appeals court reversed, holding that the case was controlled by a 1969 Supreme Court decision, *McDonald v. Board of Election Commissioners of Chicago*, and that only lax rational basis review applied to Texas's absentee ballot law (*McDonald* v. *Board of Election Commissioners of Chicago* 1969).

[19] The court also cautioned against court orders issued too close to the election, citing *Purcell v. Gonzalez* (2006). For a critique of the *Purcell* Principle as applied in the context of the pandemic, see (Morley 2016, 282-83, 297). For a more general critique, see (Hasen 2015) and the discussion below. In *DeWine,* use of the *Purcell* Principle was particularly pernicious because the court was applying it to interim orders with an election months away. Such a broad reading could shut down much meritorious election litigation not brought on the eve of an election.

In *McDonald*, the Supreme Court had rejected a constitutional challenge to an Illinois law that let those with a physical disability vote by absentee ballot but not those in pretrial detention. The *McDonald* plaintiffs failed to present evidence that they would be effectively disenfranchised if the state did not give them the ability to vote by absentee ballot (*McDonald* v. *Board of Election Commissioners of Chicago* 1969, 808, 808 n.6). Citing *McDonald* and two subsequent Supreme Court cases, the Fifth Circuit held that absent a state's "absolute prohibition" on voting, a state could decide to offer mail-in balloting options only to some voters and not others: "That is true even where voting in person may be extremely difficult, if not practically impossible, because of circumstances beyond the state's control, such as the presence of the Virus" (*Texas Democratic Party* v. *Abbott* 2020), *10-12). Applying rational basis review and rejecting the application of *Anderson-Burdick* in this context on grounds that *McDonald* was controlling precedent, the Fifth Circuit also gave the back of its hand to an age discrimination argument under the Twenty-Sixth Amendment, essentially ignoring the idea that the Amendment had any independent force (*Texas Democratic Party* v. *Abbott* 2020, *13-14).

The Fifth Circuit was wrong to read *McDonald* as preventing an equal protection argument under *Anderson-Burdick* balancing. Although *McDonald* has not formally been overruled, it no longer reflects the type of *Anderson-Burdick* balancing analysis courts regularly apply to the review of voting burdens (Driver 2012, 1150-55). Even accepting *McDonald* as standing for the proposition that there is no *general* right to vote by absentee ballot so long as in-person voting remains an option, there may be a right to access to a safe ballot in conditions of a national emergency, like a pandemic, when laws requiring in person voting become extremely burdensome through no fault of the voter. *McDonald* did not address such a question. Nor did the Fifth Circuit give a serious answer to the question whether the law discriminated against younger voters in violation of the Twenty-Sixth Amendment by allowing only voters aged 65 or older to vote without excuse by absentee ballot. The Fifth Circuit further erred in refusing to conduct its balancing, as the Sixth Circuit held was required in *Esshaki*, taking into account the additional burdens that the virus put on the exercise of voting rights. The Fifth Circuit was willing to let the state off the hook because external forces prevented voting; it is hard to believe that if a hurricane hit the Texas coast and prevented voting there that the court would be just as cavalier about the loss of voting rights.

Early in the litigation over COVID-related election disruptions, there was reason for hope that courts would provide effective treatment to deal with weak voting rights during a pandemic. As the virus and election season has worn on, however, that hope has begun to fade.

C. Statutory Interpretation in Election Cases in Light of COVID-19

Voting rights case in the wake of the pandemic do not always raise constitutional issues. Sometimes they raise issues about how to read an ambiguous election statute. In addressing such questions of statutory interpretation, courts should apply a longstanding canon (or rule) of judicial interpretation that I have dubbed "the Democracy Canon" (Hasen 2010). It says that courts should interpret ambiguous election statutes with a thumb on the scale favoring the voter. Thus, in the Texas excuse example, if it is fairly possible to call one's susceptibility to contracting a potentially deadly contagious virus as a "physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter's health," courts should do so (Flanders and Spina 2020).

The practice has a long pedigree and it serves two important purposes. First, "the Democracy Canon can help protect an *underenforced constitutional norm*. In this case, the Canon protects constitutional equal protection rights in voting, rights which courts for various reasons have declined to protect directly through constitutional litigation." Furthermore, "the Democracy Canon is a *preference-eliciting mechanism*. A clear statement rule requires the legislature to take affirmative steps to express its intent to limit voter enfranchisement only when justified by other important interests" (Hasen 2010, 73).

I trace the canon's pedigree back to a Texas case in 1885 (*Owens* v. *State* 1885, 509). Some states have statutory rules of construction to use the canon; in other states they are judicially created (Guthrie 2020, 1990). As I have explained the Democracy Canon has been applied primarily in three contexts. First, "*vote counting cases*, in which someone relies upon the Canon to argue, following an election, for the counting of ballots that have not been counted because of minor voter error, election official error, or a disputed reading of a relevant statute" (Hasen 2010, 72). Second, "*voter eligibility/registration cases*, in which someone relies upon the Canon to argue, before an election, that a voter or certain group of voters who have been told they cannot vote should be allowed to cast a ballot that will be counted even though election officials have determined they cannot register or vote because of minor voter error, election official error, or a disputed reading of a relevant statute" (Hasen 2010, 72). Third, courts have applied the canon in "*candidate/party competitiveness cases*, in which a candidate or political party relies upon the Canon (and particularly upon the voters' right to vote in a competitive election) to argue, before an election, that a certain candidate or party should be allowed to run in an election or appear on an election ballot, even though election officials have excluded the candidate or party from the ballot because of minor candidate or party error, election official error, or a disputed reading of a relevant statute" (Hasen 2010, 72).

