

# UNDUE DEFERENCE TO STATES IN THE 2020 ELECTION LITIGATION

by  
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*This Article provides the first comprehensive analysis of the numerous election law cases that the Supreme Court and the federal appellate courts decided in the lead up to the 2020 election. The picture is bleak. Instead of protecting the constitutional right to vote, the Supreme Court and lower federal appeals courts unduly deferred to state legislatures in how to run the election, with little concern for the difficulties voters faced during a pandemic. If the courts do not alter their jurisprudence, then the only solution may be robust federal legislation or a constitutional amendment that enshrines the right to vote in the U.S. Constitution and requires states to justify, with specificity, any infringements on that right.*

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## INTRODUCTION

COVID-19 has wreaked havoc on so much of our lives, including how to run our elections. Yet the federal courts have refused to respond appropriately to the dilemma that many voters faced when trying to participate in the 2020 election. Instead, the courts—particularly the U.S. Supreme Court and the federal appellate courts—invoked a narrow test that unduly defers to state election administration and fails to protect adequately the fundamental right to vote.

In constitutional litigation, a law usually must satisfy a two-part test: (1) does the state have an appropriate reason for the law and (2) is the law properly tailored to achieve the state's goals?<sup>1</sup> A court will force a state to satisfy the first prong by demonstrating a “compelling” interest under strict scrutiny or still an important interest under lower intermediate-level scrutiny.<sup>2</sup> The Court has adopted a similar test for election litigation, using the framework from two cases, *Anderson v. Celebrezze* and *Burdick v. Takushi*.<sup>3</sup> If an election law imposes a severe burden on voting rights, then the Court applies strict scrutiny review.<sup>4</sup> But under this *Anderson-Burdick* framework, when a law does not create a severe burden on voters but still impacts the right to vote, courts must apply intermediate-level scrutiny by identifying “the precise interests put forward by the State as justifications for the burden imposed by its rule” and determining “the extent to which those interests make it necessary to burden the plaintiff's rights.”<sup>5</sup> Six years ago, I wrote a law review article that explained how the Supreme Court has too readily deferred to states in how to run

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<sup>1</sup> See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273–74 (2007).

<sup>2</sup> See, e.g., *id.* at 1321 (stating that “[a]pplication of strict scrutiny obviously requires the identification of compelling governmental interests. Equally plainly, what will count as a compelling interest depends on the version of the test that a court applies. An interest that suffices as compelling under the balancing version would not necessarily pass muster under the test that permits infringements of protected rights only to avert catastrophes. Regardless of the version of strict scrutiny, however, the Supreme Court has frequently adopted an astonishingly casual approach to identifying compelling interests.”).

<sup>3</sup> *Burdick v. Takushi*, 504 U.S. 428, 432–34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>4</sup> See Fallon, *supra* note 1, at 1283.

<sup>5</sup> *Anderson*, 460 U.S. at 789.

their elections, derogating the constitutional right to vote in the process.<sup>6</sup> “Without identifying a specific new rule, the Court has been unjustifiably deferring to state laws regarding election administration, thereby giving states tremendous power to regulate elections.”<sup>7</sup> As I recounted, the Court had essentially failed to require states to offer “precise interests” to justify a restrictive voting rule or explain why “those interests make it necessary to burden” the right to vote.<sup>8</sup>

The problem has only become worse as a renewed, undue deference doctrine has emerged. The Court has not explicitly overruled the *Anderson-Burdick* test, but its jurisprudence and the case law from the circuit courts of appeals in 2020 demonstrates that there is little federal judicial protection for the constitutional right to vote.<sup>9</sup> This undue deference to state legislatures and election officials helps to explain why voting rights plaintiffs lost so many cases in the lead-up to the 2020 election.

Much commentary about these cases focused on the “*Purcell* Principle,” the doctrine that tells courts not to change election rules too close to an election for fear of creating chaos and confusion.<sup>10</sup> As David Gans wrote, “[b]y privileging the status quo and preventing courts from issuing remedies close to Election Day, it downgrades the right to vote—long described as ‘preservative of all rights’—into a second-class right, which inevitably harms the marginalized and less powerful.”<sup>11</sup>

But there is an additional, more concerning problem with these cases: they too readily deferred to state legislatures and election officials on how to administer elections, allowing infringements on the constitutional right to vote without sufficient justification. At times, the courts found minimal burdens on voters, while in a few instances courts lamented that voters will probably suffer a burden on their ability to vote but still upheld the states’ practices because of a perceived need to defer.<sup>12</sup> Courts blindly said that election administration is the province of the state legislature or credited general assertions of the goal to ensure “election integrity,” without more.<sup>13</sup> There was also a reinvigoration of the “independent state legislature” doc-

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<sup>6</sup> See generally Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553 (2015) [hereinafter Douglas, *(Mis)Trusting States to Run Elections*].

<sup>7</sup> *Id.* at 553.

<sup>8</sup> *Id.* at 554; *Anderson*, 460 U.S. at 789.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam); David Gans, *The Roberts Court, The Shadow Docket, and the Unraveling of Voting Rights Remedies*, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF 1 (Oct. 2020); Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. L. REV. 427, 428 (2017).

<sup>11</sup> Gans, *supra* note 10, at 4.

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *infra* Part II.

trine, which posits that state legislatures have plenary power to regulate federal elections without interference from state courts.<sup>14</sup> Ultimately, the protection of the right to vote turned into an undue deference standard, one that places a thumb on the scale of states, especially as an election draws near. Thus, the problem is not only that courts applied the *Purcell* Principle and refused to invalidate state election rules too close to the election to preserve the status quo; they also too readily deferred to states and thereby devalued the constitutional right to vote.

That deference carried over into the post-election litigation in 2020, although it was much more justifiable in that setting. The Trump campaign and Republican supporters filed suits in at least Arizona, Georgia, Michigan, Nevada, and Pennsylvania, as well as directly to the U.S. Supreme Court, and all of those suits failed.<sup>15</sup> One might say that the courts “deferred” to the states’ election apparatus in that judges refused to invalidate the results of a just-completed election. At times, the courts in the post-election litigation relied on a doctrine of laches (that plaintiffs brought the lawsuits too late) or lack of standing.<sup>16</sup> But courts also rejected the claims on the merits, noting that undoing an election after the fact would disenfranchise millions of voters or that the specific allegations were not enough to change the result.<sup>17</sup> Either way, the post-election cases say less about the future of election law doctrine—except that courts are extremely reluctant to entertain claims to overturn an election—than do the pre-election cases on the administration of an upcoming election. Those pre-election cases exhibit an undue deference standard that refuses to question state processes even in the face of strong evidence of likely disenfranchisement.

This Article shows why the federal courts’ jurisprudence toward the right to vote in these recent cases is so concerning. Part I recounts the 2020 pre-Election Day litigation to demonstrate how the U.S. Supreme Court and the federal appeals courts too readily deferred to states and election officials without requiring states to identify the “precise interests”<sup>18</sup> that their laws promote or why it was “necessary”

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<sup>14</sup> See Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 9–10 (2020).

<sup>15</sup> See Jacob Shamsian & Sonam Sheth, *Trump and His Allies Filed More than 40 Lawsuits Challenging the 2020 Election Results. All of Them Failed*, BUS. INSIDER (Feb. 22, 2021, 5:03 PM), <https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11> [<https://perma.cc/2HSE-3D6E>].

<sup>16</sup> See, e.g., *King v. Whitmer*, 505 F. Supp. 3d 720, 731–32 (E.D. Mich. 2020); *Wood v. Raffensberger*, 981 F.3d 1307, 1313 (11th Cir. 2020).

<sup>17</sup> See, e.g., *Donald J. Trump for President v. Sec’y Commonwealth of Pa.*, 830 Fed. App’x 377, 382 (3d Cir. 2020) (“The Campaign’s claims have no merit. The number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory. And it never claims fraud or that any votes were cast by illegal voters.”).

<sup>18</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

to burden voters' rights.<sup>19</sup> It also explains how several Supreme Court justices and at least one circuit court breathed new life into the independent state legislature doctrine. Part II illustrates why this jurisprudence is wrong under *Anderson-Burdick* and explains how it devalues the right to vote, the most fundamental right in our democracy. Deference to state legislatures is particularly inappropriate in election cases given legislators' inherent incentive to craft election rules to help keep themselves in power. Part III suggests that if the courts do not alter their jurisprudence, then the only solution may be robust federal legislation or a constitutional amendment that enshrines the right to vote in the U.S. Constitution and requires states to justify, with specificity, any infringements on that right.

## I. THE 2020 PRE-ELECTION DAY LITIGATION SURROUNDING THE VOTING PROCESS

If the right to vote is a precious, fundamental right, then we would expect federal courts to require states to justify the burdens they impose on that right. To be sure, the U.S. Constitution does not explicitly confer the right to vote, leading the Supreme Court to invoke the Equal Protection Clause of the Fourteenth Amendment as the primary source of voting rights protection.<sup>20</sup> Pursuant to the Equal Protection Clause, the Court has adopted the *Anderson-Burdick* balancing test for non-severe burdens on the right to vote, whereby the courts balance the burdens a law imposes with the state's reasons for administering the election in that way.<sup>21</sup> Yet those cases still require a state to offer "precise interests" for a law and explain why the burden it imposes is "necessary" to effectuate its goals.<sup>22</sup> *Anderson-Burdick* is not simply a rational basis test.

As the numerous 2020 federal cases show, however, courts unduly deferred to state legislatures without any requirement that the state offer precise interests for its law.<sup>23</sup> In fact, there were many examples of district courts providing relief from an onerous voting law only to have appellate courts reverse those decisions and dictate repeatedly that courts should not second-guess states in their election administration.<sup>24</sup> What remains is a doctrine of undue deference that devalues the right to vote.

That undue deference has come in two forms. First, in a majority of the 2020 cases about the voting process, the Supreme Court and lower federal courts imply

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<sup>19</sup> This Article focuses on federal court litigation that was appealed to the federal appellate courts and the U.S. Supreme Court. There was also significant 2020 election litigation in the state courts.

<sup>20</sup> See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627–28 (1969).

<sup>21</sup> *Burdick v. Takushi*, 504 U.S. 428, 432–34 (1992); *Anderson*, 460 U.S. at 789.

<sup>22</sup> *Anderson*, 460 U.S. at 789.

<sup>23</sup> See, e.g., *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 642 (7th Cir. 2020).

