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Voting Rights Lawyering in Crisis

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VOTING RIGHTS LAWYERING IN CRISIS

Emily Rong Zhang†

INTRODUCTION

The familiar refrain about crisis laying bare underlying vulnerabilities and longstanding problems is certainly true with respect to the COVID-19 pandemic and voting rights lawyering. While it was clear before the pandemic that voting rights lawyering is in crisis,[1] election litigation flowing from the unprecedented COVID-19 pandemic makes painfully clear the crisis state of voting rights lawyering in the United States.

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[1] Much voting rights scholarship is devoted to addressing the inadequate and precarious state of laws protecting the right to vote. For a sample, *see, e.g.*, Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006); RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2013); Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby*)*, 123 YALE L.J. 2838 (2014); Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363 (2015); Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763 (2016); Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867 (2016); Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J. F. 799 (2018).

Ensuring that voters could vote safely and confidently during a pandemic required that election officials make significant adjustments to how elections are typically administered. Applying the pandemic motto of social distancing to voting, voters had to be spread out across time (so voting is not all concentrated on Election Day)[2] and across various modes of voting (so voting does not all occur in person).[3] Preventing congestion on Election Day transformed from an advisable election objective[4] to a public health imperative.[5] The pandemic challenged election administrators to respond nimbly with necessary adjustments to election practices. And it issued a mandate to voting rights lawyers to litigate where possible to ensure that states made these necessary adjustments.

But the ability of voting rights lawyers to obtain necessary relief when state election laws fall short depends on robust legal protections for voting rights. Even before the pandemic, such protections had been in a steady state of decay.[6] The nullification of the Voting Rights Act's preclearance regime, which required certain jurisdictions with a history of racial discrimination to preclear changes to election laws with the Department of Justice,[7] unleashed a cascade of voter suppression laws.[8] That many of these laws have survived protracted and serious legal challenges has long made clear the formidable barriers in the way of voting rights lawyering.[9]

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[2] States principally do so through implementing early voting, which permits voting to begin before Election Day. *See State Laws Governing Early Voting*, NAT'L CONF. ST. LEGISLATURES (Oct. 22, 2020), https://perma.cc/V6FM-8FYU.

[3] States principally do so through allowing absentee voting. *See Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. ST. LEGISLATURES (Sept. 24, 2020), https://perma.cc/F674-Y9QP.

[4] *See* SPENCER OVERTON & JENALYN SOTTO, JOINT CTR. FOR POLITICAL & ECON. STUDIES, REDUCING LONG LINES TO VOTE (Aug. 7, 2016), https://perma.cc/V6W4-Y7AN.

[5] *Guidance for Organizing Large Events and Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/XKJ8-7YKD (last updated Mar. 8, 2021); *Polling Locations and Voters*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/8H4U-76CT (last updated Jan. 4, 2021).

[6] *See supra* note 1.

[7] Shelby Cnty. v. Holder, 570 U.S. 529, 537, 557 (2013) (striking down the coverage formula that put certain jurisdictions under the preclearance regime, thereby rendering the preclearance regime a nullity).

[8] These laws have been collectively dubbed the "New Vote Denial." *See* Tokaji, *supra* note 1, at 691-92.

[9] *See, e.g.*, Veasey v. Abbott, 888 F.3d 792 (5th Cir. 2018) (releasing Texas's voter ID law from injunctive relief); Luft v. Evers, 963 F.3d 665 (7th Cir. 2020) (affirming invalidation of Wisconsin's provision allowing students to use their university-issued IDs to vote); Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (upholding Ohio's use-it-or-lose-it voter purge regime). To be sure, there have been notable successes. *See, e.g.*, North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017) (holding unconstitutional North Carolina's omnibus voter suppression law); Fish

Despite these barriers, when states insisted on conducting elections as usual, even in the midst of a pandemic, there was hope that lawsuits brought to adapt voting to pandemic constraints would prevail. While the pandemic did not change the law, it did significantly alter the facts that most voters faced on the ground. The cost-benefit and risk-assessment calculus of voting, as with almost every other aspect of life,[10] changed overnight. Any expectation that elections should proceed unchanged in a pandemic seemed unrealistic and unreasonable. Thus, even though pandemic-related voting rights cases faced tough legal standards, the hope was that the drastic and apparent need for adjustments to preexisting election rules would produce some important legal victories.

Yet the election litigation that occurred during the COVID-19 pandemic only confirmed just how hard voting rights lawyering has become. Cases brought to compel states to adopt pandemic-necessitated changes to their election rules and practices experienced little success—even though they sought very modest remedies.[11] Also, there was significant litigation coming from the other direction: litigants *challenging* the introduction of measures taken to make voting easier, for instance, the introduction of vote-by-mail or the relaxation of certain requirements for mail-in ballots.[12]

The paucity of successful reform litigation coupled with the multitude of obstructionist lawsuits during the pandemic makes painfully clear that the law is getting in the way of voting rights lawyering. In particular, three doctrines—one notorious, one novel, and one neglected—are of note. They are, in turn, the *Purcell* principle ("that federal courts ordinarily should not alter state election laws in the period close to an election"),[13] the Independent State Legislature Theory (which would "require[] federal courts to ensure that state courts do not rewrite state election laws"),[14] and *Anderson/Burdick*, the standard governing the right to vote under the federal constitution.[15] *In toto*, these doctrines produce

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v. Schwab, 957 F.3d 1105 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 965 (2020) (holding unconstitutional Kansas's documentary proof of citizenship requirement for voter registration).

[10] *See, e.g.*, Tara Parker-Pope, *Who Knew Grocery Shopping Could Be So Stressful?*, N.Y. TIMES (Mar. 26, 2020), https://perma.cc/6KFF-NCY5; *Q&As on COVID-19 and Related Health Topics*, WORLD HEALTH ORG., https://perma.cc/SJD5-6JRY (addressing questions about breastfeeding, health and safety in the workplace, home care for families and caregivers, mass gatherings, schools, and staying and working at hotels, among other topics.).

[11] *See infra* Section I(B).

[12] *See infra* Section I(B).

[13] Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

[14] *Id.* at 34 n.1.

[15] *See* Anderson v. Celebrezze, 460 U.S. 780 (1983) (establishing the reigning standard governing the federal right to vote); Burdick v. Takushi, 504 U.S. 428 (1992) (applying the

more than a legal presumption in favor of the electoral regime a state chooses to enact. They legitimate it, even if the regime impedes the exercise of the right to vote.

This Article is organized as follows. In the first section, I describe what voting rights lawyering has looked like in this latest crisis, the COVID-19 pandemic. I begin by noting the kinds of changes to electoral rules and regulations that a pandemic necessitates: those that reduce the concentration of voters in a physical polling location. Then, I take stock of the election litigation that resulted from the pandemic, including obstructionist litigation aimed at preventing necessary changes from being implemented in pandemic elections and reform litigation aimed at securing the necessary changes for holding pandemic elections. While obstructionist litigation proliferated through the federal courts, reform litigation—which sought modest changes—largely failed.