Going forward, it is easy to imagine pandemic-related litigation in all three categories, and given the urgency of the pandemic and the threat to the right to vote,

courts should aggressively apply the Democracy Canon to protect voting rights and assure competitive elections.[20]

Although no courts in COVID-19 litigation have yet looked to the Democracy Canon explicitly, some courts seem to be applying the canon implicitly. For example, in the Oklahoma case concerning whether voters voting by mail need to have their ballots notarized,[21] the Oklahoma Supreme Court in a single-paragraph opinion construed Oklahoma statutes to not require notarization. This was a permissible reading of an ambiguous statute and the preferred reading because it favored voter enfranchisement. The decision spurred the Oklahoma Legislature to pass new legislation quickly reversing on the notarization question, nicely showing how the canon can serve as a preference-eliciting mechanism and potentially setting up a new constitutional litigation.

As with the constitutional litigation, the early statutory interpretation election cases during COVID-19 are a mixed bag. Things look worse in Texas than Oklahoma.

In Texas state court litigation over whether lack of immunity from COVID-19 and fear of contracting it at the polling place counts as an excuse under the statute allowing absentee balloting under conditions of "disability," a trial court briefly concluded that "the evidence shows that voters . . . are reasonable to conclude that voting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring their health, and any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002."[22]

The Texas Supreme Court unanimously held otherwise. It ruled in a separate case that lack of immunity to the virus and fear of contracting it at the polling place did not count as a "disability" under the statute to allow for absentee balloting (In re State of Texas 2020). The majority opinion was crafted as somewhat of a compromise, reading the meaning of disability in a wooden way to exclude COVID-related lack of immunity as an excuse for voting by mail but encouraging voters to apply to vote by mail by making their own self-assessment as to disability given that county officials would not be checking if voters were truly disabled. The awkward decision was a recipe for Texas to prosecute for voter fraud those who would encourage people who lacked immunity to vote by absentee (Hasen 2020d).

---

[20] Unfortunately, the canon's use to protect voters has been inconsistent both over time and across states, whether the state has codified the canon or not. See the empirical analysis offered by Guthrie 2020.

[21] Order, League of Women Voters of Okla. v. Ziriax, 2020 OK 26, https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=486523.

[22] Tex. Democratic Party v. DeBeauvoir, Order on Application for Temporary Injunctions and Plea to the Jurisdiction, No. D-1-GN-20-001610, at 3-4 (Tex, 201st Jud. Distr., Apr. 17, 2020), https://electionlawblog.org/wp-content/uploads/texas-excuse-order-1.pdf.

It would have been far better for the court to admit the ambiguity in the word "disability," and to apply the democracy canon so that Texas voters had the full freedom to vote by mail in the midst of a pandemic. Given this case and the federal case rejecting a right to vote absentee in Texas during the pandemic on constitutional grounds, it appears Texas voters may need to risk their health if they wish to exercise the franchise in November.

These cases are just beginning. As courts continue to face questions over the meaning of voting rights statutes in light of the pandemic, they should feel comfortable putting a thumb on the scale favoring voters. Doing so follows a long and honorable tradition of statutory interpretation. But the Texas Supreme Court opinion shows that one cannot count on it happening everywhere.

III. CURE: THE PATH TOWARD MATURE PROTECTION OF U.S. VOTING RIGHTS

I am haunted by the image of predominantly African-American Milwaukee voters lining up in the April 7 Wisconsin primary, risking their health to exercise the franchise when the state unconscionably refused to delay the election. (Ifill 2020). Fifty-five years after the passage of the Voting Rights Act, the situation was indefensible.

It should not be this difficult to get consensus around protecting voting rights in the twenty-first century United States, especially in the midst of a deadly pandemic the likes of which the country has not seen for over 100 years. Voting rights groups should not have to sue to ensure that elderly, immunocompromised, and other vulnerable voters do not have to risk their health and lives by voting in person when voting by mail is available.

Many states, including a number of states with Republican leadership, are doing the right thing to protect the voting rights of all voters against a virus that does not discriminate on the basis of political affiliation. Other states have begun to do the right thing in the face of voting rights litigation (Lovegrove 2020). Those dragging their feet appear to be doing so for partisan reasons, threatening both the physical health of voters and the health of American democracy. And much of the problem with providing a safe and secure means of voting in 2020 have more to do with the fragmentation of authority and the competence of election officials than any attempt to suppress the vote.

From an American-centric perspective, these skirmishes in the voting wars and lack of coordination on providing safe and secure voting can feel inevitable. But from an international perspective, the United States is an outlier among advanced democracies. South Korean election officials adopted plans to conduct safe and healthy elections in the midst of the pandemic (Kuhn 2020; Jeong and Martin 2020). Israel did so as well, even setting up special polling places for

COVID-19-positive patients (Lis 2020). Most advanced democracies use national, nonpartisan election administration that ensures eligible voters can easily cast a vote that will be fairly and accurately counted.

What would it take to bolster voting rights in the United States, so that constant struggles over voter registration, voter identification, polling place locations, and other questions of sound election administration did not become grist for the partisan mill? What can be done so that whether an eligible voter is able to freely and easily cast a ballot does not depend upon the state or county in which the voter lives?

Part II has demonstrated that at least some courts are stepping up to protect the most basic of voting rights in a pandemic. But the picture is mixed, and for three reasons reliance on courts is not a sustainable long-term strategy to protect voting rights.

