

# FREE AND FAIR: JUDICIAL INTERVENTION IN ELECTIONS BEYOND THE *PURCELL* PRINCIPLE AND *ANDERSON-BURDICK* BALANCING

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*The United States’s politically charged 2020 federal election, conducted in the midst of a global pandemic, seismically shook the fault lines of state and local elections administration nationwide. Voters, candidates, parties, states, and political campaigns brought hundreds of claims to the courts, seeking judicial intervention to protect equity in their voting rights. The 2020 pandemic election cases demonstrated that Equal Protection claims relying on the Anderson-Burdick balancing test are both overly reliant on judicial discretion and highly vulnerable to invalidation under the Purcell principle.*

*This Note examines the equal protection challenges raised in courts throughout the country in 2020 to demonstrate the need for a voter equity-based approach to equal protection claims that goes beyond the Purcell principle’s weak threshold protections. This Note proposes the Carolene test, a novel threshold test for equal protection claims in voting rights cases that determines the appropriateness of judicial intervention based on: (1) whether an election process or procedure change relates to voters’ ability to participate in the political process, (2) whether the change prejudices discrete and insular minorities, and (3) whether the change would expand or diminish the franchise.*

INTRODUCTION.....	993
I. AUTONOMY, EQUITY, AND INTERVENTION: PRINCIPLES IN 2020	
EQUAL PROTECTION ELECTIONS CHALLENGES.....	996
A. <i>Autonomy: State Legislatures’ Authority to Act</i> .....	997

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B. <i>Equity: The Fourteenth Amendment's Role in Expanding and Protecting the Right to Vote</i> .....	998
1. <i>The Anderson-Burdick Balancing Test</i> .....	999
2. <i>Problems with and Proposed Solutions for the Anderson-Burdick Balancing Test</i> .....	1000
C. <i>Intervention: Oversight and Overreach in Judicial Intervention in Elections Administration</i> .....	1001
1. <i>Judicial Oversight of Elections</i> .....	1001
2. <i>The Purcell Principle</i> .....	1001
II. JUDICIAL INTERVENTION TO PROMOTE EQUITY IN THE FRANCHISE .....	1002
A. <i>Challenges Raised in the 2020 Election</i> .....	1002
1. <i>Autonomy: Challenging Authority to Act</i> .....	1002
a. <i>Executive Orders</i> .....	1003
b. <i>State and Local Elections Administrators</i> .....	1006
c. <i>The United States Postal Service</i> .....	1010
d. <i>Election Codes and Statutes</i> .....	1011
2. <i>Vote Equity: Challenging Burdens on Access to the Vote</i> .....	1012
3. <i>Intervention</i> .....	1015
a. <i>Court Orders</i> .....	1015
b. <i>The Purcell Principle in Conflict with the Anderson-Burdick Balancing Test</i> .....	1016
B. <i>Legal Solutions to the Inconsistencies of the Anderson-Burdick Balancing Test</i> .....	1017
1. <i>A Return to Strict Scrutiny</i> .....	1018
2. <i>The Democracy Canon</i> .....	1018
3. <i>The Political Outcome Test</i> .....	1019
III. A NEW APPROACH TO JUDICIAL INTERVENTION: THE CAROLENE TEST .....	1019
A. <i>The Carolene Test</i> .....	1020
B. <i>The Three Organizing Principles in the Carolene Test</i> ..	1021
C. <i>The Carolene Test Applied</i> .....	1022
1. <i>Introduction to Disability Law Center v. Meyer</i> .....	1022
2. <i>Issues Raised in Disability Law Center</i> .....	1024
3. <i>Anderson-Burdick Analysis in Disability Law Center</i> .....	1024
4. <i>Disability Law Center and the Carolene Test</i> .....	1024
5. <i>The Carolene Test Applied</i> .....	1025
CONCLUSION .....	1027

## INTRODUCTION

In a record-breaking amount of litigation surrounding the 2020 federal election, voters, candidates, parties, states, and advocacy groups challenged burdens on the fundamental right to vote during the COVID-19 pandemic.<sup>1</sup> This wave of litigation demonstrates competing visions of autonomy, equity, and judicial intervention in election law.<sup>2</sup> Voting holds a protected place in the United States as a right “of the most fundamental significance under our constitutional structure.”<sup>3</sup> Though the U.S. Constitution does not provide an affirmative right to vote, courts recognize the right to vote as “fundamental to our concept of democratic government”<sup>4</sup> because “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”<sup>5</sup>

In practice, an individual’s ability to exercise the fundamental right to vote is subject to the many administrative limitations necessary for states to conduct and regulate fair and orderly elections. Voting is an administrative process, and states retain a constitutionally delegated power to regulate

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1. See Alana Abramson, ‘A Litigation Arms Race.’ *Why the 2020 Election Could Come Down to the Courts*, TIME (Oct. 22, 2020, 10:44 AM), <https://time.com/5902389/election-2020-lawsuits-litigation/> [<https://perma.cc/JK46-X9E2>]; Lila Hassan & Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS: FRONTLINE (Oct. 28, 2020), <https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/> [<https://perma.cc/FU7Q-NTMW>]; *This Election Season Is Shaping Up to Be the Most Litigated Ever*, NPR (Sept. 17, 2020, 5:00 PM), <https://www.npr.org/2020/09/11/911870069/this-election-season-is-shaping-up-to-be-the-most-litigated-ever> [<https://perma.cc/B267-MQEY>].

2. See Hassan & Glaun, *supra* note 1; Abramson, *supra* note 1; *This Election Season Is Shaping Up to Be the Most Litigated Ever*, *supra* note 1. This Note focuses on election litigation, before and during the 2020 election season, related to voter access and enfranchisement. This Note does not substantively consider the brief series of highly publicized and largely unsuccessful postelection lawsuits brought on behalf of the Republican Party and President Donald J. Trump’s campaign challenging the election results after President-elect Joseph Biden was declared the winner of the 2020 election. See, e.g., Zahavah Levine & Jacob Kovacs-Goodman, *Post-Election Litigation in Battleground States*, HEALTHYELECTIONS.ORG (Nov. 20, 2020), [https://healthyelections.org/sites/default/files/2020-11/Post-Election\\_Litigation.pdf](https://healthyelections.org/sites/default/files/2020-11/Post-Election_Litigation.pdf) [<https://perma.cc/4PKD-KK5D>] (surveying and synthesizing the 2020 post-election litigation); Harper Neidig, *Texas Sues States Biden Won in Supreme Court, Seeking to Delay Electoral College Vote*, HILL (Dec. 8, 2020, 10:11 AM), <https://thehill.com/regulation/court-battles/529209-texas-sues-biden-states-in-supreme-court-seeking-to-delay-electoral> [<https://perma.cc/GJF7-T7A7>]; *Voting Rights Litigation 2020*, BRENNAN CTR. FOR JUST. (July 8, 2021), <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020#key-cases> [<https://perma.cc/JQ6D-HXXR>]; see also Stephen Collinson & Maeve Reston, *Biden Defeats Trump in an Election He Made About Character of the Nation and the President*, CNN (Nov. 7, 2020), <https://www.cnn.com/2020/11/07/politics/joe-biden-wins-us-presidential-election/index.html> [<https://perma.cc/NE4Q-S2RR>].

3. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

4. *Miller v. Treadwell*, 245 P.3d 867, 868–69 (Alaska 2010) (quoting *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995)).

5. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

elections that grants them wide latitude to dictate the “time, place, and manner” of election administration.<sup>6</sup> While courts recognize and protect the individual’s fundamental right to vote, courts also recognize the procedural reality that the state must play an active role in structuring elections “if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>7</sup> Further, each state’s administration of an election facilitates voters’ ability to access and exercise their fundamental right to the franchise; in any given election, between thirty-five and sixty percent of eligible voters do not cast a ballot.<sup>8</sup>

One predominant judicial tool for analyzing constitutional challenges to this fundamental right is the *Anderson-Burdick* balancing test, which allows courts to evaluate burdens on the right to vote.<sup>9</sup> It does so by balancing the character and magnitude of a burden against the state’s precise interests in imposing the burden, while considering the extent to which those interests make the burden necessary.<sup>10</sup> Although the *Anderson-Burdick* balancing test remains the predominant mode of analyzing equal protection claims challenging burdens on the right to vote that do not otherwise rise to the level of strict scrutiny, the doctrine is roundly criticized as underdetermined and overly reliant on judicial discretion.<sup>11</sup>

Historically, many of the challenged burdens on voting rights evaluated under the Fourteenth Amendment have involved voter qualifications and registration.<sup>12</sup> However, the wave of litigation over the highly contested

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6. See U.S. CONST. art. 1, § 4, cl. 1; *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (mem.); see also *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008).

7. *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

8. See Amelia Thomson-DeVeaux et al., *Why Many Americans Don’t Vote and Why for Some, This Year Could Be Different.*, FIVETHIRTYEIGHT (Oct. 26, 2020, 6:00 AM), <https://projects.fivethirtyeight.com/non-voters-poll-2020-election/> [<https://perma.cc/9GN3-ETLE>].

9. See *Burdick*, 504 U.S. at 432–44; *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983). Courts apply the *Anderson-Burdick* framework to equal protection voting claims brought under both the U.S. Constitution and state constitutions, as illustrated by the court’s treatment of the Alaska Constitution in the case study discussed in Part III. See also *Sonneman v. State*, 969 P.2d 632, 636–38 (Alaska 1998) (citing *O’Callaghan v. State*, 914 P.2d 1250, 1253–54 (Alaska 1996)).

10. *Burdick*, 504 U.S. at 432–44; *Anderson*, 460 U.S. at 786.

11. See, e.g., Rick Hasen, *The Biggest Problem with the Supreme Court’s Opinion in the Wisconsin Voting Case Was Not the Result (Which Was Still Wrong), but the Court’s Sloppiness and Nonchalance About Voting Rights and What That Means for November*, ELECTION L. BLOG (Apr. 10, 2020, 12:39 PM), <https://electionlawblog.org/?p=110647> [<https://perma.cc/8K5Y-NU7Z>]; Derek T. Muller, *The Fundamental Weakness of Flabby Balancing Tests in Federal Election Law Litigation*, EXCESS OF DEMOCRACY (Apr. 20, 2020), <https://excessofdemocracy.com/blog/2020/4/the-fundamental-weakness-of-flabby-balancing-tests-in-federal-election-law-litigation> [<https://perma.cc/DCX7-R798>].

12. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding California’s restrictions on felons’ voting rights under the Fourteenth Amendment); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (finding that a Virginia poll tax violates the Equal Protection Clause of the Fourteenth Amendment when it makes the affluence of the voter or the payment of a fee an electoral standard for voter qualification); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (finding that an Alabama gerrymander that diluted the Black vote in Tuskegee violated the Equal Protection Clause and the Due Process Clause of the Fourteenth

2020 elections in the middle of a pandemic predominantly focused on different targets: the tension among inequity in the individual voter's ability to access and exercise the franchise, state legislatures' autonomy to conduct elections, and judicial intervention in the state-run process of administering an election.<sup>13</sup> This pandemic-era litigation interrogates how the design of the electoral process impacts voters' ability to exercise the franchise, examining how a state's administrative process levies disparate impacts and unequal burdens on voters who are minorities based on age, race, and health status.<sup>14</sup> The *Anderson-Burdick* balancing test is a highly fact-based framework that produces case-specific outcomes and very few generalizable principles. This fact-intensive judicial review is critically important because it maintains the states' right to administer their own elections. States retain the power to regulate elections and have an interest in administering secure, orderly elections.<sup>15</sup> As indicated by the challenges the *Anderson-Burdick* balancing test has seen in its nearly three-decade history, the framework is particularly ill-equipped to handle disparate impact and "as-applied" claims.<sup>16</sup>

This Note examines cases and trends in the 2020 election litigation that presented challenges to the principles of equity in the voting franchise, the

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Amendment); *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45 (1959) (finding that a North Carolina voter literacy test did not violate the Fourteenth Amendment); *Giles v. Harris*, 189 U.S. 475 (1903) (holding that Alabama's voter registrars' refusal to enfranchise more than five thousand Black male voters on the basis of race was within the state's authority); *Minor v. Happersett*, 88 U.S. 162 (1874) (upholding a Missouri court's judgment that the U.S. Constitution does not confer the voting right to women).

13. See generally Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, U. CHI. L. REV. ONLINE (June 26, 2020), <http://lawreviewblog.uchicago.edu/2020/06/26/pandemic-stephanopoulos/> [<https://perma.cc/B3TQ-RWLE>] (outlining three novel issues in a sliding-scale scrutiny analysis during the time of the pandemic, including: (1) how to conceptualize burdens that are attributable to both state action and the pandemic; (2) whether to fault plaintiffs for not having taken precautionary steps before the pandemic hit; and (3) what weight to give the so-called "Purcell principle," which frowns upon late-breaking judicial changes to electoral rules); see also *COVID-19 Related Litigation: Challenges to Election and Voting Practices During COVID-19 Pandemic*, 54 A.L.R. Fed. 3d Art. 3 (2020) (providing a survey of COVID-19 litigation categorized by election administrative processes, e.g., "Remote voting or changes to such voting prohibited" and "Election delay or cancellation approved"); *2020 Election Litigation Tracker*, SCOTUSBLOG, <https://www.scotusblog.com/election-litigation/> [<https://perma.cc/G84F-XG6J>] (last visited Sept. 17, 2021) (tracking up-to-date information on major election law cases of the 2020 election cycle).

14. "Each provision of a[n election] code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Burdick*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 788); see also *id.* at 434 ("There is no doubt that the Hawaii election laws, like all election regulations, have an impact on the right to vote." (emphasis added)).

15. See U.S. CONST. art. 1, § 4, cl. 1; see also *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008).

16. See, e.g., *Crawford*, 553 U.S. at 216 (Souter, J., dissenting) (upholding an Indiana voter-ID law over plaintiffs' disparate impact claims that "the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile" in favor of the state's interest in controlling voter fraud, despite not a single recorded instance of the type of voter fraud targeted).

authority of the states to regulate their own elections, and the role of intervention by the judicial branch to expand and protect voters' rights. Part I describes the primary legal doctrines and challenges that arose in the 2020 election season in terms of the principles of state autonomy in conducting and regulating elections. It continues by outlining equity-based challenges regarding accessing, expanding, and exercising the right to vote, and it concludes with a review of judicial intervention—including intervention under the *Purcell* principle—when the principles of state autonomy and voter equity are in tension.<sup>17</sup>

Part II describes the *Anderson-Burdick* balancing test framework and considers its strengths and weaknesses in resolving the tensions that arise between state autonomy, equitable access to the vote, and judicial intervention in equal protection claims, particularly in interaction with the *Purcell* principle.

Part III introduces and demonstrates the “*Carolene* test,”<sup>18</sup> a novel approach to equal protection challenges in election administration cases that supplants the *Purcell* principle and instead centers evaluations of appropriateness of judicial intervention on expanding equity in the franchise. The *Carolene* test evaluates changes in access to the vote and determines whether judicial intervention is appropriate based on three factors: (1) whether the change is a state action in election administration that relates to the ability to participate in the political process,<sup>19</sup> (2) whether the change demonstrates prejudice against discrete and insular minorities,<sup>20</sup> and (3) whether the change would expand or diminish the franchise.

#### I. AUTONOMY, EQUITY, AND INTERVENTION: PRINCIPLES IN 2020 EQUAL PROTECTION ELECTIONS CHALLENGES

This part outlines the legal authority behind equal protection voting rights claims in terms of three fundamental organizing principles. Part I.A discusses the constitutionally granted autonomy of the states to administer and regulate their own individual elections for national office. Part I.B discusses the principle of equity in expanding and protecting the franchise and introduces the *Anderson-Burdick* balancing test, which allows courts to remedy harms under the Equal Protection Clause when voting rights are infringed. Part I.C outlines the principles governing judicial intervention in the elections context, including the *Purcell* principle. This section describes the legal doctrines behind voting rights claims based in the Equal Protection Clause, structuring them around three organizing principles: state legislatures' autonomy to direct and administer the elections process; voters'

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17. The *Purcell* principle determines the appropriateness of judicial intervention, representing that federal courts should not issue orders which change election rules on the “eve of the election.” *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006); *see also* Richard L. Hasen, *Reining In the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016); *see infra* Part I.C.3.

18. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

19. *Id.*

20. *Id.*

right to equity in access to, and exercise of, the franchise based in the Fourteenth Amendment; and the judicial intervention that ensues when state legislatures' autonomy conflicts with equity in access to the vote.

*A. Autonomy: State Legislatures' Authority to Act*

The U.S. Constitution grants broad authority to state legislatures to conduct and regulate nearly all aspects of federal elections through the Elections Clause and the Electors Clause.<sup>21</sup> The Elections Clause delegates primary authority for determining the process for electing U.S. Senators and Representatives to each state legislature, stating in full: “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 choosing Senators.”<sup>22</sup>

The Elections Clause is the primary source of constitutional authority for states to regulate congressional elections.<sup>23</sup> The Clause designates that the states determine the “Times, Places, and Manner” of congressional elections, subject to Congress’s authority to “make or alter” state regulations.<sup>24</sup> It grants states the authority to enact an election code, including rules and regulations on voting procedures, voter registration, voter protection, fraud prevention, vote counting, and the determination of election results.<sup>25</sup> Generally, this clause stands for the principle that states hold the authority to determine the administration of their elections, and judicial review upholds a variety of state laws designed to ensure that elections—including federal elections—are fair, honest, and orderly.<sup>26</sup>

State legislatures are further granted primary authority for selecting the U.S. president in the Electors Clause, which states:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.<sup>27</sup>

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21. U.S. CONST. art. 1, § 4, cl. 1; *id.* art. II, § 1, cl. 2.

22. *Id.* art. 1, § 4, cl. 1.

23. Michael T. Morley & Franita Tolson, *Common Interpretation: Elections Clause*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/750> [https://perma.cc/4TKX-ZTZU] (last visited Sept. 17, 2021).

24. *See id.*

25. *See id.*

26. *See, e.g.,* *Munro v. Socialist Workers Party*, 479 U.S. 189, 196–98 (1986) (upholding a law requiring that minor party candidates demonstrate substantial support—one percent of votes cast in the primary election—before being placed on the ballot for the general election); *Storer v. Brown*, 415 U.S. 724, 736–39 (1974) (upholding restrictions on independent candidacies requiring early commitment prior to party primaries); *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (upholding a recount for a senatorial election).

27. U.S. CONST. art. II, § 1, cl. 2.

This clause outlines the unique American Electoral College system, by which states appoint electors to choose the president. Congress determines the time of choosing electors and the day on which the electors all throughout the United States give their votes; otherwise, the states generally hold exclusive power and jurisdiction over the electoral vote for president.<sup>28</sup> Originally imagined as a deliberative body that filtered public opinion as an intermediate institution, the Electoral College today generally allots votes to candidates who win popular vote totals in the individual states.<sup>29</sup> Individual citizens hold “no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”<sup>30</sup>

*B. Equity: The Fourteenth Amendment’s Role in Expanding and Protecting the Right to Vote*

The Fourteenth Amendment to the U.S. Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>31</sup>

The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving “any person of life, liberty, or property without due process of law.”<sup>32</sup> Generally, challenges under the Due Process Clause in state election activities revolve around the question of whether a change or defect in the state’s election administration interferes with voters’ ability to exercise their right to vote, including ballot access issues that govern prospective candidates’ ability to appear on ballots.<sup>33</sup> Federal courts have yet to agree on a standard for cases when major election irregularities lead to due process violations.<sup>34</sup> However, many election-related due process violations relate to states changing or ignoring established election rules without sufficient justification or warning, or in a manner not anticipated by voters.<sup>35</sup>

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28. See *McPherson v. Blacker*, 146 U.S. 1, 11 (1892).

29. James W. Ceaser & Jamin Raskin, *Common Interpretation: Article II, Section 1, Clauses 2 and 3*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/350> [<https://perma.cc/PQY2-3WMH>] (last visited Sept. 17, 2021).

30. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.”).

31. U.S. CONST. amend. XIV.

32. See *id.*

33. *Due Process and Election Administration*, SCOTUSBLOG, <https://www.scotusblog.com/educational-resources/due-process-and-election-administration/> [<https://perma.cc/JJ8S-GLBD>] (last visited Sept. 17, 2021).