In the second section, I consider the state of crisis of voting rights lawyering that the pandemic has illuminated. I describe three culprits: the *Purcell* principle, the Independent State Legislature Theory, and the *Anderson/Burdick* standard. In particular, I focus on the *Anderson/Burdick* standard governing protections for the federal right to vote, our last legal line of defense for the right to vote. I argue that while the standard is theoretically sound, in application it does little more than legitimate state election laws regardless of whether they impinge on the right to vote. Bringing voting rights lawyering out of crisis—and making sure it is ready to face the next crisis, whatever it may be—will require deep fixes to doctrines governing the right to vote and how they are applied.

I. VOTING RIGHTS LAWYERING DURING CRISIS

A. Voting in a Pandemic

The COVID-19 pandemic threw into question whether voters could safely and confidently cast their ballots during the 2020 election cycle in

standard for evaluating a claim that a state law burdens the right to vote as set forth in *Anderson*). .

the United States.[16] The iconic image of voting in America—the congregation of voters at the polls on Election Day—no longer made sense.[17] At the very least, some accommodations needed to be made for individuals who are especially vulnerable to the virus.[18] Reducing demand for in-person voting was also consistent with stay-at-home orders[19] and the public health principle of social distancing.[20] In short, our elections needed to adapt to pandemic conditions.

The need to adapt was acute but also unexceptional. The pandemic forced us to change almost every part of how we go about our lives.[21] Many institutions—be it proactively[22] or forced kicking and screaming[23]—adjusted to changing needs as dictated by the pandemic as well.

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[16] The election cycle began with the 2020 primary elections, many of which were held after the pandemic hit. *See, e.g.*, the Wisconsin primary, Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam) (staying the District Court's order granting a preliminary injunction to the extent it required the State to count absentee ballots postmarked after April 7, 2020, the date of the state's election). And it ended with the general election held in November of 2020, with COVID cases rising to a third peak. Lauren Leatherby, *U.S. Virus Cases Climb Toward a Third Peak*, N.Y. TIMES (Oct. 15, 2020), https://perma.cc/7CUU-QU8E.

[17] *See Polling Locations and Voters*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/VKJ5-BBDG (Jan. 4, 2021).

[18] *See People at Increased Risk and Other People Who Need to Take Extra Precautions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/F9ME-46QC (last updated Mar. 15, 2021) (including older individuals, pregnant people, and those who suffer from underlying medical conditions).

[19] Such orders, typically issued at the state level, require persons to stay home as a community mitigation strategy to reduce the spread of the disease. *See* AMANDA MORELAND ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, TIMING OF STATE AND TERRITORIAL COVID-19 STAY-AT-HOME ORDERS AND CHANGES IN POPULATION MOVEMENT—UNITED STATES, MARCH 1-MAY 31, 2020 (Sept. 4, 2020), https://perma.cc/SMS7-2JHD.

[20] *Social Distancing: Keep a Safe Distance to Slow the Spread*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 17, 2020), https://perma.cc/Z4Q8-UASH.

[21] *How Coronavirus Is Changing Our Daily Lives*, N.Y. TIMES (Mar. 15, 2020, 2:20 PM), https://perma.cc/FT9V-XWM8 (describing changes to grocery shopping, professional and amateur sports, cultural activities and institutions, social gatherings, schooling, and dining out); *see* Larry Buchanan, *54 Ways Coronavirus Has Changed Our World*, N.Y. TIMES (May 27, 2020), https://perma.cc/B58L-DX2D (summarizing the many changes to our lives under COVID-19).

[22] *See, e.g.*, Lawrence S. Bacow et al., *We Lead Three Universities. It's Time for Drastic Action*, N.Y. TIMES (Mar. 17, 2020), https://perma.cc/8F6F-G9N5 ("Experts advised us that to slow the spread of the virus, we must reduce population density and increase social distancing on our campuses. That meant turning university life upside down: suddenly sending virtually all of our undergraduates home; asking faculty to swiftly bring all instruction online; canceling academic, athletic, artistic and cultural events, and nearly all in-person meetings; shutting our libraries; and asking everyone who could work remotely to do so right away.").

[23] *See, e.g.*, Univ. of Mich. Law Sch., *Special Collection: COVID-19 (Novel Coronavirus)*, C.R. LITIG. CLEARINGHOUSE, https://perma.cc/ES8B-5TT8 (last visited Mar. 15, 2021) (compiling extensive litigation addressing challenges posed by the COVID-19 pandemic); *see*

Many of these adjustments, for instance migrating almost all in-person contact online, were arguably far more drastic than those that election administration needed to make. But because of the highly fragmented and local nature of the United States' election policy and practice, adjusting elections to the pandemic required action by many policy actors.[24] Moreover, not only were the actors numerous, but the problems they faced were also varied. Because there is significant variation across the country on what modes of voting are available, and how convenient voting was to begin with,[25] the need—and capability—to adjust varied greatly across jurisdictions.

Many jurisdictions rose to the occasion. To reduce the demand for in-person voting, they made other modes of voting more accessible to more voters. Vote-by-mail (synonymous with absentee voting),[26] already an increasingly popular method of voting,[27] became the pandemic gold standard for voting.[28] Vote-by-mail allowed voters to cast ballots in the tranquility of their homes (and within their metaphorical pandemic bubbles), reducing both the risk that voters could become infected and the risk that voters could infect each other.[29] Some states that had not already fully embraced vote-by-mail prior to the pandemic expanded the availability of vote-by-mail during the pandemic.[30] Kentucky, for instance, introduced no-excuse absentee voting during the pandemic.[31] Prior to the

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also Prison Policy Initiative, *Responses to the Covid-19 Pandemic*, https://perma.cc/A9AQ-QUYC (last updated Mar. 30, 2021) (collecting policy changes in prisons and jails in light of the COVID-19 pandemic, many of which were compelled by court orders).

[24] Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 265-68 (2020).

[25] *See NCSL State Elections Resources*, NAT'L CONF. ST. LEGISLATURES, https://perma.cc/7Q4P-WYN7 (last updated Jan. 5, 2021) (providing an overview of the differences across states in how elections are conducted).

[26] *See* Michelle Ye Hee Lee, *What's the Difference Between Absentee and Mail-in Voting?*, WASH. POST (Aug. 18, 2020, 8:00 AM), https://perma.cc/989Q-VAAE; *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. ST. LEGISLATURES, https://perma.cc/NN4Q-XLLM (last visited Mar. 1, 2021).

[27] Nichelle Williams, *Vote By Mail Trends and Turnout in Six Election Cycles: 2008-2018*, U.S. ELECTION ASSISTANCE COMM'N (Oct. 22, 2020), https://perma.cc/T28H-6GER.

[28] *See infra* Section I. Vote-by-mail was not only the gold standard for voting in the United States but also across the globe. *See* MANUEL WALLY, INT'L FOUND. FOR ELECTORAL SYS., VOTE BY MAIL: INTERNATIONAL PRACTICE DURING COVID-19 5 (2020), https://perma.cc/7P76-4525.

[29] Elections Project Staff, *Minimizing COVID-19 Health Risks When Voting*, BIPARTISAN POL'Y CTR. (Aug. 11, 2020), https://perma.cc/PQ9G-HPKS.

[30] Drew DeSilver, *Mail-in Voting Became Much More Common in 2020 Primaries as COVID-19 Spread*, PEW RES. CTR.: FACT TANK (Oct. 13, 2020), https://perma.cc/3JZN-9BD8.