To begin with, there is reason to worry that courts will become less protective of voting rights going forward, as the Texas Supreme Court and federal Fifth and Sixth Circuits recently signaled. The *Anderson-Burdick* test gives courts too much discretion in balancing, with a thumb on the scale favoring state interests over voters. It is not clear that judges doing their best under the amorphous standard will correct most laws, policies, and their implementation that infringe on voting rights, particularly when the infringement is not caused by intentional steps taken by government officials. Voters only get major protection (as in a pandemic) when the threat to voting rights becomes "severe" (*Burdick* v. *Takushi* 1992, 434). The Supreme Court's decision in in *RNC v. DNC* suggests that the nation's highest court is not sympathetic to voting rights and may fracture along ideological lines. Other decisions from conservative judges advocate pulling back on *Anderson-Burdick* and sometimes even treating voting rights claims as nonjusticiable political questions, a move which would take federal courts out the business of protecting voting rights.[23]

Second, the Supreme Court's *Purcell* Principle jurisprudence, as strengthened in the *RNC v. DNC* case, stands to become a major impediment to judicial protection of voting rights. The principle cautions strongly against federal court decisions affecting voting rights too close to the election because of the danger of confusing election administrators and voters. I have already noted that the principle should not apply during a pandemic or a similar situation when court orders come at the last minute in response to an emergency changing conditions on the ground. In such a situation, any risks of voter or election administrator confusion are easily outweighed by the severe risk of voter disenfranchisement that

[23] *See, e.g.,* Coalition for Good Governance v. Raffensperger, Order, Doc. 43, No. 1:20-cv-1677-TCB at 10 n.2 (N.D. Ga. May 14, 2020), https://electionlawblog.org/wp-content/uploads/covid-ga.pdf.

may come when usually normal election procedures suddenly, and through no fault of the voters, become severe burdens on voting rights.[24]

But more generally, the *Purcell* principle is wrongheaded because it fails to follow the Supreme Court's ordinary practice of balancing interests and hardships in handling emergency litigation. As I have explained in detail elsewhere, "[a]lthough the precise test the Court uses in these emergency situations is somewhat fluid and uncertain, there is no doubt that ordinarily the Court considers the likelihood of success on the merits and relative hardship to the parties as two crucial factors in deciding whether to grant or vacate a stay or impose an injunction (Hasen 2015). By making the *Purcell* principle paramount, the Court runs the risk of issuing orders, which can disenfranchise voters or impose significant burdens on election administrators for no good reason" (Hasen 2015). In other words, while timing is an important factor in Supreme Court balancing, when threats to voting rights are significant enough—especially in times of emergency—timing concerns should be balanced against the potential for voter disenfranchisement.

The third and final reason why reliance on courts is not enough to protect voting rights going forward is that courts can do nothing to solve the overall problems of fragmentation and polarization of voting rights described above. Federal courts could not stop the internal state fights in Wisconsin and Ohio over the timing of scheduling elections during the pandemic and they can do little to deal with election administration problems. Federal courts are also not equipped to require states to apply sound and neutral election administration principles.

The pandemic has demonstrated that American protection of voting rights is so precarious that we need more radical change than simple reliance on judicial protection of voting rights. In the past I have resisted calls for a constitutional amendment enshrining the right to vote. My fear was that a push for an amendment would backfire, and provide a basis for courts to limit rights. The pursuit of such an amendment, which today would have little chance of success given partisan polarization over voting rights, could backfire as courts and political leaders see the lack of consensus over a constitutional amendment as proof that voting rights are unimportant.

But the current situation is untenable, and the judicial protection of voting rights in future years is uncertain. There seems little to lose now by pushing what this country actually needs, even if the struggle to attain it may be a long one. Back

[24] "Courts frequently are called upon to grant emergency relief extending polling place hours or modifying other rules governing the electoral process in response to power failures, floods, and other such emergencies that unexpectedly burden the constitutional right to vote. Applying the *Purcell* principle in such cases would virtually disqualify courts from protecting constitutional rights during such emergencies. The *Purcell* principle should be inapplicable when a potential claim arises from an unexpected emergency that does not occur until an election is impending or in progress." (Morley 2020, draft at 21, citation omitted).

in 2001, after the Florida debacle culminating in *Bush v. Gore*, Professor (and now Representative) Jamin Raskin offered not only a template for a Twenty-Eighth amendment protecting the right to vote but the political case for it: "A campaign for such an amendment would give coherence and energy to the scattered efforts across the country to reform the anachronistic, malleable electoral structures that exist in literally thousands of self-regulated jurisdictions." (Raskin 2020).

Such a constitutional amendment would have to be specific, and not just contain aspirational language protecting voting rights such as the language appearing in some state constitutions (Douglas 2014). It should achieve three aims: First, it should protect the right of all U.S. adult citizens to cast a ballot that will be fairly and accurately counted in federal, state, and local elections, including the right to vote directly for President. In setting forth the amendment's scope, it should provide that when voters challenge a voting law as infringing on the constitutional right to vote, the government passing the law must demonstrate that the law is nondiscriminatory and show with actual evidence that it is necessary to serve important state interests. As under *Anderson-Burdick*, laws imposing severe burdens should be subject to strict scrutiny. The amendment should provide that courts apply a presumption in adjudication favoring voters much like the Democracy Canon used in statutory interpretation, recognizing that voting rights cases often will be in the hands of a judiciary skeptical of broad protection of voting rights without an explicit constitutional command.

Second, a constitutional amendment should establish an independent, nonpartisan agency to run federal elections with the power to set uniform, national standards for the conduct for such elections. (Hasen 2012, 197-99). Such an agency, modeled after national nonpartisan election administration agencies in other advanced democracies, would have quasi-independence from political branches such as the independence of the Federal Reserve. (Hasen 2005). The nonpartisan head of the agency would be appointed upon nomination by the President and confirmed by a two-thirds supermajority of the House of Representatives,[25] to assure that the agency head has broad bipartisan support.

Third, the amendment should provide that states must meet certain minimal standards guaranteeing the right to vote in state and local elections. States must meet benchmarks to ensure that their voting systems provide generous access to the ballot for eligible voters and robustly protect integrity and security. The amendment should vest in the independent federal election agency, subject to congressional override, the ability to set minimum standards for voting technology, early voting scope, disability access, and procedures to protect voting rights in emergency conditions.

---

[25] The House of Representatives comes closer to with modern one person, one vote ideal than the United States Senate, which overrepresents states with smaller populations. It therefore is a more appropriate body to confirm the head of a national election administration agency.