34. See *id.*

35. See *id.*

The Equal Protection Clause prohibits the states from discriminating on the basis of race and other classifications; the Clause makes it unlawful to “deny to any person within its jurisdiction the equal protection under the laws.”<sup>36</sup> Where an election law—or any law—explicitly denies equal protection of the laws on the basis of race or national origin, it must be considered under strict scrutiny.<sup>37</sup> Where other categories are implicated, or where the law merely levies a burden on some voters (or candidates), the court employs a sliding-scale doctrine known as the *Anderson-Burdick* balancing test.<sup>38</sup>

### 1. The *Anderson-Burdick* Balancing Test

The *Anderson-Burdick* balancing test establishes a sliding scale of judicial scrutiny that weighs the burdens that a state law imposes on electoral participation against the state’s asserted interests or benefits.<sup>39</sup> The greater the burden imposed, the greater the state interest must be to justify it.<sup>40</sup> The doctrine is named after two U.S. Supreme Court precedents involving ballot access cases: *Anderson v. Celebrezze*<sup>41</sup> and *Burdick v. Takushi*.<sup>42</sup> The test has been applied by the Supreme Court in resolving prominent voter identification controversies<sup>43</sup> and by lower courts in a wide variety of election administration cases.<sup>44</sup> *Anderson-Burdick* balancing has been used to handle timing issues in early voting, requirements for casting and counting provisional ballots, and the regulation of voting by mail.<sup>45</sup> The Supreme Court has yet to narrow the wide possibilities for applying the balancing test, and the lower courts have been divided on how to assess burdens that various voting regulations and practices impose on voters.<sup>46</sup>

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36. See U.S. CONST. amend. XIV; Brian T. Fitzpatrick & Theodore M. Shaw, *Common Interpretation: The Equal Protection Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702> [<https://perma.cc/4JG2-VG7R>] (last visited Sept. 17, 2021).

37. See U.S. CONST. amend. XIV; Fitzpatrick & Shaw, *supra* note 36.

38. *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG [hereinafter *The Anderson-Burdick Doctrine*], <https://www.scotusblog.com/educational-resources/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/> [<https://perma.cc/MK8B-MMPM>] (last visited Sept. 17, 2021).

39. *Id.*

40. *See id.*

41. 460 U.S. 780 (1982).

42. 504 U.S. 428 (1992).

43. *See Crawford v. Marion Cnty. Bd. of Elections*, 553 U.S. 181, 190–91 (2008) (applying *Anderson-Burdick* balancing to determine the constitutionality of a state law requiring a government-issued photo ID in order to vote under the Fourteenth Amendment).

44. *The Anderson-Burdick Doctrine*, *supra* note 38.

45. *Id.*

46. *See id.*

## 2. Problems with and Proposed Solutions for the *Anderson-Burdick* Balancing Test

To determine the appropriate tier of judicial scrutiny required in a constitutional voting rights challenge, the *Anderson-Burdick* balancing test relies on complex multifactor balancing between the character and magnitude of a burden and the state's precise interests in imposing that burden, considering the extent to which those interests make it necessary to burden the right to vote.<sup>47</sup> Courts apply the *Anderson-Burdick* balancing test when evaluating burdens on citizens' right to vote under the First and Fourteenth Amendments.<sup>48</sup> The framework applies in murkier waters where the burdens on the right to vote do not categorically deny the franchise to a class of citizens based on "invidious" discrimination, which demands strict scrutiny and requires the state to present a narrowly tailored solution to a compelling government interest in order to be upheld.<sup>49</sup> Unlike strict scrutiny and rational basis review, which are found throughout constitutional law, the *Anderson-Burdick* balancing test applies only to certain subsets of election laws that burden voting and associational rights.<sup>50</sup>

In contrast to the traditional tiered scrutiny approach to judicial review, the *Anderson-Burdick* balancing test is a sliding scale that requires the court to balance: (1) the character and magnitude of the burdens on the right to vote, (2) the state's precise interests in imposing the burden, and (3) the extent to which those state interests make it necessary to burden the right to vote.<sup>51</sup> "[T]he rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."<sup>52</sup> Where the challenged law severely restricts the right to vote, the sliding scale tilts toward strict scrutiny, such that courts will require the election law be narrowly tailored to

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47. See *Burdick*, 504 U.S. at 428; *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982) ("[A] court must resolve [a constitutional] challenge [to specific provisions of a state's election laws] by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.")

48. See, e.g., *Crawford*, 553 U.S. at 200–03 (upholding a voter-ID requirement); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452–58 (2008) (upholding a Washington law instituting top-two blanket primaries); *Clingman v. Beaver*, 544 U.S. 581, 591–92 (2005) (upholding an Oklahoma law allowing parties only closed or semiclosed primaries); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369–70 (1997) (upholding a Minnesota law prohibiting fusion candidacies).

49. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding strict scrutiny necessary to protect voting rights).

50. See Andrew C. Maxfield, *Litigating the Line Drawers: Why Courts Should Apply Anderson-Burdick to Redistricting Commissions*, 87 U. CHI. L. REV. 1845, 1863 (2020).

51. See *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 793–95.

52. *Burdick*, 504 U.S. at 434.

serve a compelling state interest.<sup>53</sup> If the challenged law “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters,” then courts may find that “‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”<sup>54</sup> But, “[h]owever slight” the burden on the right to vote “may appear,” “it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”<sup>55</sup> This is a highly fact-specific determination. Courts in the Ninth Circuit and across the country apply the *Anderson-Burdick* balancing test to similar “as-applied” disparate impact claims, yet produce strikingly contrary outcomes in their balancing.<sup>56</sup>

### C. Intervention: Oversight and Overreach in Judicial Intervention in Elections Administration

This section introduces judicial oversight and judicial overreach, two opposing principles of judicial intervention which create tension in courts’ approach to election litigation.

#### 1. Judicial Oversight of Elections

*Marbury v. Madison*<sup>57</sup> establishes the principle that it is the judiciary’s role “to say what the law is”<sup>58</sup>—a principle that extends to election law.<sup>59</sup> Article III of the U.S. Constitution limits federal courts’ authority to the determination of “Cases” and “Controversies.”<sup>60</sup> If there is no “case” or “controversy” of a nature that can be decided by the judiciary, or where the matter has been delegated to a political branch, or where the matter involves no judicially enforceable rights, the issue is nonjusticiable and the judicial branch cannot hear the claim.<sup>61</sup>

#### 2. The *Purcell* Principle

The so-called “*Purcell* principle” derives from *Purcell v. Gonzalez*,<sup>62</sup> a case stemming from the 2006 midterm election, in which the Ninth Circuit blocked an Arizona voter-ID law until an appeal on the merits could be heard, in effect changing the rules for the November election.<sup>63</sup> The Court in

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53. *Id.*

54. *Id.* (quoting *Anderson*, 460 U.S. at 788).

55. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)).

56. *See infra* Part II.A; *see also infra* Part II.A.2.

57. 5 U.S. 137 (1 Cranch) (1803).

58. *Id.* at 177.

59. *See id.* *See generally* RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003).

60. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493 (2019).

61. *See Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004); *see also Baker v. Carr*, 369 U.S. 186, 217 (1962).

62. 549 U.S. 1 (2006).

63. *Id.* at 6.

*Purcell* criticized the Ninth Circuit for issuing without reasoning an order that could interfere with election administration and stir voter confusion.<sup>64</sup> Generally, the *Purcell* principle indicates that federal courts should not issue orders that change election rules in the period just before an election.<sup>65</sup> Since 2006, courts have relied on the *Purcell* principle to block last-minute changes to election procedures, and the Supreme Court routinely employs it in its review of the flurry of emergency election cases that arise every presidential election cycle.<sup>66</sup>

## II. JUDICIAL INTERVENTION TO PROMOTE EQUITY IN THE FRANCHISE

Part II of this Note outlines the role courts played in the 2020 election as judicial intervention usurped state autonomy in the interest of protecting and promoting equity in the exercise of the right to vote.

### A. Challenges Raised in the 2020 Election

Part II.A examines the litigation raised in the 2020 election under the three organizing principles of autonomy, equity, and intervention. Part II.A.1 explores challenges to state legislatures' autonomy. Part II.A.1.a focuses on challenges to governors' executive orders and emergency declarations. Part II.A.1.b outlines litigation against state and local election officials. Part II.A.1.c discusses litigation against the U.S. Postal Service. Part II.A.1.d presents litigation based on perceived violations of legislative autonomy in election codes and statutes. Part II.A.2 enumerates the challenges to voter equity brought under the *Anderson-Burdick* test. Part II.A.3 explores the challenges brought against judicial intervention, including litigation involving court orders.

#### 1. Autonomy: Challenging Authority to Act

In response to the pandemic, state governments across the United States enacted a slew of rules, regulations, policies, and orders to accommodate for the novel situation of administering an election during a pandemic.<sup>67</sup> Governors issued emergency declarations that directly or indirectly affected election administration, legislatures enacted new pandemic-era rules, secretaries of state and other designated election officials promulgated regulations, and state and federal courts issued orders and rulings.<sup>68</sup> A

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64. *Id.* at 4–5.

65. See Hasen, *supra* note 17, at 428.

66. See *id.* at 444–59.

67. See, e.g., *State Action on Coronavirus (COVID-19)*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx> [<https://perma.cc/CLT7-BHDD>] (last visited Sept. 17, 2021); *State Government Responses to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTEDIA, [https://ballotpedia.org/State\\_government\\_responses\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2020](https://ballotpedia.org/State_government_responses_to_the_coronavirus_(COVID-19)_pandemic,_2020) [<https://perma.cc/9J9C-3LXE>] (last visited Sept. 17, 2021).

68. See generally *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->

significant number of the 2020 cases brought challenges to the government agencies responsible for new and existing election rules, on the grounds that the issuing body lacked the proper statutory, delegated, or constitutional authority to act.<sup>69</sup> State legislatures have the constitutional authority to designate the time, place, and manner of administering elections.<sup>70</sup> All fifty state legislatures have assigned some election rulemaking responsibilities to state or county executive-branch bodies, most commonly to secretaries of state, but also to state bodies called, for example, elections boards, divisions of elections, or boards of commissioners.<sup>71</sup>

*a. Executive Orders*

Governors across the nation issued executive orders and emergency declarations in response to the COVID-19 pandemic, several of which had a substantial impact on how states conducted their elections.<sup>72</sup>

Some lawsuits challenged executive orders made without a pandemic-related grant of increased executive power or an emergency declaration. In *Anti-Defamation League Austin, Southwest, and Texoma Regions v. Abbott*,<sup>73</sup> a group of nonprofit organizations, including Anti-Defamation League Austin and Common Cause Texas, challenged Texas Governor Greg Abbott's proclamation prohibiting more than one mail-in ballot drop box per county, alleging that he had exceeded his authority by limiting in-person ballot drop-off locations.<sup>74</sup> The challenge reached the Texas Supreme Court, which found the governor's exercise of power permissible, reversed the Texas Court of Appeals, and lifted an injunction entered by the state trial court.<sup>75</sup>

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election.aspx [https://perma.cc/9JTM-7Q2U]; *COVID-19 and 2020 Primary Elections*, NAT'L CONF. OF STATE LEGISLATURES (July 2, 2020), https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx [https://perma.cc/X3XR-A7AD]; *Elections During COVID-19: 50-State Resources*, JUSTIA, https://www.justia.com/covid-19/50-state-covid-19-resources/elections-during-covid-19-50-state-resources/ [https://perma.cc/K3R6-MZGY] (last visited Sept. 17, 2021) (surveying state and federal governmental responses to COVID-19 during the 2020 election cycle, including voting procedures, voting dates, and modifications to ensure the safety of voters and poll workers).