[31] Executive Order 2020-688, State of Emergency Relating to Kentucky Elections (Aug. 14, 2020), available at: https://perma.cc/R2UB-KBRY. For news coverage of the order, see

pandemic, any voter seeking to vote absentee, e.g., cast a ballot by mail, needed to satisfy several excuse conditions, for instance absence from the jurisdiction on Election Day or an excused inability to physically make it to the polls.[32] In light of the pandemic, the state made absentee voting available to all registered voters.[33] Some other states even affirmatively mailed ballots to voters,[34] giving individual voters notice that this safer, distanced option for voting was available and encouraging them to take advantage of it. Another safer—and more distinctly American—mode of voting that some jurisdictions introduced during the pandemic was drive-through voting.[35]

Some states also took measures to facilitate and encourage the use of vote-by-mail. One such example is relaxing the witness requirement for mail-in ballots. Some states, for instance Minnesota, had a long-standing requirement that absentee ballots be witnessed.[36] But it made sense to do away with this requirement in a pandemic, when "it is reasonable to conclude" that "requiring voters who live alone to place their lives and health in danger" by finding a witness for their absentee ballots "impermissibly and irrationally denies the fundamental right to vote to those individuals while there is still ongoing community transmission of COVID-19."[37] In order to make absentee voting a viable and safe option for voters, states

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USA Today, Kentucky election board finalizes approval of bipartisan voting plan (Aug. 20, 2020), available at: https://perma.cc/N7PD-KAUZ.

[32] Ky. Rev. Stat. § 117.085.

[33] *Supra* note 31.

[34] Donald J. Trump for President, Inc., v. Way, 492 F.Supp.3d 354, 362 (D.N.J. 2020); Donald J. Trump for President, Inc., v. Cegavske, 488 F.Supp.3d 993, 1002 (D. Nev. 2020).

[35] Hotze v. Hollins, No. 4:20-CV-03709, 2020 WL 6437668, at *3-4 (S.D. Tex. Nov. 2, 2020) (finding drive-through voting permissible during early voting).

[36] *See Vote Early By Mail*, OFF. MINN. SEC'Y ST. STEVE SIMON, https://perma.cc/H297-TXH6 (last visited Mar. 1, 2021) (describing the usual requirement that vote-by-mail ballots be witnessed by "a registered Minnesota voter or a notary."); Andy Monserud, *Minnesota Waives Witness Requirement for November Mail-in Ballots*, COURTHOUSE NEWS SERV. (Aug. 3, 2020), https://perma.cc/X22T-KJ9D (describing the suspension of the witness requirement in the November 2020 General Election). Other states with such a requirement include North Carolina, Moore v. Circosta, No. 5:20-CV-507-D, 2020 WL 5880129, at *1 (E.D.N.C. Oct. 3, 2020) (challenging N.C. Gen. Stat. § 163-231(a) (2019), which requires that a completed absentee ballot be signed by two witnesses or be notarized), and Alabama, People First of Alabama v. Merrill, No. 2:20-CV-00619-AKK, 2020 WL 5814455 at *2, *28 (N.D. Ala. Sept. 30, 2020) (finding that a witness requirement requiring voters to sign an absentee ballot affidavit in the presence of two witnesses, Ala. Code § 17-11-10(b), violated the First Amendment right to vote and the Voting Rights Act as applied during the COVID-19 pandemic).

[37] NAACP Minnesota-Dakotas Area State Conference v. Simon, No. 62-CV-20-3625, at *21 (D. Minn. Aug 3, 2020).

needed to, and sometimes did, relax absentee voting requirements[38] because requiring strict adherence to them presented risk of infection and strained voters' decision to vote absentee.

All of these examples make the simple point that when external conditions, such as a pandemic, produce impediments to voting, election administration must make changes to the way it ordinarily conducts elections. Indeed, denizens of a democracy should be able to take these changes for granted. Certainly, denizens of *other* democracies take them for granted. New Zealand, like the United States, also held its general election during a pandemic.[39] And even though community spread in New Zealand was far less prevalent than in the United States,[40] New Zealand made various significant adjustments to its election administration.[41] The adjustments included making special provisions for vulnerable voters (e.g., those who are "in a rest home," "in hospital," "in a managed isolation or quarantine facility," "in self-isolation," in "prison," or "overseas") to varyingly vote by mail, vote in advance, and even vote by phone.[42] They also included increasing early voting days,[43] adding polling

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[38] *See, e.g.*, Mays v. Thurston, No. 4:20-CV-341 JM, 2020 WL 1531359 (E.D. Ark. Mar. 30, 2020) (concerning Arkansas's extension of time for voters to request an absentee ballot); League of Women Voters of Virginia. v. Virginia State Bd. of Elections, 481 F.Supp.3d 580, 581 (W.D. Va. 2020) (approving a consent decree enjoining the witness signature requirement for at-risk voters unable to safely have a witness present while completing their ballot).

[39] *See* Eleanor Ainge Roy, *New Zealand Election: Voters Head to the Polls*, GUARDIAN (Oct. 16, 2020), https://perma.cc/VQU2-UUXZ. New Zealand held its general election on October 16, 2020.

[40] As of two weeks before the election, New Zealand had gone 102 days with no detected cases of COVID-19 and had only seven active domestic cases. Rebecca Falconer, *Polls Open in New Zealand's "Covid Election,"* AXIOS (Oct. 2, 2020), https://perma.cc/PQ2D-WGXA. By contrast, the 2020 U.S. election was held while the country's infection rate was high, surpassing 100,000 daily cases for the first time on November 4. *See* Jason Silverstein, *U.S. Reported More COVID-19 Cases in November than Most Countries Had All Year*, CBS NEWS (Nov. 30, 2020, 3:26 PM), https://perma.cc/EQY3-CK3A.

[41] The New Zealand Electoral Commission took precautions including social distancing, use of hand sanitizer and single-use pens to mark ballots, extended early voting by two days, and added more voting places, operating nationally as if there were community spread. Falconer, *supra* note 40. While the focus of this Article is not on the public health implications of voting, it is worth noting that New Zealand not only tried to make voting safer for voters, it also conducted contact tracing at polling places in order to detect and prevent any community spread of the virus. *See COVID-19, 2020 General Election, We're Making Voting Places Safer*, ELECTORAL COMM'N, https://web.archive.org/web/20201128163308/https://vote.nz/voting/2020-general-election/covid-19/ (last visited Nov. 28, 2020).

[42] *Covid-19, 2020 General Election*, ELECTORAL COMM'N, https://web.archive.org/web/20201128163308/https://vote.nz/voting/2020-general-election/covid-19/ (last visited Nov. 28, 2020).