These three parts of a constitutional right to vote amendment would go a long way toward curing the three pathologies of contemporary American voting rights. It would eliminate fragmentation in federal elections, and to a great extent in state and local elections, by guaranteeing the right to vote, setting certain minimal protections for state and local voting, and vesting authority over federal elections in a national nonpartisan body. While such an amendment would not negate polarization in the United States, it would limit the ability of polarized politics to spill over into the protection of voting rights. Robust protection of a right to vote ultimately would limit judicial intervention in elections through clear constitutional rules that judges of all ideological stripes would enforce. And most importantly, the amendment will enshrine the primacy of voting rights within the Constitution itself.

Passage of such an amendment is a generational, or even multi-generational project, one that could be modeled upon the long struggle for the passage of the Nineteenth Amendment protecting gender equality in voting. In the interim, Congress could pass legislation under its powers under the Elections Clause and its powers to enforce the Fourteenth Amendment's equal protection clause and the voting amendments to achieve much of what a constitutional amendment would accomplish.[26] Congress could also condition federal funding on state improvements in voting and election systems.

Congressional legislation is good but not enough. Making change through ordinary legislation would be subject to easier reversal than enshrining these changes in the Constitution, and there is reason to worry about retrenchment in the absence of constitutional guarantees. Pushing for an amendment also could galvanize a political movement around robust constitutional protections.

***

Twenty years ago, the Florida debacle clarified that the American electoral system was not up to the task of competently counting votes in a close presidential election and running an election in which eligible voters, regardless of where they lived, had about an equal chance to cast a vote that would be fairly and accurately counted. Since then, the country has made some progress on voting technology, and in many places the voting experience has improved and voting rights have been expanded. But not everywhere. And not for everybody, especially under the conditions of a deadly pandemic. Voting rights should not be an uncertain, state-

[26] That is not to say that Congress could accomplish everything by statute. For example, it is uncertain whether Congress could require states to reenfranchise felons who have completed their sentences. This appears to encroach on state power to set voter qualifications, recognized in Article I of the Constitution. And in the hands of a conservative federal judiciary, it is possible that much more federal legislation could be struck down as exceeding congressional power. But thus far the Court has read Congress's power under the Elections Clause broadly. *Arizona v. Inter Tribal Council* (2013).

by-state slog in state and federal court and across multiple levels of government. We can—and we must—do better.

REFERENCES

Ad Hoc Committee for 2020 Election Fairness and Legitimacy. 2020. "Fair Elections in a Crisis: Urgent Recommendations in Law, Media, Politics, and Tech to Advance the Legitimacy of, and the Public's Confidence in, the November 2020 U.S. Elections." April, https://www.law.uci.edu/faculty/full-time/hasen/2020ElectionReport.pdf.

Amar, David Vikram, and Jason Mazzone. 2020. "Wisconsin's Decision to Have an Election This Month Was Unjust, But Was it Also Unconstitutional? Why the Plaintiffs (Rightly) Lost in the Supreme Court." *Verdict*, April 20, https://verdict.justia.com/2020/04/20/wisconsins-decision-to-have-an-election-this-month-was-unjust-but-was-it-also-unconstitutional.

Anderson v. Celebrezze. 1983. 460 U.S. 780.

Ansara, Michael. 2020. "A Memo on Voter Suppression." *Together for 2020*, Apr. 27, https://togetherfor2020.org/voter-suppression-duplicate/.

Arizona State Legislature v. Arizona Independent Redistricting Commission. 2015. 135 S. Ct. 2652.

Arizona v. Inter Tribal Council. 2013. 570 U.S. 1.

Armus, Teo, et al. 2020. "Live Updates: Prestigious Medical Journal Slams Trump as U.S. Death Toll Surpasses 85,000." Washington Post, May 15, https://www.washingtonpost.com/nation/2020/05/15/coronavirus-update-us/.

Banerjee, Shruti, and Megan Gall. 2020. "COVID-19 Silenced Voters of Color in Wisconsin." *Demos Blog*, May 14, https://www.demos.org/blog/covid-19-silenced-voters-color-wisconsin.

Barthel, Michael and Galen Stocking. 2020. "Older People Account for Large Shares of Poll Workers and Voters in U.S. General Elections." *Pew Research Center, FactTank*, April 6, https://www.pewresearch.org/fact-tank/2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/.

Beck, Molly, and Patrick Marley. 2020. "Wisconsin Justices Block Tony Evers' Order to Shut Down Election, U.S. Supreme Court Restricts Absentee Voting." *Milwaukee Journal Sentinel*, April 6, https://www.jsonline.com/story/news/politics/elections/2020/04/06/tony-evers-issues-order-shutting-down-tuesdays-election/2954626001/.

Bice, Daniel. 2020. "Milwaukee Election Commission Votes to Count at Least 390 Absentee Ballots with Postmark Problems." *Milwaukee Journal Sentinel*, April 13, https://www.jsonline.com/story/news/politics/elections/2020/04/13/milwaukee-votes-count-absentee- ballotspostmark-problems/2980259001/.

Bromberg, Yael. 2019. "Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment." *University of Pennsylvania Journal of Constitutional Law* 21(5):1105-66.

Burdick v. Takushi. 1992. 504 U.S. 428.

Bush v. Gore. 2000. 531 U.S. 98.

Bush v. Palm Beach County Canvassing Board. 2000. 531 U.S. 70.

Cantoni, Enrico, and Vincent Pons. 2019. "Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008–2018." *National Bureau of Economic Research*, Working Paper No. 25522, (February), https://www.nber.org/papers/w25522.

Case, Anne, and Angus Deaton. 2020. "Opinion: American Can Afford a World-Class Health System. Why Don't We Have One?" *New York Times*, April 14, https://www.nytimes.com/2020/04/14/opinion/sunday/covid-inequality- health-care.html.