<sup>24</sup> See *id.*

failed to apply the *Anderson-Burdick* test accurately and did not require states to explain their “precise interests” for their laws or why they were “necessary” to burden voters.<sup>25</sup> It was almost as if the courts silently overturned *Anderson-Burdick* itself or at least gutted its second and third prongs. Second, as the election drew closer, several justices and at least one federal appeals court invoked the “independent state legislature” doctrine to say that only the state legislature—and not state courts or even state election officials—can dictate election rules.<sup>26</sup> Both methods of deference are concerning for the judicial protection of the right to vote.<sup>27</sup>

#### A. *Undermining Anderson-Burdick’s Requirement that States Justify Their Election Rules*

Shades of undue deference to states in election litigation became apparent in April 2020, when the Supreme Court reversed a lower court’s decision that had extended the absentee ballot receipt deadline for the Wisconsin primary due to the COVID-19 pandemic.<sup>28</sup> Although the Court rested its decision on the *Purcell* Principle, which says that courts should not change the rules too close to an election to avoid confusion, the Court also said that “[e]xtending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election.”<sup>29</sup> Implicit in that statement is deference to the Wisconsin legislature to decide the “nature of the election” without court interference, no matter the burden on voters that the pandemic might create.

Justice Kavanaugh was even more explicit in invoking judicial deference to state legislatures in a different case reversing a lower court ruling that had invalidated

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<sup>25</sup> See *Anderson*, 460 U.S. at 789.

<sup>26</sup> See Morley, *supra* note 14, at 9; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 732 (2001).

<sup>27</sup> In addition to these cases involving the voting process, there were numerous cases in 2020 about ballot access, either for candidates or initiatives. These cases tended to challenge states’ signature requirements as too onerous due to the pandemic. Plaintiffs were largely unsuccessful in these cases as well, with deference to state laws playing a role in the analysis. For example, the Third Circuit, affirming a district court decision that rejected a challenge to Pennsylvania’s signature requirement for candidates to appear on the ballot, credited the state’s “legitimate and sufficiently important interests in ‘avoiding ballot clustering, ensuring viable candidates, and the orderly and efficient administration of elections.’” *Libertarian Party of Pa. v. Gov. of Pa.*, 813 Fed. App’x 834,835 (3d Cir. 2020). However, plaintiffs did find relief in Illinois. See *Libertarian Party of Ill. v. Cadigan*, 824 Fed. App’x 415, 415–16 (7th Cir. 2020). Otherwise, courts rejected claims to change the ballot access rules due to the pandemic. See Table of 2020 Election Cases in Federal Appeals Courts, [https://drive.google.com/file/d/15xC1qbr\\_IZH7p363hKHrjAZBW2Uuu4hG/view](https://drive.google.com/file/d/15xC1qbr_IZH7p363hKHrjAZBW2Uuu4hG/view) [<https://perma.cc/ZVF7-8HXX>] (last visited Oct. 27, 2021).

<sup>28</sup> *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1208 (2020).

<sup>29</sup> *Id.* at 1207.

South Carolina's witness requirement for absentee ballots, thereby reinstating the state's rule that absentee ballots need a witness signature.<sup>30</sup> He wrote, in a concurrence to the short order, that "a State legislature's decision either to keep or to make changes to election rules to address COVID-19 ordinarily 'should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people."<sup>31</sup> Deference to the legislature was more important than protecting the fundamental right to vote during a major health crisis.

Perhaps most concerning, Justices Gorsuch and Kavanaugh both explicitly espoused an undue deference standard in a case involving Wisconsin's absentee ballot receipt deadline for the general election, refusing to enjoin a Seventh Circuit decision that had put on hold a district court order extending the deadline by six days.<sup>32</sup> Each justice wrote a concurrence to the ruling to explain why courts should not intervene to invalidate election rules.<sup>33</sup> Both concurrences argued for a strong election law theory of undue deference.<sup>34</sup> Neither opinion grappled with the burdens Wisconsin's election regime imposed on voters or invoked any concept of a constitutional right to vote.<sup>35</sup> Justice Gorsuch wrote that "[t]he Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."<sup>36</sup> Justice Kavanaugh declared that "[t]his Court has consistently stated that the Constitution principally entrusts politically accountable state legislatures, not unelected federal judges, with the responsibility to address the health and safety of the people during the COVID-19 pandemic."<sup>37</sup> Justice Kavanaugh even cited explicitly a "principle of deference to state legislatures" for these election cases.<sup>38</sup> He also rejected the "ordinary *Anderson-Burdick* balancing test for analyzing state election rules."<sup>39</sup> Although other justices did not sign on to these two concurrences, the case suggests that *Anderson-Burdick* itself may be on life support, replaced by a standard that simply defers to state legislatures in their election administration.<sup>40</sup>

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<sup>30</sup> See *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring).

<sup>31</sup> *Id.* (Kavanaugh, J., concurring) (quoting *South Bay United Pentecostal Church v. Newsom*, 590 U.S. \_\_\_\_ (2020) (application for injunctive relief) (Roberts, C.J., concurring)).

<sup>32</sup> *Democratic Nat'l Comm. v. Wis. St. Leg.*, 141 S. Ct. 28, 29 (2020).

<sup>33</sup> *Id.* at 29–30 (Gorsuch, J., concurring) (Kavanaugh, J., concurring).

<sup>34</sup> *Id.*

<sup>35</sup> See *id.* at 28–30, 35.

<sup>36</sup> *Id.* at 29 (Gorsuch, J., concurring).

<sup>37</sup> *Id.* at 32 (Kavanaugh, J., concurring).

<sup>38</sup> *Id.* at 33.

<sup>39</sup> *Id.* at 35.

<sup>40</sup> *Id.* In addition to these cases, which had written opinions, in October 2020 the Court stayed a lower court's decision that had put on hold Alabama's ban on curbside voting, even

### 1. *Invoking Undue Deference to Uphold Restrictive Voting Rules*

Numerous circuit courts of appeals—filled with Trump appointees—reversed lower court rulings that would have expanded voter access in 2020, relying on the supposed deference due to state legislatures and election officials in administering an election.<sup>41</sup> Voting rights plaintiffs were largely unsuccessful in these lawsuits, winning ultimate relief in only a few cases.<sup>42</sup> Three of those wins involved states that had actually agreed to the voting changes (in Montana, North Carolina, and Rhode Island) and a fourth was not about the voting process but whether to run the congressional election at all (in Minnesota) after a candidate had died.<sup>43</sup>

In the aggregate, these cases show a clear ideological pattern for the adoption of a narrow construction of the constitutional right to vote.<sup>44</sup> There were at least eighteen cases in 2020 where a district court ruled in favor of voting rights plaintiffs and invalidated a state law, often due to the difficulties voters faced during a pandemic, only to see the circuit courts of appeals reverse those decisions.<sup>45</sup> Eight of those cases were 3–0 decisions, nine were 2–1, and one en banc case was 6–4; those split decisions typically fell along ideological lines based on the president who appointed each judge.<sup>46</sup> Perhaps most tellingly, twelve of the eighteen cases, and seven of the nine 2–1 decisions, included at least one Trump-appointed judge in the majority.<sup>47</sup> The 6–4 en banc decision from the Eleventh Circuit on Florida’s felon disenfranchisement law included five Trump-appointed judges in the majority.<sup>48</sup> Forty-three percent of the judges that were in the majority in these cases (21 of 48)

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though several Alabama counties sought to offer it. *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020).

<sup>41</sup> See Charlie Savage, *G.O.P.-Appointed Judges Threaten Democracy, Liberals Seeking Court Expansion Say*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/politics/court-packing-judges.html> [<https://perma.cc/6GC7-BG7T>].

<sup>42</sup> See Table of 2020 Election Cases in Federal Appeals Courts, *supra* note 27. The spreadsheet lists the U.S. Supreme Court appeal from the decision of the Pennsylvania Supreme Court, but I have omitted that case from this statistic given that it did not go through a federal appeals court.

<sup>43</sup> See *id.* A fifth case that voting rights plaintiffs won was on a Tennessee law that required first-time voters who registered online or by mail to vote in person. The Sixth Circuit affirmed the district court’s order enjoining the law. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 382 (6th Cir. 2020). A sixth case was a challenge to New York cancelling its presidential primary given that Joe Biden was the presumptive Democratic nominee, other candidates had dropped out, and the state was concerned about a large gathering during the pandemic; the court reinstated the primary. *Yang v. Kosinski*, 805 Fed. App’x 63, 64–65 (2d Cir. 2020).

<sup>44</sup> See Joshua A. Douglas, *How Trump-Appointed Judges Have Made It Harder to Vote*, CNN (Nov. 1, 2020 10:48 PM), <https://www.cnn.com/2020/11/01/opinions/trump-judges-harder-to-vote-douglas/index.html> [<https://perma.cc/NRW3-C36T>].

<sup>45</sup> See Table of 2020 Election Cases in Federal Appeals Courts, *supra* note 27.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*



were Trump appointees.<sup>49</sup> Most of the circuit court opinions rested on the need to defer to state legislatures or state election officials.<sup>50</sup> Suffice to say, voting rights advocates did not do well in the federal appeals courts in 2020. Instead, courts essentially trusted states to regulate the election as they wished.

The language of the opinions bears this out. The Fifth Circuit expressly deferred to the state in reversing a district court order that had rejected Texas Governor Greg Abbott's directive to allow only one ballot drop off location per county.<sup>51</sup> The appellate court found that there was "no more than a de minimis burden on the right to vote"—despite the harms to voters, especially in large counties, who preferred dropping off their absentee ballot in person.<sup>52</sup> On the state interest inquiry, the court ruled that the district court had "undervalued" the goals of an "orderly administration of elections" and "vigilantly reducing opportunities for voting fraud."<sup>53</sup> But besides speculating that "'mail-in voting' is 'far more vulnerable to fraud' than other 'forms of voting,'"<sup>54</sup> the court did not explain how the state's ballot drop off limitation specifically achieved these goals. Thus, the crux of the decision was the court's deference to the state's determination.<sup>55</sup>

Another panel of the Fifth Circuit rejected a district court order that would have required Texas to allow voters to cure a signature mismatch, instead permitting the state to simply reject those ballots.<sup>56</sup> The court said that the law would not impose a severe burden on voters and credited the state's justification of preventing voter fraud. "[W]e do not force states to shoulder 'the burden of demonstrating empirically the objective effects' of election laws."<sup>57</sup>

The Fifth Circuit also rejected a district court judgment that put on hold a new Texas law that eliminated straight ticket voting, resting its decision both on the *Purcell* Principle and on the notion that the status quo was the new Texas law eliminating the straight ticket option, even though the state was implementing it for the first time in November 2020.<sup>58</sup> The court's determination that a new law, not yet in force, constituted the "status quo" demonstrated the court's deference to legislative judgment on the matter.<sup>59</sup>

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<sup>49</sup> *See id.*

<sup>50</sup> *See id.*

<sup>51</sup> *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 140 (5th Cir. 2020).