[43] Falconer, *supra* note 40.

locations to reduce the number of voters casting ballots at the same time[44]—and offering a surprisingly fragrant hand sanitizer.[45]

A comparative example is instructive because it highlights not only what is done in other countries, but also what is taken for granted there. After all, in a democracy it is reasonable to expect that facilitating and enabling voter participation should occur without fanfare or controversy. But what is true for New Zealand is far from true in the United States. What states elect to do, instead of what voters need, dictates election practices and policies here. Indeed, that has become an accepted feature, not a bug, of our democracy. A back and forth that occurred between Justice Kavanaugh and the Vermont Secretary of State in one of the 2020 shadow docket election cases illuminates just how much we tolerate states underserving their voters.[46] In the part of his concurring opinion describing "our constitutional system of federalism," Justice Kavanaugh noted that while some state legislatures exercised their authority in light of the pandemic to "change[] their election rules for the November 2020 election . . . . [o]ther States such as Vermont, by contrast, have decided not to make changes to their ordinary election rules . . . ."[47]

Justice Kavanaugh turned out to be wrong about Vermont.[48] As a letter from the Vermont Secretary of State to the Court seeking a correction made clear, Vermont made "two significant changes to [its] ordinary election rules in response to the pandemic," including mailing every active registered voter a ballot and a prepaid return envelope, and processing ballots received before Election Day earlier than before.[49] Yet, the true

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[44] *Covid-19, 2020 General Election, We're Making Voting Places Safer*, ELECTORAL COMM'N, https://web.archive.org/web/20201128163308/https://vote.nz/voting/2020-general-election/covid-19/ (last visited Nov. 28, 2020).

[45] Charlotte Graham-McLay, *'Scent of Democracy': Fragrant Hand Sanitiser Ticks Box for New Zealand's Early Voters*, GUARDIAN (Oct. 12, 2020, 3:00 PM), https://perma.cc/F2TQ-S3SJ.

[46] Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 32-33 (2020) (Kavanaugh, J., concurring); *see* Letter from Jim Condos, Vt. Sec'y of State, to Scott S. Harris, Clerk of Court, Supreme Court of the U.S. (Oct. 28, 2020), https://perma.cc/KUB4-RNDK (seeking correction); *Democratic Nat'l Comm.*, 141 S. Ct. at 32 (Oct. 28, 2020, 7:47 PM) (Kavanaugh, J., concurring), https://perma.cc/39GK-YDAV (correcting opinion); Press Release, Jim Condos, Vt. Sec'y of State, Vermont Secretary of State Jim Condos Issues Statement in Response to Correction of Justice Kavanaugh's Incorrect Opinion (Oct. 29, 2020), https://perma.cc/ASW2-MBZW (responding to correction). For a full write-up of the exchange, see Alexa Corse, *Vermont Election Official Asks Supreme Court to Correct Justice Kavanaugh*, WALL ST. J. (Oct. 28, 2020, 8:39 PM), https://perma.cc/ZPF8-CE6H.

[47] *Democratic Nat'l Comm.*, 141 S. Ct. at 32.

[48] *Democratic Nat'l Comm.*, 141 S. Ct. at 32 (Kavanaugh, J., concurring) (Oct. 28, 2020, 7:47 PM), https://perma.cc/39GK-YDAV (correcting opinion).

[49] Letter from Jim Condos, Vt. Sec'y of State, to Scott S. Harris, Clerk of Court, Supreme Court of the U.S. (Oct. 28, 2020), https://perma.cc/KUB4-RNDK.

embarrassment of the exchange was not Justice Kavanaugh's mistake,[50] but that a state doing nothing at all to ensure that voters can vote during a pandemic should be cited as an unexceptional fact.

To be sure, Justice Kavanaugh's position in the case is not law. But it demonstrates that the issue of whether, how much, and under what conditions states have to facilitate the exercise of our fundamental right to vote is hotly contested. Indeed, many states that adopted some change to how they administer elections during the pandemic were sued for doing so.[51] And almost every kind of policy change described previously,[52] and more,[53] was the target of litigation. In addition to obstructionist litigation to prevent the implementation of changes, voting rights groups, partisan organizations, and private citizens also brought reform litigation to compel jurisdictions to relieve onerous burdens on the right to vote in light of the pandemic.[54] But that litigation, especially those brought by voting rights lawyers, can be fairly described as modest in scope and in remedy sought.

B. Election Litigation During the Pandemic

Specifically, two sets of lawsuits are worth highlighting. The first set sought to protect individuals rendered vulnerable in the voting process by the pandemic. The flagship case in this set is *People First of Alabama v. Merrill*, challenging, among other things, Alabama's witness requirement for absentee ballots (a notary or two witnesses) and the state's ban on

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[50] After all, the drafting period for the Court's opinions for emergency election litigation is extremely truncated: the Court's opinion was issued ten days after both parties' briefs were filed. *Democratic National Committee v. Wisconsin State Legislature*, SCOTUSBLOG, https://perma.cc/MDD8-VNWT (last visited Mar. 1, 2021) (noting that the response to the application to vacate stay was filed on October 16, 2020, and the Court's opinion was issued on October 26, 2020).

[51] *See, e.g.*, cases cited *supra* notes 31, 35, 37.

[52] In addition to the cases cited in note 51, *see also* Arizona *ex rel.* Brnovich v. Fontes, No. CV2020-003477 (Ariz. Super. Ct., Maricopa Cnty. Mar. 13, 2020) (prohibiting the mailing of early ballots to every registered voter in Maricopa County, Arizona); Ariz. Pub. Integrity All. v. Fontes, 475 P.3d 303, 305-06 (Ariz. 2020) (challenging the new overvote instruction for mail-in ballots directing voters to draw a line through the incorrect candidate's name and oval and fill in the oval next to the corrected selection).

[53] *See, e.g.*, Complaint at 1-2, Ohio *ex rel.* Speweik v. Wood Cnty. Bd. of Elections, 141 N.E.3d 240 (Ohio 2020) (challenging Ohio's change of primary date due to the COVID-19 pandemic in the first month of the pandemic).

[54] In addition to those described *infra*, *see, e.g.*, Thomas v. Andino, No. 3:20-CV-01552-JMC, No. 3:20-CV-01730-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020) (challenging witness requirement); Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278 (N.D. Ga. 2020) (challenging requirement to buy postage for mail-in ballot); Missouri State Conference of the NAACP v. State, No. 20AC-CC00169 (Mo. Cir. Ct., Cole Cnty., May 15, 2020) (seeking no-excuse absentee voting in light of the COVID-19 pandemic).

curbside voting.[55] Curbside voting, also synonymous with drive-through voting, allows voters to cast their ballot in person but outside the polling location without leaving the car (and hence remaining in the safety of their bubble).[56] Plaintiffs contended, with evidence that the court credited, that the challenged provisions imposed burdens on the ability of certain high-risk groups, for instance those over 65, those with disabilities, and those with underlying medical conditions, to cast their votes safely and confidently.[57] While these provisions were preliminarily enjoined by the district court,[58] they were in effect during the July 14 runoff election[59] and the general election.[60]

That *Merrill* did not prevail to secure necessary relief for affected voters is dispiriting. The case was brought on behalf of vulnerable voters who needed judicial relief in order to exercise their right to vote.[61] Mr. Howard Porter Jr., one of the individual plaintiffs in the case, is at significantly elevated risk of complications or death from COVID-19: he is Black man in his seventies who has asthma and Parkinson's disease, which makes it difficult for him to walk.[62] He lost both his sister and uncle to COVID-19 and was justifiably "very fearful about becoming infected."[63] Mr. Porter's "earnestly expressed" views encapsulate what was at stake in the lawsuit well: "[S]o many of my [ancestors] even died to vote. And while I don't mind dying to vote, I think we're past that—we're past that time."[64]

Alabama's witness requirement is especially onerous and pandemic-inappropriate, requiring either a notary or *two* witnesses.[65] By its terms, it required isolated individuals and couples (who do not happen to be notaries) to come into contact with at least one individual outside of their household.[66] Moreover, the relief issued by the district court in the case was ultimately very limited. The preliminary injunction only waived the witness requirement for:

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[55] People First of Alabama v. Merrill, 467 F. Supp. 3d 1179, 1192 (N.D. Ala. 2020).

