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STANDARDIZING STATE VOTE-BY-MAIL DEADLINES IN FEDERAL ELECTIONS

Jason Nagel†

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† J.D. Candidate, Benjamin N. Cardozo School of Law. This Note is dedicated to Americans who participate on the fringe of our fragile democracy and find themselves in the crossfire of partisan election litigation. The author would like to thank everyone who played a role in this Note's publication. Of mention, Professor David Rudenstine and *Cardozo Law Review* editors Trena Riley, Kurt Stumpo, and Bryan Olert played critical roles in the organization and presentation of ideas discussed here throughout the past sixteen months. Finally, a special thank you to loved ones for their steadfast support during the drafting and editing process of this Note. Without them, nothing would be possible.

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INTRODUCTION

Early on November 4, 2020, former President Donald Trump falsely claimed that he had won the 2020 presidential election.[1] Of course, he had lost, and the election ended up not being particularly close by his own standards.[2] Despite a prolonged vote counting process which fueled conspiratorial cries of a stolen election amongst many Republicans,[3] the

1 Reality Check Team, *US Election 2020: Fact-Checking Trump's Speech on Election Night*, BBC NEWS (Nov. 4, 2020), https://www.bbc.com/news/election-us-2020-54811406 [https://perma.cc/WK5E-Y69Q].

2 *See* Katelyn Newman, *Trump Tweets Thanks to 'Deplorables,'* U.S. NEWS & WORLD REP. (Nov. 8, 2017), https://www.usnews.com/news/politics/articles/2017-11-08/trump-tweets-thanks-to-deplorables-on-election-day-anniversary [https://perma.cc/58MB-WG540]; *Elections Overview*, PBS NEWSHOUR, https://www.pbs.org/newshour/elections-2020/results [https://perma.cc/DUT8-3PMA].

3 Fredreka Schouten & Jeremy Herb, *Here's Why the Vote Count Is Still Going in Key States*, CNN (Nov. 6, 2020), https://www.cnn.com/2020/11/05/politics/vote-count-key-states/index.html [https://perma.cc/LD6J-MK8M] ("Counts were delayed by a record flood of mail-in ballots."); Jan Zilinsky, Jonathan Nagler & Joshua Tucker, *Which Republicans Are Most Likely to Think the Election Was Stolen? Those Who Dislike Democrats and Don't Mind White Nationalists.*, WASH.

United States' decentralized election system conducted a free, fair, and highly secure election.[4] Yet, even under these democratically favorable conditions, the presidential election could have been much closer and its outcome actually uncertain, as in 2000.[5] Specifically, the presidential election could have plausibly come down to hundreds of votes in two states where litigation to determine absentee ballot postmark and receipt deadlines remained in flux.[6]

Prior to the outbreak of the COVID-19 pandemic,[7] federal elections in the United States were already unnecessarily complicated.[8] In the run-up to the general election in November, dozens of states confronted the challenge of how to effectively run primaries while providing necessary additional safety protocols during a pandemic.[9] After election officials struggled to ensure a smooth voting process in states such as Georgia and Wisconsin in the pandemic's earlier days,[10] many jurisdictions rushed to

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POST (Jan. 19, 2021, 5:07 PM), https://www.washingtonpost.com/politics/2021/01/19/which-republicans-think-election-was-stolen-those-who-hate-democrats-dont-mind-white-nationalists [https://perma.cc/52DN-V5N5].

4 Press Release, Cybersecurity & Infrastructure Security Agency, Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election [https://perma.cc/X3X7-4JUJ].

5 Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 339 (2001) (noting that the election in 2000 ended in a statistical tie).

6 For the purposes of this Note, "voting by mail" and "absentee balloting" will be used interchangeably. While semantically there may be slight differences surrounding whether a voter requested their ballot and whether an excuse is necessary, the two terms describe the same general process: voting using a ballot sent to a registered voter's mailing address rather than a vote being cast in person at a polling place or local official's office. *See* Dylan Matthews, *Trump Insists Absentee Ballots Are Fair but Mail Voting Is Corrupt. That's Nonsense.*, VOX MEDIA (Sept. 14, 2020, 11:06 AM), https://www.vox.com/policy-and-politics/2020/8/18/21373478/absentee-ballot-vote-by-mail-voting [https://perma.cc/H57N-3ZT8].

7 For purposes of referring to COVID-19, the pandemic began in the United States in early 2020 and has continued through the time of this Note's publication. *See* Kathy Katella, *Our Pandemic Year—A COVID-19 Timeline*, YALE MED. (Mar. 9, 2021), https://www.yalemedicine.org/news/covid-timeline [https://perma.cc/3MAG-CJZR].

8 Tiana Epps-Johnson, *Why Is Voting in the US So Difficult?*, TED CONFS. (Nov. 20, 2018), https://ideas.ted.com/why-is-voting-in-the-us-so-difficult [https://perma.cc/RE8P-YJX7] (noting that even the most determined voters encounter barriers, like outdated technology systems, when voting).

9 Nathaniel Rakich, *We've Had 56 Statewide Elections During the Pandemic. Here's What We Learned from Them.*, FIVETHIRTYEIGHT (Oct. 1, 2020, 6:00 AM), https://fivethirtyeight.com/features/weve-had-56-statewide-elections-during-the-pandemic-heres-what-we-learned-from-them [https://perma.cc/5V8U-4FPX] (noting a spike in mail-in voting after the pandemic began and a correlational increase in voter turnout).

10 Danny Hakim, Reid J. Epstein & Stephanie Saul, *Anatomy of an Election 'Meltdown' in Georgia*, N.Y. TIMES (July 25, 2020, 6:40 AM), https://www.nytimes.com/2020/07/25/us/politics/

expand access to voting by mail as a safe alternative to potentially crowded polling places.[11]

This expansion consequently led to litigation in the vast majority of states.[12] Although legal fights over absentee ballot deadlines are nothing new,[13] COVID-19 gave rise to an explosion of colorable equal protection claims on the subject.[14] As a result, these cases laid bare what has long been true: by virtue of where one lives as an American voter, one citizen may have more—or an easier—time voting than one's neighbor in another state.[15]

Though states are entitled to set the rules of their own elections, Congress reigns supreme in the determination of federal election rules, deriving this authority from the Constitution's Elections Clause.[16] Nevertheless, recent experience suggests that eleventh-hour federal court rulings prior to Election Day have done more to shape state absentee ballot deadline rules for federal elections than congressional

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georgia-election-voting-problems.html [https://perma.cc/TRE7-RCPN]; Chad Cotti, Bryan Engelhardt, Joshua Foster, Erik Nesson & Paul Niekamp, *The Relationship Between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary*, 39 CONTEMP. ECON. POL'Y 760–61, 774 (2021) ("[O]verall results suggest that a 10% increase in voters per polling location leads to about an 18% increase in the test-positive rate.").

11 *See* Rakich, *supra* note 9 (noting that expansion of pandemic mail voting coincided with poll closures in some states).

12 For comprehensive tracking of this litigation, see *Voting Rights Litigation 2020*, BRENNAN CTR. FOR JUST. (Jan. 20, 2021), https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020 [https://perma.cc/3SWT-G3ET].

13 *See, e.g.*, Laura McCrystal, *Montco Judge Extends Deadline for Absentee Ballots*, PHILA. INQUIRER (Nov. 3, 2016), https://www.inquirer.com/philly/news/politics/20161104_Montco_seeks_to_extend_deadline_for_absentee_ballots.html [https://perma.cc/UAX5-HG5D].

14 *See, e.g.*, Democratic Nat'l Comm. v. Bostelmann (*DNC*), 451 F. Supp. 3d 952, 958 (W.D. Wis. 2020) (recognizing an equal protection claim due to COVID and stating that the "role of a federal district court is to take steps that help avoid the impingement on citizens' rights to exercise their voting franchise as protected by the United States Constitution"); Disability L. Ctr. of Alaska v. Meyer, 484 F. Supp. 3d 693, 707 (D. Alaska 2020) ("Plaintiffs have failed to convince this Court that its [sic] equal protection claims are likely to succeed on the merits."); First Amended Complaint at 30–31, League of Women Voters of N.J. v. Way, No. 20-CV-05990-MAS-LHG (D.N.J. June 3, 2020), 2020 WL 6535230, ¶¶ 98–103; Complaint for Injunctive & Declaratory Relief at 24, Yazzie v. Hobbs, No. 20-CV-08222-GMS (D. Ariz. Aug. 26, 2020), 2020 WL 5049638, ¶¶ 13, 112–16.

15 *See How Hard Is It to Vote in Your State?*, NIU NEWSROOM (Oct. 13, 2020), https://newsroom.niu.edu/2020/10/13/how-hard-is-it-to-vote-in-your-state [https://perma.cc/6V4B-R4DZ] (scaling and mapping the varying degrees of difficulty that voters encounter in their effort to cast votes in each state).

16 U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

lawmaking.[17] This Note argues that this reality is inherently problematic because not only do these court rulings often breed uncertainty for voters,[18] but they also create functional circuit splits very shortly before federal elections.[19] In other words, regardless of the legal reasoning that federal courts apply, many 2020 election voters in certain states enjoyed the fruits of ballot deadline extensions, while others did not.[20] To prevent such nonsensical outcomes, Congress should draft legislation using its underutilized Elections Clause power to standardize absentee ballot request, postmark, and deadline dates for federal elections.[21] Doing so would not only provide greater certainty to the electoral process than federal courts can provide, but also avoid a disputed election in a heated sociopolitical environment that could make the January 6, 2020, U.S. Capitol insurrection seem tame in hindsight.[22]

To support this argument, Sections I.A and I.B of this Note will provide a historical overview of voting by mail in the United States, while surveying the current state of vote-by-mail law and the motivations underlying modern absentee ballot deadline litigation, respectively. Then, Section I.C will discuss the relevant legal arguments and principles prevalent in such cases and will include a detailed recounting of how federal courts decided pre-election ballot deadline cases in North Carolina, Minnesota, Pennsylvania, and Wisconsin. Next, Part II

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17 The U.S. House of Representatives passed a comprehensive piece of legislation related to absentee balloting in March of 2019, but the Senate did not vote on the bill. *See* For the People Act of 2019, H.R. 1, 116th Cong. Subtitle I (2019). The U.S. House recently passed a very similar bill in the most recent Congress, but its future is uncertain. *See* For the People Act, H.R. 1, 117th Cong. Subtitle I (2021). See also *infra* Part III for its discussion of H.R. 1 in greater detail.

18 Olivia Rubin, Kendall Karson & Lucien Bruggeman, *'Don't Wait': Some Swing State Officials Urge Voters to Bypass the Mail to Return Ballots*, ABC NEWS (Oct. 28, 2020, 5:01 AM), https://abcnews.go.com/US/dont-wait-swing-state-officials-urge-voters-bypass/story?id=73867343 [https://perma.cc/RQ7K-RBZ3] (noting state party officials warning voters about the uncertainty of ballot deadlines as litigation continued leading up to Election Day 2020).

19 For purposes of this Note, a "functional circuit split" refers to the idea that even though the application of relevant law in two circuits may be the same or very similar, quirks of election jurisprudence, such as the *Purcell* principle, *see infra* Section I.C.i.2, cause voters to experience a different practical outcome, i.e., benefiting from a ballot extension in one state but not another. *See, e.g.*, text accompanying notes 156 and 157. The introduction of this term seeks to draw attention to an outcome-based approach, regardless of whether two courts applied the law dissimilarly as in a regular circuit split situation.

20 *See infra* Section I.C.ii (contrasting the Minnesota and North Carolina absentee ballot case decisions).

21 *See infra* Part III (introducing the proposal and discussing details of the strengths and deficiencies of H.R. 1).

22 *See infra* Section II.A (analyzing the negative effect of circuit splits). Removing courts from electoral decisions could also depoliticize the federal courts to a certain extent. The call for depoliticization around the Supreme Court is not a new idea in the legal academic literature. *See, e.g.*, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 834–36 (2006) (arguing that term limits would depoliticize the Supreme Court nomination and confirmation processes).

analyzes why the uncertainty and circuit splits that Article III courts' rulings produce offend basic principles of American law, as well as how these outcomes have deviated from the Founders' original intent regarding the Elections Clause. After illustrating how Congress has recently underutilized its Elections Clause power, Part III then suggests certain particulars for federal standardization and argues in favor of a jurisdictional-stripping element in such a legislative proposal while addressing opposing arguments.

Finally, much of the 2020 absentee ballot litigation related to other technical aspects of voting such as drop boxes, signature verification, and ballot processing timelines.[23] However, this Note focuses primarily on vote-by-mail ballot request, postmark, and arrival deadlines. Thus, any ancillary discussion of other technical aspects of the general vote-by-mail process will be used to contextualize the absentee ballot deadline litigation that this Note critiques.[24]

I. BACKGROUND

A. *Brief Historical Overview of Voting by Mail in the United States*

i. The Military Context

Absentee voting in the United States began during one of our nation's darkest historical moments: the election of 1864 during the Civil War.[25] Notably, several Union and Confederate states, rather than the federal government, passed laws which enabled soldiers to vote absentee in that presidential election.[26] Like American civilians today, this patchwork of laws meant soldiers fighting for the same cause did not

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23 *See, e.g.*, Middleton v. Andino, 488 F. Supp. 3d 261 (D.S.C.), *stayed in part*, 141 S. Ct. 9, 10 (2020) (explaining plaintiffs' motion for preliminary injunction against South Carolina's witness signature requirement due to the COVID-19 pandemic); Complaint & Emergency Motion for Preliminary Injunction, Moran v. Massachusetts, No. 20-CV-12171-ADB (D. Mass. Dec. 7, 2020) (alleging inconsistencies in signature verification); American Fed'n of Teachers v. Gardner, No. 216-2020-CV-0570 (N.H. Sup. Ct. Oct. 2, 2020) (denying plaintiff's request for drop box restrictions to be lifted).

24 *See, e.g.*, Sections I.A.iii, I.B.i (discussing the patchwork of absentee ballot legal changes due to COVID and the web of disparate state laws governing the process before the pandemic, respectively).