<sup>52</sup> *Id.* at 145.

<sup>53</sup> *Id.* at 146.

<sup>54</sup> *Id.* (citations omitted).

<sup>55</sup> Notably, even though the decision came less than a month before the end of the voting period, the court expressly chose not to consider the timing issues pursuant to *Purcell*. *See id.* at 142.

<sup>56</sup> *See Richardson v. Hughs*, 978 F.3d 220, 224 (5th Cir. 2020).

<sup>57</sup> *Id.* at 240 (citation omitted).

<sup>58</sup> *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 565 (5th Cir. 2020).

<sup>59</sup> *Id.* at 568.

Further, the Fifth Circuit stayed a lower court order that would have imposed a mask mandate for poll workers and voters.<sup>60</sup> The district court had found that the state's rule that exempted polling sites from the state's mask mandate would likely violate the Voting Rights Act, as it would make minority voters—who were suffering disproportionate harms from the virus—less comfortable voting; the Fifth Circuit, relying mostly on the *Purcell* Principle, deferred to the state.<sup>61</sup>

The Sixth Circuit reversed a lower court decision that would have required Ohio Secretary of State Frank LaRose to allow counties to offer multiple ballot drop box locations.<sup>62</sup> LaRose wanted drop boxes available only at the county clerk's offices, meaning each county would have only one place for voters to deliver their ballots in person.<sup>63</sup> In reversing the lower court's order to require additional drop box spots, the court cited a "state's interest in the 'orderly administration of elections[.]'" but failed to explain precisely how limiting the number of drop box locations would promote that goal, beyond noting that election officials have a lot of tasks in the lead-up to the election.<sup>64</sup> Perhaps most tellingly, the court opined that its decision "is unlikely to harm anyone."<sup>65</sup> That finding failed to credit the plaintiffs' assertions—which the district court found persuasive based on the evidence presented—that a single drop box location would make it harder for many voters to deliver their ballots in person and thus to participate at all if they wanted to vote via absentee ballot but did not trust the mail because of the politicization of the postal service.<sup>66</sup>

The Sixth Circuit also refused to invalidate Tennessee's absentee balloting rules, invoking the doctrine of standing to shield itself from determining the constitutionality of the state's election practices during a pandemic.<sup>67</sup> But Judge Moore, in dissent, saw through this procedural mechanism to note the harm the court's ruling would have on voting rights:

Make no mistake: today's majority opinion is yet another chapter in the concentrated effort to restrict the vote. To be sure, it does not cast itself as such—invoking instead the disinterested language of justiciability—but this only makes today's majority opinion more troubling. As a result of today's decision, Tennessee is free to—and will—disenfranchise hundreds, if not thousands of its citizens who cast their votes absentee by mail. Masking today's outcome in

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<sup>60</sup> *Mi Familia Vota v. Abbott*, 834 F. App'x 860, 861 (5th Cir. 2020).

<sup>61</sup> *Id.* at 863.

<sup>62</sup> *A. Philip Randolph Inst. of Ohio v. LaRose*, 831 Fed. App'x 188, 190 (6th Cir. 2020).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 192.

<sup>65</sup> *Id.*

<sup>66</sup> See Leila Fadel, *The Politicization of the Postal Service*, NPR (Aug. 15, 2020, 5:40 PM), <https://www.npr.org/2020/08/15/902894304/the-politicization-of-the-postal-service> [<https://perma.cc/2LYL-QLP9>].

<sup>67</sup> See *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 393–94 (6th Cir. 2020).

standing doctrine obscures that result, but that makes it all the more disquieting. I will not be a party to this passive sanctioning of disenfranchisement.<sup>68</sup>

The same panel, however, refused to reverse a district court order that had put on hold a Tennessee law that required voters who registered online or by mail to vote in person the first time they vote.<sup>69</sup> The major issue was that the state had waited too long to appeal and that voting had already started.<sup>70</sup> Thus, the court said that even if the state had a strong likelihood of success on the merits of the appeal, the other equities favored the plaintiffs in this setting.<sup>71</sup> This decision was one of the only significant circuit court opinions in 2020 favoring voting rights plaintiffs that did not face reversal from the Supreme Court.<sup>72</sup>

Finally, in a case from Michigan, the Sixth Circuit reversed a district court order that had put on hold the state's ban on paying someone to provide transportation to the polls.<sup>73</sup> The court credited the state's interest in preventing fraud through "vote hauling"—despite a lack of evidence that this problem actually affects Michigan elections.<sup>74</sup> As the dissent noted,

[w]ithout any evidence of an anti-fraud purpose, we would need to conclude that voter transportation fundamentally promotes voter fraud . . . . The majority's invocation of vote-hauling is unpersuasive. Plaintiffs want to rent buses to help people get to the polls; companies like Uber want to provide discounted rides to the polls in Michigan as they have in every other state. These prohibited activities are a far cry from the majority's specter of vote-hauling.<sup>75</sup>

The Seventh Circuit, in early October 2020, reversed a district court decision that had extended various deadlines for registration and absentee ballot delivery in Wisconsin.<sup>76</sup> In particular, the lower court ruling had extended the received-by date from Election Day to six days later so long as the ballots were postmarked by Election Day.<sup>77</sup> In addition to rejecting the lower court's order under the *Purcell* Principle,

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<sup>68</sup> *Id.* at 392 (Moore, J., dissenting) (internal citations omitted).

<sup>69</sup> *See* *Memphis A. Philip Randolph Inst. v. Hargett*, 977 F.3d 566, 577 (6th Cir. 2020).

<sup>70</sup> *Id.* at 569.

<sup>71</sup> *Id.*

<sup>72</sup> The state did not appeal this ruling to the Supreme Court. Plaintiffs also secured relief in cases from Montana, North Carolina, and Rhode Island, even at the circuit court, but the state had consented to the election changes in those cases. Thus, the circuit courts still deferred to the states and rejected challenges from other parties. *See* *Lamm v. Bullock*, No. 20-35847, 2020 U.S. App. LEXIS 31714 (9th Cir. Oct. 6, 2020); *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020); *Common Cause R.I. v. Gorbea*, 970 F.3d 11 (1st Cir. 2020).

<sup>73</sup> *Priorities USA v. Nessel*, 978 F.3d 976 (6th Cir. 2020).

<sup>74</sup> *Id.* at 983.

<sup>75</sup> *Id.* at 990 (Cole, C.J., dissenting).

<sup>76</sup> *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020).

<sup>77</sup> *Id.*

the court explained that “[d]eciding how best to cope with difficulties caused by disease is principally a task for the elected branches of government.”<sup>78</sup> There was little discussion of the infringement on the constitutional right to vote or the need for the state to offer its “precise interests,” under *Anderson-Burdick*, for maintaining its current absentee balloting rules, especially during the pandemic.<sup>79</sup> As noted above, the Supreme Court, on a 5–3 vote, refused to issue a stay of that decision.<sup>80</sup>

In another case from the Seventh Circuit, which affirmed a district court’s decision rejecting the plaintiff’s challenge to Indiana’s absentee balloting rules, the court again deferred to the legislature.<sup>81</sup> Indiana was one of only five states in 2020 that still required a non-COVID-19 excuse to vote absentee.<sup>82</sup> But older voters did not need an additional excuse.<sup>83</sup> The plaintiffs argued that the Indiana law violates the Twenty-Sixth Amendment because it allows voters aged 65 and older, but not younger voters, to request an absentee ballot without any other excuse.<sup>84</sup> The court rejected the claim because, it asserted, what was at stake was not the right to vote but instead the “privilege” to vote in a particular manner.<sup>85</sup> Inherent in that very framing is the notion that the legislature can decide the methods available for certain people to vote without judicial interference. “[B]alancing the interests of discouraging fraud and mitigating elections-related issues with encouraging voter turnout is a judgment reserved to the legislature,” the court said.<sup>86</sup> The court further claimed that the state itself was not burdening the right to vote through its refusal to respond to the difficulties some people faced when voting in person during the pandemic: “the *statute* does not ‘impact [Plaintiffs’] ability to exercise the fundamental right to vote’ or ‘absolutely prohibit [Plaintiffs] from voting’; only the pandemic is potentially guilty of those charges.”<sup>87</sup> Never mind that the state’s refusal to accommodate voters was actually the inaction that impacted the ability to vote for many people.

The Seventh Circuit then relied on these two cases to reverse a district court’s ruling that had extended the absentee ballot receipt deadline in Indiana, reverting to the prior state rule that election officials must receive all absentee ballots by noon

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<sup>78</sup> *Id.* at 643.

<sup>79</sup> *See id.* at 647 (Rovner, C.J., dissenting).

<sup>80</sup> *Democratic Nat’l Comm. v. Wis. St. Leg.*, 141 S. Ct. 28 (2020).

<sup>81</sup> *Tully v. Okeson*, 977 F.3d 608, 618 (7th Cir. 2020).

<sup>82</sup> *See* Quinn Scanlan, *Here’s How States Have Changed the Rules around Voting amid the Coronavirus Pandemic*, ABC NEWS (Sept. 22, 2020, 5:57 PM), <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089> [<https://perma.cc/9PQL-LA83>] (the other states were Louisiana, Mississippi, Tennessee, and Texas).

<sup>83</sup> *See Tully*, 977 F.3d at 612.

<sup>84</sup> *Id.* at 613.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 611.