[56] *See id.* at 1192.

[57] *See id.* at 1207-08, 1213-14.

[58] In fact, the law was enjoined twice by the district court. People First of Alabama v. Merrill, 491 F. Supp. 3d 1076 (N.D. Ala. 2020) (for general election); People First of Alabama, 467 F. Supp. 3d 1179 (for run-off election).

[59] Merrill v. People First of Alabama, 141 S. Ct. 190 (2020).

[60] Merrill v. People First of Alabama, 141 S. Ct. 25 (2020).

[61] *See* People First of Alabama, 491 F. Supp. 3d at 1109-15 (describing individuals especially vulnerable to COVID-19).

[62] *Id.* at 1109.

[63] *Id.*

[64] *Id.* at 1092.

[65] *Id.* at 1091.

[66] *See id.* at 1118, 1123, 1125.

> [A]bsentee voters who determine it is impossible or unreasonable to safely satisfy that requirement in light of the COVID-19 pandemic, and who provide a written statement signed by the voter under penalty of perjury that he or she suffers from an underlying medical condition that the Centers for Disease Control has determined places individuals at a substantially higher risk of developing severe cases or dying of COVID-19 . . . .[67]

As for curbside voting, the injunction merely precluded the state from maintaining a ban on the practice. It did not affirmatively require any election officials to offer curbside voting opportunities;[68] it simply permitted jurisdictions to offer them if desired.[69]

The second (and voluminous) set of lawsuits concerned the deadline by which absentee ballots must be returned. That issue became a flashpoint for election controversies during the 2020 Election Season.[70] States that extended the deadline got sued (e.g., Pennsylvania and North Carolina),[71] and plaintiffs sued states for maintaining stringent deadlines that required ballots to be received by Election Day (e.g., Wisconsin).[72] In light of concerns over the alacrity and reliability of the Postal Service,[73] a

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[67] People First of Alabama v. Merrill, 467 F.Supp.3d 1179, 1226-27 (N.D. Ala. 2020).

[68] *Id*. at 1227.

[69] *Id.* at 1192.

[70] Of the election law controversies that made it onto the Supreme Court's shadow docket, a majority concerned extensions of states' absentee ballot receipt deadlines. *See* Edward Foley, *Symposium: The Particular Perils of Emergency Election Cases*, SCOTUSBLOG (Oct. 23, 2020, 5:28 PM), https://perma.cc/7FX5-DKKX (describing shadow docket cases, most of which are the absentee ballot receipt deadline cases cited *infra*).

[71] *See, e.g.*, Scarnati v. Boockvar, 141 S. Ct. 644 (2020) (mem.) (denying application to stay Pennsylvania Supreme Court injunction allowing ballots received up to the Friday after Election Day to be counted if postmarked by Nov. 3); Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1 (2020); Moore v. Circosta, 141 S. Ct. 46, 47 (2020) (Gorsuch, J., dissenting) (mem.) (noting that the North Carolina challenge concerned state actors other than the legislature—including the State Board of Elections—issuing "their own addition and supplemental set of amendments to state election laws," including extending "the absentee ballot receipt deadline by six days . . . ."). While I primarily focus on the lawsuits concerning Wisconsin's and Pennsylvania's deadlines, there were lawsuits concerning deadlines from other states as well. *See, e.g.*, Carson v. Simon, 494 F. Supp. 3d 589 (D. Minn. 2020), *reversed and remanded*, 978 F.3d 1051 (8th Cir. 2020) (granting plaintiff's motion for preliminary injunction and blocking Minnesota's absentee ballot receipt deadline extension).

[72] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (seeking relief from, among other things, Wisconsin's extended absentee ballot receipt deadline during the primary election); *see also* Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28 (2020) (mem.) (rejecting request to strike down Seventh Circuit's stay of an injunction extending November election mail-in ballot deadline).

[73] The problems with USPS for the delivery of absentee ballots were so grave that the postal service itself became the subject of voting rights litigation. *See* Jones v. U. S. Postal Serv., 488 F. Supp. 3d 103 (S.D.N.Y. 2020). These issues were also fleshed out in the absentee

modified deadline requiring that ballots be postmarked by Election Day and received up to a week subsequent would ensure that voters were not penalized for delays beyond their control.

Ballot receipt deadlines were extensively litigated in the 2020 Election season and responsible for many heated opinions and statements from the Supreme Court.[74] And they gave rise to the Independent State Legislature Theory, a novel theory that I discuss further in the next Section.[75] But to follow up on my observation about the modesty of what plaintiffs sought in *Merrill*, the same is true, in some limited respects, about what was at issue in the ballot receipt deadline cases. To be sure, the stakes of whether those ballots would be counted were high.[76] But whether plaintiffs objecting to relaxed deadlines, or those seeking them, prevailed in each case would result in very limited changes to election administration. The ballot receipt deadline does not interfere with the preparation of elections, only with which ballots are counted.[77] And it does not require that election administrators adopt any new procedures since ballots are processed and counted exactly in the same way. While accepting more ballots no doubt increases the volume of work on election workers, the number of additional ballots is a rounding error compared to the number of ballots processed for the entire election.[78]

Looking back on what was not successfully achieved through voting rights lawyering highlights just how formidable the barriers are. That lim-

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ballot receipt deadline cases. *See, e.g.*, Donald J. Trump for President, Inc., v. Way, 492 F. Supp. 3d 354, 360-61(D.N.J. 2020) (describing problems the State experienced during the July 2020 Primary Election arising from the USPS's postmarking practices); Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 44-45 (2020) (Kagan, J., dissenting) (mem.) (noting Postal Service delays and the associated effects, including increased risk that voters will be unable to return mail-in ballots by Election Day).

[74] *See* cases cited *supra* notes 71 & 72.

[75] *See infra* Section II.

[76] The mobilization of both major political parties in the litigation over whether the deadline can and should be extended is evident from the case names: the political parties served as the parties to litigation, e.g., "Republican Nat'l Comm. v. Democratic Nat'l Comm.," and "Republican Nat'l Comm. v. Wisconsin State Legislature."

[77] Typically, administrative burdens are heavy on election administrators during the "hectic period before elections," and, of course, on Election Day itself. Barry C. Burden, et al., *The Effect of Administrative Burden on Bureaucratic Perception of Policies: Evidence from Election Administration*, 72 PUB. ADMIN. REV. 741, 746-48 (2012).

[78] As an example, in Pennsylvania, only 10,000 mail ballots arrived during a three-day post-Election Day grace period. Jonathan Lai, *Only 10,000 Pa. Mail Ballots Arrived After Election Day—Far Too Few to Change the Result If Thrown Out*, PHILA. INQUIRER (Nov. 11, 2020), https://perma.cc/VG6Y-C6EJ. Those ballots constituted around 0.14% of the total ballots cast in the state. *See Pennsylvania's Election Stats*, PA. DEP'T ST., https://perma.cc/N8B2-9SNV (last visited May 21, 2020) (noting that almost seven million votes were cast and counted in the 2020 Election in Pennsylvania).

ited carve-outs for vulnerable voters could not be secured through litigation in a pandemic shows just how hard it is to represent vulnerable clients in voting rights cases under noncrisis circumstances. Taking stock of what was litigated and controversial before the Supreme Court in the last election shines a light on the role that law and doctrine has played in forming those barriers. That precious judicial resources were spent not on clarifying the responsibility that states have in ensuring that everyone who has the right to vote can exercise it, but on deciding whether validly cast ballots arriving behind schedule should be counted, reveals some unfortunate truths about the state of our laws governing voting rights.