25 JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS 7 (2006).

26 *Id.* at 8.

necessarily obtain equal ballot access.[27] For example, soldiers hailing from New York and Alabama could vote absentee from the battlefield, while compatriots in combat from the neighboring states of New Jersey and Mississippi, respectively, could not.[28] This lack of standardization for military members persisted for years, until Congress formally acknowledged soldiers' logistical challenge of voting far from home by passing a series of laws in the twentieth century culminating in the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA).[29]

Well prior to this late twentieth century federal standardization in the military context, litigation quickly ensued regarding the validity of state absentee ballot laws in the mid-nineteenth century.[30] For example, some state courts struck down the earliest absentee ballot laws as violating their respective state constitutions, while other state courts of last resort upheld the practice as falling within the state legislature's ability to set the time and place of elections.[31] However, litigation concerning the practice has exploded since the late twentieth century as plaintiffs have sought to use the courts to accord themselves a potentially decisive political advantage.[32]

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27 *Id.* At the time, Union Democrats who supported General McClellan's candidacy were more likely to oppose these laws, while President Lincoln's Republican Party viewed soldiers voting absentee as advantageous to him. *See* Meilan Solly, *The Debate Over Mail-In Voting Dates Back to the Civil War*, SMITHSONIAN MAG. (Oct. 20, 2020), https://www.smithsonianmag.com/smart-news/debate-over-mail-voting-dates-back-civil-war-180976091 [https://perma.cc/WLW5-BURA] (describing, as a general rule, that Civil War-era state legislatures controlled by Democrats opposed absentee voting, whereas President Lincoln's Republican Party supported the practice).

28 John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 493 nn.48–49 (2003); *see also* JOSIAH HENRY BENTON, VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR 312–13 (1915).

29 FORTIER, *supra* note 25, at 10–13; 52 U.S.C. § 20303; 39 U.S.C. § 3406 (providing free postage and a backup federal absentee ballot to service members and citizens living abroad who did not receive their respective states' ballots on time); 18 U.S.C. §§ 608–609 (criminally proscribing anyone from impeding a U.S. servicemember's right to vote as it relates to the rest of UOCAVA's provisions).

30 Fortier & Ornstein, *supra* note 28, at 499.

31 *Id.*; *see* People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127 (1865).

32 Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629, 630 (2018) ("In the period since 2000, the amount of election-related litigation has more than doubled compared to the period before 2000, from an average of 94 cases per year in the period just before 2000 to an average of 258 cases per year in the post-2000 period."); *see also* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958 (2005) (showing a graphical increase in election litigation).

ii. Early Civilian and Modern Usage

The adoption of the secret ballot paved the way for states to expand absentee balloting for civilians, and such laws proliferated with the acknowledgement that many working people were not always close enough to home on Election Day to be able to vote.[33] While new voting expansions in states like Vermont and North Dakota seem restrictive by today's standards, they were groundbreaking in the early twentieth century.[34] States thus quickly expanded absentee voting, yet before World War II, the patchwork of discrepancies between each state's laws that are commonplace today had already emerged.[35] By the end of the twentieth century—among other limitations—some states required witness signatures to vote absentee depending on a voter's circumstance(s), while others did not; concurrently, each state continues to set its own request, postmark, and arrival deadlines.[36]

In 2000, Oregon became the first state to exclusively vote by mail following a successful 1998 citizens' initiative advancing the practice.[37] Over the course of the next twenty years, a handful of Western states followed suit.[38] While cries of fraud have accompanied some of these expansions,[39] these states have demonstrated that—even prior to COVID-19—all-mail elections can be conducted freely, fairly, and without any meaningful fraud.[40] Perhaps just as importantly for the purposes of this

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33 JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 283 (1934).

34 Fortier & Ornstein, *supra* note 30, at 499, 502.

35 *Id.* at 504 (noting that between 1914 and 1917, the number of states with some form of civilian absentee voting skyrocketed from three to twenty-four); *see also* HARRIS, *supra* note 33, at 291 (showing that as of 1934, California, as it does today, provided for a greater window between postmark and arrival date than any other state).

36 Fortier & Ornstein, *supra* note 28, at 511. For the final rules that governed the 2020 election from state to state, see *Absentee and Mail Voting Policies in Effect for the 2020 Election*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx [https://perma.cc/C5HE-635R].

37 OREGON SECRETARY OF STATE, OREGON VOTE BY MAIL 4–11 (2000), https://sos.oregon.gov/elections/Documents/statistics/vote-by-mail-timeline.pdf [https://perma.cc/6W68-43M6] (detailing Oregon's evolution to a full vote-by-mail state starting in 2000).

38 *All-Mail Voting*, BALLOTPEDIA, https://ballotpedia.org/All-mail_voting#States_with_existing.2C_permanent_automatic_mail-in_ballot_systems [https://perma.cc/B3WM-ZCFB] (noting that by November 2020, "Five states—Colorado, Hawaii, Oregon, Utah, and Washington—conduct what are commonly referred to as all-mail elections").

39 *See, e.g.*, 1 PHIL KEISLING, VOTERS' PAMPHLET 67 (1998) (citing fraud as an argument against adopting all-mail voting), available for download at https://digital.osl.state.or.us/islandora/object/osl%3A64375 [https://perma.cc/5ETE-F6BE].

40 *See* Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks*, BROOKINGS INST. (June 2, 2020), https://www.brookings.edu/

Note, the administration of all-mail elections in these states prior to COVID-19 insulated them from the need to quickly change their pre-existing election systems and to engage in any absentee ballot deadline litigation resulting therefrom.[41]

iii. Quick Expansion Due to COVID-19

For the forty-five states that did not have all-mail election procedures in place prior to COVID-19's arrival in the United States, the pandemic caused state officials to scramble to make voting safer than the traditional method of in-person voting on Election Day.[42] Making voting by mail easier—either through postmark and/or deadline extensions or by other means—was an obvious choice for certain states as politically varied as Mississippi and New Jersey.[43] While the fight over whether such changes will remain permanent is just beginning as of this writing,[44] these COVID-conscious changes often did not assuage litigants from

blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks [https://perma.cc/B9M7-2HH4] (finding that out of 15,476,519 mail ballots cast in Oregon since 2000 and prior to the 2020 presidential election, fourteen instances of attempted mail fraud occurred, or a rate of roughly 0.0000009%).

41 *See supra* note 12. One reason for a lack of absentee ballot deadline litigation in these states is that such cases likely would not have succeeded on equal protection grounds because of the pre-existing strength of the vote-by-mail system. *See id.* (showing that among Colorado, Hawaii, Oregon, Utah, and Washington, only one lawsuit was filed challenging the states' pre-existing vote-by-mail systems); *see* Griffin v. Hawaii, No. 20-CV-00298-DKW-KJM, 2020 U.S. Dist. LEXIS 230530, at *2 (D. Haw. Dec. 8, 2020) (dismissing suit on standing and mootness grounds). For a better understanding of the legal arguments present in these cases, see also Section I.C.i.1's discussion of the equal protection arguments litigants often assert in absentee ballot litigation deadline cases.

42 *See supra* notes 9–11 and accompanying text.

43 *Changes to Election Dates, Procedures, and Administration in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA, https://ballotpedia.org/Changes_to_election_dates,_procedures,_and_administration_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020 [https://perma.cc/W3BL-NJN5].

44 In 2021, several Republican state legislatures moved to curtail voting access in states that had temporarily eased ballot access due to COVID. *See, e.g.*, Stephen Gruber-Miller, *Gov. Kim Reynolds Signs Law Shortening Iowa's Early and Election Day Voting*, DES MOINES REG. (Mar. 9, 2021, 10:44 AM), https://www.desmoinesregister.com/story/news/politics/2021/03/08/iowa-governor-kim-reynolds-signs-law-shortening-early-voting-closing-polls-earlier-election-day/6869317002 [https://perma.cc/7NZN-MEHE] ("Iowa is among a national wave of Republican-led states whose leaders have expressed concerns about the integrity of the 2020 elections . . . . States such as Florida and Georgia have undertaken high-profile efforts to limit absentee voting after the practice surged in 2020."); *see also* Stephen Fowler & David Armstrong, *16 Years Later, Georgia Lawmakers Flip Views on Absentee Voting*, GA. PUB. BROAD. (Mar. 7, 2021, 8:00 AM), https://www.gpb.org/news/2021/03/07/16-years-later-georgia-lawmakers-flip-views-on-absentee-voting [https://perma.cc/Q6QE-BXWT].

attempting to use the courts to achieve greater ballot access for voters.[45] Thus, in a country with at least fifty-one separate sets of election laws covering a single federal election, the United States' political structure was poorly positioned to resist an onslaught of COVID-related election litigation.[46]

B. *The State of Vote-by-Mail Law and the Pre-COVID Incentives for Litigation*

i. Current Law

At the state level, no two states' absentee ballot laws are identical, and ballot postmark and deadline provisions can vary widely.[47] For instance, in certain states, an absentee ballot will only count if a voter obtains either multiple witness signatures or a notary public's autograph.[48] To understand the origins of such burdensome requirements, Justice Kagan has counseled that election law analysis cannot be divorced from evaluating lawmakers' underlying political incentives.[49] That is to say, how loose or restrictive a state's absentee ballot laws were pre-COVID is reflective of which procedures and policies state legislative majorities deemed beneficial to their political interests at the time of

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45 Ivan Pereira, *Voting Rights Legislation Across Country Looks to Both Restrict, Expand Access*, ABC NEWS (Jan. 27, 2021, 8:00 PM), https://abcnews.go.com/US/voting-rights-legislation-country-restrict-expand-access/story?id=75473644 [https://perma.cc/D5HR-MZZG]; *see also* Section I.C's discussion of plaintiffs' claims.

46 This is not to assert that courts themselves were necessarily overwhelmed by the litigation. Rather, with a lack of uniformity in state law around absentee balloting, there were simply more fora for litigants to challenge various rules. Research suggests that uniform state acts promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) reduce litigation costs by reducing forum shopping. Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138 (1996).

47 *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 36 (showing each state's disparate voting rules in place for the 2020 presidential election).

48 *VOPP: Table 14: How States Verify Voted Absentee Ballots*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx [https://perma.cc/J387-EGAR] (listing Rhode Island, Alabama, and North Carolina as states requiring two witnesses prior to any pandemic-related changes to voting rules). Local officials in two of these three states were formerly unable to change any voting regulations without U.S. Justice Department approval until the Supreme Court gutted the Voting Rights Act of 1965's preclearance mechanism in *Shelby County v. Holder*, 570 U.S. 529 (2013); *see Jurisdictions Previously Covered by Section 5*, U.S. DEP'T OF JUST. (Sept. 11, 2020), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 [https://perma.cc/M595-9TMS].

49 *See* Democratic Nat'l Comm. v. Wis. State Legislature (*DNC*), 141 S. Ct. 28, 43 (2020) (Kagan, J., dissenting) (mem.) (arguing that in relation to election law, "politicians' incentives often conflict with voters' interests").

adoption.[50] Thus, the patchwork of state absentee ballot laws appears to be federalism at work, which has become net harmful because it provides federal courts more opportunities to meddle in ruling on these laws.[51] Stated differently, states have been prolific in utilizing their Elections Clause power, while Congress has not.[52]

Given this Note's call for a national overhaul of absentee ballot deadline laws, it is unsurprising that federal law regarding the practice mostly regulates the military and other federal personnel rather than a majority of civilians.[53] While federal law on absentee balloting is limited given states' traditional authority over the subject, statutes such as UOCAVA have served as drivers of voter enfranchisement where state law had historically proved insufficient.[54] In fact, UOCAVA's generous week-after-Election Day ballot arrival deadline provision has been the basis of at least one petition in state court to extend an absentee ballot deadline.[55]

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50 *See, e.g.*, Frank Cerabino, *Mail-In Voting in Florida Deserves a Bi-Partisan Stamp of Approval*, PALM BEACH POST (June 30, 2020, 5:32 PM), https://www.palmbeachpost.com/story/news/columns/2020/06/30/cerabino-mail-in-voting-in-florida-deserves-bi-partisan-stamp-of-approval/112301672 [https://perma.cc/DG3X-LKJ6] (noting that a Republican governor and Republican-led state legislature spearheaded Florida's 2002 transition to no-excuse absentee voting, and that the state Republican Party has since promoted its use to benefit statewide Republican candidates).

51 *See infra* text accompanying notes 62–65.

52 Absent Congress exercising its power under the second subclause of the Elections Clause, state legislatures have near free rein to determine election rules. *See* U.S. CONST. art. I, § 4, cl. 1.

53 *See supra* text accompanying note 29; *see also* 52 U.S.C. § 20303; 39 U.S.C. § 3406 (containing UOCAVA free postage and backup absentee ballot provisions).

54 *See* Fortier & Ornstein, *supra* note 28, at 485 ("Much of federal election reform legislation focuses on reforming the election day polling place, and since . . . the trend is toward voting away from the polling place, a substantial percentage of voters will not receive the full benefit of these reforms."). To illustrate UOCAVA's attempt to expand the franchise, the law established the Federal Voter Assistance Program (FVAP), which provides military service members with information on everything they need to know about casting an absentee ballot under the law, and a resource which traditionally exists for civilians at the state level. *See Voting Assistance Guide*, FED. VOTING ASSISTANCE PROGRAM, https://www.fvap.gov/guide [https://perma.cc/A8A9-WXR4]; *see also, e.g.*, *Absentee and Early Voting*, VA. DEP'T OF ELECTIONS, https://www.elections.virginia.gov/casting-a-ballot/absentee-voting [https://perma.cc/A8F8-DDA2].