69. See *infra* Part II.A.1.

70. See *supra* Part I.A.

71. See *Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx [https://perma.cc/2JT5-LCGR].

72. See generally *Executive Orders Issued by Governors and State Agencies in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTEDIA, https://ballotpedia.org/Executive\_orders\_issued\_by\_governors\_and\_state\_agencies\_in\_response\_to\_the\_coronavirus\_(COVID-19)\_pandemic\_2020 [https://perma.cc/TJJ9-7B46] (June 29, 2020) (cataloguing at least 2065 executive orders issued during the coronavirus pandemic by state and by subject, including those related to elections).

73. 610 S.W.3d 911 (Tex. 2020).

74. *Id.* at 914–15.

75. *Id.* at 923.

Another case, *City of Green Bay v. Bostelmann*,<sup>76</sup> presented an unusual challenge in the Eastern District of Wisconsin: the mayor and city clerk of the City of Green Bay, in their official capacities, challenged the authority of the Wisconsin governor, secretary-designee, and election committee after the state decided not to postpone the April 2020 primary election.<sup>77</sup> The Green Bay city officials sought declaratory and injunctive relief that: (1) permitted a primary delay until June, (2) extended the voter registration deadline, (3) provided relief from in-person and absentee voting requirements, (4) and allowed mail-in ballots to be sent to all registered voters.<sup>78</sup> The district court dismissed the city officials' claims for lack of subject matter jurisdiction, citing the "political subdivisions standing doctrine"<sup>79</sup> and finding that the city officials lacked standing to bring federal constitutional claims in their official capacity because they are not "persons" within the meaning of the Due Process Clause.<sup>80</sup>

In *Donald J. Trump for President, Inc. v. Bullock*,<sup>81</sup> President Donald J. Trump for President, Inc. ("the Trump Campaign") pursued a suit in the District of Montana against Montana Governor Steven Bullock and Secretary of State Corey Stapleton, alleging that the governor overstepped his authority and infringed on the role of the state legislature when he promulgated an executive order granting universal vote-by-mail balloting due to the pandemic.<sup>82</sup> The case garnered a number of prominent intervenors, including the speaker of the Montana House of Representatives and the president of the Montana Senate in support of the Trump Campaign, as well as the Montana Democratic Party, the Democratic Congressional Campaign Committee (DCCC), and the Democratic Senatorial Campaign Committee (DSCC) in support of the governor and secretary of state.<sup>83</sup> A federal district court in the District of Montana considered the claim of executive overstep along with the plaintiffs' other major claim: that the governor's system left Montana elections vulnerable to voter abuse and fraud. The court ultimately denied the Trump Campaign's request for injunctive relief.<sup>84</sup> The court invoked the *Purcell* principle and concluded that the threat of mail-in voting fraud in Montana is a "fiction," leaving in place the governor's directive granting universal vote-by-mail for the state.<sup>85</sup>

Similarly, the Trump Campaign challenged New Jersey Governor Philip Murphy's authority to enact New Jersey Executive Order 177, which mandated holding an all-mail election, automatically distributing mail-in

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76. No. 20-C-479, 2020 WL 1492975, at \*1 (E.D. Wis. Mar. 27, 2020).

77. *Id.*

78. *Id.*

79. *Id.* The "political subdivisions standing doctrine" holds that a political subdivision of the state, like a municipality, may not sue the state of which it is a part in federal court. *Id.*

80. *Id.* at \*2–3.

81. 491 F. Supp. 3d 814 (D. Mont. 2020).

82. *Id.* at 822–23.

83. *Id.* at 821.

84. *Id.* at 821–22.

85. *Id.* at 822.

ballots, and treating all in-person ballots as provisional.<sup>86</sup> The executive order was later amended to further revise mail-in balloting procedures and add provisions requiring county boards of elections to establish ballot drop boxes in each county at least forty-five days before the general election.<sup>87</sup> The plaintiffs sought an injunction against the implementation of Executive Order 177, challenging the governor's authority under the Elections Clause and Electors Clause of the U.S. Constitution. They further argued that the order diluted the value of legitimate votes and violated in-person voters' rights to vote safely and efficiently.<sup>88</sup> A federal district court in the District of New Jersey denied the preliminary injunction and dismissed the claims for lack of standing and for relying on overly speculative assertions.<sup>89</sup>

Some claims focused on the political impact of executive-branch responses to the pandemic, including the widespread restrictions on large gatherings many states enacted. In *Election Integrity Fund v. Whitmer*,<sup>90</sup> plaintiffs Election Integrity Fund and One Nation Michigan challenged Michigan Governor Gretchen Whitmer's executive order prohibiting large gatherings on the basis that the order, which restricted their ability to hold political gatherings and rallies, violated the First Amendment's guarantees of freedom of speech and assembly.<sup>91</sup> They sought an injunction to prevent the state from arresting or prosecuting anyone on the basis of the executive order.<sup>92</sup>

Similarly, in *Minnesota Voters Alliance v. Walz*,<sup>93</sup> a group of voters and the Minnesota Voters Alliance sued Minnesota Governor Tim Walz and other officials, including Secretary of State Steve Simon, arguing that the prospect of being prosecuted for failing to wear a mask under the governor's executive order chilled their First Amendment political and associational freedoms. They further argued that the governor had overstepped his executive authority and encroached on the legislative role and that an executive order he had issued directly contradicted a legislatively enacted statute.<sup>94</sup> A federal district court in the District of Minnesota found that the plaintiffs lacked standing to pursue state law claims, and the Eighth Circuit Court of Appeals denied the application for an injunction pending appeal.<sup>95</sup> Plaintiffs then appealed to the Supreme Court, and Justice Gorsuch denied relief without comment.<sup>96</sup>

Several states also saw a series of challenges to executive orders from the medical profession that had direct implications on the executive branch's

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86. *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 358 (D.N.J. 2020).

87. *Id.*

88. *Id.* at 363, 365.

89. *Id.*

90. No. 1:20-cv-805, 2020 WL 6605988 (W.D. Mich. Oct. 5, 2020).

91. *Id.*, at \*1. The district court dismissed the case as moot after the Michigan Supreme Court ruled that Governor Whitmer's executive orders lacked the force of law. *Id.*

92. *Id.*

93. 494 F. Supp. 3d 610 (D. Minn. 2020).

94. *Id.*

95. *Id.* at 613.

96. *Minn. Voters All. v. Walz*, No. 20A81 (U.S. Nov. 2, 2020) (Gorsuch, J.) (denial of application for injunctive relief pending appeal).

ability to intervene in the elections administration process. One such challenge came in *Midwest Institute of Health, PLLC v. Whitmer*,<sup>97</sup> a suit brought by several medical institutions and individual physicians against the governor and attorney general of Michigan. The claims targeted the governor's executive orders under the Emergency Powers of the Governor Act and the Emergency Management Act as violative of the separation-of-powers and nondelegation clauses, ultimately holding that the governor only had the authority to declare a single state of emergency that must terminate if the legislature does not grant an extension, and that the Emergency Powers of the Governor Act violated the Michigan Constitution by impermissibly delegating legislative authority to the executive branch.<sup>98</sup>

*b. State and Local Elections Administrators*

Before the pandemic, only a handful of states mailed absentee ballot applications to all registered voters. This year, in light of the pandemic, election administrators in a few states made unprecedented decisions to mail out absentee ballots to all registered voters.<sup>99</sup> Jocelyn Benson, secretary of state of Michigan, made this change and saw a series of challenges from voters and candidates alike beginning in May 2020.<sup>100</sup>

One prominent example was in North Carolina in *Moore v. Circosta*.<sup>101</sup> The plaintiffs were several North Carolina voters, candidates, members of the U.S. Congress, the Trump Campaign, the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, and the North Carolina Republican Party. They challenged the North Carolina State Board of Elections' changes to the 2020 voting procedures made under a Settlement Act entered into with the North Carolina Alliance for Retired Americans.<sup>102</sup> The changes effectively extended the absentee ballot receipt deadline, provided voters with notice and an opportunity to cure ballot defects after election day, allowed absentee ballots to be dropped off at early voting locations and

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97. No. 1:20-CV-414, 2020 WL 3248785 (W.D. Mich. June 16, 2020), *certified question accepted sub nom. In re Certified Questions from U.S. Dist. Ct., W. Dist. of Mich., S. Div.*, 944 N.W.2d 911 (Mich. 2020) (mem.), and *certified question answered sub nom. In re Certified Questions from U.S. Dist. Ct., W. Dist. of Mich., S. Div.*, 958 N.W.2d 1 (Mich. 2020). The case was removed to the Western District of Michigan. *Id.*

98. *Id.* at \*2–3.

99. See, e.g., *Absentee and Mail Voting Policies in Effect for the 2020 Election*, *supra* note 68; Kate Rabinowitz & Brittany Renee Mayes, *At Least 84% of American Voters Can Cast Ballots by Mail in the Fall*, WASH. POST (Sept. 25, 2020), <https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/> [<https://perma.cc/SL7G-JX89>]; Benjamin Swasey, *Map: Mail-In Voting Rules By State—And the Deadlines You Need*, NPR (Oct. 14, 2020, 3:00 PM), <https://www.npr.org/2020/09/14/909338758/map-mail-in-voting-rules-by-state> [<https://perma.cc/6G47-NZHZ>].

100. See, e.g., *Cooper-Keel v. Benson*, No. 20-000091-MM, 2020 WL 7033536, at \*1 (Mich. Ct. Cl. June 18, 2020).

101. 494 F. Supp. 3d 289, 297 (M.D.N.C. 2020), *appeal dismissed sub nom. Wise v. Circosta*, No. 20-2104 (L), 2021 WL 1511943 (4th Cir. Jan. 8, 2021), and *appeal dismissed*, No. 20-2107, 2021 WL 1511941 (4th Cir. Jan. 11, 2021).