<sup>87</sup> *Id.* at 614 (citations omitted).

on Election Day.<sup>88</sup> “[D]ifficulties adributable [sic] to the virus do not require change in electoral rules—not, at least, as a constitutional matter. That some people are unwilling to vote in person does not make an otherwise-valid system unconstitutional. It is for states to decide what sort of adjustments would be prudent.”<sup>89</sup>

The Seventh Circuit also reversed a lower court order that had invalidated a new Indiana law on who can sue to seek an extension of the polling hours on Election Day if there are problems.<sup>90</sup> The district court had found that the new law, which allows only county election boards to bring suit and imposes various evidentiary standards, violated the constitutional right to vote because it would preclude voters from seeking a remedy to a polling place issue.<sup>91</sup> The Seventh Circuit reversed, saying that “*Anderson-Burdick* does not license such narrow second-guessing of legislative decision making.”<sup>92</sup>

The Eighth Circuit stayed a lower court decision that had invalidated Missouri’s rule separating “absentee” voters from “mail-in” voters.<sup>93</sup> Absentee voters, who had to provide an excuse to vote absentee, could return their ballots either in person or via the mail. But “mail-in” voters, who were people voting by mail because of the risks of COVID-19, could return their ballots *only* through the mail.<sup>94</sup> The district court found that this differential scheme for delivering ballots violated the right to vote, but the Eighth Circuit reversed.<sup>95</sup> The court relied on some of the cases from the other circuits—in particular the restrictive rulings from the Seventh and Eleventh Circuits—and said that “[t]he Missouri Legislature is entrusted with the responsibility and authority to weigh relevant considerations and proposals and craft legislation.”<sup>96</sup> The court therefore deferred to the state’s new rule that forbade mail-in voters from delivering their ballots in person yet still required these ballots to arrive by 7:00 pm on Election Day, calling the rule a “reasonable and rational exercise of the State’s authority.”<sup>97</sup> Judge Kelly, in dissent, more appropriately noted that although the state asserted an interest in “preserving the integrity of its election process,” “interests such as these cannot merely be asserted in the abstract.”<sup>98</sup>

The Ninth Circuit, in rejecting a district court’s order that would have required Arizona to allow early voters to “cure” a signature problem up to five days after

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<sup>88</sup> Common Cause Ind. v. Lawson, 977 F.3d 663, 664 (7th Cir. 2020).

<sup>89</sup> *Id.*

<sup>90</sup> Common Cause Ind. v. Lawson, 978 F.3d 1036, 1038 (7th Cir. 2020).

<sup>91</sup> *Id.* at 1038–39.

<sup>92</sup> *Id.* at 1040.

<sup>93</sup> Org. for Black Struggle, Inc. v. Ashcroft, 978 F.3d 603, 606 (8th Cir. 2020).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 606–07, 609.

<sup>96</sup> *Id.* at 608.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 611 (Kelly, J., dissenting).

Election Day, at least discussed the state's regulatory interests but couched them as necessitating only a "reasonable" justification.<sup>99</sup>

All ballots must have *some* deadline, and it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion.<sup>100</sup>

In another case, the Ninth Circuit reversed a district court's ruling that had extended the Arizona voter registration deadline due to the pandemic by crediting the "administrative burdens" the Arizona Secretary of State would face with a later deadline.<sup>101</sup>

The Eleventh Circuit reversed a district court ruling from Georgia that had extended the absentee ballot receipt deadline to three days after Election Day.<sup>102</sup> The court found that the lower court had "improperly weigh[ed] the State's interests."<sup>103</sup> The court echoed other courts in saying that the absentee balloting rules "do[] not implicate the right to vote at all,"<sup>104</sup> failing to recognize that restrictions on returning an absentee ballot during a pandemic surely make it harder for some people to vote and therefore *do* impact the constitutional right to vote. On the state interest front, the court credited the state's generalized assertions: "These include conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud."<sup>105</sup> There was no discussion of how Georgia's rules, applied during a pandemic, would further those generalized state interests. A simple assertion of the need to run an "efficient election" and "maintain[] order" was enough.<sup>106</sup>

The Eleventh Circuit, without explanation, also stayed a district court order from Alabama that would have eased the state's witness requirement and photo ID law for absentee voters who had higher risk of COVID-19, though the court refused to reinstate Alabama's ban on curbside voting.<sup>107</sup> But the Supreme Court then issued a stay, by a 5–3 vote, on the curbside voting portion of the lawsuit, reinstating the

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<sup>99</sup> See generally *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020).

<sup>100</sup> *Id.* at 1085.

<sup>101</sup> *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 952 (9th Cir. 2020).

<sup>102</sup> See *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1280 (11th Cir. 2020).

<sup>103</sup> *Id.* at 1281.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1284.

<sup>106</sup> *Id.*

<sup>107</sup> *People First of Ala. v. Merrill*, No. 20-13695-B, 2020 WL 6074333 (11th Cir. Oct. 13, 2020); see Zoe Tillman (@ZoeTillman), TWITTER (Oct. 13, 2020, 12:08 PM), <https://twitter.com/ZoeTillman/status/1316048224122273799> [<https://perma.cc/H5HR-XVY8>].

Alabama Secretary of State's ban on the practice, though the Court provided no reasoning for its ruling.<sup>108</sup>

Some district courts have taken notice of this widespread circuit precedent to defer to the states. A Georgia district court decision exemplifies the pervasiveness of the undue deference given to state election officials.<sup>109</sup> The court found that Georgia's new implementation of electronic ballot marking devices would probably violate the constitutional right to vote given their unreliability.<sup>110</sup> But the court, in seeming almost apologetic for its ruling, said that its hands were tied:

Ultimately, the Court must find that imposition of such a sweeping change in the State's primary legally adopted method for conducting elections at this moment in the electoral cycle would fly in the face of binding appellate authority and the State's strong interest in ensuring an orderly and manageable administration of the current election, consistent with state law. So, for this reason alone, despite the strength of Plaintiffs' evidence, the Court must decline the Plaintiffs' Motions for Preliminary Injunction.<sup>111</sup>

None of this discussion is meant to suggest that the courts were definitely wrong in the outcome of each of these cases. Perhaps the plaintiffs did not present strong enough evidence of the burdens the state laws would impose, or perhaps changing the state's rules at the last minute would cause too much confusion. But the analytical framework was wrong because the courts did not require the states to demonstrate the "precise interests" that would justify a burden on the constitutional right to vote, as *Anderson* purportedly requires.<sup>112</sup>

## 2. *Deferring to States that Eased Voting Rules*

On the flip side, strong deference to state legislatures and election officials can help the cause of expanded voting rights when courts reject plaintiffs' attempts to have judges impose even stricter rules on the voting process—or when they seek to overturn the results after the election. Deference drove the Supreme Court's rejection of a challenge to a lower court's consent decree that suspended Rhode Island's normal rule that requires absentee ballots to have two witnesses or a notary.<sup>113</sup> In denying a stay of the lower court's ruling, the Court noted that "here the state election officials support the challenged decree, and no state official has expressed opposition."<sup>114</sup> That is, the Court rejected the appeal because the state itself had consented to the lower court's order that changed its election regime. The First Circuit, in the

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<sup>108</sup> *Merrill v. People First of Ala.*, 141 S. Ct. 25, 25 (2020).

<sup>109</sup> *See Curling v. Raffensberger*, 493 F. Supp. 3d 1264 (N.D. Ga. 2020).

<sup>110</sup> *Id.* at 1334–35.

<sup>111</sup> *Id.* at 1312.

<sup>112</sup> *See generally id.*

<sup>113</sup> *See Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206 (Mem.) (2020).

<sup>114</sup> *Id.*

same case that the Supreme Court upheld, noted that “in the abstract, the broader regulatory interest—preventing voting fraud and enhancing the perceived integrity of elections—is substantial and important,” but explained that the state itself was not challenging the relaxation of those rules during the pandemic.<sup>115</sup> Similarly, the Fourth Circuit rejected a challenge to a North Carolina State Board of Elections decree to extend the absentee ballot receipt deadline, noting that the “status quo” was the State Board’s modifications to state law.<sup>116</sup> The Supreme Court refused to stay that decision.<sup>117</sup>

A similar phenomenon was present in a Trump campaign lawsuit in Pennsylvania involving the state’s drop box rules.<sup>118</sup> The Trump campaign asserted that the use of drop boxes to collect absentee ballots was unconstitutional because of the risk of fraud, but the district court rejected that challenge, saying that any election integrity harm was speculative.<sup>119</sup> In deferring to the legislature on this point, the court explained,

Plaintiffs essentially ask this Court to second-guess the judgment of the Pennsylvania General Assembly and election officials, who are experts in creating and implementing an election plan. Perhaps Plaintiffs are right that guards should be placed near drop boxes, signature-analysis experts should examine every mail-in ballot, poll watchers should be able to man any poll regardless of location, and other security improvements should be made. But the job of an unelected federal judge isn’t to suggest election improvements, especially when those improvements contradict the reasoned judgment of democratically elected officials.<sup>120</sup>

The district court engaged in a painstaking review of whether the state’s drop box rules, such as having in-person guards in some counties but not others, violated the Equal Protection Clause.<sup>121</sup> The court explained that these differential rules would not violate the right to vote or dilute any votes because the plaintiffs could only speculate that drop boxes would lead to fraudulent votes.<sup>122</sup> On the state interest side of the scale, the court noted that Pennsylvania had provided “reasonable, precise, and sufficiently weighty interests that are undisputed.”<sup>123</sup> Instead of just general

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<sup>115</sup> Common Cause R.I. v. Gorbea, 970 F.3d 11, 15 (1st Cir. 2020) (per curiam).

<sup>116</sup> Wise v. Circosta, 978 F.3d 93, 98 (4th Cir. 2020).

<sup>117</sup> Moore v. Circosta, 141 S. Ct. 46, 46 (2020).

<sup>118</sup> See Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. 2020).

<sup>119</sup> See *id.* at 342.

<sup>120</sup> *Id.* at 343.

<sup>121</sup> *Id.* at 391. The plaintiffs argued that the equal protection clause principle from *Bush v. Gore*, 531 U.S. 98 (2000), should invalidate the state’s rules. *Id.* at 386.

<sup>122</sup> *Id.* at 394.