55 Pa. Democratic Party v. Boockvar, 238 A.3d 345, 353, 371 (Pa. 2020) (granting petitioner an injunction in part; absentee ballot arrival deadline extension of three days granted, but petitioner had asked for a week based on UOCAVA's arrival deadline), *cert. denied sub nom.* Republican Party of Pa. v. Degraffenreid (*Boockvar*), 141 S. Ct. 732 (2021). Veronica Degraffenreid became acting Secretary of the Commonwealth of Pennsylvania following former Secretary Kathy Boockvar's resignation in February 2021. *See* Maggie Mancini, *Gov. Wolf Replaces Acting Secretary of State Ahead of His Final Year in Office*, PHILLY VOICE (Dec. 29, 2021), https://www.phillyvoice.com/gov-wolf-replaces-acting-state-secretary-final-year-office [https://perma.cc/MCP6-WU62].

ii. Litigation Driven by Electoral Power Politics

The best way to understand the legal battles over postmark and arrival deadlines is to first evaluate the political forces behind them. These include the "Blue Shift" phenomenon, a term coined in a paper by Edward Foley and Charles Stewart.[56] In recent twenty-first century federal elections, both Republican and Democratic operatives have adopted a general perception that absentee ballots that are postmarked and received closer to their respective deadlines disproportionally benefit Democratic candidates, and Foley and Stewart's research gives statistical validity to this view.[57] In fact, such a phenomenon proved pivotal to California Democrats in close Federal House races in 2018.[58]

Simply put, as a general matter, the looser a state's postmark and arrival deadlines are, the more likely Democratic candidates are to benefit.[59] If the close margins in the 2018 California House elections are any guide, then there are tremendous incentives for both parties to litigate the legal issues around ballot postmark and arrival deadlines, even if those incentives do not align with voters' best interests.[60] Thus, for Democrats, their litigation goals have been, inter alia, to extend postmark/reception criteria and deadlines when possible, while

56 Edward B. Foley & Charles Stewart III, *Explaining the Blue Shift in Election Canvassing*, 1 J. POL. INSTS. & POL. ECON. 239 (2020).

57 *See id.* at 248–51, 257 ("Votes added to tallies in the days following the election come primarily from three sources: (1) corrections and late returns submitted by outlying jurisdictions, (2) provisional ballots, and (3) mail ballots. If any of these three sources disproportionately consist of Democratic voters, or Democratic regions within the states, and if any of them has grown sufficiently large in magnitude over time, it would not take a conspiracy among election administrators for a persistent blue shift to develop. . . . [T]here appears to have been a tendency for Democrats to disproportionately cast provisional and mail ballots in 2016, [thus producing a Blue Shift.]").

58 Yimeng Li, Michelle Hyun & R. Michael Alvarez, *Why Do Election Results Change After Election Day? The "Blue Shift" in California Elections*, APSA PREPRINTS 4 (2021) (explaining that by three weeks after Election Day, results in California looked markedly different in Democrats' favor than on Election night). This content is a preprint and has not yet been peer-reviewed.

59 This was exactly the phenomenon in California in 2018. *See id.*

60 *See supra* note 58 at 19 (noting that two House seats "flipped" due to the post-Election Day Blue Shift). *See also supra* note 49 and accompanying text; *see also* text accompanying note 61. The Blue Shift played a pivotal role in how the public internalized election results in crucial 2020 states such as Pennsylvania, where President Biden did not take a lead in vote counting until multiple days after the election. *See Pennsylvania Presidential Election Results*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-pennsylvania-president.html [https://perma.cc/R2BZ-J2PV] (showing a blue shift between the time when 50% and 100% of the expected vote was reported in Pennsylvania).

Republicans have recently sought to limit when and which mail ballots may be counted and how they may be received.[61]

So long as Congress does not act to make it more difficult for litigants to chip at the edges of each state's absentee ballot deadline laws, this incentive structure is unlikely to change.[62] As a result, there is an intractable problem of growing litigation around mail balloting deadlines, as one political party views a certain practice or existing legal structure as providing an inherent advantage or disadvantage in an election.[63] This creates a two-part legal problem: (1) new circuit splits while federal elections are already underway,[64] and (2) judicial activism on behalf of judges who may rule in accordance with their pre-existing political ideologies when deciding an election law dispute.[65]

C. *The Run-Up to Election Day 2020: What Happened in Court?*

i. Legal Arguments and Applicable Case Law

1. Equal Protection and Constitutional Balancing in the Context of Voting Rights

Although the U.S. Constitution does not guarantee the right to vote anywhere in its plain language,[66] the U.S. Supreme Court has recognized voting as a "fundamental interest" under its Fourteenth Amendment equal

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61 *See, e.g.*, Pa. Democratic Party v. Boockvar, 238 A.3d 345, 371–72, 380 (Pa. 2020). While *Boockvar* is one of many cases concerning these issues, both parties were able to walk away with at least one of their litigation goals accomplished. For Republicans, the Supreme Court of Pennsylvania rejected the counting of so-called "naked ballots," while Democrats received an extension deadline (three days) that they had been seeking from the onset of litigation. *Id.*

62 The New Abnormal with Molly Jong-Fast & Rick Wilson, *Is This When Ivanka Will Run Against Little Marco Rubio?*, DAILY BEAST (Dec. 11, 2020), https://play.acast.com/s/the-new-abnormal/isthiswhenivankawillrunagainstlittlemarcorubio- [https://perma.cc/7FE9-VKYN] (featuring Podcast guest and Democratic elections lawyer Marc Elias explaining that only Congress can step in to reduce the rising flood of election-related litigation).

63 *Id.*

64 *See infra* Section I.C.ii.

65 The Supreme Court arguably gave license to an increased amount of judicial activism in election law cases following its decision in *Bush v. Gore*, 531 U.S. 98 (2000). *See* Erwin Chemerinsky, *The Meaning of* Bush v. Gore*: Thoughts on Professor Amar's Analysis*, 61 FLA. L. REV. 969, 970 (2009) ("Although unusual in its national significance, *Bush v. Gore* is typical in terms of two crucial points: first, Justices have tremendous discretion in deciding constitutional cases; and second, how that discretion is exercised is frequently, if not inevitably, a product of the Justices' life experiences and ideology."); *see also* Mark S. Brodin, Bush v. Gore*: The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563 (2012).

66 Several constitutional amendments (including the Fourteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth) have expanded voting rights by limiting state power, yet none of these expressly guarantee the right to vote as an explicit, standalone right. *See* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 805 (Saul Levmore et al. eds., 20th ed. 2019).

protection jurisprudence, which usually triggers heightened scrutiny.[67] Further, the Supreme Court has recognized that the act of voting is a form of expression and association that the First Amendment protects.[68] Given this nexus between the First and Fourteenth Amendments, the Supreme Court has instructed lower federal courts to first determine whether a burden on voting rights is so high as to require strict scrutiny review, or so unimpactful as to fall back into the realm of rational basis review.[69] If a district court deems neither standard to be appropriate, as is often the case, then that court must balance the plaintiff's claimed injuries concerning these rights against the state's interest in maintaining the voting-related provision or regulation at issue.[70] Over time, federal courts applying this intermediate balancing test have referred to it as "*Anderson-Burdick*" balancing.[71] Essentially, the test has enabled Justices who reject the rigidity of rational basis versus strict scrutiny review to employ a more malleable standard, though the Supreme Court has yet to produce a majority opinion relying on *Anderson-Burdick* balancing.[72]

Interestingly, some litigation in the 2020 election cycle has concerned this balancing approach, whereas other cases involved

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67 This recognition began during the Warren Court's overall expansion of voting rights. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (striking down Virginia's $1.50 poll tax); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (invalidating a New York law limiting eligibility to vote in local school district elections to those who owned or leased taxable real property within the district or were parents (or legal guardians) of children within the district). Notably, these decisions employed a standard of review closer to strict scrutiny, whereas *Anderson-Burdick* balancing employs a test somewhere in between mere rational basis review and strict scrutiny. *See infra* notes 71–72 and accompanying text.

68 *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting).

69 Daniel Bruce, *Is It Time for SCOTUS to Revisit the* Anderson-Burdick *Test?: Insights from the Challenge to West Virginia's Ballot Order Statute*, WM. & MARY L. SCH. ELECTION L. SOC'Y (Nov. 18, 2020), http://electls.blogs.wm.edu/2020/11/18/time-scotus-revisit-anderson-burdick-test-insights-challenge-west-virginias-ballot-order-statute [https://perma.cc/PQ38-KFA6]. For a general overview of the differences between rational, intermediate, and strict scrutiny, see Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (Jan. 27, 2014, 9:05 AM), https://www.findlaw.com/legalblogs/law-and-life/challenging-laws-3-levels-of-scrutiny-explained [https://perma.cc/4WB2-VR9K].

70 Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (articulating the balancing test to invalidate a burdensome candidate filing deadline in Ohio); *see also* Burdick v. Takushi, 504 U.S. 428, 433 (1992) (rejecting petitioner's request to apply strict scrutiny review and subsequently applying *Anderson-Burdick* balancing to Hawaii's state constitutional ban on write-in voting and sustaining the provision).

71 *See, e.g.*, *DNC*, 141 S. Ct. 28, 33–34 (2020) (Kavanaugh, J., concurring) (mem.) (discussing *Anderson-Burdick* balancing).

72 The most significant Supreme Court case analyzing a state election law using the *Anderson-Burdick* balancing approach is *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). However, only a plurality of Justices endorsed the Court's application of the balancing approach in that case. *Id.* at 190 (plurality opinion).

challenging ballot deadline extensions on other grounds.[73] In any event, there is little doubt that the COVID-19 pandemic opened the door to an increased number of reasonable equal protection claims under this general framework, even though many were unsuccessful at varying levels of the federal court system.[74]

2. The *Purcell* Principle

Arguably the most influential Supreme Court case affecting absentee ballot deadline litigation is *Purcell v. Gonzalez*.[75] In *Purcell*, the Supreme Court criticized the Ninth Circuit Court of Appeals for greenlighting a district court's injunction that had temporarily blocked a new and restrictive Arizona voter identification law from taking effect.[76] As a result, *Purcell* stands for the general notion that federal courts should not change election rules shortly before federal elections.[77] While this idea initially may seem both logical and simple, it has often been relied on as a cudgel to bat down valid equal protection claims that should be analyzed primarily under *Anderson-Burdick* balancing instead.[78] Thus, in some ways, *Purcell* is the off-ramp that saves federal judges from needing to justify a rejection of expanding the franchise—when presented with a valid argument for doing so—where the state interest asserted by defendants is often preventing voting fraud, which is empirically extremely rare.[79]

Even if one accepts the growing influence of *Purcell* on the election law docket in federal courts, the principle is hard to apply days or weeks

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73 *See infra* Section I.C.ii.3 (discussing how Pennsylvania's deadline extension rested upon state constitutional law grounds).

74 *See, e.g.*, Tex. Democratic Party v. Abbott, 978 F.3d 168 (5th Cir. 2020) (staying the district court decision in holding that Texas's sixty-five-year-old threshold requirement for voting absentee likely does not violate the Equal Protection Clause); People First of Ala. v. Merrill, 491 F. Supp. 3d 1076, 1144–49 (N.D. Ala. 2020) (applying the balancing framework to a witness requirement for absentee ballots), *stay granted in part by* People First of Ala. v. Sec'y of State, No. 20-13695-B, 2020 U.S. App. LEXIS 33371, at *2 (11th Cir. Oct. 13, 2020); Democratic Nat'l Comm. v. Bostelmann (*DNC*), 977 F.3d 639, 641–43 (7th Cir. 2020) (per curiam).

75 549 U.S. 1 (2006) (per curiam).

76 *Id.* at 4–5; *see* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).

77 *Purcell*, 549 U.S. at 2–5. The decision does not specify the time horizon for when federal courts should no longer intervene in federal elections. *See generally id.* Of course, this omitted detail is crucial, and it therefore comes as no surprise that one election law expert has called the Supreme Court's *Purcell* decision a "rush[] to judgment on an unfamiliar issue." Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1067 (2007).

78 To illustrate how application of the *Purcell* principle warps how judges and Justices would likely otherwise rule on valid constitutional claims, see Hasen, *supra* note 76, at 456–59.

79 Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 746 n.37 (2015) (noting that reported UFO sightings are more common than validated instances of voter fraud).

before federal elections conclude.[80] At the very least, federal courts have recently weaponized the principle such that cases relying on a *Purcell* analysis change the very election rules that the principle itself supposedly aims to keep from changing.[81] Of course, countless legal rules are subject to dueling interpretations by judges, but if there was ever a principle in need of uniform application to reduce confusion among voters and not to disrupt election administration, it is this one.[82] In other words, the spirit of *Purcell* should be inscribed into federal statutory law with clear language, or courts should do away with applying the principle all together.[83]

ii. Making Sense of a Contradictory Bag of Outcomes

In this subsection, the North Carolina,[84] Minnesota,[85] Pennsylvania,[86] and Wisconsin[87] ballot deadline cases deserve specific attention for a few reasons, despite other choices.[88] First, the two major

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80 Disagreements regarding the application of the *Purcell* principle animate judges' opinions in the North Carolina, Minnesota, and Wisconsin cases because they all originated in federal rather than state court. *See infra* Sections I.C.ii.1 (North Carolina), I.C.ii.2 (Minnesota), and I.C.ii.4 (Wisconsin). The Pennsylvania case reached federal court after originating in the state system, meaning that *Purcell* does not apply to a case involving judicial rulings at the state level. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 352–55 (Pa. 2020).

81 *See infra* Section I.C.ii.2 (demonstrating that *Simon* is an apt illustration of *Purcell*'s backwardness).

82 *See* Tokaji, *supra* note 77, at 1094 ("[T]he Supreme Court's intervention in Purcell was anything but constructive or clarifying. . . . [I]ts discussion of the constitutional issues at play provides ambiguous guidance for the lower courts. The Court's opinion also demonstrated little regard or interest in the practical realities of election administration practices, either in Arizona or in other states that may be implicated by Purcell's ruling.").

83 *See infra* Part III (containing a discussion of potential jurisdiction-limiting measures, which could include a date after which no appellate court may change rules for a federal election, regardless of *Purcell*).

84 Moore v. Circosta (*Moore*), 494 F. Supp. 3d 289 (M.D.N.C. 2020); Wise v. Circosta (*Wise*), 978 F.3d 93 (4th Cir. 2020) (en banc). These cases have two different names to reflect one of the intervenors (Patsy J. Wise). However, they arise from the same set of facts and are analyzed as the same case in this Note. *See infra* text accompanying notes 97 and 98.

85 Carson v. Simon (*Simon*), 978 F.3d 1051 (8th Cir. 2020) (per curiam).

86 *See supra* note 55.