102. *Id.*

county board offices, and did not reject ballots dropped off by third parties.<sup>103</sup> Plaintiffs asserted that these changes were outside the authority of the North Carolina State Board of Elections to regulate congressional and presidential elections in the state and further asserted that the changes would lead to increases in voter fraud.<sup>104</sup>

The case reached a three-judge panel at the Fourth Circuit.<sup>105</sup> Ultimately, the U.S. Supreme Court consolidated the case with other North Carolina cases in *Moore v. Circosta*,<sup>106</sup> which had been brought by the speaker of the North Carolina House of Representatives, the president pro tempore of the North Carolina Senate, and several voters, against the chair and several officials of the North Carolina State Board of Elections for, among other things, alleged violations of the Elections Clause and Equal Protection Clause of the United States Constitution arising from changes in election policies intended to prevent the spread of COVID-19.<sup>107</sup>

In *Arizona Public Integrity Alliance, Inc. v. Adrian Fontes and Maricopa County*,<sup>108</sup> plaintiffs challenged Maricopa County, Arizona County Clerk Adrian Fontes's decision to include an instruction on Maricopa County's general election early ballots that would instruct voters to correct any mistaken votes by striking the incorrect vote and filling in the oval next to their preferred candidate choice.<sup>109</sup> Plaintiffs argued that Fontes lacked the authority to give this instruction because it contradicted an Arizona state law.<sup>110</sup> The Arizona Supreme Court agreed, ruling that Fontes was not authorized to instruct voters to correct ballots simply by striking out prior selections.<sup>111</sup>

Likewise, several candidates for public office in Pennsylvania sought a temporary restraining order against the Allegheny County Board of Elections and county elections officials, challenging their treatment of certain revised mail-in ballots during the review and inspection process as taking over the powers of the Pennsylvania legislature to determine election procedures.<sup>112</sup> A district court in the Western District of Pennsylvania denied the request for a temporary restraining order and supported a consent decree establishing procedures for the Allegheny County Board of Elections to handle ballots from voters who were initially sent incorrect ballots.<sup>113</sup>

Further, state legislatures across the country struggled to convene and maintain their sessions throughout the pandemic. In *State ex rel. Speweik v.*

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103. *See id.*

104. *Id.*

105. *Moore v. Circosta*, 978 F.3d 93 (4th Cir. 2020).

106. 141 S. Ct. 46 (2020).

107. *Id.*

108. 475 P.3d 303, 305 (Ariz. 2020).

109. *Id.*

110. *Id.* at 305–06.

111. *Id.*

112. *Parnell v. Allegheny Cnty. Bd. of Elections*, No. 2:20-CV-1570, 2020 WL 6276845, at \*1 (W.D. Pa. Oct. 26, 2020).

113. *Id.*

*Wood County Board of Elections*,<sup>114</sup> a candidate challenged a decision from the Wood County Board of Elections and Ohio Secretary of State Frank LaRose to change the primary date from March 17, 2020, when the Ohio legislature had not elected to move the primary date despite knowing of the onset of the pandemic crisis.<sup>115</sup> The plaintiff pursued a writ of mandamus on a theory of executive overstep and a fundamental violation of the “bedrock separation of powers” as necessary to avoid “chaos” and “clear violation of the election laws.”<sup>116</sup> The chief justice of the Supreme Court of Ohio considered the complaint on an expedited basis and denied the writ of mandamus.<sup>117</sup> Likewise, in *Bailey v. South Carolina State Election Commission*,<sup>118</sup> several Democratic primary candidates, the South Carolina Democratic Party, and the DCCC urged the South Carolina Supreme Court to interpret an existing South Carolina law that allowed absentee voting for physically disabled persons to apply temporarily to all registered South Carolina voters, in light of the pandemic.<sup>119</sup> The South Carolina Supreme Court dismissed the case as moot; it saw clear legislative intent in the fact that the state legislature had already enacted a law permitting all voters to vote absentee in the June primary but not in the November general election.<sup>120</sup>

Minnesota Secretary of State Steve Simon entered a consent decree with the Minnesota Alliance for Retired Americans Education Fund to not enforce Minnesota’s statutorily mandated absentee ballot receipt deadline and to instead allow the counting of all ballots postmarked before November 3 and received within one week of election day.<sup>121</sup> Several voters and electors sought to enjoin the consent decree, alleging that the secretary of state lacked authority to enter it and that it conflicted with state law, federal law, and the U.S. Constitution.<sup>122</sup> A court in the District of Minnesota refused to grant the injunction.<sup>123</sup> Voters and electors appealed, with the Republican Party of Minnesota as intervenor, to a three-judge panel of the Eighth Circuit Court of Appeals, which granted the preliminary injunction and blocked Minnesota’s absentee ballot receipt deadline extension.<sup>124</sup>

Iowa Secretary of State Paul Pate faced challenges from both Republicans and Democrats after he issued a directive ordering county auditors to send blank absentee ballot applications to all households, although three county

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114. 141 N.E.3d 253 (Ohio 2020) (unpublished table decision).

115. Verified Complaint at 1–2, State *ex rel.* Speweik v. Wood Cnty. Bd. of Elections, 141 N.E.3d 253 (Ohio 2020).

116. *Id.* at 2.

117. *Speweik*, 141 N.E.3d at 253.

118. 844 S.E.2d 390 (S.C. 2020).

119. *Id.* at 391. The plaintiffs sought this extension for both the June primaries and the November general election. *Id.*

120. *Id.* at 393.

121. *Carson v. Simon*, 494 F. Supp. 3d 589, 592 (D. Minn. 2020), *rev’d and remanded*, 978 F.3d 1051 (8th Cir. 2020).

122. *Id.*

123. *Id.*

124. *Carson v. Simon*, 978 F.3d 1051, 1062–63 (8th Cir. 2020).

auditors had already begun to send out prefilled absentee ballot applications in efforts to promote valid ballot requests and reduce administrative burdens.<sup>125</sup> The Republican National Committee filed lawsuits against all three county auditors who had sent out prefilled absentee ballot applications, seeking a temporary injunction ordering the auditors to follow the secretary of state's directive.<sup>126</sup> After attempting to intervene in these suits and being denied, the Iowa Democratic Party, along with the DCCC and the DSCC, brought a claim against Iowa Secretary of State Paul Pate.<sup>127</sup> After the lower court issued a stay on the secretary of state's directive,<sup>128</sup> the secretary of state appealed to the Iowa Supreme Court. The high court found that not only did Secretary Pate act within proper statutory authority but further that the lower court improperly intervened in violation of the *Purcell* principle.<sup>129</sup>

The Democratic parties requested judicial review of the agency action and challenged the secretary of state's authority to act on separation-of-powers grounds, urging that the directive interfered with the counties' "home rule"<sup>130</sup> and Iowans' right to vote.<sup>131</sup> The DSCC, DCCC, and Iowa Democratic Party concurrently filed another suit regarding how county auditors respond when they receive a defective absentee ballot request with incorrect or missing identification information. The case ultimately reached the Iowa Supreme Court, consolidated with *League of United Latin American Citizens of Iowa v. Pate*,<sup>132</sup> and with intervenors for the defendant, including the Trump Campaign, the National Republican Senatorial Committee, the National Republican Congressional Committee, and the Republican Party of Iowa.<sup>133</sup> This case, known as *Pate II*, focused on the Iowa secretary of state's alleged lack of authorization to impose, enforce, and implement official guidance for ballot drop box restrictions, urging that promulgating regulations constitutes agency action and, as such, would be regulated under Iowa law, which allegedly did not comport with the secretary of state's guidance.<sup>134</sup> On this second challenge, the Iowa Supreme Court found that the case was largely resolved by the findings in *Pate I* and declined to set aside the state law for the purposes of the 2020 election.<sup>135</sup>

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125. Democratic Senatorial Campaign Comm. v. Pate (*Pate I*), 950 N.W.2d 1, 3 (Iowa 2020).

126. See Complaint at 11, *Pate I*, 950 N.W.2d 1 (Iowa 2020).

127. *Id.*

128. DSCC, DCCC, and the Iowa Democratic Party v. Pate, No. CVCV060642 (Iowa Dist. Ct. for Polk Cnty. Oct. 5, 2020), <https://electionlawblog.org/wp-content/uploads/IA-DSCC-20201005-decision.pdf> [<https://perma.cc/7T8Y-75ZT>].

129. See *Pate I*, 950 N.W.2d at 6–8.

130. See *id.* at 5. Iowa's constitution provides counties "home rule power and authority, not inconsistent with the laws of the general assembly," such that they are granted the prevailing authority to determine their local affairs and government. IOWA CONST. art. III, § 39a.

131. See *Pate I*, 950 N.W.2d at 7.

132. 950 N.W.2d 204 (Iowa 2020).

133. *Id.* at 206–07.

134. *Id.* at 208–13.

135. *Id.* at 207.

Similarly, in *In re Hotze*,<sup>136</sup> the Texas Supreme Court considered whether the Harris County clerk overstepped his powers, designated under the Texas Election Code, by sending applications for mail-in ballots to over 2.37 million registered voters in Harris County, regardless of whether the individual had a “disability” as defined in the Texas Election Code.<sup>137</sup> The Texas Supreme Court saw a related matter in *State v. Hollins*,<sup>138</sup> which queried whether the Harris County clerk had the power to send out an unsolicited mass mailing of ballots, where the Texas Election Code limits voting by mail to certain groups and establishes statutory eligibility requirements.<sup>139</sup> While the trial and appellate courts denied the Texas attorney general’s request for a temporary restraining order on behalf of the State of Texas,<sup>140</sup> the Texas Supreme Court reversed and remanded, finding that the Texas Election Code does not authorize a county clerk to exercise the authority to send mail-in ballots to voters who have not requested one.<sup>141</sup>

Courts also saw challenges to new and existing regulations for poll watchers, including their level of access during the 2020 pandemic. In *Trump v. Philadelphia County Board of Elections*,<sup>142</sup> the Trump Campaign asserted a purported right for its campaign representatives to observe Philadelphia’s on-site satellite early voting locations as poll watchers, citing Pennsylvania statutory authority.<sup>143</sup> The Trump Campaign also sued Pennsylvania Secretary of State Kathy Boockvar, asserting that insufficient poll watching and failure to “undertake[] any meaningful effort to prevent the casting of illegal or unreliable absentee or mail-in ballots” violated the Elections Clause.<sup>144</sup>

*c. The United States Postal Service*

Given the unprecedented nationwide participation in voting by mail, this election cycle brought a new degree of attention to the political role of the U.S. Postal Service (USPS) and its authority to enact changes that affect elections administration. In *Pennsylvania v. DeJoy*,<sup>145</sup> seven states sued Louis DeJoy, in his official capacity as postmaster general of the United States, along with the chairman of the Board of Governors of the United

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136. No. 20-0739, 2020 WL 5919726 (Tex. Oct. 7, 2020).