Cava, Marco della. 2020. "Latinos Disproportionately Dying, Losing Jobs Because of Coronavirus: 'Something Has to Change.'" *USA Today*, April 18, https://www.usatoday.com/story/news/nation/2020/04/18/coronavirus-latinos-disproportionately-dying-losing-jobs/5149044002/.

Centers for Disease Control and Prevention. 2020. "Recommendations for Election Polling Locations." March 27, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

Cooper v. Harris (2017). 137 S. Ct. 1455.

Corasaniti, Nick, and Stephanie Saul. 2020. "16 States Have Postponed Their Primaries Because of Coronavirus. Here's a List." *New York Times* April 9, https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html.

Cotti, Chad D., Bryan Engelhardt, Joshua Foster, Erik T. Nesson, & Paul S. Niekamp. 2020. "The Relationship Between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary." NBER Working Paper 27187, May, https://www.nber.org/papers/w27187.pdf.

Coyle, Marcia. 2020. "Analysis: Supreme Court's First Opinion Related to COVID-19 Was Anonymous. Here's Why That Matters." *PBS News Hour*, April 22, https://www.pbs.org/newshour/nation/analysis-supreme-courts-first- opinion-related-to-covid-19-was-anonymous-heres-why-that-matters.

Crawford v. Marion County Election Board. 2008. 553 U.S. 181.

Daunt v. Benson. 2020. 956 F.3d 396 (6th Cir.).

Democratic Nat'l Comm. v. Bostelmann. 2020. 2020 WL 1638374 (W.D. Wis., Apr. 2).

Dershowitz, Alan M. 2020. "The Final Nail in the ACLU's Coffin." *The Hill*, June 11, https://thehill.com/opinion/civil-rights/391682-the-final-nail-in-the-aclus-coffin.

Douglas, Joshua A. 2014.."The Right to Vote Under State Constitutions," *Vanderbilt Law Review* 67(1) 89-149.

Driver, Justin. 2012. "The Constitutional Conservatism of the Warren Court." *California Law Review* 100(5): 1101-68.

Eligon, John, Aura D. S. Burch, Dion Searcey, and Richard A. Oppel Jr. 2020. "Black Americans Face Alarming Rates of Coronavirus Infection in Some States." *New York Times*, April 14, https://www.nytimes.com/2020/04/07/us/coronavirus-race.html.

Elmendorf, Christopher S. and Edward B. Foley. 2008. "Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court." *William & Mary Bill of Rights Journal* 17(2):507-38.

Epstein, Reid J. 2020a. "Democrats' Vote-by-Mail Effort Won in Wisconsin: Will It Work Elsewhere?" *New York Times*, May 10, https://www.nytimes.com/2020/05/10/us/politics/Wisconsin-election-vote-by-mail-.html.

Epstein, Reid J. 2020b. "Upset Victory in Wisconsin Supreme Court Race Gives Democrats a Lift." *New York Times*, April 13, https://www.nytimes.com/2020/04/13/us/politics/wisconsin-primary-results.html.

Epstein, Reid J. and Adam Nagourney. 2020. "Democratic Victory in Wisconsin Looms as 'Clarion Call' for Trump." *New York Times*, Apr.14, https://www.nytimes.com/2020/04/14/us/politics/trump-wisconsin-2020-election.html.

Erney, Dominique, and Wendy R. Weiser, "Bipartisan Support for Expanded Mail Voting for 2020 Elections." Brennan Ctr. For Justice, April 15, https://www.brennancenter.org/our-work/research-reports/bipartisan-support-expanded-mailvoting-2020-elections.

Esshaki v. Witmer. 2020. 2020 WL 2185553 (6th Cir. May 5).

Fessler, Pam. 2020. "Republicans Disagree on Voter Fraud Risk for Mail-in Voting." *NPR*, May 14, https://www.npr.org/2020/05/14/855855742/republicans-disagree-on-voter-fraud-risk-for-mail-in-voting.

Fish, Eric S. 2012. "The Twenty-Sixth Amendment Enforcement Power." *Yale Law Journal* 121(5):1168-1235.

Flanders, Chad, and Kristen Spina. 2020. "Texas is the Next Major Battleground Over Pandemic Voting Rights." *Slate*, April 17, https://slate.com/news-and-politics/2020/04/texas-coronavirus-pandemic-voting-rights.html.

Foley, Edward B. 2013. "Voting Rules and Constitutional Law." *George Washington Law Review* 81(6): 1836-64.

Foley, Edward B. 2017. "Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws." *University of Chicago Law Review* 84(2): 655-756.

Foley, Edward B. 2019. "Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management." *Loyola University Chicago Law Journal* 51(2): 309-62, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446021.

Foley, Edward B. 2020 (forthcoming). "Assessing the Validity of an Election Result: History, Theory, and Present Threats." *New York University Law Review Online*.

Garbett v. Herbert. (2020). 2020 WL 2064101 (D. Utah Apr. 29).

Gardner, Amy, Dan Simmons, and Robert Barnes. 2020. "Unexpected Outcome in Wisconsin: Tens of Thousands of Ballots That Arrived After Election Day Were Counted, Thanks to Court Decisions." *Washington Post*, May 3, https://www.washingtonpost.com/politics/unexpected-outcome-in-wisconsin-tens-of-thousands-of-ballots-that-arrived-after-voting-day-were-counted-thanks-to-court-decisions/2020/05/03/20c036f0-8a59-11ea-9dfd-990f9dcc71fc_story.html.

Goldstein v. Sec'y of the Commonwealth. 2020. 142 S.E.3d 560.

Guthrie, Rebecca. 2020. "Note, State Courts, the Right to Vote, and the Democracy Canon." Fordham Law Review 88(5): 1957-2010.

Gutman, Matt, Robert Zepeda, Tenzin Shakya, and Allie Yang. 2020. "Navajo Community Left to Fight COVID-19 with Limited Resources." *ABC News*, May 4, https://abcnews.go.com/Health/navajo-community-left-fight-covid-19-limited-resources/story?id=70490722.