87 See *supra* notes 14, 49, and 74 for the shifting names (depending on the stage of the case) of the same absentee ballot deadline litigation in Wisconsin, collectively analyzed as *DNC* in this Note.

88 *See, e.g.*, Common Cause Ind. v. Lawson, 978 F.3d 1036 (7th Cir. 2020) (per curiam) (reversing district court injunction which had granted plaintiff's equal protection claim to extend absentee ballot arrival deadline for the general election). Unlike the states mentioned above, Indiana has not been a competitive state at the presidential level since 2008. *See* Bill Ruthhart & Jonathon Berlin, *Campaign Trail Tracker: Where Trump, Biden and Their Running Mates Have Traveled in*

2020 presidential campaigns and nonpartisan election handicappers viewed these states as extremely competitive.[89] Additionally, each one involved some form of adjudication by either a federal circuit court or the U.S. Supreme Court less than ten days before Election Day.[90] When analyzed both separately and comparatively, these cases demonstrate the practical unworkability inherent in these rulings, and present a strong microcosm of why congressional intervention to reduce federal court involvement in absentee ballot deadline law is so important following 2020.[91] Further, throughout 2020, federal courts repeatedly handed down election rule-changing decisions that bred the very confusing uncertainty against which *Purcell* counsels.[92]

1. North Carolina

Of the four states surveyed, the North Carolina examples, *Moore v. Circosta* and *Wise v. Circosta*,[93] are the only cases where a federal appellate court[94] allowed an absentee ballot deadline extension to stand

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Presidential Race's Final Weeks, CHI. TRIB. (Nov. 5, 2020, 4:59 PM), https://www.chicagotribune.com/politics/ct-viz-presidential-campaign-trail-tracker-20200917-edspdit2incbfnopchjaelp3uu-htmlstory.html [https://perma.cc/8YXY-GRMP]; *2020 Electoral College Map*, REAL CLEAR POLS. (Oct. 29, 2020), https://www.realclearpolitics.com/epolls/2020/president/2020_elections_electoral_college_map.html [https://perma.cc/88E5-9HXB].

89 *See* Ruthhart & Berlin, *supra* note 88; *2020 Electoral College Map*, *supra* note 88.

90 For an exhaustive case-by-case timeline of 2020 election litigation, including the dates of each court order, see BRENNAN CTR. FOR JUST., *supra* note 12.

91 Additionally, underneath the hood of these decisions is a disagreement between Supreme Court Justices as to what is the meaning of the term "Legislature" in the Constitution. *See* text accompanying Section I.C.ii.3; U.S. CONST. art. I, § 4; Moore v. Circosta, 141 S. Ct. 46 (2020) (Gorsuch, J., dissenting) (arguing against the State Board of Election's authority to change ballot deadlines because the Board is not a part of the North Carolina General Assembly within Justice Gorsuch's understanding of the meaning of "Legislature"). Notably, Justice Barrett did not play a role in adjudicating *Moore*. Given the Court's sharp division over this question, resolution of this issue is likely best left to cases fully briefed and argued before the Court rather than when adjudicating emergency petitions in deeply partisan cases. If this cannot be accomplished due to time constraints, a deeper post-hoc analysis would still be helpful. *See* Hasen, *supra* note 76, at 461–63 ("The benefits of giving reasons are many. Reasons will help lower courts use the right standards in election cases, rather than having to try to read tea leaves from unexplained Court orders. Following the Court's normal procedural regularity in election cases will bolster the legitimacy of the Court in the eyes of the public, something especially important in controversial cases, such as election cases. Following usual and articulated rules may also discipline Justices into deciding similar cases alike, regardless of the identity of the parties." (footnotes omitted)).

92 Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). *Purcell* was decided just over two weeks before the 2006 midterm congressional elections. *See id.*

93 *Moore*, 494 F. Supp. 3d 289 (M.D.N.C. 2020); *Wise*, 978 F.3d 93 (4th Cir. 2020) (en banc). *See supra* note 84.

94 For purposes of this Note, the U.S. Supreme Court counts as a "federal appellate court." Where distinctions are necessary, the terms "Circuit Court" and "Supreme Court" will be used.

based on a lower federal court's decision.[95] The North Carolina litigation initially began with elderly citizen plaintiffs seeking, inter alia, an absentee ballot deadline extension that would enable such votes to be counted up to ten days after Election Day due in part to COVID-19.[96] When the parties reached an agreement on a slightly shorter extension, the Speaker of North Carolina's House of Representatives, Tim Moore, attacked the agreement as a plaintiff,[97] but the Fourth Circuit ultimately let the first suit's consent judgment stand.[98] Notably, Moore and his co-litigants sought to upend a unanimous bipartisan consent decree, agreed to between the defendant state elections board and the original plaintiffs.[99] Further, the trial court-approved consent decree highlighted that the North Carolina State Board of Elections had unilaterally moved to extend such deadlines in the past due to hurricanes.[100]

Understanding this extension is important because it demonstrates some of the tension between it and *Democratic National Committee v. Wisconsin State Legislature* in terms of the Supreme Court's deference towards federal district courts and *Purcell*'s operability and bearing on them.[101] Importantly, the district court judges in both cases initially allowed for extensions to each states' absentee ballot deadlines, but the *Wise* decision in North Carolina was based on a consent decree, whereas

95 *See also* Donald J. Trump for President, Inc. v. Degraffenreid, 141 S. Ct. 1451 (2021) (mem.); *cf.* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. 2020) (allowing lower state court's absentee ballot deadline extension to stand).

96 Complaint at 24–27, 40, N.C. All. for Retired Ams. v. N.C. State Bd. of Elections, No. 20-CVS-8881, 2020 N.C. Super. LEXIS 27 (Super. Ct. N.C. Oct. 2, 2020), available at https://static1.squarespace.com/static/5e909f4422f7a40a188de597/t/5f3195adacb31f23dbc554b3/1597085101270/2020.08.10+-+NC+Alliance+for+Retired+Americans+v.+State+-+Complaint.pdf [https://perma.cc/2U9W-NF8J].

97 *See generally* Complaint for Declaratory & Injunctive Relief, Moore v. Circosta, No. 20-CV-507-D (E.D.N.C. Oct. 3, 2020), available at https://storage.courtlistener.com/recap/gov.uscourts.nced.182692/gov.uscourts.nced.182692.1.0.pdf [https://perma.cc/XJ2M-S5G6].

98 *Wise*, 978 F.3d at 103 ("As the district court wisely recognized, there is no need, in the middle of an ongoing election, for the federal courts to intervene into the voting affairs of North Carolina.").

99 Most of the Fourth Circuit, while sitting en banc, also looked unfavorably on a litigant attempting to invalidate a bi-partisan agreement surrounding election rules. *Id.* at 97.

100 The Court noted that the North Carolina State Board of Elections undertook this course of action both in 2018 and 2019. *Id.* at 97 n.2. Interestingly, this line of reasoning demonstrates that a strong majority of the Fourth Circuit places the COVID-19 pandemic in the category of a force majeure type event necessitating *administrative*, rather than judicial, intervention to protect equal protection interests. *See id.* at 95 (noting that the majority opinion gained twelve judges' approval over only three dissenters).

101 *DNC*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring) (mem.) ("While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin.").

the subsequently overturned *DNC* extension in Wisconsin was based on a judge's decision alone.[102]

While the Supreme Court ultimately let the Fourth Circuit's *Wise* decision stand without explanation,[103] the sharp disagreements between the court of appeals' *Wise* majority and dissent demonstrate both the difficulty and contradictions inherent in applying the *Purcell* principle.[104] Commendably, the majority sets out a clear line of reasoning focused primarily on two issues: what triggers the "status quo" for *Purcell* purposes,[105] and whether the *Moore* plaintiffs were likely to have success on the merits of their equal protection argument.[106] Unlike their dissenting colleagues, the Fourth Circuit majority relied on the Supreme Court's recent decision in *Andino v. Middleton* to establish that the "status quo" begins with a state's action, not an interfering district court's injunction.[107]

Alternatively, the dissent sought to extend *Purcell* to the actions of state courts on the theory that if the case only applied to federal court decisions, litigants would nonetheless run off to state courts for the same

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102 *See* N.C. All. for Retired Ams. v. N.C. State Bd. of Elections, No. 20-CVS-8881, 2020 N.C. Super. LEXIS 27 (Super. Ct. N.C. Oct. 2, 2020); *infra* note 149.

103 *See* Wise v. Circosta, 141 S. Ct. 658 (2020) (mem.) (denying application for stay of lower courts' decisions).

104 *See Wise*, 978 F.3d at 98. As is typical for emergency orders, the ruling on application for injunctive relief simply states which Justice referred the matter and that there was a denial. *Wise*, 141 S. Ct. at 658. Considering the time-sensitive nature of these decisions, at least one scholar has urged the Supreme Court to give at least barebones explanations for its reasoning. *See* Hasen, *supra* note 76, at 461–63. In the meantime, one can only assume that a majority of Supreme Court Justices either (1) agreed with the Fourth Circuit's decision and/or reasoning; and/or (2) refused to rock the boat themselves at such a late stage in the election, as the Court released the North Carolina decision six days prior to the end of the general election.

105 For the purposes of the Court's analysis, "status quo" means a backward-looking date at which the *Purcell* analysis starts, or, in other words, at what point of action on a particular date a reviewing court should decide that any more changes to election rules would constitute a violation of the *Purcell* principle. The Fourth Circuit majority chose October 2, the date that a state court approved the North Carolina State Board of Elections consent decree with the original plaintiffs. The U.S. District Court below also agreed. *Wise*, 978 F.3d at 98–99 (citing *Moore*, 494 F. Supp. 3d 289, 322 (M.D.N.C. 2020)).

106 The new attacking plaintiffs were alleging that the consent decree, which extended the state's absentee ballot receipt deadline, violated the Equal Protection Clause. Complaint for Declaratory & Injunctive Relief at 17, *Moore*, 494 F. Supp. 3d 289 (No. 20-CV-182).

107 *Wise*, 978 F.3d at 98 (citing Andino v. Middleton, 141 S. Ct. 9, 10 (2020)). *Andino* concerned South Carolina's witness requirement for absentee voting and was decided on October 5. *See Andino*, 141 S. Ct. at 10. Thus, to clarify an important but unclear principle, the *Wise* court relied on a two-week-old precedent from another emergency shadow docket case which also bred unnecessary confusion for voters in South Carolina. *See, e.g.*, Michelle Ye Hee Lee & Stephanie Hunt, *Supreme Court Order on Mail Ballots in South Carolina Sparks Worries About Voter Confusion*, WASH. POST (Oct. 6, 2020), https://www.washingtonpost.com/politics/south-carolina-mail-ballots-signature/2020/10/06/65bd6630-07e8-11eb-859b-f9c27abe638d_story.html [https://perma.cc/4F8T-V2FK].

relief that would be denied to them in federal court.[108] In essence, the dissenters argued that the *Purcell* principle is useless if it is only applied in federal courts, in part because it promotes forum shopping.[109] While this may practically be true, the majority notes that the dissent found no legal basis—in case law or statute—for this assertion.[110]

Crucially, the dissent's rigid argument does little to rid itself of its underlying practical irony. The dissent claims that the North Carolina State Board of Elections undertook illegal action via its consent decree with the first set of plaintiffs while "hundreds of thousands of North Carolinians have already voted in important elections."[111] However, at the same time, the dissent sought to change the rules of the election for a second time—the very action it was complaining about—once millions of North Carolinians had already voted in the name of ending supposed "chaos."[112] Varying interpretations of *Purcell* are nothing new,[113] yet the abuse of the principle demonstrates the federal judiciary's dangerous folly of interpreting election law on the eve of federal elections—either the majority or dissenting opinion can be easily read by the general public as judges choosing their preferred election rule outcome, only then to return to precedent and massaging it to justify their desired results.[114] On

108 *Wise*, 978 F.3d at 116–17 (Wilkinson & Agee, JJ., dissenting) ("[T]here is no principled reason why this rule should not apply against interferences by state courts and agencies. The victim of a last-minute interference, whatever its source, is the same: a federal election.").

109 *See id.*

110 *See* Section I.C.ii.3's discussion of litigation in Pennsylvania (noting plaintiffs in *Boockvar* brought only state law claims in state court). *Purcell* "traditionally" has only been applied against federal court intervention. *See Wise*, 978 F.3d at 117 (Wilkinson & Agee, JJ., dissenting); *id.* at 99 (majority opinion) ("[O]ur dissenting colleagues' assertion that 'there is no principled reason why this rule should not apply against interferences by state courts and agencies,' . . . flips *Purcell* on its head: our colleagues *justify* federal court intervention—the one thing *Purcell clearly* counsels against—based on their own notions of what the Supreme Court *should have* said in *Purcell*.").

111 *Wise*, 978 F.3d at 105, 117 (Wilkinson & Agee, JJ., dissenting).

112 *Id.* For detailed early-vote data as of 4:40 AM the day of the *Wise* decision, see *N.C. Absentee Statistics for the 2020 General Election*, N.C. STATE BD. OF ELECTIONS, https://s3.amazonaws.com/dl.ncsbe.gov/Press/NC%20Absentee%20Stats%20for%202020%20General%20Election/Absentee_Stats_2020General_10202020.pdf [https://perma.cc/A6AH-CHWZ].

113 Hasen, *supra* note 76 (discussing *Purcell*-related litigation during 2014). The article's argument that *Purcell* has swallowed the constitutional election-related claims before federal courts remains as important as ever today.