<sup>123</sup> *Id.*



assertions about the need to run an election, the court credited the “precise” interests that the state offered on the specific aspects of its drop box rules.<sup>124</sup> The court agreed with the state’s interests but in the way that *Anderson-Burdick* requires: by evaluating “the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>125</sup>

Other district courts similarly rejected Trump campaign lawsuits to undo state changes to ease the voting process in response to the COVID-19 pandemic.<sup>126</sup> In New Jersey, a district court dismissed a challenge to the legislature’s decision to allow election officials to start processing mail-in ballots ten days before Election Day and to count ballots received without a postmark up to two days after Election Day.<sup>127</sup> The court disagreed with the Trump campaign’s argument that the mail-in balloting scheme violated federal law and instead deferred to the judgment of the New Jersey legislature.<sup>128</sup> Similarly, a district judge in Montana denied the Trump campaign’s speculation that the Montana Governor’s decision to allow counties to conduct the election by mail would open the door to fraud.<sup>129</sup> The court found that the Montana legislature had given the Montana Governor the authority to issue emergency regulations during the pandemic—thereby deferring to state authorities on how to run the election.<sup>130</sup>

In addition to the pre-election litigation, courts refused to disturb the results after the election, showing a mode of deference to the state’s voting processes. For instance, in rejecting a challenge to the presidential election in Wisconsin, a district judge wrote:

[O]n the merits of plaintiff’s claims, the Court now further concludes that plaintiff has not proved that defendants violated his rights under the Electors Clause. To the contrary, the record shows Wisconsin’s Presidential Electors are being determined in the very manner directed by the Legislature, as required by Article II, Section 1 of the Constitution.<sup>131</sup>

Courts therefore refused to question the way states ran their elections after-the-fact, especially when there was little evidence of problems or when the margin of

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<sup>124</sup> *Id.* at 385.

<sup>125</sup> *See id.* at 394–95; *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>126</sup> *See Zoe Tillman, Judges Aren’t Buying Trump’s Claims of Widespread Voter Fraud*, BUZZFEED (Oct. 11, 2020 11:06 AM), <https://www.buzzfeednews.com/article/zoetillman/judges-reject-trump-claims-mail-voter-fraud> [<https://perma.cc/KT66-VDNB>].

<sup>127</sup> *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354 (D. N.J. 2020).

<sup>128</sup> *Id.* at 359.

<sup>129</sup> *See Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 822 (D. Mont. 2020).

<sup>130</sup> *Id.* at 831–32. *See generally* Emergency Application for Writ of Injunction, *Lamm v. Bullock*, No. 20A61 (U.S. Oct. 8, 2020) (the Supreme Court refused to consider an appeal).

<sup>131</sup> *Trump v. Wis. Elections Comm’n*, 506 F. Supp. 3d 620, 625 (E.D. Wis. 2020).

victory was large.<sup>132</sup> As Samuel Issacharoff notes, “In both periods [pre- and post-election], courts proved to be defenders of preexisting institutional arrangements against claimed needs to emergency alterations.”<sup>133</sup>

These cases show that deference can help the cause of expanded voting rights when playing defense against a challenge to a state determination to make voting easier. But that same deference harms voting rights plaintiffs when seeking relief against a state’s refusal to ease the burdens of voting during the pandemic. The difference is the kind of legislative action at stake: facilitating the right to vote as compared to burdening it—expanding a constitutional right as compared to restricting it. Imagine that the government opened up more property to speech: no judicial scrutiny is necessary because the state’s practice would further the constitutional right of free speech, so deference to the state’s action is warranted. But if the government began closing off properties available for speech, courts would require the government to justify its actions with specificity and would not defer so readily.<sup>134</sup> The same analysis should apply for the right to vote.<sup>135</sup>

Thus, although the deference to states in administering an election is similar, the results are analytically distinct: deferring to state authorities when they have already eased the voting process promotes the on-the-ground determination of how to protect voters, while deferring to legislatures in a challenge to restrictive voting rules harms the fundamental right to vote. Deference has been a shield to both kinds of challenges—those against expansive and restrictive voting rules—without recognizing that the two kinds of claims are quite different.<sup>136</sup> *Anderson’s* requirement that states proffer a “precise interest” to justify a burden on the right to vote demonstrates that deference to a state that makes it easier to vote is qualitatively different from deference to a state that makes it harder to vote.<sup>137</sup>

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<sup>132</sup> See, e.g., *Wood v. Raffensberger*, 501 F. Supp. 3d 1310, 1327 (N.D. 2020) (highlighting the “insubstantial evidence supporting” the plaintiff’s argument); *Donald J. Trump for President v. Sec’y Commonwealth of Pa.*, 830 Fed. App’x 377, 382 (“The Campaign’s claims have no merit. The number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory. And it never claims fraud or that any votes were cast by illegal voters.”).

<sup>133</sup> See Samuel Issacharoff, *Judges Doing What Judges Do: A Unified Theory of the 2020 Election Season*, JUST SEC. (Jan. 5, 2021), <https://www.justsecurity.org/74062/judges-doing-what-judges-do-a-unified-theory-of-the-2020-election-season/> [<https://perma.cc/DJ5C-CVDT>].

<sup>134</sup> See generally R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291 (2016) (describing the various levels of scrutiny in First Amendment doctrine).

<sup>135</sup> See Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 454 (2019) (describing how courts “find that the previously existing legal framework is the baseline for the ‘right to vote,’ and litigation is viewed through the lens of burdens placed upon that preexisting constellation”).

<sup>136</sup> See *supra* notes 128–33 and accompanying text.

<sup>137</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

*B. Deference Through the Independent State Legislature Doctrine*

A few of the 2020 cases saw Supreme Court Justices and one federal appeals court invoke the independent state legislature doctrine to reject election rules that were intended to ease the voting process during the pandemic, as the state legislature had not directly passed those rules.<sup>138</sup>

These cases drew on the recent history of the independent state legislature doctrine.<sup>139</sup> In *Bush v. Palm Beach County Canvassing Board*, which was the first case the U.S. Supreme Court heard stemming from the Florida 2000 presidential election dispute, the Court stated that although normally it will defer to a state court's interpretation of a state statute, in the context of a presidential election, "the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under" the U.S. Constitution.<sup>140</sup> Specifically, Article I, Section 2 says that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."<sup>141</sup> The Court remanded for the Florida Supreme Court to explain "the extent to which [it] saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2."<sup>142</sup>

When the case returned to the U.S. Supreme Court in *Bush v. Gore*, the majority opinion did not address this question, resting its decision on the Equal Protection Clause and the federal safe harbor statute.<sup>143</sup> But Chief Justice Rehnquist, for himself and Justices Scalia and Thomas, wrote a concurrence to expound upon the independent state legislature doctrine.<sup>144</sup> He posited that the Court should defer to the state legislature and overturn the state supreme court's ruling because "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."<sup>145</sup> That "legislative scheme" might include the delegation of authority to the Secretary of State and the state circuit courts.<sup>146</sup> Importantly, then, Chief Justice Rehnquist did not suggest that state legislatures have no constraints whatsoever when regulating presidential elections, but only that a state supreme court's decision cannot "wholly change" the legislature's

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<sup>138</sup> See *infra* notes 156–67 and accompanying text.

<sup>139</sup> Michael Morley considers the longer history of the doctrine in support of its greater use. See Morley, *supra* note 14.

<sup>140</sup> *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam).

<sup>141</sup> U.S. CONST. art. I, § 2, cl. 2.

<sup>142</sup> *Bush*, 531 U.S. at 78.

<sup>143</sup> *Bush v. Gore*, 531 U.S. 98, 111 (2000) (per curiam).

<sup>144</sup> *Id.* at 111–13 (Rehnquist, C.J., concurring).

<sup>145</sup> *Id.* at 113.

<sup>146</sup> *Id.* at 113–14.

commands.<sup>147</sup> Thus, the Rehnquist concurrence concluded that the Florida Supreme Court's interpretation of state law was an "impermissibl[e] distort[ion]. . . beyond what a fair reading required."<sup>148</sup> This is a bold claim: these Justices essentially said that they were in a better position than the Florida Supreme Court to determine the meaning of Florida law.

A majority of Justices rejected the independent state legislature doctrine in a 2015 case involving Arizona's independent redistricting commission.<sup>149</sup> Arizona voters passed a state constitutional amendment in 2000 to remove the power to draw district lines from the legislature and give it to an independent commission.<sup>150</sup> The Republican-controlled Arizona legislature sued after the commission adopted new congressional maps in 2012, arguing that the commission itself was invalid under the U.S. Constitution.<sup>151</sup> Specifically, the Arizona legislature argued that Article I, Section 4, the Elections Clause, vests authority only in the "legislature" to direct the "manner" of regulating congressional elections.<sup>152</sup> The Court, in a 5–4 vote, rejected the claim, holding that the term "legislature" in the Elections Clause encompasses the state's "lawmaking" powers, which includes the initiative process under the Arizona Constitution.<sup>153</sup> The Court noted that "[n]othing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."<sup>154</sup> That would seem to end the matter and should apply to the term "legislature" in Article II, Section 1 for the manner of appointing presidential electors as well.

But even though a majority rejected the doctrine in 2015, several Justices reinvigorated the idea in 2020 by suggesting that state courts have no role to interpret state laws that regulate the presidential election, even if the state courts are construing those laws to be consistent with the state constitution.<sup>155</sup> Just days before Election Day 2020, at least four Justices indicated that they believe the U.S. Supreme Court should review decisions from state supreme courts to ensure deference to state legislatures.<sup>156</sup> In an appeal from a Pennsylvania Supreme Court decision that extended the absentee ballot receipt deadline pursuant to the state constitution, Justice Alito—joined by Justices Thomas and Gorsuch—suggested that state legislatures have

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<sup>147</sup> *Id.* at 114.

<sup>148</sup> *Id.* at 115.

<sup>149</sup> *Ariz. St. Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 793 (2015).

<sup>150</sup> *Id.* at 792.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 813–14.

<sup>154</sup> *Id.* at 817–18.

<sup>155</sup> *See infra* notes 158–63 and accompanying text.

<sup>156</sup> *See infra* notes 158–63 and accompanying text.

plenary power to determine the rules for federal elections.<sup>157</sup> Given that the U.S. Constitution gives authority to the state “legislature” to regulate elections, these justices questioned the state supreme court’s interpretation of the state’s rules under the state constitution.<sup>158</sup> Justice Kavanaugh made a similar pronouncement in dicta in a case from Wisconsin, echoing Chief Justice Rehnquist’s concurrence in *Bush v. Gore*.<sup>159</sup> And Justice Gorsuch reiterated his view in a case out of North Carolina, saying that the State Board of Elections could not alter the absentee ballot receipt deadline because only the legislature has that power.<sup>160</sup> This view seems to go even further than Chief Justice Rehnquist’s concurrence: Justice Gorsuch suggested that the North Carolina State Board of Elections has no authority whatsoever to “(re)writ[e] election laws” given the Constitution’s command that “only the state ‘Legislature’” may determine the manner of appointing electors.<sup>161</sup> Interestingly, even though Chief Justice Roberts wrote a vigorous dissent in the *Arizona Independent Redistricting* case in 2015, he did not join these opinions in 2020.<sup>162</sup> Moreover, Justice Barrett, brand new to the Court, did not participate in these cases. Thus, it is not clear whether a majority of Justices are willing to question any election rules that a state legislature does not promulgate. But the issue is surely to recur, and it is possible that there are enough votes to solidify the independent state legislature doctrine, placing few constraints on legislatures and allowing them to burden the right to vote more easily.