137. *Id.* at \*1. The Texas Supreme Court denied the writ of mandamus. *Id.* at \*3.

138. 620 S.W.3d 400 (Tex. 2020).

139. *Id.* at 403.

140. *See id.* at 405.

141. *Id.* at 410.

142. 241 A.3d 120 (Pa. Commw. Ct. 2020) (unpublished table decision).

143. *Id.* at \*2 (noting that the Trump Campaign requested that the court order defendants “to ‘permit representatives of the Campaign to enter and remain in the satellite election offices to serve as a [sic] watchers pursuant to 25 Pa. Stat. Ann. §§ 2650 and 2687’ of the Election Code of the Commonwealth of Pennsylvania” (quoting plaintiff’s proposed order)).

144. Verified Second Amended and Supplemental Complaint for Declaratory and Injunctive Relief at 48, Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. 2020) (No. 2:20-cv-00966-NR).

145. 490 F. Supp. 3d 833 (E.D. Pa. 2020), *order clarified*, No. CV 20-4096, 2020 WL 6580462 (E.D. Pa. Oct. 9, 2020).

States Postal Service and the agency itself.<sup>146</sup> The states challenged a series of election-time changes to USPS internal policies that resulted in mailing delays, with impacts on the election, including: (1) prohibiting late or extra trips by postal workers, (2) requiring carriers to adhere to rigid start and stop times, (3) limiting postal workers' overtime, (4) no longer automatically treating election mail as first-class mail, and (5) no longer delivering first class mail regardless of whether it has sufficient postage.<sup>147</sup> A federal district court in the Eastern District of Pennsylvania found that the postmaster's policy changes violated federal statutes and subsequently issued a nationwide injunction on these policies.<sup>148</sup>

Similarly, in *New York v. Trump*,<sup>149</sup> plaintiffs New York State, New York City, Hawaii, New Jersey, and the City and County of San Francisco sued President Donald J. Trump, the USPS, and Postmaster General DeJoy in a district court in the District of Columbia for a slate of USPS policy changes including: (1) removing collection boxes and sorting machines, (2) cutting overtime, (3) prohibiting late and extra trips, (4) a pilot program in nearly 400 localities that disrupted regular mail service; and (5) no longer automatically treating election mail as first-class mail.<sup>150</sup> After these changes were enacted, forty-six states sent a joint letter indicating that the new policies would seriously impact the timely delivery of mail-in ballots in the general election.<sup>151</sup> The states alleged that the USPS and Postmaster General DeJoy's policy changes overstepped their authority and harmed states', counties', and cities' sovereign, quasi-sovereign, economic, and proprietary interests—including the ability to administer their elections and conduct government functions.<sup>152</sup> The district court granted the plaintiffs' motion for a preliminary injunction, finding that the plaintiffs demonstrated that the USPS policies had a meaningful impact on mail service and established a likelihood of irreparable harm in their ability to combat the spread of COVID-19 and provide safe alternatives to in-person voting.<sup>153</sup>

#### d. Election Codes and Statutes

This election cycle also brought some interesting challenges to new and existing election laws. In *Common Cause Indiana v. Lawson*,<sup>154</sup> the nonprofit group Common Cause Indiana brought a claim against Indiana election officials seeking injunctions of three 2019 Indiana election

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146. *Id.* at 844.

147. *Id.* at 844–53.

148. *Id.* at 893.

149. 490 F. Supp. 3d 225 (D.D.C. 2020), *order clarified*, No. 20-CV-2340, 2020 WL 6572675 (D.D.C. Oct. 22, 2020), *appeal dismissed*, No. 20-5352, 2021 WL 672390 (D.C. Cir. Feb. 10, 2021), *and appeal dismissed*, No. 20-5352, 2021 WL 672390 (D.C. Cir. Feb. 10, 2021).

150. *Id.*

151. *Id.*

152. *See id.*

153. *Id.* at 242–45.

154. 488 F. Supp. 3d 724 (S.D. Ind. 2020), *rev'd*, 978 F.3d 1036 (7th Cir. 2020).

statutes.<sup>155</sup> The three statutes substantially narrowed Indiana election laws to: (1) bar Indiana courts from hearing any lawsuits regarding voter disenfranchisement and polling practices brought by voters, political parties, candidates for public office, public interest groups, or any other entity other than a county election board; (2) provide standing to *only* county election boards to bring lawsuits for voter disenfranchisement and, further, requiring unanimous approval by a county election board before bringing such a lawsuit; and (3) limit lawsuits regarding polling station irregularities to *only* those regarding shortened polling hours.<sup>156</sup> A district court in the Southern District of Indiana enjoined the implementation, enforcement, and administration of all three statutes, finding that all three failed an *Anderson-Burdick* balancing test analysis and impermissibly burden the fundamental right to vote.<sup>157</sup> However, a three-judge panel of the Seventh Circuit found that the district court had incorrectly assessed the burden on the right to vote and stayed the injunction, citing the *Purcell* principle.<sup>158</sup>

In contrast, in *Republican State Committee of Delaware v. State of Delaware Department of Elections*,<sup>159</sup> plaintiffs sought declaratory and injunctive relief in the Delaware Chancery Court blocking a new Delaware law that allowed all voters to vote absentee, regardless of their reason, on the grounds that it violated the Delaware Constitution's limited permissible reasons for voting absentee and that universal absentee voting allegedly increased fraud.<sup>160</sup>

## 2. Vote Equity: Challenging Burdens on Access to the Vote

Challenges to vote equity represented a limited but critically important world of cases in the 2020 election cycle. No fewer than twenty-seven prominent voting rights challenges in the United States applied an *Anderson-Burdick* balancing test as the U.S. Supreme Court and state and federal courts in Alaska, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Michigan, New Hampshire, New York, Ohio, South Carolina, Tennessee, Texas, and Virginia considered burdens on the right to vote in the context of the COVID-19 pandemic.<sup>161</sup>

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155. *Id.* at 728.

156. *Id.*

157. *Id.* at 731–32. One statute targeted standing to challenge the changes, limiting eligible litigants to just county election boards who unanimously voted to file suit. *See* IND. CODE § 3-11.7-7-2 (2020) (ruled unconstitutional). Another targeted remedies, requiring a court to produce a number of evidentiary and other findings before it could issue an order changing the new polling hours. *See id.* § 3-11.7-7-3 (ruled unconstitutional). The third statute limited the duration of a court extension and allowed only certain polling places to be eligible for the extension. *See id.* § 3-11.7-7-4 (ruled unconstitutional).

158. *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1043 (7th Cir. 2020).

159. 250 A.3d 911 (Del. Ch. 2020).

160. *Id.* at 915, 917.

161. *See COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, <https://healthyelections-case-tracker.stanford.edu/> [<https://perma.cc/ZS6G-DR2L>] (last visited Sept. 17, 2021) (analyzing more than 600 election law cases arising

Several voting rights claimants prevailed. In *People First of Alabama v. Merrill*,<sup>162</sup> four registered voters at higher risk for severe complications from COVID-19 due to age, race, or underlying medical conditions filed a suit against the State of Alabama, its governor, and its secretary of state (among others) challenging Alabama’s voter-ID requirement, two-witness signature requirement, and de facto banning of curbside voting as violating the First and Fourteenth Amendments.<sup>163</sup> Plaintiffs produced evidence that these requirements burden voters over the age of sixty-five and disproportionately burden Black voters and voters with disabilities.<sup>164</sup> A federal court in the Northern District of Alabama granted plaintiffs’ request for a stay on the substantial likelihood that they would prevail on the merits of their challenge to the signature requirements, also supporting the curbside voting claim as it comported with the Americans with Disabilities Act standard.<sup>165</sup>

Likewise, in *Frederick v. Lawson*,<sup>166</sup> plaintiffs successfully challenged the constitutionality of Indiana’s absentee ballot signature matching determinations using the *Anderson-Burdick* balancing test. The plaintiffs established a significant burden where voters were erroneously deprived of the right to vote without notice or opportunity to cure deficiencies, even though the errors affected only a few people.<sup>167</sup> Critical to the determination was that the burden on voters’ exercise of the right to vote outweighed the state’s interests in fraud prevention and electoral integrity—two state interests that typically outweigh voter interests under *Anderson-Burdick* balancing.<sup>168</sup>

However, these results were certainly not uniform. In *Common Cause Indiana*, Common Cause Indiana sued the Indiana secretary of state, Indiana Election Commission, Indiana Election Division, and county officials over a set of election laws, claiming that the laws violate the First and Fourteenth Amendments to the U.S. Constitution by: (1) removing voters’ standing to seek the extension of polling hours at polling locations where they have been disenfranchised; (2) limiting claims challenging some types of voting irregularities and providing no redress at all for others;<sup>169</sup> (3) requiring a unanimous vote of “the entire membership” of a county board to change polling station hours, thus providing no means for a polling location’s hours to be extended if even a single member of a relevant county board is absent,

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out of the COVID-19 pandemic in more than forty-six states, the District of Columbia, and Puerto Rico).

162. 467 F. Supp. 3d 1179 (N.D. Ala. 2020), *appeal dismissed*, No. 20-12184, 2020 WL 5543717 (11th Cir. July 17, 2020).

163. *Id.* at 1192.

164. *Id.*

165. *Id.*

166. 481 F. Supp. 3d 774 (S.D. Ind. 2020).

167. *Id.* at 779.

168. *See id.* at 799.