II. VOTING RIGHTS LAWYERING IN A STATE OF CRISIS

A. Notorious & Novel Legal Devices

For a while now, our laws have been getting in the way of voting rights lawyering. The *Purcell* principle,[79] named for the case in which it was first briefly articulated, *Purcell v. Gonzalez*, has come to stand for an increasingly categorical rule that election laws cannot be changed close to an election,[80] thus imposing severe time constraints on when voting rights lawyering can occur.[81] And it is possible that the Independent State Legislature Theory, making its first appearance in the pandemic-era ballot receipt deadline cases, will attract even more criticism than the *Purcell* principle has thus far accumulated. [82]

Even before the pandemic, the *Purcell* principle had become widely recognized as a culprit standing in the way of voting rights lawyering.[83] The principle derived from the case—that election laws should be changed with caution for fear of causing "voter confusion and consequent

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[79] *See* Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring) (mem.).

[80] *See id.*

[81] *See id.*

[82] *See* Democratic Nat'l Comm., 141 S. Ct. at 34 n.1 (2020) (Kavanaugh, J., concurring); *see also* Moore v. Circosta, 141 S. Ct. 46, 47-48 (2020) (Gorsuch, J., dissenting) (mem.).

[83] *See, e.g.*, Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427 (2016) (urging the Court to limit its use of the *Purcell* principle when asked to intervene close to an election and to view it as only relevant to one of the various factors considered (the public interest factor) rather than a separate rule); Richard L. Hasen, *You Don't Have to Be a Structuralist to Hate the Supreme Court's Dignitary Harm Election Law Cases*, 64 U. MIAMI L. REV. 465 (2010) (arguing that the *Purcell* Court was more concerned about the structure and functioning of the electoral system than about voters' dignitary rights).

incentive to remain away from the polls"[84]—has been applied to functionally preclude the issuance of relief in election law cases close to an election,[85] except when such relief is sought by state defendants.

A notable instance of the inconsistent application of *Purcell* occurred in the course of a challenge by Native voters to North Dakota's voter identification law and was highlighted by Justice Ginsburg's dissent from the decision to allow the law to go into effect for the 2018 General Election.[86] As a result of a district court injunction, the law was not in effect "during the primary election" and the "Secretary of State's website announced for months the ID requirements as they existed under that injunction."[87] The Eight Circuit stayed that injunction, giving voters "a month to 'adapt' to the new regime."[88] The Supreme Court, in siding with the Eight Circuit, produced the "all too real risk of grand-scale voter confusion," as voters had reason to expect based on recent voting experiences that the law would not be in effect.[89]

Even if consistently applied, *Purcell* is supported by the untested assumption that implementing election laws on the books always minimizes voter confusion. There are reasons to believe that the consequences of voter confusion flowing from changes that make voting harder and easier are not symmetrical. Those resulting from making voting easier do not produce disenfranchised voters; those resulting from making voting harder do. Changes to election laws making it easier for voters to vote may enfranchise certain individuals who were not previously able to vote. And any confused voters (believing voting to be harder than it is) are no more harmed than under the status quo because they would not have voted anyway. But when changes make it harder for voters to vote, confused voters (believing voting to be easier than it is) may show up to vote and yet be prevented from doing so because they cannot meet more stringent requirements than anticipated. *When* changes to election laws are sought is no more relevant to whether voters are confused than *how* those laws have changed.

The pandemic not only strengthened the arguments advanced by *Purcell* critics, but also garnered new *Purcell* critics. Justice Kagan's dissenting opinion in *DNC v. Wisconsin State Legislature*, concerning Wisconsin's absentee ballot receipt deadline, made her the most prominent of

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[84] Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) (per curiam).

[85] *See supra* note 83.

[86] *See* Brakebill v. Jaeger, 139 S. Ct. 10 at 10 (2018) (Ginsburg, J., dissenting).

[87] *Id.*

[88] *Id.*

[89] *Id.*

the new *Purcell* critics.[90] One of the reasons the Court invoked for declining to modify Wisconsin's absentee ballot receipt deadline was adherence to the *Purcell* principle: the change would occur six weeks before Election Day.[91] But as Justice Kagan noted, the *Purcell* principle should stand for no more than a "caution" against changes close to an election, not a "rule" that prevents any changes to election laws within a certain time period before the Election Day.[92]

Purcell evinces not merely a status quo bias towards existing election laws but a legitimation of them. And a pandemic offers a forceful refutation of the advisability of adherence to status quo election laws. While there may be pragmatic reasons to follow the election laws we have always had, there is nothing inherently righteous about those laws. Indeed, as discussed prior, status quo pre-pandemic election laws may be inherently flawed when applied to pandemic conditions.[93] Any preference for status quo election laws must not rise to unconditional fealty. And if the application of the *Purcell* principle requires the maintenance of status quo election laws even under the most extreme conditions, that clearly suggests that the principle is (over)ripe for reconsideration or recalibration.

If *Purcell* is the recurring doctrinal villain, the Independent State Legislature Theory is the one that just arrived from out of town—and is already much maligned by leading scholars.[94] It first appeared in a footnote by Justice Kavanaugh in *DNC v. Wisconsin State Legislature*[95]—and further support for it appeared in a subsequent dissenting opinion in *Moore v. Circosta* by Justice Gorsuch (declining to stay the extension of the North Carolina absentee ballot receipt deadline)[96] and in a statement

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[90] *See* Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 40-46 (2020) (Kagan, J., dissenting) (mem.).

[91] Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 641-42 (7th Cir. 2020) (per curiam).

[92] Democratic Nat'l Comm., 141 S. Ct. at 42 (Kagan, J., dissenting) (quoting *Bostelmann*, 977 F.3d at 644 (Rovner, J., dissenting)).

[93] *See supra* Section I.

[94] Ned Foley, *#2DaysOut: How to Draw the Line on a State Legislature's Electoral Power?*, ELECTION L. BLOG (Nov. 1, 2020, 10:14 AM), https://perma.cc/N36A-SGCG; Richard Pildes, *The WI District Court's Important Decision on the Independent State Legislature Issue*, ELECTION L. BLOG (Dec. 13, 2020, 10:16 AM), https://perma.cc/JSJ9-74KW; Nick Stephanopoulos, *#2DaysOut: The Textual Problem with the Presidential Version of the Independent State Legislature Argument*, ELECTION L. BLOG (Nov. 1, 2020, 10:38 AM), https://perma.cc/4BES-X85A; Vikram D. Amar, *Federal Court Review of State Court Interpretations of State Laws that Regulate Federal Elections: Debunking the "Independent State Legislature" Notion Once and for All, and Keeping Federal Judges to Their Important but Limited Lanes* (Univ. of Ill. Coll. of Law Legal Stud. Research Paper, Working Paper No. 21-02, 2020), https://perma.cc/JQJ2-2TTE.