At least one federal appellate court also agreed with the doctrine in the lead up to the 2020 election. The Eighth Circuit invoked it to reverse a district court in a challenge to the Minnesota Secretary of State’s extension of the absentee ballot deadline, issuing its decision only five days before Election Day.<sup>163</sup> The court ruled that only the legislature—and not the state’s chief election official—can alter election

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<sup>157</sup> *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1, 1–2 (2020) (statement of Justice Alito).

<sup>158</sup> *Id.* at 2 (“The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.”).

<sup>159</sup> *Democratic Nat’l Comm. v. Wis. St. Leg.*, 592 U.S. 1, 9 n.1 (2020) (Kavanaugh, J., concurring) (noting that “the text of the Constitution requires federal courts to ensure that state courts do not rewrite state election laws”) (citing *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C. J., concurring)).

<sup>160</sup> *Moore v. Circosta*, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting).

<sup>161</sup> *Id.* at 2.

<sup>162</sup> *Compare* *Ariz. St. Leg. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015) (Roberts, C.J., dissenting), *with* *Moore*, 141 S. Ct. at 46 (Chief Justice Roberts did not write separately in *Moore*, in which three other Justices—Justices Thomas, Gorsuch, and Alito—indicated they would have granted the emergency application for injunctive relief).

<sup>163</sup> *Carson v. Simon*, 978 F.3d 1051, 1054 (8th Cir. 2020).

rules.<sup>164</sup> Plaintiffs in Texas then invoked this theory in a stunning lawsuit to throw out votes, filed only three days before Election Day, by arguing that Harris County, Texas was not permitted to allow drive-in voting, even though the Texas Supreme Court had rejected a prior challenge and over 100,000 voters had already cast their ballots in this manner.<sup>165</sup> The district court dismissed the lawsuit based on the plaintiff's lack of standing but also indicated that, if it had reached the merits, it would have rejected the claim for the votes already cast during early voting, but that it would have disallowed drive-in voting on Election Day itself because of a lack of "legislative authorization for movable structures."<sup>166</sup>

In sum, although voting rights plaintiffs enjoyed some initial success in federal court when challenging election laws that burdened the right to vote, especially during a pandemic, the Supreme Court and the circuit courts of appeals mostly reversed those decisions.<sup>167</sup> The *Purcell* Principle—the admonition against changing election rules too close to an election—did some of the work,<sup>168</sup> but the other driver was a pernicious doctrine that defers too readily to states in their election administration.

The cases reveal that undue deference to state legislatures has come from two sources. First, in cases involving the U.S. Constitution's protection of the right to vote, the Court has deferred by not requiring states to provide a precise interest for their voting laws under the *Anderson-Burdick* test.<sup>169</sup> Second, in cases from state courts involving the state constitution's protection of the right to vote, the U.S. Supreme Court has suggested that it must defer to state legislatures under Article I, Section 4 and Article II, Section 1, which confer authority to the "legislature" to regulate elections.<sup>170</sup> The upshot of this jurisprudence: no matter the source of constitutional protection for the right to vote, courts must simply defer to the state legislature in its election laws. Most concerning, the implications of this approach greatly impacted the administration of the 2020 election and will likely affect the future of election law doctrine for years to come.

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<sup>164</sup> *Id.* at 1060 (stating that "only the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota.").

<sup>165</sup> Complaint at ¶ 30, *Hotze v. Hollins*, 2020 WL 6437668 (S.D. Tex. 2020) (No. 4:20-cv-03709).

<sup>166</sup> *Hotze v. Hollins*, No. 4:20-cv-03709, 2020 WL 6437668, at \*4–5 (S.D. Tex. Nov. 2, 2020).

<sup>167</sup> See *supra* notes 157–66 and accompanying text.

<sup>168</sup> See *supra* note 10 and accompanying text.

<sup>169</sup> See *supra* notes 21–40 and accompanying text.

<sup>170</sup> See *supra* notes 156–61 and accompanying text.

## II. THE DEVALUATION OF THE CONSTITUTIONAL RIGHT TO VOTE BECAUSE OF UNDUE DEFERENCE TO STATES

The undue deference to state legislatures in the 2020 litigation was both wrong and dangerous. It was wrong because it was not faithful to the Supreme Court's initial explication of the *Anderson-Burdick* balancing test to evaluate burdens on the right to vote. It was dangerous because it devalued the importance and significance of the right to vote and failed to account for the difficulties voters faced during a pandemic. If the Supreme Court and lower federal courts insist on continuing down this path of undue deference to state legislatures in election cases, then the only recourse may be a constitutional amendment that makes explicit what should already be part of our constitutional structure: the paramount importance of the fundamental right to vote.<sup>171</sup>

First, current doctrine is not in line with the Supreme Court's previous rules for the right to vote. To be sure, the Supreme Court has stated that strict scrutiny is not required to evaluate all election laws: "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."<sup>172</sup> But that general rule also does not mean that courts should blindly defer to a state's regulation of the election. Instead, the Court applies a balancing test that weighs the burden of the law against the state's precise need to regulate the voting process in that specific manner:

A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."<sup>173</sup>

Current jurisprudence, however, has forgotten those crucial second and third steps: discerning the state's "precise interests" and evaluating whether those interests make it "necessary to burden the plaintiff's rights."<sup>174</sup> As Judge Kelly put it in dissent in an Eighth Circuit case, "the state interest must be linked in some meaningful way to the particular rule or regulation that allegedly imposes a burden on a citizen's right to vote."<sup>175</sup> Crediting a state's generalized assertion of the need to promote an

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<sup>171</sup> See, e.g., Richard L. Hasen, *Bring on the 28th Amendment*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/opinion/sunday/voting-rights.html> [<https://perma.cc/J3QJ-6BBY>].

<sup>172</sup> *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

<sup>173</sup> *Id.* at 434 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

<sup>174</sup> *Org. for Black Struggle, Inc. v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020).

<sup>175</sup> *Id.* at 612 (Kelly, J., dissenting).

orderly election or to ensure election integrity does not scrutinize the state's goals sufficiently enough, even under a standard that is lower than strict scrutiny.<sup>176</sup> As I have explained previously, as recently as 2000 the Supreme Court had required more of states than generalities about the importance of its election administration.<sup>177</sup> Yet there has been a creep in the Court's doctrine since then, such as in *Crawford v. Marion County Election Board* in 2008, where the Court deferred to Indiana's assertions of its need for a photo ID law based on generalized notions of "election modernization," rooting out "voter fraud," and "safeguarding voter confidence."<sup>178</sup> The 2020 cases increase this trend, with the Supreme Court and federal courts of appeals refusing to require states to offer "precise interests" for their election rules or to demonstrate why those interests make the challenged regulations "necessary."<sup>179</sup> The problem is even more troubling given the unique concerns of voting during a pandemic: states should be required to justify the application of their rules when it is even more difficult for some people to vote.

Second, undue deference to legislatures devalues the fundamental right to vote.<sup>180</sup> Courts credit state assertions of "election administration" or "election integrity," without more, making it harder for plaintiffs to vindicate their rights. The images from Wisconsin after the Supreme Court's decision in April 2020, just before the state's primary, told it all: extremely long lines of voters in masks who did not receive their absentee ballots on time, with *The New York Times* headline explaining, "Voters Forced to Choose Between Their Health and Their Civic Duty."<sup>181</sup> In a case several months later, Judge Rovner of the Seventh Circuit recounted why undue deference to state legislatures is inappropriate by pointing out that legislatures may not act and voters will suffer as a result:

I recognize that the district court's decision to order modifications to Wisconsin's election practices represents an intrusion into the domain of state government, but in my view it is a necessary one. We are seven months-plus

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<sup>176</sup> See Douglas, (*Mis*)*Trusting States to Run Elections*, *supra* note 6, at 561–62.

<sup>177</sup> *Id.* at 561 (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000)).

<sup>178</sup> *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 192, 195, 197 (2008) (plurality opinion). Atiba Ellis notes that a "meme of voter fraud" has led to stricter state regulation of the voting process and greater deference to states to ensure election integrity, as *Crawford* demonstrates. Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879, 903 (2014).

<sup>179</sup> See *supra* Section I.A.

<sup>180</sup> See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 188–91 (2008).

<sup>181</sup> *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html> [https://perma.cc/7B2P-VQ5Q].



into this pandemic. The Legislature has had ample time to make modifications of its own to the election code and has declined to do so.<sup>182</sup>

Judge Rovner concluded her dissent with a chilling statement: “Good luck and G-d bless, Wisconsin. You are going to need it.”<sup>183</sup>

It is particularly concerning when an appellate court reverses a lower court’s ruling that had invalidated an election law without considering adequately the district court’s evaluation of the evidence. The district judge is in the best position to determine whether the application of a particular rule, especially during a pandemic, will—as a factual matter—burden the fundamental right to vote.<sup>184</sup> District courts hear the evidence and experts, and therefore can best evaluate the burdens on voters on the ground. But in deferring to legislative judgments, the appellate courts are discrediting these ground-level determinations.<sup>185</sup> It may be that some of these decisions were correct—that the states did have valid justifications for imposing these rules. But courts should require states to make their case.

There are real consequences of a jurisprudence that fails to put states to the test to justify election rules that burden voters. Fewer people may be able to participate in our democracy. Or they will have to jump through unnecessary hoops to effectuate that most precious right. Moreover, it makes little sense to defer to state legislators regarding election laws given that these politicians have every incentive to craft rules that will help them win re-election.<sup>186</sup> Courts must carefully scrutinize voting rules precisely because of the possibility that legislative majorities may try to entrench themselves through election laws.<sup>187</sup> As Justice Kagan put it in dissent in the Wisconsin absentee ballot deadline case, “if there is one area where deference to legislators should not shade into acquiescence, it is election law. For in that field politicians’ incentives often conflict with voters’ interests—that is, whenever suppressing

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<sup>182</sup> Democratic Nat’l Comm. v. Bostelmann, 977 F.3d 639, 653 (7th Cir. 2020) (Rovner, J., dissenting).