Hasen, Richard L. 2005. "Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown." *Washington & Lee Law Review* 62(3): 937-99.

Hasen, Richard L. 2006. "Bad Legislative Intent." *Wisconsin Law Review* 2006(3): 843-95.

Hasen, Richard L. 2010. "The Democracy Canon." *Stanford Law Review* 62(1): 69-125.

Hasen, Richard L. 2012. "The Voting Wars: From Florida 2000 to the Next Election Meltdown." New Haven and London: Yale University Press.

Richard L. Hasen. 2014. "The New Conservative Assault on Early Voting." *Slate,* Feb. 10, https://slate.com/news-and-politics/2014/02/the-new-conservative-assault-on-early-voting-more-republicans-fewer-voters.html

Hasen, Richard L. 2015. "Reining in The *Purcell* Principle." *Florida State University Law Review* 43(2): 427-64.

Hasen, Richard L. 2019. "The Supreme Court Could Make Gerrymandering Worse." *The Atlantic*, Jan. 7, https://www.theatlantic.com/ideas/archive/2019/01/supreme-court-will-rule-gerrymandering-md-and-nc/579550/.

Hasen, Richard L. 2020a (forthcoming). "Direct Democracy Denied: The Right to Initiative in a Pandemic." *University of Chicago Law Review Online*.

Hasen, Richard L. 2020b. "Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy." New Haven and London: Yale University Press.

Hasen, Richard L. 2020c. "Op-Ed: How Republicans are Using the Pandemic to Suppress the Vote." *Los Angeles Times*, April 4, https://www.latimes.com/opinion/story/2020-04-04/coronavirus-voting-republicans-safety-polls.

Hasen, Richard L. 2020d. "Texas Voters Face Malicious Prosecutions After COVID-19 Absentee Ballot Ruling." *Slate*, May 27, https://slate.com/news-and-politics/2020/05/texas-supreme-court-voters-covid-19-absentee-ballot.html.

Hasen, Richard L., and Leah M. Litman. 2020 (forthcoming). "Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It," *Georgetown Law Journal*, 19th Amendment Special Edition.

Hasen, Rick. 2020e. "Ned Foley Recap of OSU Event: Trump v. Biden: How Would It Compare to Bush v. Gore?" *Election Law Blog*, May 6, https://electionlawblog.org/?p=111203.

Hasen, Rick. 2020f. "The Biggest Problem with the Supreme Court's Opinion in the Wisconsin Voting Case Was Not the Result (Which Was Still Wrong), But the Court's Sloppiness and Nonchalance About Voting Rights and What That Means for November." *Election Law Blog*, April 10, https://electionlawblog.org/?p=110647.

Hoberock, Barbara. 2020. "Gov. Stitt Signs Fast-Moving Bill to Restore Notary Requirements on Oklahoma Absentee Ballots." *Tulsa World*, May 8, https://www.tulsaworld.com/news/state-and-regional/gov-stitt-signs-fast-moving-bill-to-restore-notary-requirement-on-oklahoma-absentee-ballots/article_13753f29-d58c-5bae-aa61- cbeb0ca1b76e.html#1.

Ifill, Sherrilyn. 2020. "Never Forget Wisconsin," *Slate*, April 8, https://slate.com/news-and-politics/2020/04/never- forget-wisconsin.html.

In re State of Texas. 2020 2020 WL 2759629 (Tex. May 27).

Isenstadt, Alex. 2020. "Trump Intensifies War with Democrats Over Voting Laws." *Politico*, May 7, https://www.politico.com/news/2020/05/07/trump-democrats-voting-laws-243517.

Jacobs, Andrew, Matt Richtel, and Mike Baker. 2020. "'At War With No Ammo': Doctors Say Shortage of Protective Gear Is Dire." *New York Times*, March 9, https://www.nytimes.com/2020/03/19/health/coronavirus-masks- shortage.html.

Jacobson v. Florida Secretary of State. (2020) 2020 WL 2049076 (11th Cir. Apr. 29).

Jeong, Andrew and Timothy W. Martin. 2020. "South Korea's Coronavirus Test Run: How to Hold an Election/" *Wall Street Journal*, April 15 https://www.wsj.com/articles/south-koreas-coronavirus-test-run-how-to-hold-an-election-11586948227.

Johnson, Shawn. 2020. "Justice Daniel Kelly Will Lift Recusal in Voter Purge Case/" *WPR*, April 29, https://www.wpr.org/justice-daniel-kelly-will-lift-recusal-voter-purge-case.

Keyssar, Alexander. 2009. "The Right to Vote: The Contested History of Democracy in the United States" (revised edition). New York: Basic Books.

Klein, Ezra. 2020. "Why We're Polarized." New York: Avid Reader Press/Simon & Schuster.

Kousser, J. Morgan. 1974. "The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910." New Haven: Yale University Press.

Kousser, J. Morgan. 1999. "Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction." University of North Carolina Press.

Kuhn, Anthony. 2020. "In South Korea, Success Fighting the Virus Brings Success at the Ballot Box." *NPR*, April 16, https://www.npr.org/2020/04/16/835710358/in-south-korea-success-fighting-the-virus-brings-success-at-the-ballot-box.

LaLoggia, John. 2020. "Conservative Republicans are Least Supportive of Making It Easy for Everyone to Vote." *Pew Research Center, FactTank*, October 31, https://www.pewresearch.org/fact-tank/2018/10/31/conservativerepublicans-are-least-supportive-of-making-it-easy-for-everyone-to-vote/.

League of Women Voters of Okla. v. Ziriax. 2020. 2020 OK 26, https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=486523.

League of Women Voters of Va. v. Va. State Bd. of Elections. 2020. 2020 WL 2158249 (W.D. Va. May 5).

Levine, Carrie. 2020a. "Elderly Workers Run Our Elections. But COVID-19 Will Keep Many Home." *Center for Public Integrity*, May 13, https://publicintegrity.org/politics/elections/democracy-2020/elderly-workers-run-elections-but- covid-19-will-keep-many-home/.