169. These laws limited claims of voting irregularities to only those regarding late openings and closings of polling stations. *Id.* at 728. Further, they provided no redress for other polling station irregularities, such as malfunctioning equipment or voting machines, insufficient ballots, or extraordinarily long wait times. *Id.*

unreachable, or unwilling to protect constituents' fundamental right to vote; and (4) disenfranchising voters with no legitimate state interest in the changes effected by the 2019 amendments neither individually nor in their combined effect.<sup>170</sup> A federal court in the Southern District of Indiana applied the *Anderson-Burdick* balancing test and enjoined all the Indiana statutes at issue, determining that they impermissibly burdened the right to vote.<sup>171</sup>

Nevertheless, the Seventh Circuit reversed the district court's injunction extending the Indiana poll hours.<sup>172</sup> In a per curiam decision authored by Judge Frank Easterbrook, the Seventh Circuit rejected the district court's *Anderson-Burdick* balancing test analysis, finding that "[t]he district court rested its conclusion that the amendments burdened the right to vote on the possibility that some imaginable circumstance exists in which those [statutory] provisions might affect voters."<sup>173</sup> Furthermore, the Seventh Circuit construed the plaintiffs' claim that the amendments burden Indiana citizens' right to vote as "a private right of action to enforce the amendments," noting that "[t]hese amendments do not place a burden on the right to vote" and that "the justifications the defendants offer in their support stand to reason."<sup>174</sup> Absent a burden, the Seventh Circuit stayed the injunction, further citing the *Purcell* principle.<sup>175</sup>

In *Anderson v. Raffensperger*,<sup>176</sup> the Democratic Party of Georgia, the Democratic Senatorial Campaign Committee, and three Georgia residents challenged local election administration policies that resulted in extended wait times at the polls, arguing that the wait times deterred citizens from voting and asserted undue burdens on the right to vote under the *Anderson-Burdick* balancing test.<sup>177</sup> The court denied the plaintiffs' request for a preliminary injunction on standing grounds, asserting that plaintiffs' evidence of the likelihood of long lines in November was merely speculative and did not amount to an injury in fact.<sup>178</sup>

Further, in *Nemes v. Bensinger*,<sup>179</sup> a group of Kentucky voters failed to show that the state's reduced number of polling places unconstitutionally burdened Black voters in several Kentucky counties.<sup>180</sup> A federal district court in the Western District of Kentucky considered a series of asserted disproportionate burdens on Black voters, including high rates of underlying health circumstances that would raise risks of contracting COVID-19,<sup>181</sup> disproportionately long lines at certain polls predominantly serving Black

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170. *Id.*

171. *See id.*

172. *See Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1043 (7th Cir. 2020).

173. *Id.* at 1040.

174. *Id.* at 1040–41.

175. *See id.* at 1042–43; *see also infra* Part III.A.3.b.

176. 497 F. Supp. 3d 1300 (N.D. Ga. 2020).

177. *Id.* at 1303–05.

178. *Id.* at 1306–30.

179. 467 F. Supp. 3d 509 (W.D. Ky. 2020).

180. *Id.* at 515.

181. *Id.* at 531–32.

voters,<sup>182</sup> and individual polling locations that caused a discriminatory impact on Black voters.<sup>183</sup> However, these arguments failed the *Anderson-Burdick* balancing test,<sup>184</sup> and the district court found that these conditions imposed no more than a modest burden on the right to vote and that Kentucky's "substantial government interests" were sufficiently weighty to justify this modest burden.<sup>185</sup>

### 3. Intervention

This section discusses challenges to judicial intervention in election cases themselves, first discussing cases that probed the legal basis and appropriateness of court orders in the election context and then discussing cases that weighed the *Purcell* principle against *Anderson-Burdick* balancing.

#### a. Court Orders

Many litigants in election cases sought permanent injunctions, which require election administrators to take or cease particular actions in order to prevent possible injustice and irreparable harm that could not otherwise be remedied with damages.<sup>186</sup> Since election litigation moves quickly in the time-pressured weeks and days before an election, lower courts often issue preliminary rulings in the form of preliminary injunctions and temporary restraining orders.<sup>187</sup> Courts issue a preliminary injunction when a party shows in a hearing that it will suffer irreparable harm unless the injunction is issued.<sup>188</sup> The appropriateness of a preliminary injunction is determined by meeting all four factors of the U.S. Supreme Court's test established in *Winter v. Natural Resources Defense Council, Inc.*,<sup>189</sup> which considers: (1) whether the plaintiff is likely to succeed on the merits of the claim, (2) whether the plaintiff is likely to suffer irreparable harm without the injunction, (3) whether the balance of equities and hardships is in the plaintiff's favor, and (4) whether an injunction is in the public interest.<sup>190</sup> Similarly, federal courts grant temporary restraining orders, or fourteen-day renewable injunctions, pursuant to Federal Rule of Civil Procedure 65(b) via a two-part test that considers (1) whether immediate and irreparable injury

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182. *Id.* at 531.

183. *Id.* at 525–29.

184. *See id.* at 524–29.

185. *Id.* at 529.

186. *See generally Injunction*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/injunction> [<https://perma.cc/25JT-MVNV>] (last visited Sept. 17, 2021); *see also infra* Part II.

187. Amy Howe, *Emergency Appeals: Stay Requests*, SCOTUSBLOG, <https://www.scotusblog.com/educational-resources/emergency-appeals-stay-requests/> [<https://perma.cc/F6SQ-2Q7Y>] (last visited Sept. 17, 2021).

188. In federal court, Federal Rule of Civil Procedure 65 governs. *See Preliminary Injunction*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/preliminary\\_injunction](https://www.law.cornell.edu/wex/preliminary_injunction) [<https://perma.cc/KMN5-769D>] (last visited Sept. 17, 2021); FED. R. CIV. P. 65.

189. 555 U.S. 7 (2008).

190. *See id.* at 20.

will result before the adverse party can be heard and (2) what efforts, if any, have been made to give the notice and the reasons supporting the claim that notice should not be required.<sup>191</sup>

In 2020, the most prominent challenge to court authority came in *Pennsylvania Democratic Party v. Boockvar*.<sup>192</sup> The Republican Party of Pennsylvania pursued a challenge to the Pennsylvania Supreme Court's authority to order the state to count mail-in ballots received up to three days after Election Day.<sup>193</sup> A federal district court in the Western District of Pennsylvania found that, although plaintiffs were likely to succeed on the claim that the Pennsylvania Supreme Court's ballot deadline extension violated the Equal Protection Clause, the *Purcell* principle mandated that no injunction be awarded.<sup>194</sup> The challenge went up to the U.S. Supreme Court, but was ultimately dismissed for mootness in April 2021.<sup>195</sup>

*b. The Purcell Principle in Conflict with the Anderson-Burdick Balancing Test*

Several *Anderson-Burdick* balancing test claims were struck down under the *Purcell* principle, including claims of burdens on the right to vote that would otherwise have prevailed and have been found unconstitutional under the *Anderson-Burdick* balancing test. In *Republican National Committee v. Democratic National Committee*<sup>196</sup> (previously known as *Democratic National Committee v. Bostelmann*<sup>197</sup>), a Wisconsin district court granted a temporary restraining order that allowed extension of the deadline for request and receipt of absentee ballots,<sup>198</sup> but the U.S. Supreme Court found in a 5–4 decision that this extension violated the *Purcell* principle.<sup>199</sup> Justice Ruth Bader Ginsburg wrote a dissent, joined by Justices Breyer, Sotomayor, and Kagan, noting the district court's *Anderson-Burdick* analysis and finding the Court's intervention "ill advised, especially so at this late hour."<sup>200</sup> The dissent urged that "[t]he concerns advanced by the Court and the applicants pale in comparison to the risk that tens of thousands of voters will be disenfranchised."<sup>201</sup> The dissent's fundamental divergence from the majority rests on the appropriateness of relying on the *Purcell* principle, stating instead, "Ensuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern . . . . The question here

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191. FED. R. CIV. P. 65; *Temporary Restraining Orders*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/temporary\\_restraining\\_order](https://www.law.cornell.edu/wex/temporary_restraining_order) [https://perma.cc/K58Q-8ZJL] (last visited Sept. 17, 2021).

192. 238 A.3d 345 (Pa. 2020).

193. *Id.* at 352–355.

194. *Bognet v. Boockvar*, No. 3:20-cv-00215, 2020 WL 6323121 (W.D. Pa. Oct. 28, 2020).

195. *Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (mem.).

196. 140 S. Ct. 1205 (2020) (per curiam).

197. 451 F. Supp. 3d 952 (W.D. Wis. 2020).

198. *Republican Nat'l Comm.*, 140 S. Ct. at 1206–07.

199. *Id.* at 1206–08.

200. *Id.* at 1208 (Ginsburg, J., dissenting).

201. *Id.* at 1211.

is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic.”<sup>202</sup>

Similarly, the *Purcell* principle defeated an *Anderson-Burdick* claim in *A. Philip Randolph Institute of Ohio v. LaRose*.<sup>203</sup> Plaintiffs challenged Ohio Secretary of State Frank LaRose’s restriction on Ohio absentee voters’ ballot drop-off locations to just a single secure drop box location per county, seeking temporary and permanent injunctions allowing installation of more drop-off locations per county and allowing voters to return absentee ballot applications and ballots to any polling place at which they may vote.<sup>204</sup> While a district court in the Northern District of Ohio applied the *Anderson-Burdick* balancing test and found that the secretary’s guideline did not even meet rational basis review,<sup>205</sup> the Sixth Circuit stayed the lower court’s ruling pending appeal, citing the *Purcell* principle.<sup>206</sup>

### B. Legal Solutions to the Inconsistencies of the Anderson-Burdick Balancing Test

The 2020 election cycle presented a limited but evolving world of cases that demonstrated the inconsistencies produced by the high level of judicial scrutiny involved in the *Anderson-Burdick* balancing test.<sup>207</sup> The politically supercharged 2020 election cycle and the staggering administrative challenges presented by the pandemic resulted in a renewed call from the legal community to reconsider the underlying doctrine of the *Anderson-Burdick* balancing test.<sup>208</sup> Legal scholars have proposed a number

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202. *Id.*

203. 831 F. App’x 188 (6th Cir. 2020).

204. *Id.* at 190.

205. *A. Philip Randolph Inst. of Ohio v. LaRose*, 493 F. Supp. 3d 596, 600 (N.D. Ohio 2020), *appeal dismissed*, No. 20-4063, 2020 WL 7980224 (6th Cir. Oct. 28, 2020).

206. *LaRose*, 831 F. App’x at 190 (stating that while “lower federal courts should ordinarily not alter election rules on the eve of an election[,] [h]ere, the district court went a step further and altered election rules *during* an election” (internal citation omitted)); *see also* Hasen, *supra* note 17 (advocating that the *Purcell* principle in emergency stays should be understood not as a stand-alone rule, but as one factor in the public-interest consideration prong).