<sup>183</sup> *Id.* at 656.

<sup>184</sup> See Hon. Shira A. Schendlin, *Judicial Fact-Finding and the Trial Court Judge*, 69 U. MIAMI L. REV. 367, 371–72 (2015).

<sup>185</sup> See, e.g., *A. Philip Randolph Inst. of Ohio v. LaRose*, 831 Fed. App’x 188, 194 (6th Cir. 2020) (White, J., dissenting) (“I would not find that the district court, after conducting evidentiary hearings with multiple witnesses, and analyzing significant briefing, abused its discretion in enjoining what it determined to likely be an unconstitutional directive issued by a single elected official, impacting the voting rights of thousands of citizens.”).

<sup>186</sup> See *Democratic Nat’l Comm. v. Wis. St. Leg.*, 141 S. Ct. 28, 43 (2020) (Kagan, J., dissenting) (noting that deference to legislative judgments makes little sense when state rules “infringe the constitutionally enshrined right to vote”).

<sup>187</sup> See generally Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

votes benefits the lawmakers who make the rules.”<sup>188</sup> That entrenchment concern provides greater reason for courts to require states to demonstrate precise justifications for any burden on the right to vote. It is no answer to say that the democratic process can respond to these infringements; restricting the right to vote by its very nature makes it harder to vote out the current majorities.

Moreover, this undue deference doctrine is concerning because it applies even outside of the *Purcell* Principle and last-minute election lawsuits.<sup>189</sup> *Purcell* is troubling because courts are applying it incorrectly, making it harder for voting rights plaintiffs to secure judicial protection of the constitutional right to vote as an election nears.<sup>190</sup> But undue deference was an additional—and often primary—reason many courts rejected these challenges, separate from the timing of the suits close to an election.<sup>191</sup> These cases have therefore created circuit precedent that will erect barriers for plaintiffs to effectuate the fundamental right to vote beyond the 2020 election. Indeed, some of the later cases in the 2020 cycle explicitly relied on earlier cases from other circuits to justify their restrictive rulings.<sup>192</sup>

Finally, undue deference under the independent state legislature doctrine also makes little sense, in part because it removes the vital and more robust protection that state constitutions give to the right to vote.<sup>193</sup> Michael Morley argues, however, that because both Article I, Section 4 and Article II, Section 1 confer authority to regulate federal elections only to the state “legislature,” “state constitutions cannot restrict the scope of that authority.”<sup>194</sup> Richard Pildes, by contrast, more convincingly explains that “as a matter of historical practice, state legislatures were not understood at the time to be more ‘independent’ by virtue of Article II of the constraints and conditions on their power than they were when acting pursuant to any other source

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<sup>188</sup> *Democratic Nat’l Comm.*, 141 S. Ct. at 43 (Kagan, J., dissenting).

<sup>189</sup> *Id.* at 41–43 (Kagan, J., dissenting) (discussing deference as a separate issue after dismissing the *Purcell* Principle as insufficient).

<sup>190</sup> See Gans, *supra* note 10; Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, ELECTION LAW BLOG (Sept. 27, 2020, 12:22 PM), <https://electionlawblog.org/?p=115834> [<https://perma.cc/R9GU-ZAVJ>]; see also *Democratic Nat’l Comm.*, 141 S. Ct. at 42 (Kagan, J., dissenting) (“At its core, *Purcell* tells courts to apply, not depart from, the usual rules of equity. And that means courts must consider all relevant factors, not just the calendar. Yes, there is a danger that an autumn injunction may confuse voters and suppress voting. But no, there is not a moratorium on the Constitution as the cold weather approaches. Remediable incursions on the right to vote can occur in September or October as well as in April or May.”) (internal citations omitted).

<sup>191</sup> See *Democratic Nat’l Comm.*, 141 S. Ct. at 33–34 (Kavanaugh, J., concurring).

<sup>192</sup> See, e.g., *Org. for Black Struggle, Inc. v. Ashcroft*, 978 F.3d 603, 607–09 (8th Cir. 2020) (citing and following the Seventh and Eleventh Circuits’ earlier October 2020 rulings).

<sup>193</sup> See generally Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014) [hereinafter Douglas, *The Right to Vote Under State Constitutions*].

<sup>194</sup> See Morley, *supra* note 14.

of authority.”<sup>195</sup> That is, the term “legislature” in the U.S. Constitution does not make the state legislature a pure free agent but entails the normal limits on its law-making authority, such as through the state constitution. Vikram Amar, considering the word “legislature” in Article V, notes that “the term, used against the historical backdrop of state constitutions in 1787, was not designed to interfere with the preexisting control that people enjoyed over their state legislatures.”<sup>196</sup> After all, state constitutions create state legislatures, so one would think that state legislatures cannot act outside of the state constitution’s mandates.

But perhaps the best rejection of the independent state legislature doctrine relates to the consequences of its logical extension: it would call into question tons of election rules—especially if the doctrine means that legislatures cannot delegate their authority to another actor, as at least Justice Gorsuch seemed to indicate.<sup>197</sup> The doctrine would cause courts to strike down “all state laws or constitutional provisions regulating federal elections that were passed by initiative or by a state constitutional convention.”<sup>198</sup> It would mean that, if the legislature cannot even delegate its authority to promulgate election rules, then Governors, Secretaries of State, Boards of Elections, and courts would seemingly not be able to protect voters when an emergency arises, such as during a pandemic.<sup>199</sup> For example, Kentucky law allowed the Governor and Secretary of State to alter the “manner” of elections during a state of emergency;<sup>200</sup> were the emergency regulations that the Governor and Secretary of State crafted for the 2020 election constitutionally suspect? Could a court order the extension of polling hours if there is a major problem on Election Day or would only the legislature be allowed to do so? Would the doctrine invalidate pro-democracy voter initiatives, often passed because of the legislature’s inaction? After all, voters cannot simply rely on the political process to vindicate their rights if legislative majorities refuse to act, especially because those very voting rules often serve to help keep the majorities in power. And are state courts now unable to protect the state constitutional right to vote, which goes beyond federal constitutional protection?<sup>201</sup> To ask these questions is to understand how undue deference through the independent state legislature doctrine harms voters. The doctrine undermines the

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<sup>195</sup> Richard H. Pildes, *Judging “New Law” in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 727–28 (2001).

<sup>196</sup> Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037, 1041 (2000).

<sup>197</sup> See *Moore v. Circosta*, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting).

<sup>198</sup> Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 708 (2016).

<sup>199</sup> See *Moore*, 141 S. Ct. at 47 (Gorsuch, J., dissenting).

<sup>200</sup> KY. REV. STAT. ANN. § 39A.100(l) (West 2021).

<sup>201</sup> See Douglas, *The Right to Vote Under State Constitutions*, *supra* note 193, at 95.

constitutional right to vote because it suggests that state legislatures can act outside of the state constitutions' proscriptions.

In sum, the 2020 election cycle was tough on voting rights plaintiffs, thanks to undue deference to states and the corresponding lower federal protection for the right to vote, alongside unfettered deference through the independent state legislature doctrine. Even when they won cases initially in the federal district courts to ease voting rules, federal appeals courts often reversed those favorable decisions.<sup>202</sup> There appears to be a new rule in the federal courts: instead of protecting the right to vote, courts must protect states' ability to run their election as they see fit.<sup>203</sup> There is a new, unwarranted, and dangerous standard: undue deference to states in election litigation.

### III. THE PATH FORWARD: SHORT-TERM AND LONG-TERM SOLUTIONS TO FEDERAL COURTS' NARROW VOTING RIGHTS JURISPRUDENCE

As the previous Part indicated, the Supreme Court and the federal appellate courts have been wrong in their approach to the constitutional right to vote, unduly deferring to states in their election administration and harming voters in the process. Therefore, the most obvious solution is for federal courts to reassess their election law jurisprudence. If the *Anderson-Burdick* framework is to remain (something that itself is questionable given that the right to vote, as a fundamental right, should actually enjoy strict scrutiny review<sup>204</sup>), then at a minimum the courts should enforce its dictates: states must put forth a "precise interest" for their rules and must explain why those precise interests "make it necessary" to burden the fundamental right to vote.<sup>205</sup>

Of course, it may be a pipe dream to expect the Roberts Court to heighten the scrutiny for the right to vote or to require states to provide more detailed justifications for their election laws. The Court seems to be doing just the opposite, gutting the *Anderson-Burdick* test of its ability to protect voters.<sup>206</sup> Part of the problem is that the U.S. Constitution, as the Court famously noted in *Bush v. Gore*, does not explicitly confer the right to vote.<sup>207</sup> Although we do not yet know how Justice Amy

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<sup>202</sup> See, e.g., *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 643 (7th Cir. 2020) (staying the district court's injunction).

<sup>203</sup> See, e.g., *Democratic Nat'l Comm. v. Wis. St. Leg.*, 141 S. Ct. 28, 28–30 (2020) (Gorsuch, J., concurring).

<sup>204</sup> See Douglas, *The Right to Vote Under State Constitutions*, *supra* note 193.

<sup>205</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>206</sup> See, e.g., *Democratic Nat'l Comm.*, 141 S. Ct. at 33 (Kavanaugh, J., concurring).

<sup>207</sup> *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint

Coney Barrett will approach election law, it is a safe assumption that she will join her fellow conservative justices to cabin the constitutional right to vote in favor of states' authority to regulate elections.<sup>208</sup> Therefore, voting rights advocates need bolder solutions to avoid a repeat of their losses in future election cycles.

A shorter-term fix would include federal legislation that eases the burdens on voters and adopts best practices for election administration. Democrats have indicated that they will make voting rights a top priority now that they control both Houses of Congress and the presidency.<sup>209</sup> H.R. 1, the omnibus election legislation that House Democrats introduced in early 2019, is a good start.<sup>210</sup> That law would require states to adopt automatic voter registration, expand early voting, ease felon disenfranchisement, create independent redistricting commissions, expand public financing of campaigns, and impose various ethics rules, among other reforms. These practices already exist in numerous states that have high turnout.<sup>211</sup> A federal law could require states to adopt these pro-voter rules, though Congress should expand H.R. 1 even further to provide stronger voting rights protection.