114 Relatedly, both legal commentators and even one Supreme Court Justice have conceded that public perception of the Supreme Court as a political entity increased in recent years. *See* Ian Millhiser, *Kagan Warns that the Supreme Court's Legitimacy Is in Danger*, THINKPROGRESS (Sept. 17, 2018, 8:00 AM), https://archive.thinkprogress.org/justice-kagan-warns-that-the-supreme-courts-legitimacy-is-in-danger-2de1192d5636 [https://perma.cc/L62K-GRAM]; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 160 (2019) (showing that "polling data provides some evidence that much of the public sees the Justices as political actors"). Even though the analysis above concerns the Fourth Circuit rather than the

top of this, the Supreme Court did not make public its decision to let the Fourth Circuit's decision stand until less than a week before Election Day.[115]

Nonetheless, what make the *Moore* and *Wise* decisions somewhat unique is that the very state action being protected under the *Purcell* principle happened to be an expansion, rather than a restriction, of the franchise.[116] While the Fourth Circuit's decision theoretically should serve as a model for other federal courts—applying *Purcell* neutrally to preserve or even expand the franchise—it stands in contrast to other decisions which have weaponized poorly developed doctrine or ignored it all together to restrict ballot deadlines, and therefore voting option flexibility—a position for which the *Wise* dissent vociferously advocated.[117]

2. Minnesota

There are several factual similarities between *Carson v. Simon* and *Wise*, yet their diametrically opposite outcomes illustrate the need to federally standardize absentee ballot deadlines.[118] Similar to North Carolina, the absentee ballot deadline extension (in Minnesota's case, one week) resulted from a consent decree between an initial group of plaintiffs and Minnesota's Secretary of State.[119] Where the cases stand in stark contrast, however, is that the Eighth Circuit majority in *Simon* used much of the same reasoning—that the consent decree itself usurped legislative power—as the dissent in *Wise*.[120] Yet the most eyebrow-raising part of the *Simon* opinion is that the majority in effect ignores *Purcell* and *Andino* as binding precedent by arguing that, under the U.S.

Supreme Court, federal intermediate appellate court decisions are most in the public eye around election time, supporting the notion that such decisions can be viewed by the public through the lens of desired political outcomes. *See, e.g.*, Jim Rutenberg & Rebecca R. Ruiz, *Federal Appeals Courts Emerge as Crucial for Trump in Voting Cases*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/10/17/us/politics/federal-appeals-courts-trump-voting.html [https://perma.cc/W5BT-D5M2].

115 The Supreme Court issued its ruling on October 28, 2020. *See* Wise v. Circosta, 141 S Ct. 658 (2020) (mem.).

116 *See* N.C. All. for Retired Ams. v. N.C. State Bd. of Elections, No. 20-CVS-8881, 2020 N.C. Super. LEXIS 27 (Super. Ct. N.C. Oct. 2, 2020). North Carolina's absentee ballot deadline was initially extended via a consent decree. *See Wise*, 978 F.3d at 106–07 (Wilkinson & Agee, JJ., dissenting) (describing the terms of the consent decree).

117 *See, e.g.*, *Simon*, 978 F.3d 1051 (8th Cir. 2020) (per curiam); *see also Wise*, 978 F.3d at 104–117 (Wilkinson & Agee, JJ., dissenting).

118 *Simon*, 978 F.3d at 1054–63. While not identical in reasoning, the spirits of the *Wise* dissent and the *Simon* majority are essentially the same. *Cf. Wise*, 978 F.3d at 104–117 (Wilkinson & Agee, JJ., dissenting) (rejecting state election rule changes emanating from consent decrees between private parties and non-legislative state agencies as usurping state legislative power).

119 *Simon*, 978 F.3d at 1054.

120 *Id.* at 1054–63.

Constitution, once a state legislature sets the status quo via lawmaking, any rule changes related to election administration will thenceforth be invalid.[121] While this argument stands in contrast not only with the *Wise* ruling, it also flies in the face of *Purcell* itself and any judicial restraint embodied in the doctrine of constitutional avoidance.[122] In other words, there was no need for the Eighth Circuit majority to decide a question that was constitutional in nature.[123] Nonetheless, by doing so, the majority found a way to apply the doctrine that best suited its desired outcome, as the Fourth Circuit arguably did as well.[124]

Of course, circuit splits are bound to happen on all sorts of hot button, politically charged issues;[125] yet, as the Supreme Court has counseled, election cases are unique in their time constraints and effect

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121 *Id.* at 1062 ("The *Purcell* principle is a presumption against disturbing the status quo. The question here is who sets the status quo? The Constitution's answer is generally the state legislature. And in the case of presidential elections, the Electors Clause vests power exclusively in the legislature. In our case, the Minnesota Legislature set the status quo, the Secretary upset it, and it is our duty, consistent with *Purcell*, to at least preserve the possibility of restoring it."). Though the majority purports to adhere to *Purcell*, it deals little with the fact that when the Minnesota Secretary of State "upset" the status quo via a consent decree that Minnesota had agreed to in August, the court's decision came in late October, over a month after early voting had begun in between the two reversals in election law. *See id.*; Amy Forliti, *Court Hears Challenge to Minnesota Mail-in Ballots Extension*, ASSOCIATED PRESS (Oct. 27, 2020), https://apnews.com/article/election-2020-donald-trump-virus-outbreak-elections-minnesota-d8042c923aa8c1abd67829357a756724 [https://perma.cc/UYC7-3HWS].

122 The majority could have relied on *Purcell* alone to avoid any constitutional analysis, rather than analyzing the constitution and retrofitting *Purcell* into its interpretation thereof. *See* Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam) ("We underscore that we express no opinion here on the correct disposition, after full briefing and argument . . . on the ultimate resolution of these cases."); *id.* at 6 (Stevens, J., concurring) ("Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality."); *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

123 *See* note 122 and accompanying text.

124 *See Simon*, 978 F.3d at 1067–68 (Kelly, J., dissenting) (describing the majority's approach to crafting injunctive relief as "novel" and noting "[t]he Supreme Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election. . . . Nonetheless, this court has issued an order directing the Minnesota Secretary of State to take specific action with respect to its election process for an election that is already under way." (internal quotations marks and citation omitted) (quoting Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020))); Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1380 ("From 2018–2020 there was a dramatic and strongly statistically significant spike in both partisan splits and partisan reversals of en banc decisions—more in both categories than we observed in any other time period over six decades."). *See also supra* notes 113–114 and accompanying text. While *Simon* involved a three-judge panel rather than an appellate court sitting en banc, it comes as little surprise that the two-to-one decision broke down on partisan lines. *See generally* 978 F.3d 1051.

125 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (resolving a circuit split between the Sixth Circuit and every other federal circuit that had addressed the exclusion of same-sex couples from obtaining marriage licenses).

on the public's ability to participate in the electoral process.[126] There is therefore no justifiable legal reason why voters in North Carolina should have a consent decree validated to extend absentee ballot receipt deadlines, while voters in Minnesota should receive the opposite result less than a week before a contentious federal election, as voters in both states were choosing between at least four of the same candidates for president and vice president.[127]

Moreover, specific to *Simon*, the dissent notes important practical considerations and public interest concerns which should be at the bedrock of adjudication of election law decisions, including avoiding voter confusion and enabling as many citizens to vote as possible.[128] Furthermore, the dissent correctly spells out concerns over confusion that the majority brushes off as "inevitable post-election challenges."[129] For example, while the majority argues that Minnesota's Secretary of State's alleged usurpation of the state legislature's power was the original violation of *Purcell*, the dissent notes that for the one million seven-hundred thousand Minnesota voters, the consent decree's absentee ballot deadline extension instructions were the only form of notice and directions that they had received from the state prior to the majority's ruling which disturbed those instructions.[130] Further complicating matters, given the decision's timing—six days before voting ended—potential Republican Electoral College electors brought this suit attacking the consent decree.[131] Because the Eighth Circuit panel reversed the District Court's ruling that the Electors did not have standing to pursue their claims, Minnesotans did not know if the decision applied only to sidelining votes for the national presidential election, or if all

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126 *Republican Nat'l Comm.*, 140 S. Ct. 1205 (Ginsburg, J., dissenting).

127 *See* Daniel P. Tokaji & Allison R. Hayward, *The Role of Judges in Election Law*, 159 U. PA. L. REV. PENNUMBRA 273, 275–76 (2011) (arguing that there are two scenarios in which judicial intervention in election law cases is warranted: (1) where "a majority will seek to weaken a minority of citizens" from exercising their voting rights and (2) when elected officials "promote their own self-interest at the expense of the polity"). Here, in the absentee ballot deadline context, neither of Tokaji and Hayward's criteria apply to justify the Eighth Circuit's invalidation of the consent decree to extend the ballot deadline in that state. *See id.*; *see also supra* text accompanying notes 122–123.

128 *Simon*, 978 F.3d at 1067 (Kelly, J., dissenting) ("The court's injunctive relief will cause voter confusion and undermine Minnesotans' confidence in the election process, implicating both *Purcell* concerns and the public interest inherent in having eligible citizens participate in state elections, as well as causing potential harm for voters.") (citing League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014)); *see also infra* Section III.C.

129 *Simon*, 978 F.3d at 1061 (majority opinion).

130 *Id.* at 1067 (Kelly, J., dissenting). Stated differently, the majority can assert whatever theory of legislative power it likes, but its theory as applied to the facts on the ground in Minnesota belies the experience of voters, all of whom had requested ballots under the pretense that they would be counted if received by local elections officials by November 10. Thus, general election voters in Minnesota were only experiencing *one* rule change, arguably in violation of *Purcell*.

131 *Id.* at 1054 (majority opinion).

ballots received after November 3 would be invalid.[132] This bred even further "unnecessar[]y disrupti[on]."[133] Finally, the ruling meant that state election officials had to segregate ballots arriving after November 3, leaving a sizeable portion of voters in doubt as to the potential validity of their votes.[134]

3. Pennsylvania

Pennsylvania Democratic Party v. Boockvar involved various state law claims to ease restrictions on the absentee balloting process under the state's constitution, and the Supreme Court of Pennsylvania exercised its "Extraordinary Jurisdiction" to extend the state's absentee ballot receipt deadline by three days for the presidential election.[135] In appealing that decision to the U.S. Supreme Court, the Republican Party of Pennsylvania first sought a stay, which the highest Court denied by an evenly split four-to-four vote.[136] In a last-ditch effort to prevent the Supreme Court of Pennsylvania's decision from taking effect, petitioners sought expedited consideration of their writ of certiorari on the constitutional question of whether the Supreme Court of Pennsylvania had usurped its power to interpret that state's constitution given the meaning of the term "Legislature" in the Federal Constitution.[137] As he

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132 *Id.* at 1057–59 (ruling that the Electors had standing to bring their suit before the presidential election, while not addressing the lingering issue of whether such standing would preclude an entire ballot from counting, or only a vote cast for president). *See also infra* note 133.

133 Greta Kaul, *What the Appeals Court's Decision on Late-Arriving Ballots Means for Minnesota—and Where Things Could Go from Here*, MINNPOST (Oct. 30, 2020), https://www.minnpost.com/elections/2020/10/what-the-appeals-courts-decision-on-late-arriving-ballots-means-for-minnesota-and-where-things-could-go-from-here [https://perma.cc/7QLK-L5SH] (noting that the Eighth Circuit's decision created the uncertainty of possible further post-election litigation).

134 *See id.*; *see also* Jeremiah Jacobsen & Chris Hrapsky, *Court: Late-Arriving Minnesota Absentee Ballots Must Be Separated, May Not Be Counted*, KARE 11 (Oct. 31, 2020), https://www.kare11.com/article/news/politics/elections/court-late-arriving-minnesota-absentee-ballots-must-be-separated-may-not-be-counted/89-6dccc710-c1eb-46ea-8b92-4f6e12e5efe8 [https://perma.cc/F5M3-F8KT] ("The ruling casts doubt on whether absentee ballots received after Nov. 3 will be counted, despite a state plan to continue to count absentee ballots received within seven days of the election[.]").

135 *See supra* note 61; Harvard Law Review, *Recent Case:* Pennsylvania Democratic Party v. Boockvar, HARV. L. REV. BLOG (Oct. 4, 2020), https://blog.harvardlawreview.org/recent-case-_pennsylvania-democratic-party-v-boockvar_ [https://perma.cc/8VQW-H4C2] (noting the Supreme Court of Pennsylvania's exercise of extraordinary jurisdiction).

136 Pam Fessler, *Supreme Court Rules Pennsylvania Can Count Ballots Received After Election Day*, NPR (Oct. 19, 2020, 7:44 PM), https://www.npr.org/2020/10/19/922411176/supreme-court-rules-pennsylvania-can-count-ballots-received-after-election-day [https://perma.cc/5LNZ-VRJV] (explaining Chief Justice Roberts siding with his liberal colleagues to allow the court's ruling to stand. The Court issued its ruling without comment).

137 Petition for a Writ of Certiorari at 2, 17, Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020) (No. 20-542), 2020 WL 6273543. Only four votes are needed for the Supreme Court to grant

reluctantly approved of the U.S. Supreme Court's denial of petitioners' motion to expedite, Justice Alito accused his colleagues of not acting quickly enough to issue a stay of the Supreme Court of Pennsylvania's decision.[138]

The practical effect of both of these U.S. Supreme Court shadow docket decisions was to leave the absentee ballot arrival deadline extension in place, yet three U.S. Supreme Court Justices initially left the door open to throwing out ballots that arrived after Election Day had such votes become dispositive to the state's presidential results.[139] In the end, President Biden won the state by a margin greater than the number of absentee ballots that arrived during the three-day extension window,[140] and on February 22, 2021, the U.S. Supreme Court ruled that the ultimate constitutional question was therefore moot.[141]

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a writ of certiorari. *See Supreme Court Procedures*, UNITED STATES CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/8PUE-9JTY].

138 *Republican Party of Pa.*, 141 S. Ct. at 1–5 (Alito, J., concurring) ("The Court's handling of the important constitutional issue raised . . . has needlessly created conditions that could lead to serious post-election problems.").

139 Jess Bravin & Brent Kendall, *Supreme Court Declines to Disturb Ballot Deadlines in North Carolina, Pennsylvania*, WALL ST. J. (Oct. 28, 2020, 10:04 PM), https://www.wsj.com/articles/supreme-court-won-t-hear-pennsylvania-ballot-case-before-election-11603920921 [https://perma.cc/T4L9-VDX6] ("Justice Alito cited [the Pennsylvania Attorney General's decision to segregate ballots received after election day] in his statement, saying that it would allow 'a targeted remedy,' such as invalidating the late-delivered votes, should the court take up the case after Election Day."); *see also* Elizabeth Hardison & Stephen Caruso, *U.S. Supreme Court Turns Down Pa. Republicans' Request to Halt Extended Ballot Deadline*, PA. CAPITAL-STAR (Oct. 28, 2020, 7:20 PM), https://www.penncapital-star.com/blog/u-s-supreme-court-turns-down-pa-republicans-request-to-halt-extended-ballot-deadline-report [https://perma.cc/L5D2-BN4Z] (noting how Justice Alito's statement asserted a reserved right for the U.S. Supreme Court to disqualify ballots arriving after Election Day if those ballots had become dispositive to the state's election results).