[95] Democratic Nat'l Comm., 141 S. Ct. at 34 n.1 (Kavanaugh, J., concurring).

[96] *See* Moore v. Circosta, 141 S. Ct. 46, 47-48 (2020) (Gorsuch, J., dissenting) (mem.).

in *Republican Party of Pennsylvania v. Boockvar* by Justice Alito (declining to stay the extension of the Pennsylvania absentee ballot receipt deadline).[97]

As thus far articulated, the Independent State Legislature Theory draws from the text of Article II, Section 1, Clause 2 of the Constitution, which provides that each state shall appoint its presidential electors "in such Manner as the Legislature thereof may direct."[98] Indeed, the theory takes the quoted language literally: it interprets the reference to "the Legislature" as endowing special authority to the state legislature over other branches of government in providing for rules for Presidential elections. Thus, a state court "depart[ing] from the state election code enacted by the state legislature . . . presents a federal constitutional question."[99]

The stakes of recognizing the Independent State Legislature Theory as doctrine are evident in the Pennsylvania absentee ballot receipt deadline litigation.[100] In the wake of the pandemic, the state legislature passed several laws to facilitate voting, notably by introducing no-excuse absentee voting.[101] Reform litigation was brought in state court to ensure that the rules governing no-excuse absentee voting did not disenfranchise and disadvantage voters.[102] The litigation sought to relax rules governing, among other things, the deadline by which mail ballots must be returned.[103] Eventually, the Pennsylvania Supreme Court agreed that some of the challenged rules, including the absentee ballot receipt deadline, must be adjusted in light of the pandemic to fully give effect to the state constitution's protections for the right to vote.[104]

The Pennsylvania litigation stands out in this Article compared to the others described because it succeeded, at least initially and partially, before the state supreme court. Plaintiffs were able to secure remedies that enhanced voting rights beyond what state election law provided for.[105] That the case was brought in state court, as opposed to federal court, was no coincidence. Waning protections for the right to vote in federal court[106] have spurred voting rights lawyering in state courts. The partisan gerrymandering litigation from the last redistricting cycle demonstrates this

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[97] *See* Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1, 1-2 (2020) (Alito, J., concurring) (mem.).

[98] U.S. CONST. art. II, § 1, cl. 2.

[99] Democratic Nat'l Comm., 141 S. Ct. at 34 n.1 (citing Bush v. Gore, 531 U.S. 98, 113, 120 (2000) (Rehnquist, C.J., concurring)).

[100] *See* Boockvar, 141 S. Ct at 1-2 (describing the issue as one of national importance).

[101] *Id.* at 1.

[102] *See* Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 352-53 (Pa. 2020).

[103] *Id.*

[104] *Id.* at 371-72.

[105] *Id.* at 361.

[106] *See infra* Section II(B).

dynamic well: while maps in Wisconsin, North Carolina, Ohio, and Michigan survived legal challenges in federal court,[107] they did not survive challenges in state courts in Pennsylvania[108] and North Carolina.[109]

The Pennsylvania litigation made clear that state courts are not only venues for cutting-edge reform litigation (like they were for partisan gerrymandering litigation) but also possibly the only venues where remedies to voting rights injuries can be found. And what happened after the Pennsylvania Supreme Court's decision also made clear the stakes of recognizing the Independent State Legislature Theory as doctrine: voting rights victories secured in state courts can be taken away in federal courts. The Republican Party of Pennsylvania sued in federal court to reverse the decision of the Pennsylvania Supreme Court.[110] And ultimately, while the Supreme Court declined to overturn the Pennsylvania Supreme Court's decision,[111] Justice Alito issued a statement pursuant to the case (joined by Justices Thomas and Gorsuch) that "there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution,"[112] presumably under some version of the Independent State Legislature Theory. Taken to its logical conclusion, the Independent State Legislature Theory would require the Supreme Court to override a state supreme court's decision interpreting its state constitution to give full effect to the voice of voters who cast valid ballots in an election (and whose ballots may not have arrived by Election Day due to no fault of their own).

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[107] The Supreme Court's decision in Rucho v. Common Cause, 139 S. Ct. 2484 (2019), where the Court found partisan gerrymandering claims non-justiciable under the federal constitution, doomed the challenge to North Carolina's maps, as well as to those of Wisconsin, Whitford v. Vos, No. 19-2066, 2019 WL 4571109 (7th Cir. July 11, 2019), Ohio, Householder v. Ohio A. Philip Randolph Inst., 140 S. Ct. 101 (2019), and Michigan, Chatfield v. League of Women Voters, 140 S. Ct. 429 (2019).

[108] League of Women Voters v. Commonwealth, 178 A.3d 737, 824-25 (2018) (finding partisan gerrymandering unconstitutional under the Pennsylvania Constitution).

[109] While the federal challenge to North Carolina's maps failed because the Supreme Court refused to recognize federal constitutional claims against partisan gerrymandering, North Carolina state courts recognize partisan gerrymandering claims under the North Carolina state constitution. *See* Common Cause v. Lewis, No. 18-CVS-014001, 2019 WL 4569584 (N.C. Super. Ct., Wake Cnty. Sept. 3, 2019).

[110] First, various Republican officials and party affiliates sought a stay of the Pennsylvania Supreme Court's order from the U.S. Supreme Court. Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari, Scarnati v. Boockvar, 141 S. Ct. 644 (2020) (No. 20A53). They also subsequently petitioned the Supreme Court to hear the case on the merits. Petition for a Writ of Certiorari, Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 1 (2020) (No. 20-542).

[111] Republican Party of Pennsylvania, 141 S. Ct. at 1.

[112] *Id.* at 2.

B. Neglected Constitutional Protections

I share the concern over and criticisms of both the *Purcell* principle and the Independent State Legislature Theory. Reform to facilitate voting rights lawyering will have to seriously contend with them. But I wish to devote the rest of this piece to outlining the longstanding misapplication of the *Anderson/Burdick* standard governing the right to vote under the federal constitution.[113] After all, the federal constitutional standard sets the floor for protections for the right to vote beyond what state laws (statutory and constitutional) and federal statutory laws provide. For voting rights lawyers, it is also the last line of defense. And yet, the *Anderson/Burdick* standard has done little to protect the right to vote.

This is the case not because the standard is mis-specified, but because it is misapplied. The standard weighs two interests: the character and magnitude of burdens the challenged law imposes on voters against the state's interests in maintaining the challenged law.[114] As a resting principle for a constitutional democracy that considers the right to vote to be fundamental,[115] *Anderson/Burdick* is a sound one. It acknowledges that the political process needs regulations. For instance, we have verification methods to ensure that voters are in fact eligible to vote, do not vote more than once,[116] and can cast their ballots freely and privately.[117] It allows states to maintain election laws needed to regulate the political process, but not unjustifiably burdensome ones. And it is factually curious about burdens that election laws impose on voters, as well as about the state's reasons for those election laws, too. The doctrine does not require that voting be entirely costless or maximally available to all eligible voters. It simply requires that election administration be backed up by reason.