But simply passing legislation might not be enough given the possibility of a conservative Supreme Court that will still likely sanction restrictive state voting rules or strike down federal legislation aimed at protecting voting rights.<sup>212</sup> Franita Tolson persuasively argues that Congress has strong constitutional authority under the Elections Clause and the Fourteenth and Fifteenth Amendments to regulate elections.<sup>213</sup> Nick Stephanopoulos similarly suggests that Congress may regulate elections under

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members of the electoral college.”); see also Douglas, *The Right to Vote Under State Constitutions*, *supra* note 193, at 95.

<sup>208</sup> See Beth Reinhard & Tom Hamburger, *How Amy Coney Barrett Played a Role in Bush v. Gore—and Helped the Republican Party Defend Mail Ballots*, WASH. POST (Oct. 10, 2020, 3:10 PM), [https://www.washingtonpost.com/politics/amy-coney-barrett-bush-gore/2020/10/10/594641b8-09e3-11eb-991c-be6ead8c4018\\_story.html](https://www.washingtonpost.com/politics/amy-coney-barrett-bush-gore/2020/10/10/594641b8-09e3-11eb-991c-be6ead8c4018_story.html) [<https://perma.cc/G83J-Y35H>].

<sup>209</sup> See, e.g., Elaine Godfrey, *This is the Future that Liberals Want*, THE ATLANTIC (Sept. 17, 2020), <https://www.theatlantic.com/politics/archive/2020/09/democrats-win-senate-white-house/616370/> [<https://perma.cc/VLM6-HJ3R>]; For the People Act, H.R. 1, 116th Congress (2019–2020), <https://www.congress.gov/bill/116th-congress/house-bill/1/text> [<https://perma.cc/3X7H-GE5Y>].

<sup>210</sup> See generally H.R. 1, 116th Congress.

<sup>211</sup> See *America Goes to the Polls 2018*, NONPROFIT VOTE (Apr. 30, 2021), <https://www.nonprofitvote.org/wp-content/uploads/2021/05/america-goes-polls-2018.pdf> [<https://perma.cc/7MVL-E85G>].

<sup>212</sup> See generally, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013). Joshua Sellers explains that *Shelby County* actually emboldens states to pass more restrictive voting laws, as “the decision gave the Court’s imprimatur to states that are actively, and contentiously, testing the boundaries of permissible voting-related changes.” Joshua S. Sellers, *Shelby County as a Sanction for States’ Rights in Elections*, 34 ST. LOUIS U. PUB. L. REV. 367, 368 (2015).

<sup>213</sup> See Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 392–93 (2019).

the Elections Clause, the Guarantee Clause, and the Fourteenth Amendment's Enforcement Clause.<sup>214</sup> But, of course, a 6–3 conservative Court could still cabin Congress's authority to regulate the voting process by construing narrowly the U.S. Constitution's delegation of congressional authority over elections. The Court could invoke the independent state legislature doctrine, for instance, to invalidate congressional rules as applied to presidential elections.<sup>215</sup>

The 2020 jurisprudence, along with the reality of a conservative Court full of “textualist” justices, therefore provides a renewed justification for a new constitutional amendment that would recognize explicitly the fundamental right to vote as a vital feature of our democratic structure.<sup>216</sup> As noted above, the U.S. Constitution does not affirmatively grant the right to vote.<sup>217</sup> Instead, the right to vote is listed in the negative: states cannot deny the right to vote on the basis of race (Fifteenth Amendment), sex (Nineteenth Amendment), inability to pay a poll tax (Twenty-Fourth Amendment), or age over eighteen (Twenty-Sixth Amendment).<sup>218</sup> As Gilda Daniels notes, the “Constitution has more amendments addressing the right to vote than any other fundamental right” but it still “does not grant the right to vote.”<sup>219</sup> The U.S. Supreme Court has located protection for the right to vote within the Fourteenth Amendment's Equal Protection Clause,<sup>220</sup> but as discussed earlier, under the *Anderson-Burdick* test it has construed that protection narrowly and instead defers too readily to the states.<sup>221</sup> A commitment of an affirmative right to vote in the text of the U.S. Constitution would require greater judicial protection if these justices are true to their textualist jurisprudence.

Democratic Senators Richard Durbin and Elizabeth Warren—along with a handful of other Senators—have introduced a proposed constitutional amendment to do just that.<sup>222</sup> That amendment would enshrine in the U.S. Constitution “the funda-

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<sup>214</sup> See generally Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1 (2021).

<sup>215</sup> See, e.g., *Moore v. Circosta*, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., concurring).

<sup>216</sup> See Hasen, *supra* note 171; *Right to Vote Amendment*, FAIRVOTE, [https://www.fairvote.org/right\\_to\\_vote\\_amendment](https://www.fairvote.org/right_to_vote_amendment) [<https://perma.cc/DNR6-5LDM>] (last visited Oct. 27, 2021).

<sup>217</sup> See *Bush v. Gore*, 531 U.S. 98, 104 (2000).

<sup>218</sup> See U.S. CONST. amends. XV, XIX, XXIV, XXVI.

<sup>219</sup> GILDA R. DANIELS, *UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA* 198–99 (New York Univ. Press 2020).

<sup>220</sup> See, e.g., *Kramer v. Union Free Sch. Dist.* 395 U.S. 621, 627 (1969) (noting that “if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest”).

<sup>221</sup> See *supra* notes 205–07 and accompanying text.

<sup>222</sup> Press Release, U.S. Senator Dick Durbin, Durbin Introduces Joint Resolution To Enshrine Right To Vote In U.S. Constitution (Aug. 5, 2020), <https://www.durbin.senate.gov/newsroom>

mental right to vote” and would require courts to apply strict scrutiny to any infringements on that right.<sup>223</sup> The text of the proposed amendment says that “Every citizen of the United States, who is of legal voting age, shall have the fundamental right to vote in any public election held in the jurisdiction in which the citizen resides.”<sup>224</sup> The amendment would also impose strict scrutiny review: states would have to show that any “denial or abridgment is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.”<sup>225</sup> The right to vote amendment would therefore require, as a textual matter, courts to force states to provide a specific justification for any laws that burden voters—although perhaps the language could be even stronger on this front.<sup>226</sup> The amendment would also repeal the constitutional allowance for felon disenfranchisement by amending Section 2 of the Fourteenth Amendment, which the Supreme Court relied upon in *Richardson v. Ramirez* to uphold California’s felon disenfranchisement practice.<sup>227</sup> And the amendment would give Congress further authority to enforce its provisions.<sup>228</sup>

This proposed constitutional amendment would be a good start to undo the federal courts’ narrow jurisprudence. But the language could go even further to require states to offer “precise interests” for a law that harms voters and explain why it is “necessary” for the state to burden voters to effectuate those interests.<sup>229</sup> Or the text could more explicitly invoke the stringent strict scrutiny test from *Harper* and *Kramer*, which the Warren Court handed down in the 1960s at the height of its rights-protective era.<sup>230</sup> There should be no wiggle room for a conservative Supreme Court to defer to states. What does it mean, for example, for a law to be “in furtherance” of a compelling governmental interest? Could that language be a textual hook to further derogate the right to vote? To clear up any ambiguity, Congress should beef up this proposed constitutional amendment even further to indicate that courts shall

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/press-releases/durbin-introduces-joint-resolution-to-enshrine-right-to-vote-in-us-constitution [https://perma.cc/UK66-GDP4] (last visited Oct. 27, 2021).

<sup>223</sup> S.J. Res. 75, 116th Cong. (2020).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *See id.*

<sup>227</sup> *See generally* 418 U.S. 24 (1974).

<sup>228</sup> S.J. Res. 75, 116th Cong. (2020). For an analysis of each of the amendment’s provisions, see Franita Tolson, *Legal Analysis of the Durbin-Warren Right to Vote Amendment*, ADVANCEMENT PROJECT, <https://advancementproject.org/wp-content/uploads/2020/08/Professor-Franita-Tolsons-Legal-Analysis-of-the-Right-to-Vote-Amendment.pdf> [https://perma.cc/F94C -737K] (last visited Oct. 27, 2021).

<sup>229</sup> *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (requiring courts to identify “the precise interests put forward by the State as justifications for the burden imposed by its rule” and determine “the extent to which those interests make it necessary to burden the plaintiff’s rights”).

<sup>230</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627–28 (1969).

not defer to states' election laws without a specific and precise justification for why it must burden voters' rights and should apply rigorous strict scrutiny review. The amendment should also clarify that it applies to all elections, including presidential elections, meaning that state legislatures do not have unfettered authority under the independent state legislature doctrine.

In sum, to fix the devaluation of the right to vote in the federal courts' constitutional analysis, we may need a textual requirement that the Court apply the highest form of judicial scrutiny and may not defer to the states so readily in their election administration. The current conservatives on the Supreme Court, as well as many federal appellate judges, are supposedly textualists and originalists, so arguably they would change their jurisprudence if the constitutional text was clear. The best way to undo the harms from the 2020 election litigation and the precedents it set may be to adopt a new amendment to the U.S. Constitution.

## CONCLUSION

There were over 400 cases in forty-four states about the 2020 election during the COVID-19 pandemic.<sup>231</sup> In many of these cases, plaintiffs saw initial success in the federal district courts only to have those wins reversed in the courts of appeals and the U.S. Supreme Court. Those appellate courts rejected many challenges for two main reasons: the lawsuits were too late under the *Purcell* Principle and the states should enjoy deference on how to run their elections.<sup>232</sup> But that deference is undue and unwarranted under Supreme Court precedent and a proper understanding of the right to vote as a cherished, fundamental right. The courts should rethink their approach and rein in legislatures to ensure that voter access can remain as equal and robust as possible. A refusal to change their jurisprudence provides even stronger reasons for robust federal voting legislation and a new constitutional right to vote amendment.

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<sup>231</sup> *COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, <https://healthyelections-case-tracker.stanford.edu/> [<https://perma.cc/48QN-VVGN>] (last visited Oct. 27, 2021).

<sup>232</sup> See, e.g., *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641–42 (7th Cir. 2020) (staying the district court's injunction based on the *Purcell* Principle). The Supreme Court denied an emergency application to vacate the stay. See *Democratic Nat'l Comm. v. Wis. St. Leg.*, 141 S. Ct. 28, 30–33 (2020).