140 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://www.inquirer.com/politics/election/pennsylvania-mail-ballots-counted-deadline-supreme-court-20201111.html [https://perma.cc/A9CV-XLQW]. *See also* Pennsylvania Presidential Election Results, *supra* note 60.

141 *Boockvar*, 141 S. Ct. 732, 732 (2021) (mem.) ("The motions of Donald J. Trump for President, Inc. for leave to intervene as petitioner are dismissed as moot. The motions of Thomas J. Randolph, et al. for leave to intervene as respondents are dismissed as moot. . . . The petitions for writs of certiorari are denied."). Professor Rick Hasen believes that the U.S. Supreme Court would ultimately like to address the core constitutional question present in the Pennsylvania case, but it rejected the writ of certiorari in this instance because the case is so politically charged, and the Court has no interest in putting the spotlight on itself in a case that could be seen as attempting to undermine the results of the 2020 presidential election. Rick Hasen, *Breaking and Analysis: Supreme Court Refuses to Hear Cases Over Conduct of Election in Pennsylvania, With Justices Alito, Gorsuch and Thomas Dissenting: A Ticking Time Bomb to Go Off in a Later Case*, ELECTION L. BLOG (Feb. 22, 2021, 6:39 AM), https://electionlawblog.org/?p=120941 [https://perma.cc/UM9R-QFPR].

Though the extension was left in place and the "late" arriving ballots were not dispositive to the state's result in the presidential election,[142] *Boockvar* nonetheless illustrates the potential dangers of federal court involvement around absentee ballot deadline rules. Despite the Court's obvious appellate jurisdiction to decide the meaning of the term "Legislature" in the Federal Constitution,[143] the practical effects of the various rulings in the Pennsylvania case before the election were to leave voters in limbo around absentee ballot rules after voting had already begun, while civilian voters whose ballots arrived shortly after Election Day did not know if their votes would count as of December 2020.[144] In essence, even though *Purcell* did not apply to this case because the litigation emanated from state court, the U.S. Supreme Court's late role in it right before Election Day created the very uncertainty that the Court chides lower federal courts for causing in a different context.[145] To wit, the very involvement of the U.S. Supreme Court, irrespective of its eventual rulings after the election, left election administrators in Pennsylvania without clarity of election rules both before and after Election Day.[146] Under exact uniform national deadline rules, the U.S.

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142 *See supra* note 140.

143 *See* 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."). *See also, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 793 (2015) (upholding the right of Arizona citizens, by a 5-4 vote, to create an independent redistricting commission by ballot initiative through a non-strict majority interpretation of the meaning of the word "Legislature" in the Constitution). Justice Barrett's replacement of Justice Ginsburg leaves the ruling in *Arizona State Legislature* in doubt.

144 Jonathan Lai, *10,000 Pennsylvania Votes Are in Limbo. They Won't Change the Outcome. They Could Still Have a Huge Impact.*, PHILA. INQUIRER (Dec. 20, 2020), https://www.inquirer.com/politics/election/pennsylvania-late-mail-ballots-supreme-court-20201220.html [https://perma.cc/FPG3-6GBB].

145 *See infra* Section I.C.ii.4 (noting how the Wisconsin case is the most clear-cut application of the *Purcell* principle of the three cases surveyed that began in federal court).

146 Marie Albiges & Tom Lisi, *Pa. Election Officials Are Burnt Out and Leaving Their Jobs After 2020 'Nightmare,'* SPOTLIGHT PA (Dec. 21, 2020), https://www.spotlightpa.org/news/2020/12/pennsylvania-election-2020-officials-retiring-nightmare [https://perma.cc/9AHL-78EQ] ("Act 77 [Pennsylvania's no-excuse absentee ballot law] left a lot of room for interpretation and confusion, election officials said. There were questions about what to do if a ballot wasn't in a secrecy envelope, or what to do with mail ballots that arrived after Election Day. Secretary of the Commonwealth Kathy Boockvar attempted to clarify the law by issuing guidance documents to county election officials and getting legal opinions from the courts, but the rules were constantly changing."). *Cf. infra* note 164 (noting Justice Kavanaugh's view that court involvement before Election Day is contradictory to U.S. Supreme Court precedent).

Supreme Court would likely have not ruled on the absentee ballot portion of the case.[147]

4. Wisconsin

In several respects, *DNC* is the most procedurally—and possibly legally—simple case of the four analyzed in this Note.[148] In short order, a federal district court judge extended Wisconsin's absentee ballot deadline for November by employing *Anderson-Burdick* balancing, the Seventh Circuit issued a stay to that decision citing *Purcell* in part, and the Supreme Court denied national Democrats' attempts to vacate the stay by ruling that the federal district judge in the Western District of Wisconsin had violated *Purcell* when he issued an absentee ballot extension deadline.[149] However, the Supreme Court issued its decision only ten days before Election Day, giving the Justices a late opportunity to clarify their conflicting interpretations of *Anderson-Burdick* balancing and *Purcell* in four separate opinions.[150]

First, Justice Roberts wrote to clarify the discrepancy between his vote in the *Boockvar* and *DNC* cases.[151] For both Justices Gorsuch and Kavanaugh, the prospect of vacating the stay presented an untenable slippery slope that would potentially invalidate the other twenty-nine state laws that required absentee ballots to arrive sometime on Election Day.[152] On the other hand, relying on the difficulties posed by the

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[147] *See infra* Part III (discussing jurisdiction stripping for federal courts). Properly tailored legislation would severely limit both state and federal courts' roles in any absentee ballot deadline litigation.

[148] *See DNC*, 141 S. Ct. 28 (2020) (mem.).

[149] *Id.* at 28 (Roberts, C.J., concurring) ("In this case, as in several this Court has recently addressed, a District Court intervened in the thick of election season to enjoin enforcement of a State's laws. Because I believe this intervention was improper, I agree with the decision of the Seventh Circuit to stay the injunction pending appeal."); *id.* (Gorsuch, J., concurring) ("Weeks before a national election, a Federal District Judge decreed that Wisconsin law violates the Constitution by requiring absentee voters to return their ballots no later than election day. . . . Why did the district court seek to scuttle such a long-settled tradition in this area? COVID. Because of the current pandemic, the court suggested, it was free to substitute its own election deadline for the State's."); *id.* at 30 (Kavanaugh, J., concurring) ("For three alternative and independent reasons, I conclude that the District Court's injunction was unwarranted. First, the District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents. This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle."); *see also DNC*, 977 F.3d 639, 641 (7th Cir. 2020) (per curiam); Democratic Nat'l Comm. v. Bostelmann (*DNC*), 488 F. Supp. 3d 776, 816–18 (W.D. Wis. 2020).

[150] *See* 141 S. Ct. 28 (Roberts, C.J., concurring); *id.* at 28–30 (Gorsuch, J., concurring); *id.* at 30–40 (Kavanaugh, J., concurring); *id.* at 40–46 (Kagan, J., dissenting, joined by Breyer & Sotomayor, JJ.).

[151] *See supra* note 101.

[152] 141 S. Ct. 28 (Gorsuch, J., concurring); *id.* (Kavanaugh, J., concurring).

pandemic and a drastically different interpretation of *Purcell*, Justice Kagan would have vacated the Seventh Circuit's stay.[153]

The Court's rebuke of the federal district judge in Wisconsin[154] is curious given its affirmance of the Fourth Circuit's *Wise* ruling, even though the supposed initial election rules changed right around the same time.[155] Like the Pennsylvania case, this legal hair-splitting certainly falls within the Supreme Court's domain, but the distinction of allowing a consent decree to stand versus overturning a federal district court ruling is meaningless to voters who are primarily concerned with how much time they have to return their absentee ballots.[156] In effect, the Wisconsin decision created a functional circuit split by placing the Seventh Circuit's decision in the Wisconsin case in contrast with the North Carolina case.[157]

5. Contextualizing the Surveyed Decisions

In all, these four cases represent only a fraction of the absentee ballot litigation of the 2020 cycle.[158] Nonetheless, they helpfully demonstrate the need to extricate the federal courts from last-minute absentee ballot deadline rulings. Of the four cases analyzed, federal courts allowed two ballot extensions to stand for separate reasons, while the other two saw previously scheduled extensions reversed for equally different reasons, too.[159] In *Boockvar* and *DNC*, the different outcomes can be partially attributed to Chief Justice Roberts providing a swing vote.[160] Meanwhile, in *Simon* and *Boockvar*, certain judges on the Eighth Circuit Court of Appeals and the U.S. Supreme Court, respectively, sought to decide whether ballots arriving in between the "old" and "new" deadlines would count after the election, leaving thousands of voters in limbo.[161] In all, this judicial quibbling at least deserves a full briefing and opinion.[162]

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153 *Id.* 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.").

154 *See supra* note 149.

155 *DNC*, 488 F. Supp. 3d 776 (W.D. Wis. 2020) (issuing opinion extending deadlines on September 21, 2020); *Wise*, 978 F.3d 93, 97 (4th Cir. 2020) (en banc) (describing parties' joint petitioning of the court for an agreed-upon absentee ballot extension on September 22, 2020); *see supra* note 115 and accompanying text.

156 *See, e.g.*, *supra* notes 132–134 and accompanying text.

157 *See supra* note 19 and accompanying text; *supra* text accompanying note 20.

158 *See supra* note 12.

159 *See supra* Sections I.C.ii.1–4.

160 *See supra* note 101.

161 *See* text accompanying notes 132 and 144; *see also* note 139.

162 Hasen, *supra* note 76, at 461–64 (arguing that the Supreme Court should publish full opinions on election-related shadow docket cases after the fact). *See also* Stephen I. Vladeck, *The Supreme Court Needs to Show Its Work*, ATL. (Mar. 10, 2021, 9:35 AM),

Regardless, the conflicting web of results ultimately deserves congressional attention.[163] For the average voter in these states, the surveyed federal courts' legal constructions are confusing at best and cause the very election administration issues against which *Purcell* cautions.[164]

II. ANALYSIS: ZOOMING OUT, WHAT IS WRONG WITH THE CURRENT SITUATION ANYWAY?

A. *Circuit Splits of Any Kind Are Antithetical to Basic Principles of American Law*

Beyond the mish-mash application of *Purcell*, the reality that federal court rulings surveyed in this Note resulted in opposite outcomes for voters is representative of a bug in American law, as circuit splits generally have grown increasingly common in recent years.[165] In their recent Article, Jonathan M. Cohen and Daniel S. Cohen lay out five basic legal problems that circuit splits pose: (1) they "create uncertain and disparate applications of federal legal rights," (2) they burden or limit government actors under federal law based solely on location, (3) the Supreme Court does not resolve enough of them, so many remain indefinitely, (4) "they impair the bedrock American principle that federal law should be uniform," and (5) because these splits raise fundamental fairness questions, "they may undermine the federal judiciary's legitimacy."[166]

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https://www.theatlantic.com/ideas/archive/2021/03/supreme-court-needs-show-its-work/618238 [https://perma.cc/P9AF-C5MU] ("For a Court whose legitimacy depends largely on the public's perception of its integrity, the growth of [shadow docket] decisions that disrupt life for millions of Americans can only be a bad thing—and is reason enough for the Court to bring more of these rulings out of the . . . shadows.").

163 *See infra* Part III.

164 *See DNC*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (mem.) (arguing against "a federal district court [swooping] in and alter[ing] carefully considered and democratically enacted state election rules when an election is imminent. That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion . . . ." (citing Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006))).

165 Jonathan M. Cohen & Daniel S. Cohen, Iron-*ing out Circuit Splits: A Proposal for the Use of the* Irons *Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989 (2020).

166 *Id.* at 996–98 (citing, in relation to factor four, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 824 (1992) ("Our constitutional language and culture hold the U.S. Constitution to be the repository of the fundamental values of the national community, a community to which every citizen belongs.")).

At least four of these five factors are implicated in the absentee ballot litigation described herein.[167] While the authors point out several relevant but somewhat mundane examples,[168] the federal courts' undermining of their own validity in the absentee ballot context is particularly troublesome given the growth of election legitimacy questions among significant portions of the public.[169] Further complicating matters, absentee ballot deadline circuit splits are some of the few where thousands of people experience the consequences of incidental geographical division very shortly after a court's contrary decision.[170] In sum, absentee ballot deadline circuit splits not only exemplify, but also amplify, the very foundational wrongs that Cohen and Cohen describe.

B. *Congress Should Be the Ultimate Decider of Federal Election Rules, Not Article III Courts*

Like many other technical legal topics, the Constitution says nothing about the modern mechanics of election administration whatsoever.[171] Consequently, as with other hot-button issues concerning election outcomes, there is reasonable disagreement as to what role, if any, courts should play in shaping an election's playing field in general.[172] For example, Professor Daniel P. Tokaji has argued specifically for Supreme Court restraint in election administration litigation cases, since they are

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167 The authors' concerns over the Supreme Court hardly ever resolving circuit splits seems less immediately pertinent to the absentee ballot litigation context, where the Supreme Court has been quite active via ruling on its shadow docket. *See supra* Section I.C.ii.

168 Cohen & Cohen, *supra* note 165, at 996–97 (describing Commerce Clause and Second Amendment circuit splits).

169 See *supra* note 3 highlighting voters who believed the 2020 presidential election was fraudulent.

170 This impact for citizens stands in contrast with less publicly visible, or constitutionally and electorally consequential, circuit splits such as the Second and Third Circuit's narrow statutory interpretation of "automatic telephone dialing system" under the Telephone Consumer Protection Act, versus the Ninth Circuit's broader and inconsistent interpretation of the same. *See* Cohen & Cohen, *supra* note 165, at 996 n.52.

171 Famously, the U.S. Constitution does not mention "slavery" once. U.S. CONST. A search for the terms "mail," "absentee," and "ballot" reveal that the Constitution only uses the word "ballot" in reference to the election of the president via the Electoral College. *See* U.S. CONST. art. II, § 1.