Levine, Carrie. 2020b. "Ohio's Mail-in Ballot Brouhaha: A Sign of Coming Trouble?" *Center for Public Integrity*, April 28, https://publicintegrity.org/politics/elections/ohios-mail-in-ballot-brouhaha-a-sign-of-coming-trouble/.

Levine, Sam. 2020c. "'We Can't Afford to Wait': Coronavirus Could Shut Out Droves of New U.S. Voters." *The Guardian*, April 23, https://www.theguardian.com/us-news/2020/apr/23/coronavirus-fight-to-vote-us-voters.

Levitt, Justin. 2020. "The List of COVID-19 Election Cases." *Election Law Blog*, June 11, https://electionlawblog.org/?p=111962.

Liptak, Adam. 2020. "Rulings on Wisconsin Election Raise Questions About Judicial Partisanship." *New York Times*, April 7, https://www.nytimes.com/2020/04/07/us/politics/wisconsin-elections-supreme-court.html.

Lis, Jonathan. 2020. "Israel Election: Special Polling Places Set for Coronavirus Patients." *Haaretz*, March 2, https://www.haaretz.com/israel-news/elections/.premium-israel-election-polling-stations-coronavirus-patients-1.8587512.

Lovegrove, Jamie. 2020. "SC Expands Absentee Voting for June Primaries Due to Coronavirus Pandemic." *Post & Courier*, May 12, https://www.postandcourier.com/health/covid19/sc-expands-absentee-voting-for-june-primaries-due-to-coronavirus-pandemic/article_ffbb76c8-9470-11ea-836c-1337cfd2f468.html

Lowenstein, Daniel Hays, Richard L. Hasen, Daniel P. Tokaji, and Nicholas Stephanopoulos. 2017. "Election Law—Cases and Materials." Durham: Carolina Academic Press (6th ed.).

McCarthy, Ryan. 2020. "Whether the Ballot You Mail is Counted May Depend on Where You Vote." *Propublica*, April 30, https://www.propublica.org/article/whether-the-ballot-you-mail-is-countedmay-depend-on-where-you- vote.

McDonald v. Board of Election Commissioners of Chicago. 1969. 394 U.S. 802.

McGhee, Eric, and Mindy Romero. 2020. "Effects of Automatic Voter Registration in the United States." May, https://static1.squarespace.com/static/57b8c7ce15d5dbf599fb46ab/t/5eb9847fb7a1f3362ced2d99/1589216438166/USC+CCEP+Effects+of+AVR+in+the+U.S.+Final.pdf.

Mena, Kelly, Ariane de Vogue, and Liz Stark. 2020. "Democrats Sue Over Wisconsin Election as State Debates Next Steps." *CNN*, March 18, https://www.cnn.com/2020/03/18/politics/democrats-sue-wisconsin voting/index.html.

Mickle, Jordan. 2020. "Five Voting Centers, Five Absentee Ballot Dropoff Locations Open in Milwaukee for Tuesday's Primary." *WTMJ-TV*, https://www.tmj4.com/news/local-news/these-are-the-five-in-person-voting-centers- in-milwaukee-open-for-wisconsins-spring-primary-tuesday.

Morley, Michael T. 2016. "Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment." *University of Chicago Legal Forum* 2015: 279-339.

Morley, Michael T. 2020. "Postponing Federal Elections Due to Election Emergencies." Unpublished manuscript, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3619213.

National Conference of State Legislatures. 2020a. "Online Voter Registration." Feb. 3, https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx.

National Conference of State Legislatures. 2020b. "Voting Outside the Polling Place, Absentee, All-Mail and Other Voting at Home Options," April 24, https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

Neely, Brett. 2020. "NPR Poll: Majority of Americans Believe Trump Encourages Election Interference." *NPR*, January 21, https://www.npr.org/2020/01/21/797101409/npr-poll-majority-of-americans-believe-trump- encourageselection-interference.

Owens v. State. 1885. 64 Tex. 500.

Park, Katie, Tom Meagher, and Weihua Li. 2020."Tracking the Spread of Coronavirus in Prisons." *The Marshall Projec*t, April 24, https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons.

Pildes, Richard H., and Charles Stewart III. 2020. "The Wisconsin Primary Had Extraordinarily High Voter Turnout." *Monkey Cage*, *Washington Post*, April 15, https://www.washingtonpost.com/politics/2020/04/15/wisconsin-primary-had-extraordinarily-high-voter-turnout/.

Purcell v. Gonzalez. 2006. 549 U.S. 1.

Rakich, Nathaniel. 2020. "What Went Down in Ohio's Primary?" *FiveThirtyEight*, https://fivethirtyeight.com/features/what-went-down-in-ohios-primary/.

Raskin, Jamin. 2020. "A Right to Vote," *American Prospect*, August 7, http://archive3.fairvote.org/articles/raskin-a-right-to-vote/#.UNN3h4njk2I.

Reilly, Briana. 2020a. "Madison has 66 Polling Sites on Election Day, Milwaukee Has Five. What's the Deal?" *The Cap Times*, April 7, https://madison.com/ct/news/local/govt-and-politics/madison-has-66-polling-sites-on-election- day-milwaukee-has-five-whats-the-deal/article_8868bacf-6697-5cf4-aa4f-d85fb37cf846.html.

Reilly, Briana. 2020b. "One Day Before Wisconsin Election, Gov. Tony Evers Delays In-Person Voting." *The Cap Times*, April 6, https://madison.com/ct/news/local/govt-and-politics/one-day-before-wisconsin-election-gov- tonyevers-delays-in-person-voting/article_7215017a-657f-5c67-a52b-4f0fc21b8308.html.

Republican Nat'l Comm. v. Democratic Nat'l Comm. [*RNC v. DNC*]. 2020. 140 S. Ct. 1205.