But even if the theory behind the standard is sound, the application of the standard has been deeply flawed. This is because the evidentiary demands on each element of the balancing test are not similarly rigorous. While burdens on voters must be proven with substantial empirical evidence, the state's interest in maintaining an election law can be supported with little more than a citation. Ever since *Crawford v. Marion County*,

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[113] *See* cases cited *supra* note 15 and accompanying text.

[114] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

[115] *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[116] In every state except North Dakota, an eligible voter must register to vote before she can vote. *Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Oct. 5, 2020), https://perma.cc/SF6T-DZH3.

[117] Laws that require privacy sleeves for ballots serve this interest. *See VOPP: Table 13: States That Are Required to Provide Secrecy Sleeves for Absentee/Mail Ballots*, NAT'L CONF. ST. LEGISLATURES (May 5, 2020), https://perma.cc/8AXE-MCNU.

which upheld an Indiana voter ID law,[118] states have to do little more to shore up the constitutionality of their election laws than to identify a state interest that the election laws satisfy and cite a Supreme Court opinion that recognizes that interest to be a valid one.

To be sure, evidence of burdens imposed on voters in *Crawford* was wanting.[119] But evidence of the state's interest in maintaining the voter ID law at issue in *Crawford*—e.g., preventing in-person voter fraud and maintaining public confidence—was also wanting.[120] Yet, since plaintiffs in the case launched a facial challenge against the law, they bore a heavy burden of persuasion and failed to meet it.[121] Regardless of the procedural posture of *Crawford* itself, the decision has produced a one-sided evidentiary standard for the balancing test. In the subsequent challenges to voter ID laws, states have defended their laws simply by citing the same interests the Court recognized in *Crawford*.[122] Thus, while on paper *Anderson/Burdick* sets out an even-handed evaluation of how the interest of

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[118] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008). For a full critique of how *Crawford* watered down meaningful judicial scrutiny of the state justification prong of the *Anderson/Burdick* analysis, see Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139, 146-48 (2018).

[119] Crawford, 553 U.S. at 200 (noting that record evidence "does not provide us with the number of registered voters without photo identification," nor "any concrete evidence of the burden imposed on voters who currently lack photo identification," and that there was "virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed").

[120] *Id.* at 191-97 (relying on little more than assertions of state interests).

[121] *Id.* at 202.

[122] *See, e.g.*, ACLU of New Mexico v. Santillanes, 546 F.3d 1313, 1323 (10th Cir. 2008) (noting that because in *Crawford*, the Supreme Court "did not require any showing from Indiana regarding past instances of fraud," the state's invocation of the same justifications was "sufficient."); Frank v. Walker, 768 F.3d 744, 749-51 (7th Cir. 2014) (reversing district court decision striking down Wisconsin's voter ID law and explicitly identifying the state's interest in maintaining confidence in its elections as a "legislative fact" that must simply be accepted as true); Ohio Democratic Party v. Husted, 834 F.3d 620, 632 (6th Cir. 2016) (stating that the sufficiency of the state's justification is a "legislative fact"); Lee v. Virginia State Bd. of Elections, 843 F.3d 592, 606-07 (4th Cir. 2016) (concluding state justification analysis after noting simply that the justifications Virginia advanced to support its voter ID law were "the same as those advanced by Indiana" in *Crawford*); Richardson v. Texas Sec'y of State, 978 F.3d 220, 240 (5th Cir. 2020) (explicitly treating as precedential *Crawford*'s conclusion that "there is no question about the legitimacy or importance of the State's interest" in preventing voter fraud despite the fact that "the record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history") (citing Crawford, 553 U.S. at 194); Greater Birmingham Ministries v. Sec'y of State for Alabama, 966 F.3d 1202, 1223-24 (11th Cir. 2020), *vacated*, 992 F.3d 1299 (11th Cir. 2021) (determining that because the "state interests espoused by Indiana in defending its voter ID law in *Crawford* . . . are the same ones advanced as justification for the Alabama photo voter ID law, . . . [i]t follows that the burden of presenting a photo ID in order to vote 'is justified by relevant and legitimate state interests 'sufficiently weighty to justify'' the burden on Alabama voters") (quoting Crawford, 553 U.S. at 191-97 and Norman v. Reed, 502 U.S. 279, 288-289 (1992)).

states and voters stack up against each other, in reality it gives states a significant leg up.

The misapplication of *Anderson/Burdick* has doomed voting rights reform litigation. One of the virtues of *Anderson/Burdick* is that it is self-updating: election laws that impose burdens on voting must be supported by a proper rationale. Circumstances can make burdens more severe; societal and technological change can erode prior justifications for election laws. By drastically altering the macroenvironment for voting, the pandemic made the first point crystal clear. Pandemic-necessitated practices like social distancing and shelter-in-place made voting in person unprecedentedly burdensome. And if states had not affirmatively made other modes of voting more accessible to voters, *Anderson/Burdick* should provide a viable claim. Yet, while there were many lawsuits seeking various accommodations in light of the COVID-19 pandemic bringing *Anderson/Burdick* claims,[123] almost none prevailed.[124] Even the Wisconsin lawsuits pursuing *Anderson/Burdick* claims and seeking relief that imposes little burden on election administration—the extension of absentee ballot receipt deadlines—were clear losers before the Supreme Court.[125]

CONCLUSION

The inability of voting rights lawyering, despite persistent and back-breaking efforts, to secure limited relief for vulnerable individuals during a pandemic is an especially grievous consequence of our eroding set of legal protections for the right to vote. We must not only closely reexamine doctrines and theories that rubber stamp states' electoral regimes, but also recommit to more robust legal protections for the right to vote. I join many others in suggesting the *Anderson/Burdick* standard as a place to start.[126] What is heartening is that the standard is itself sound. It must simply be

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[123] *See, e.g.*, Thomas v. Andino, No. 3:20-CV-01552-JMC, No. 3:20-CV-01730-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020); Black Voters Matter Fund v. Raffensperger, 478 F.Supp.3d 1278 (N.D. Ga. 2020); Third Amended Complaint at 58, Nielsen v. DeSantis, 469 F.Supp.3d 1261 (N.D. Fla. 2020) (4:20CV236-RH-MJF); Complaint at 14, Mays v. Thurston, No. 4:20-CV-341 JM, 2020 WL 1531359 (E.D. Ark. Mar. 26, 2020); Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, Request for Oral Argument at 10, Voto Latino Found. v. Hobbs, No. CV-19-05685-PHX-DWL, 2020 WL 1236352 (D. Ariz. Feb. 25, 2020); Paher v. Cegavske, 457 F.Supp.3d 919, 927-29 (D. Nev. Apr. 30, 2020).

[124] Few plaintiffs in the cases cited *supra* note 123 prevailed in court. Success tended to be attained through settlement. *See, e.g.*, Settlement Agreement, Voto Latino Found. v. Hobbs, No. 2:19-CV-05685-DWL, 2020 WL 1236352 (D. Ariz. June 18, 2020); League of Women Voters of Virginia. v. Virginia State Bd. of Elections, 458 F. Supp. 3d 442 (W.D. Va. 2020).

[125] *See* cases cited *supra* notes 72, 91 and accompanying text.

[126] *See, e.g.*, Hasen, *supra* note 24; Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. (forthcoming).

applied rigorously to what is on both sides of the balancing test. The pandemic taught us, in a painful way, how important it is to take seriously the burdens that circumstances impose on voters and require that our election laws be backed up by reason.