172 The justiciability debate around partisan gerrymandering is a helpful example of such a reasonable disagreement about the role of the judiciary in shaping electoral outcomes. *See generally* Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (ruling that claims concerning partisan gerrymandering are nonjusticiable political questions for federal courts). *But see* League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282, 289 (2018) (per curiam) (describing the exercise of jurisdiction over gerrymandering claims and striking down the state legislature's congressional district maps as "clearly, plainly and palpably violat[ing] the Constitution of the Commonwealth of Pennsylvania").

fact intensive in nature, have "weighty democratic values at stake," their procedural postures often "necessitate[] expedited consideration," and there is a "heated political atmosphere" surrounding them.[173] While Professor Tokaji has hit the nail on the head in terms of identifying the problem with Supreme Court intervention in election administration cases, his solution of letting lower federal courts play a greater role in resolving election litigation on the eve of elections is inadequate.[174] Instead, one must look to history for the Founders' original intent regarding election administration to ascertain the proper role for federal courts in election litigation.

At the constitutional convention, debate raged over how best to conduct elections for both houses of Congress, as well as the executive branch in what would become the Presidency.[175] In concerning itself with the overall conduct of congressional elections, the resulting Elections Clause is situated at the intersection of federalism and separation of powers:[176] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[177]

The plain meaning of the words "make or alter" grants Congress the authority both to preempt and supersede state law regulating federal elections, and to create original federal laws concerning these elections, too.[178] In Samuel Johnson's 1768 *Dictionary of the English Language*, among the top definitions of "make" is "to create," "to form," or "to

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173 Tokaji, *supra* note 77, at 1067 (identifying the four factors in the context of criticizing *Purcell*).

174 For example, Tokaji uses a district court judge's handling of a challenge to Ohio's Voter ID law days before the 2006 midterm elections to note that federal district court judges are well positioned to clarify voting rules on the eve of the election given their ability to work closely with the parties' attorneys—in contrast to an appellate court—and their ability to "encourage settlement that will clarify the rules of the game." *See id.* at 1085–86. However, this praise ignores that the distinction of whether a court of appellate jurisdiction or a district court rules on an election provision on the eve of the election is meaningless to those most affected by such decisions. *See, e.g.*, Lucien Bruggeman, *'Like a Yo-Yo': Election Officials Grapple with Flood of Confusing Last-Minute Rule Changes*, ABC NEWS (Oct. 29, 2020, 7:56 AM), https://abcnews.go.com/Politics/yo-yo-election-officials-grapple-flood-confusing-minute/story?id=73890047 [https://perma.cc/KW58-68K5] (quoting an election administrator in Michigan's reaction to court rulings from different levels as a "blizzard of legal challenges, conflicting rulings, deadline extensions and last-minute rule changes, [which] ha[ve] only compounded []confusion, . . . 'We get a directive, then a judge says "no." We get another directive, and the appeals court says "no." It has not been easy.'").

175 JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE 67–71 (2020).

176 Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 104 (2016).

177 U.S. CONST. art. I, § 4, cl. 1. *See supra* note 16.

178 Brief Amici Curiae of Constitutional Law Professors in Support of Respondents at 2–8, Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1 (2013) (No. 12-71), 2013 WL 267029.

produce."[179] "[A]lter" is defined as "to change," and "to make otherwise than it is."[180] In other words, the Clause's power is not limited to a check on state power; it provides Congress with the opportunity to proactively legislate. That this Clause gives Congress an enormous amount of power was never in doubt at the time of the nation's founding; in fact, precisely because of this vast textual grant of power, the Elections Clause became one of many sticking points between Federalists and Anti-Federalists during the Ratification debates.[181]

Aware of Anti-Federalist opposition, Alexander Hamilton defended the Elections Clause in three of his fifty-one essays in the *Federalist Papers*.[182] In *The Federalist No. 59*, Hamilton explained that at the constitutional convention, delegates aimed to create a federal elections system which provided for a degree of flexibility, arguing that there would be "extraordinary circumstances" where the "interposition" of the eventual Congress would become necessary.[183] In so doing, Hamilton poked at a fundamental contention between Federalists and Anti-Federalists surrounding the Elections Clause: the former group was fearful of state legislatures exercising too much power over the new national government—one of the very causes of the constitutional convention in the first instance—while Anti-Federalists feared an all-powerful national government, including Congress.[184] Thus, the terms "extraordinary circumstances" and "necessary" reflect Hamilton's desire for Congress to have the final say over disputed issues related to elections while trying to temper opponents' criticism of the Clause.[185] Noticeably

179 *Make*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768).

180 *See Alter*, JOHNSON, *supra* note 179; *see also Alter*, THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1780).

181 Brief Amici Curiae, *supra* note 178. *See also* Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019) ("During the subsequent fight for ratification, the provision remained a subject of debate.").

182 THE FEDERALIST NOS. 59, 60, 61, at 397–414 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

183 THE FEDERALIST NO. 59, at 399 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In relevant part, Hamilton argued, "[Delegates] have submitted the regulation of elections for the Federal Government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have *reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety*. Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy." *Id.* (emphasis added).

184 *See* WEGMAN, *supra* note 175, at 59–61 (describing the main contentions between the Federalists and Anti-Federalists up until and at the beginning of the Constitutional Convention of 1787).

185 *See* Anthony Peacock, *The Heritage Guide to the Constitution: Election Regulations*, HERITAGE FOUND., https://www.heritage.org/constitution/#!/articles/1/essays/19/election-regulations [https://perma.cc/4P99-5TQB] (conceding Hamilton's desire to have Congress reign

absent, however, is any discussion of either state or federal courts resolving such disputes.[186]

Though the *Federalist Papers* argued in favor of judicial review generally, the federal judiciary's vast powers far outpace what the *Papers*' authors had in mind.[187] While the general efficacy of such expansive power falls beyond the scope of this Note, federal courts' ability to change election rules—either by recognizing or reversing equal protection claims, invalidating or approving mutual consent decrees, or claiming to apply *Purcell* correctly—days before the conclusion of federal elections interlopes on the intent of the Founders to ensure that Congress has the ultimate say regarding federal election administration.[188]

i. Congress's Elections Clause Power Is Currently Underutilized

Recent scholarship has noted that the Elections Clause provides for broad federal powers even if Congress infrequently exercises its power under the Clause.[189] Nevertheless, the U.S. Supreme Court has long provided Congress with a roadmap for the legislative branch's vast Elections Clause powers, including vote counting and supervision.[190]

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supreme on federal election rules, but arguing that Congress's post-ratification interventions in the arena have not met Hamilton's own "extraordinary circumstances" bar).

186 *See supra* note 182. A search for the terms "judge," "justice," "tribunal," "court," and "adjudicate" in *The Federalist Nos. 59*, *60*, and *61* reveal that "court" is found once in the context of its use as the verb "to court," in *The Federalist No. 60*. *See* THE FEDERALIST NOS. 59, 60, 61 at 397–414 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("But what is to be the object of this capricious partiality in the national councils? . . . [W]ill it *court* the elevation of 'the wealthy and the well-born' to the exclusion and debasement of all the rest of the society?" (emphasis supplied)). However, the use of the word has nothing to do with a "court" in the legal context of the word. *See* THE FEDERALIST NO. 60, at 405–06 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In other words, the present practice of federal courts molding state election rules on the eve of federal elections was likely not contemplated by the Founders, or at least not by Publius.

187 CARSON HOLLOWAY, AGAINST JUDICIAL SUPREMACY: THE FOUNDERS AND THE LIMITS ON THE COURTS 16 (2019), https://www.heritage.org/courts/report/against-judicial-supremacy-the-founders-and-the-limits-the-courts [https://perma.cc/66W5-ZD2Z] (arguing that the *Federalist Papers* envisioned judicial review as a power limited to striking down "clear cases of unconstitutional action on the part of the people's representatives").

188 See *supra* Section I.C.ii's discussion of the respective timelines in each case surveyed.

189 Zachary Newkirk, *An Untapped "Arsenal of Power": The Elections Clause, a Federal Election Administration Agency, and Federal Election Oversight*, 47 FLA. ST. U. L. REV. 143 (2019) (arguing in favor of using Congress's Elections Clause power to create independent federal oversight of American elections).

190 *See, e.g.*, Smiley v. Holm, 285 U.S. 355 (1932). The *Smiley* Court noted that in addition to the time and place of elections for members of Congress, the body, through the Elections Clause, has control over "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and

Historically, exercising this power has included the standardization of certain election laws that today seem so basic that one may find it shocking to discover that they were once not existent at the federal level.[191] Specifically, prior to the 1840s, the presidential election did not end on the same day, i.e., there was no uniform Election Day, and prior to 1876, members of the House of Representatives were not elected on the same day as the president.[192] In these instances, although questionable state election administration—among other factors—triggered the push towards federal standardization, today Congress's ability to legislate is nonetheless unreduced when the culprit of needlessly tinkering with election rules is the federal courts.[193] Additionally, even though such earlier intervention was met with opposition, these specific actions provide a roadmap for future legislation because of their emphasis on bold federal uniformity.[194]

More recently, however, Congress's most prominent exercises of its Elections Clause power have arguably been the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA).[195] These laws pass on to the several states webs of base requirements for voter registration and election administration, respectively, rather than a complete and total federal overhaul and administration for either process.[196] As a result, NVRA and HAVA are cautionary tales of an underutilized Elections Clause, given that plenty of litigation persists concerning both laws, as in the absentee ballot deadline

publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Id.* at 366.

191 BEN LEUBSDORF, CONG. RSCH. SERV., R46413, ELECTION DAY: FREQUENTLY ASKED QUESTIONS 2 (2021).

192 *Id.*

193 Jeffrey M. Stonecash, Jessica E. Boscarino & Rogan T. Kersh, *Congressional Intrusion to Specify State Voting Dates for National Offices*, 38 PUBLIUS J. FEDERALISM 137, 141 (2008) (noting that states voting on different days led to more opportunities for voter fraud).

194 *Id.* at 149 (recounting how the push for a uniform Election Day for the House was met with sizeable opposition).

195 *See* National Voter Registration Act, 52 U.S.C. §§ 20501–20511 (requiring states to provide at least three different accessible mechanisms to register to vote); *About the National Voter Registration Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/about-national-voter-registration-act [https://perma.cc/Y2R9-AHES] (noting that three states required additional time to be NVRA compliant due to the need to change their respective state constitutions after NVRA's passage); Help America Vote Act, 52 U.S.C. §§ 20901–21145 (creating a clearinghouse for federal election administration information and passing minimum standards for voting, including the requirement of allowing provisional voting).

196 *See, e.g.*, 52 U.S.C. § 20507(a) (laying out requirements for states regarding voter registration provisions, including a standard voter registration form for when voters register to vote at any state's Department of Motor Vehicles or equivalent); *see also* 52 U.S.C. §§ 20921–20930 (establishing the Election Assistance Commission to, inter alia, aid states in meeting HAVA's voting equipment requirements, while simultaneously limiting the agency's rulemaking ability).

domain.[197] Thus, to extricate federal courts from absentee ballot deadline decision making, Congress should go big or go home. To be sure, unprecedented federal action should not be confused with unconstitutional federal action.[198]

III. PROPOSAL

A. *A Framework for Standardization More Effective Than H.R. 1*

Initially, priorities for a federal law standardizing absentee ballot deadlines may be difficult to define as there are several aspects of the process that Congress could emphasize. That said, Congress has not been totally asleep at the wheel in attempting to federally standardize many absentee ballot procedures.[199] As recently as March 2021, the U.S. House passed a sweeping election reform bill, H.R. 1, that, among other provisions, eliminates many of the onerous requirements on who could vote absentee.[200] The legislation is a useful point of comparison because the House has passed the bill in two consecutive Congresses.[201] However, the law's absentee ballot timeline provisions are a mishmash.[202] For example, the law creates a single postmark deadline on Election Day,

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197 For an in depth look at the status of voting registration litigation involving NVRA, see Dale E. Ho, *Election Day Registration and the Limits of Litigation*, 129 YALE L.J. F. 185 (2019); *see also, e.g.*, Iowa Voter All. v. Black Hawk Cnty., 515 F. Supp. 3d 980 (N.D. Iowa 2021) (alleging election administrators violated both HAVA and NVRA).

198 Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171, 184 (2019) ("While Congress has used [its Elections Clause] authority sparingly, leading to confusion about its actual scope, there are historical precedents that go beyond [recent proposed legislation] in their assertion of federal power. In any case, unprecedented or novel exercises of federal power should not be confused with unlawful uses of federal authority.").

199 *See, e.g.*, Vote by Mail Act of 2019, S. 26, 116th Cong. (2019); *see also supra* note 17.

200 *See* For the People Act, H.R. 1, 117th Cong. § 307(a)(2)(A) (2021) (prohibiting voter ID requirements for absentee ballots); § 307(a)(2)(B) (preempting state laws which require notarization and a witness signature on absentee ballots).

201 *See supra* note 17. The author acknowledges that Congressional Democrats in the 117th Congress have attempted to pass other voting rights legislation that concerns, or relates to, some of the ideas expressed herein. *See, e.g.*, Jacob Pramuk, *Senate Republicans Block Democrats' Sweeping Voting, Ethics Bill*, CNBC (June 22, 2021 7:45 PM), https://www.cnbc.com/2021/06/22/senate-to-vote-on-s1-for-the-people-act-bill.html [https://perma.cc/6A9U-FDRM] (describing how the U.S. Senate's version of H.R. 1, the For the People Act—also known as S. 1—failed to pass the chamber); Nicholas Reimann, *John Lewis Voting Rights Act Fails to Pass Senate*, FORBES (Nov. 3, 2021, 3:45 PM), https://www.forbes.com/sites/nicholasreimann/2021/11/03/john-lewis-voting-rights-act-fails-to-pass-senate/?sh=2427e2ebb3d2 [https://perma.cc/S43C-MBES] (detailing how Democrats' proposed revamp of the Voting Rights Act of 1965 failed to pass the Senate). However, in light of the failure of any of this legislation to become law, H.R. 1 still remains a helpful framework for the reasons stated herein.