Rettner, Rachel. 2020. "San Francisco COVID-19 Testing Reveals Stark Burden on the Poor and Marginalized." *LiveScience*, May 5, https://www.livescience.com/covid-19-mass-testing-san-francisco-mission.html.

Richmond, Todd. 2020. "Judge Won't Delay Wisconsin Election But Extends Voting," *Associated Press*, April 2, https://apnews.com/e36c3adc0c7474014f3e7ab566071303.

Rosenfeld, Steven. 2020. "Are We Headed Toward Another Bush-Gore Impasse in November 2020." *National Memo*, May 12, https://www.nationalmemo.com/are-we-headed-toward-another-bush-gore-impasse-in-november-2020.

Rouan, Rick. 2020. "Federal Judge Denies Voter Advocates' Lawsuit to Change Ohio Primary Election," *Columbus Dispatch*, April 3, https://www.dispatch.com/news/20200403/federal-judge-denies-voter-advocatesrsquo-lawsuit-to- change-ohio-primary-election.

Rowland, Darrel and Rick Rouan. 2020. "After a Problem-Plagued Primary, Ohio Leaders Disagree About November Election Plan." *Columbus Dispatch*, April 28, https://www.dispatch.com/news/20200428/after-problem-plagued- primary-ohio-leaders-disagree-about-november-election-plan.

Saul, Stephanie and Reid J. Epstein. 2020. "Trump is Pushing a False Argument on Vote-by-Mail Fraud. Here are the Facts. *"New York Times*, April 11 https://www.nytimes.com/article/mail-in-voting-explained.html.

Seitz-Wald, Alex and Shaquille Brewster. 2020. "GOP Lawmakers Reject Wisconsin Governor's Call for Delay in Election Deadline." *NBC News*, April 3, https://www.nbcnews.com/politics/2020-election/wisconsin-governor-calls-special-legislativesession-consider-delaying-election-deadline-n1176186.

Smiley v. Holm. 1932. 285 U.S. 355.

Smith, Allan. 2020. "Ohio Primary Called Off at Last Minute Because of Health Emergency." *NBC News*, March 16, https://www.nbcnews.com/politics/2020-election/ohio-governor-calls-state-postpone-tuesday-s-primary-elections-n1160816.

Smith, Hayward H. 2001. "History of the Article II Independent State Legislature Doctrine." *Florida State University Law Review* 29(2): 731-85.

Smyth, Julie Carr. 2020. "Ohio Sets All-Mail Primary April 28; In-Person Voting Off." *Associated Press*, April 3, https://apnews.com/77e1c1806b756e201ea22efe1af18583.

Spicuzza, Mary. 2020. "'A Very Sad Situation for Voters': Milwaukeeans Brave Wait Times as Long as 2½ Hours, Top Election Official Says." *Milwaukee Journal Sentinel*, April 7, https://www.jsonline.com/story/news/politics/elections/2020/04/07/wisconsin-election-milwaukee-voters-bravelong-wait-lines-polls/2962228001/.

Stephanopoulos, Nicholas. 2020 (forthcoming). "Election Litigation in the Time of the Pandemic," *University of Chicago Law Rev. Online*.

Stern, Mark Joseph. 2020. "Trump Can't Cancel the Election. But States Could Do It for Him." *Slate*, March 13, https://slate.com/news-and-politics/2020/03/trump-cancel-election-day-constitution-state-electors-coronavirus.html.

Stockman, Farah, Matt Richtel, Danielle Ivory, and Mitch Smith. 2020. "'They're Death Pits': Virus Claims at Least 7,000 Lives in U.S. Nursing Homes." *New York Times*, May 7, https://www.nytimes.com/2020/04/17/us/coronavirus-nursing-homes.html.

Texas Dem. Party v. Abbott (2020) 2020 WL 2982937 (5th Cir. June 4).

Tex. Election Code Ann. §§ 82.001-82.007.

Thompson v. DeWine. 2020. 2020 WL 2702483 (6th Cir. May 26).

Times Staff and Wire Report. 2020. "Coronavirus Upends Primary Elections in Florida, Illinois, and Arizona; Vote Postponed in Ohio." *Los Angeles Times*, March 17, https://www.latimes.com/politics/story/2020-03-17/coronavirus-primary-election-confusion-florida-ohio-polling.

U.S. Const. art. I §§ 4, II; amend. XV, XIX, XXVI, XXIV, XIV.

U.S. Gov't Accountability Office. 2016. "Elections: Issues Related to Registering Voters and Administering Elections." GAO-16-6306, https://www.gao.gov/assets/680/678131.pdf.

Wahlberg, David. 2020. "67 Got COVID-19 After Visiting Polls in State's April 7 Election But Tie to Voting is Unclear." *Wisconsin State Journal*, May 8, https://madison.com/wsj/news/local/health-med-fit/67-got-covid-19-after-visiting-polls-in-states-april-7-election-but-tie-to/article_49a42a7e-45d8-50cc-bd76-a583842de39.html.

Watts, Lauren. 2014. Note, "Reexamining *Crawford*: Poll Worker Error as a Burden on Voters." *Washington Law Review* 89(1): 175-216.

Welna, David. 2020. "'We All Feel at Risk:' 100,000 People Dead from COVID-19 in U.S." *NPR*, May 27, https://www.npr.org/2020/05/27/860508864/we-all-feel-at-risk-100-000-people-dead-from-covid-19-in-the-u-s.

Wisconsin Election Commission. 2020. *April 7 2020 Absentee Ballot Report.* May 15, https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/May%2020%2C%202020.Final_.pdf.

Wisconsin Legislature v. Evers. 2020. No. 202AP608-OA, Apr. 6, https://www.courthousenews.com/wp-content/uploads/2020/04/wis-supreme-primary.pdf.

Yang v. Kellner, 2020. 2020 WL 2129597 (S.D.N.Y. May 6).