202 *See infra* note 203 and accompanying text.

while states may impose their own "reasonable" request deadlines beforehand and may not make their ballot receipt deadlines less than ten days post-Election Day.[203] Thus, while it is unclear whether H.R. 1 will become law in the foreseeable future without a strong majority of Democratic senators,[204] its passage as written would not distort this Note's central thesis because litigants could still attack disparate absentee ballot deadlines on equal protection grounds.[205]

Instead, a better piece of legislation would include a special focus on singular and specific request, postmark, and receiving deadlines, where congressional compromises remain possible. For instance, considering that most states already require absentee ballots to arrive at some point on Election Day, such a provision choosing an hour on Election Day should be a blueprint of bipartisan compromise.[206] Furthermore, legislation zeroing in on a national deadline compromise could theoretically do away with state laws concerning postmark deadlines, at least one of which currently exists because there is no corresponding absentee ballot receipt deadline.[207]

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203 For the People Act, H.R. 1, 117th Cong. §§ 307(a)(2)(C), (e)(1), (e)(2) (2021).

204 Though the 117th Congress is composed of thin Democratic House and Senate majorities, voting rights bills must receive sixty votes to end legislative debate. *See* Peter W. Stevenson, *Here's What H.R. 1, the House-Passed Voting Rights Bill, Would Do*, WASH. POST (June 2, 2021, 12:44 PM), https://www.washingtonpost.com/politics/2021/03/05/hr1-bill-what-is-it [https://perma.cc/XD3P-7CEK] ("But if they actually want [H.R. 1] to pass, Democrats don't have a lot of options. . . . H.R. 1 isn't being passed through the special reconciliation process that requires a simple majority. Democrats' other option is to eliminate part or all of the legislative filibuster . . . ."). Filibuster reform requires a simple majority but is no easy political task. *See generally* Giovanni Russonello, *Will Democrats Nix (or Weaken) the Filibuster?*, N.Y. TIMES (Mar. 15, 2021), https://www.nytimes.com/2021/03/15/us/politics/democrats-filibuster-manchin-sinema.html [https://perma.cc/YF4P-NFKH] (noting that many of the Democrats' legislative priorities are dead in the Senate if the filibuster remains unchanged). *See also infra* text accompanying Section III.C (noting Republican opposition to the bill).

205 H.R. 1's ten-day minimum ballot acceptance deadline would likely reduce some of the litigation that this Note focuses on the most, but litigants could still bring equal protection claims to persuade courts to extend deadlines to align with states with longer deadlines than the ten-day baseline. Further, the "reasonable" request deadline provision would become the subject of equally contentious litigation as state legislatures unhappy with the ten-day receipt deadline could seek to shrink the ballot request window as much as possible. *See supra* note 44. Thus, H.R. 1 could shift the focus of absentee ballot deadline litigation from the back-end to the front-end of the vote-by-mail process.

206 *See supra* note 152 and accompanying text (noting that Justices Kavanaugh and Gorsuch took umbrage with a district court judge in Wisconsin altering ballot deadlines in part because Wisconsin is one of the thirty states requiring ballots to arrive on election day).

207 Laurel Demkovich, *Wondering if Your Ballot's Been Counted? Here's How to Track It in Washington and Idaho*, SPOKESMAN-REVIEW (Oct. 25, 2020), https://www.spokesman.com/stories/2020/oct/25/wondering-if-your-ballots-been-counted-heres-how-t [https://perma.cc/JA4Q-PHPT] (noting that Washington's mail-in ballots must be postmarked by 8:00 PM on Nov. 3, 2020 (Election Day) and there is no arrival deadline in that state, whereas ballots in Idaho must be *received* by county Elections Offices at the exact same time).

While some of these suggestions could be read as invitations to restrict the franchise by restricting ballot deadlines in the minority of states that currently have them after Election Day, the net positives would outweigh the net negatives by streamlining the absentee ballot process to enable more votes to count regardless of whatever uniform deadline is chosen.[208] Put simply, the specific details of such legislation are less important than a couple overarching goals: 1) eliminating as many deadline timeframe discrepancies for requesting and returning ballots as possible, which H.R. 1 fails to do; and 2) reducing the amount and complexity of deadline rules. One can easily envision a world in which voters nationally are all able to begin requesting ballots on one date, and every voter knows that their ballots must arrive by a uniform deadline on Election Day.[209]

B. *Exploring a Jurisdictional-Stripping Element*

Any future absentee ballot standardization law must be able to withstand legal attack. To do so, language in it must include a finding of Congress that the Act is meant to reduce the litigation discussed herein.[210] Furthermore, Congress could go so far as to add a jurisdiction-stripping element to the law, in order to prevent the intervention of federal courts prior to federal elections.[211] For example, this could include a provision that prevents any federal appellate adjudication regarding the proposed statute a certain amount of time before an election.[212] While this may

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208 *See generally* Mike Ellis, *Absentee Voting at Record Levels Already, as Confusion Over Mail Ballots Continues*, GREENVILLE NEWS (Sept. 30, 2020, 6:04 AM), https://www.greenvilleonline.com/story/news/2020/09/30/record-absentee-voting-already-confusion-over-mail-ballots-witness-signatures/3571556001 [https://perma.cc/YV47-TLGS] (noting that absentee ballots face higher rejection rates than their Election Day-vote counterparts); Anna Baringer, Michael C. Herron & Daniel A. Smith, *Voting by Mail and Ballot Rejection: Lessons from Florida for Elections in the Age of the Coronavirus*, 19 ELECTION L.J. 289, 314–15 (2020) (stating that equity concerns over vote-by-mail due to disparate state laws and procedures are nothing new).

209 Theoretically, if Congress set a national date earlier than October for initial ballot requests, this would put pressure on courts to resolve any lingering litigation around absentee voting earlier than much of the contentious, late-breaking cases analyzed herein. *See* Section I.C.ii.5's discussion of *Wise*, *Boockvar*, *Simon*, and *DNC*. H.R. 1's reasonable deadline requirement fails to achieve this goal.

210 In the past, Congress has passed legislation solely to reduce litigation or the abuse of the courts for particularized ends. *See, e.g.*, Lawsuit Abuse Reduction Act, H.R. 758, 114th Cong. (2015).

211 For an in-depth discussion of the legal murkiness surrounding jurisdiction stripping, see KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10100, JURISDICTION STRIPPING: WHEN MAY CONGRESS PROHIBIT THE COURTS FROM HEARING A CASE? 1–4 (2018).

212 This is not to suggest that federal courts could not "say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). Rather, they would simply need to wait until after an election to do so.

sound radical at first, jurisdiction stripping is nothing new.[213] Relatedly, Congress has enacted several laws with jurisdictional-stripping elements over the last thirty years.[214] While this framework would potentially push any lingering absentee ballot deadline litigation into state court,[215] such litigation would be greatly reduced under the proposed law—if nothing else—because litigants would have less statutory language to target under a uniform standard.[216] Over time, the thought of a court entertaining a case moving the national absentee ballot deadline—irrespective of valid constitutional claims—could become just as unthinkable as a court delaying the date for congressional elections and the appointment of presidential electors, both of which are affixed by statute, rather than the Constitution.[217]

C. *In Defense of Federal Standardization*

Though this Note critiques particular provisions of H.R. 1,[218] the bill has sparked fierce Republican opposition to its entirety.[219] Incidentally, this antagonism has brought forth many of the legal arguments that would apply to states' potential opposition to this Note's specific proposal.[220]

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213 *See Ex parte* McCardle, 74 U.S. 506 (1868) (unanimously holding that Congress may strip the Supreme Court of its appellate jurisdiction at any time); *The Francis Wright*, 105 U.S. 381, 385–86 (1881) ("[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control."); *see also* Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) ("Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred . . . .").

214 *See, e.g.*, Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244 (limiting the number of habeas corpus petitions available to prison inmates and federal appellate courts' ability to review them).

215 Congress cannot strip state courts of their jurisdiction to hear cases based on state constitutional grounds. *See* Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1 (2018).

216 *See* Ribstein & Kobayashi, *supra* note 46.

217 *See* 2 U.S.C. § 7 ("The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States . . . of Representatives . . . to the Congress . . . ."); 3 U.S.C. § 1 ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.").

218 *See supra* text accompanying notes 202–205.

219 *See, e.g.*, Kevin McCarthy, *The Truth Behind Democrats' Election Bill, H.R. 1*, YOUTUBE (Mar. 6, 2019), https://www.youtube.com/watch?v=mg-voAFowfI [https://perma.cc/MN2W-C3WL].

220 *See* David B. Rivkin Jr. & Jason Snead, *An Unconstitutional Voting 'Reform,'* WALL ST. J. (Feb. 16, 2021, 12:38 PM), https://www.wsj.com/articles/an-unconstitutional-voting-reform-

This includes a letter from twenty of twenty-six Republican state attorneys general to congressional leaders outlining legal arguments against any further federalization of elections.[221] With respect to standardization in the absentee ballot context for federal elections, the attorneys general put forth two principal arguments: (1) that Congress has no power to choose the "Manner" of appointing presidential electors and, for congressional elections, (2) under the Supreme Court's proportionality doctrine, Congress may not bestow more voting rights onto individuals than those that are already constitutionally protected.[222]

These arguments do not carry weight upon further examination. For presidential elections, there is no reason that states should not retain control over how to appoint their presidential electors.[223] In fact, state legislatures and local election administrators are the ones who have chosen to appoint electors in accordance with popular vote winners and place presidential candidates with congressional candidates on the same ballot, respectively.[224] So long as ballots are designed with congressional candidates on them, then Congress's Elections Clause authority to regulate those ballots is undisturbed.[225] Additionally, the proportionality doctrine is inapposite. The absentee ballot standardization opponents rely principally on *City of Boerne v. Flores*, in which the Supreme Court struck down the Religious Freedom Restoration Act of 1993 (RFRA) as unconstitutional because it substantively altered constitutional protections and thus impinged on states' usual police powers.[226] Such reliance is deeply misplaced. The recommended election law changes in this Note are instead related to timing under the Elections Clause, while RFRA was a statute at the intersection of the Fourteenth and First

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11613497134 [https://perma.cc/C32L-U86N] (noting the differences between the Electors Clause and the Elections Clause). Interestingly, the op-ed's authors state that the law's provisions as they apply to congressional elections are "bad policy," thus meaning they inherently concede H.R. 1's constitutionality as applied to congressional elections. *See id.*

221 Letter from Todd Rokita, Ind. Att'y Gen., to Nancy Pelosi, Speaker of the U.S. House of Representatives, et al. (Mar. 3, 2021), https://content.govdelivery.com/attachments/INAG/2021/03/03/file_attachments/1712412/HR1%20Letter%20332021.pdf [https://perma.cc/EL24-5B3M].

222 *Id.*

223 Any suggestion to the contrary would require a constitutional amendment to enact. *See* U.S. CONST. art. II, § 1, cl. 2.

224 *See, e.g.*, Bush v. Gore, 531 U.S. 98, 112–14 (2000) (Rehnquist, C.J., concurring); *The Art of the Vote: Who Designs the Ballots We Cast?*, NPR (Nov. 6, 2016, 6:51 AM), https://www.npr.org/2016/11/06/500678100/the-art-of-the-vote-who-designs-the-ballots-we-cast [https://perma.cc/A8YY-WTXW] ("There is no federal ballot design authority . . . .").

225 States could theoretically put congressional candidates on different ballots, but this would likely increase election costs. *See Election Costs: What States Pay*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 3, 2018), https://www.ncsl.org/research/elections-and-campaigns/election-costs.aspx [https://perma.cc/45ZV-JHF9] (noting that paying hourly personnel, necessary for counting ballots on Election night, is usually the most costly budgetary item for local election officials).

226 *See supra* note 221; City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997).

Amendments.[227] Here, however, standardizing absentee ballot deadlines merely falls within the Elections Clause's plain text, and the attorneys general noticeably ignore any textual analysis of the latter half of the Elections Clause in their faulty argument.[228] Unlike RFRA, this Note's proposal only falls within a constitutional provision, rather than unlawfully altering one.

CONCLUSION

President Joe Biden won the 2020 election, but the run-up to it revealed that our nation's election system is badly in need of repair.[229] While COVID-19 led to an expansion of mail-in voting, the pandemic also exposed many state laws to legal challenges on equal protection grounds, as well as intervening counterattacks.[230] Specifically, absentee ballot deadline cases in Minnesota, North Carolina, Pennsylvania, and Wisconsin relied on legal standards that are prone to contradicting applications, while such rulings occurred too close to Election Day to avoid sowing public confusion and creating new functional circuit splits.[231]

Even though as a country we do not know when the next global catastrophe will again disturb our election system, now is the time for Congress to act under its Elections Clause power to standardize absentee ballot request, postmark, and arrival deadlines for federal elections. In so doing, such a law must include H.R. 1's generous mail voting eligibility provisions while also stating individual calendar dates[232] for request, postmark, and deadline rules, and potentially include some type of jurisdiction-stripping or delay element for federal courts. Such an act would be unprecedented in its scope, yet wholly constitutional, tapping into an underutilized "arsenal of [federal] power."[233] Certainly, it is incumbent on Congress to take such action before too many Americans lose faith in one of our most important institutions: partially decentralized elections that are free and fair.

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227 *See Flores*, 521 U.S. at 519–20.

228 *See supra* note 221; see also *supra* Section II.B's textual analysis of the Elections Clause.

229 Jonathan Lemire, Zeke Miller & Will Weissert, *Biden Defeats Trump for White House, Says 'Time to Heal*,*'* ASSOCIATED PRESS (Nov. 7, 2020), https://apnews.com/article/joe-biden-wins-white-house-ap-fd58df73aa677acb74fce2a69adb71f9 [https://perma.cc/DKL3-JERF].

230 *See supra* notes 46 and 93.

231 *See supra* Section I.C.ii.

232 Unambiguous language akin to 2 U.S.C. § 7 and 3 U.S.C. § 1 would be ideal. *See supra* note 217.

233 Newkirk, *supra* note 189, at 171 (citing United States v. Classic, 313 U.S. 299, 330 (1941) (Douglas, J., dissenting) (arguing that the Elections Clause is "an arsenal of power ample to protect Congressional elections from any and all forms of pollution.")).