207. *See supra* Part II.A. Surrounding the November 2020 election, no fewer than twenty-seven prominent voting rights challenges in the United States apply an *Anderson-Burdick* framework analysis as the U.S. Supreme Court and state and federal courts in Alaska, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Michigan, New Hampshire, New York, Ohio, South Carolina Tennessee, Texas, and Virginia consider burdens on the right to vote in the context of the COVID-19 pandemic. *See COVID-Related Election Litigation Tracker*, *supra* note 161 (analyzing over 600 election law cases arising out of the COVID-19 pandemic in more than forty-four states).

208. *See, e.g.*, Daniel Bruce, *Is It Time for SCOTUS to Revisit the Anderson-Burdick Test?: Insights from the Challenge to West Virginia’s Ballot Order Statute*, STATE OF ELECTIONS: WM. & MARY L. SCH. (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/4MJG-8YU7>]; Edward B. Foley, *The Coming Supreme Court Showdown That May Affect How You Vote*, FULCRUM (Oct. 23, 2020), <https://thefulcrum.us/election-dissection/election-case-in-supreme-court> [<https://perma.cc/95RP-PPXV>] (discussing the *Anderson-Burdick* balancing test as a “collision of two tectonic plates . . . causing an earthquake in federal jurisprudence on absentee voting”); Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to*

of resolutions to the perceived weaknesses in the framework of the *Anderson-Burdick* balancing test, including a return to the strict scrutiny regime (discussed in Part II.B.1), the Democracy Canon (discussed in Part II.B.2), and the Political Outcome test (discussed in Part II.B.3).

### 1. A Return to Strict Scrutiny

Several scholars have proposed abandoning the *Anderson-Burdick* balancing test and returning to strict scrutiny as applied in *Harper v. Virginia State Board of Elections*.<sup>209</sup> In equal protection voting rights claims, this would require the application of strict scrutiny whenever a statute or policy infringes a citizen's right to vote, especially when there may be a discriminatory motivation behind the state regulation; there would be no balancing of the state's administrative or regulatory interest.<sup>210</sup> *Anderson* did not explicitly overrule *Harper*, and returning to the *Harper* strict scrutiny standard would realign the jurisprudence around discrimination in voting rights with other constitutionally recognized fundamental rights.<sup>211</sup> However, while a return to strict scrutiny would certainly raise the bar for election laws that burden voters' ability to access and exercise the franchise, it lacks the flexibility that became so important in achieving success under the *Anderson-Burdick* balancing test during the pandemic.<sup>212</sup> The rapidly changing context of the pandemic made clear that an ordinarily minor burden on voters, such as returning absentee ballots by a deadline, can become a severe and extremely onerous one.<sup>213</sup>

### 2. The Democracy Canon

Courts have also applied the "Democracy Canon," as developed by Richard L. Hasen.<sup>214</sup> Generally, the Democracy Canon is a substantive canon of statutory interpretation that promotes an interpretation in favor of

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*Treat and Cure Them*, 19 ELECTION L.J. 263, 264 (2020), <https://www.liebertpub.com/doi/pdf/10.1089/elj.2020.0646> [<https://perma.cc/EE96-KGW2>] (praising the *Anderson-Burdick* balancing test's flexibility, but describing it as "an uncertain balancing test" that offers only "weak" and "ad hoc protection of voting rights through constitutional adjudication").

209. 383 U.S. 663, 667–68 (1966) (holding that strict scrutiny is necessary to protect voting rights following *Carolene*); see Mary Jo Lang, *The Importance of Being Narrowly Tailored: A Call for Strict Scrutiny for a Fundamental Right in Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), 88 NEB. L. REV. 582, 579–611 (2010).

210. See Lang, *supra* note 209; *Harper*, 383 U.S. at 667–68.

211. See Lang, *supra* note 209, at 603–06.

212. See Hasen, *supra* note 208.

213. See *id.* ("It might be far more effective to require heightened scrutiny for every election law that burdens voters. But . . . flexibility is the key benefit of *Anderson-Burdick* in the context of the pandemic: what ordinarily might appear to be a minor burden on voters, such as returning absentee ballots by a set deadline, becomes a severe burden when voters, through no fault of their own, cannot vote safely in person and cannot receive an absentee ballot to return by the set deadline.").

214. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 70–75 (2009); see also Rebecca Guthrie, Note, *State Courts, the Right to Vote, and the Democracy Canon*, 88 FORDHAM L. REV. 1957, 1960–66, 1993–2009 (2020) (noting that many states have adopted the democracy canon as part of their state constitutions).

voter enfranchisement.<sup>215</sup> The Democracy Canon functions to expand voter access and enfranchisement, working to promote opportunities for registered voters to vote and have their votes counted in a variety of contexts, including vote counting, voter eligibility and registration, and candidate and party competitiveness cases.<sup>216</sup>

While many state judicial and legislative branches nationwide have endorsed and adopted the Democracy Canon as a useful standard for protecting legitimacy and voter enfranchisement,<sup>217</sup> the canon also suffers from inconsistent application. Moreover, foisting back onto legislatures a constant stream of ex ante corrections and adjustments to election rules in response to courts' statutory interpretations is not only overburdensome on the legislative process but also potentially promotes "the actual and perceived politicization of the judiciary."<sup>218</sup>

### 3. The Political Outcome Test

The "Political Outcome" test is another interesting, yet untested, scholarly approach.<sup>219</sup> This test represents a small change to the *Anderson-Burdick* balancing test that would target cases where political motivations are implicated. Under this test, the court would consider factors indicating improper partisanship, such as whether a law: (1) confers a political advantage to the enacting lawmakers or their party, (2) politically disadvantages their opponents or an opposing party, (3) dilutes or otherwise weakens the political participation of identifiable groups of voters, and (4) creates sharp division along party lines.<sup>220</sup> Where this improper partisanship appears likely, a court's presumption should shift in favor of the plaintiff, and the burden of showing that the law's benefits outweigh its burden on voters should fall upon the state.<sup>221</sup> However, although promising as an alternative test of constitutionality, the Political Outcome test is still vulnerable under the same conditions as the *Anderson-Burdick* balancing test; as the cases employing the *Anderson-Burdick* balancing test during the pandemic have shown, courts may still refuse to intervene on voters' behalf—even when intervention is constitutionally justified—based on the *Purcell* principle of nonintervention.

### III. A NEW APPROACH TO JUDICIAL INTERVENTION: THE *CAROLINE* TEST

This part introduces the *Carolene* test, designed as a threshold test that determines whether judicial intervention is appropriate in an equal protection

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215. See Guthrie, *supra* note 214, at 1960.

216. See Hasen, *supra* note 214, at 82–84.

217. See Guthrie, *supra* note 214, at 1960 (surveying the Democracy Canon's presence in election codes and general rules of statutory construction across all fifty states).

218. See Hasen, *supra* note 214, at 106.

219. See Matthew R. Pikor, *Voter ID in Wisconsin: A Better Approach to Anderson/Burdick Balancing*, 10 SEVENTH CIR. REV. 465, 495 (2015).

220. *Id.*

221. *Id.* (suggesting that considering the impact to political outcomes is an effective mode of addressing election regulations that are facially neutral but discriminatory as-applied).

challenge to any change in election administration. First, this part outlines the *Carolene* test. Next, this part demonstrates the *Carolene* test's relationship to the principles discussed in Part II. Finally, it applies the *Carolene* test using a case study from the 2020 election.

#### A. *The Carolene Test*

This Note introduces the *Carolene* test, a novel standard for judicial review of voting rights claims against state and local elections administration made under the Equal Protection Clause. The *Carolene* test applies the principles set forth in “Footnote Four” of *United States v. Carolene Products*<sup>222</sup> in a novel threshold question that determines whether judicial intervention is appropriate in equal protection challenges in election administration cases. This approach proposes a threshold consideration of the appropriateness of judicial intervention in state legislatures’ constitutionally delegated authority over elections, based on a principle of expanding equity in the franchise by evaluating changes in access to the vote, including statutory changes, policy changes, court orders, and executive orders. The *Carolene* test’s threshold determination of whether judicial intervention is appropriate to affirm or deny the constitutionality of those changes is based on a three-factor analysis: (1) whether the change is a state action in election administration that implicates the ability to participate in the political process; (2) whether the change may disproportionately affect discrete and insular minorities; and (3) whether the change would diminish access to, and exercise of, the franchise.<sup>223</sup>

The voting rights jurisprudence in the era of COVID-19 signals an urgent need to reexamine the judicial approach to evaluating challenges to burdens on access to the vote under the Fourteenth Amendment.<sup>224</sup> As the litigation throughout the COVID-19 pandemic has revealed, even outcomes that would otherwise succeed under the *Anderson-Burdick* framework are susceptible to being undermined by the *Purcell* principle, resulting in unpredictable judicial approaches to election law issues of ballot access and the right to vote. The *Purcell* principle holds that judicial intervention is inappropriate on the eve of an election because it may undermine voter confidence in the election process and turn away otherwise-qualified voters.<sup>225</sup> The *Carolene* test supplants the *Purcell* principle as a threshold examination, indicating that judicial intervention is appropriate at any time where state autonomy conflicts with equity, where the ability to participate in the political process is implicated, and where regulations adversely affect “discrete and insular minorities.”<sup>226</sup> Furthermore, the concept of heightened scrutiny is based on

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222. 304 U.S. 144, 152 n.4 (1938).

223. *See id.*

224. *See Disability L. Ctr. of Alaska v. Meyer*, 484 F. Supp. 3d 693, 697 (D. Alaska 2020); U.S. CONST. amend. I; *id.* amend. XIV, §§ 1–2, 5.

225. *See supra* Part I.C.3.

226. *Carolene Prods. Co.*, 304 U.S. at 152 n.4; *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that heightened scrutiny is necessary to protect voting rights following *Carolene*).

the judiciary's acknowledgment that "searching judicial inquiry" into state action is particularly justified where "political processes ordinarily relied upon to protect minorities" have broken down.<sup>227</sup>

The *Carolene* test is derived from the factors mentioned in the case's so-called "Footnote Four," which considers heightened scrutiny where a law "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments."<sup>228</sup> This threshold test is particularly appropriate for application in voting rights cases because these cases present precisely the sort of circumstances imagined by the Supreme Court in *Carolene*: burdens on voters' ability to access and exercise the franchise "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and are often directed at particular "religious . . . or national . . . or racial minorities."<sup>229</sup> Furthermore, voting rights cases continue to arise in the second set of circumstances contemplated in *Carolene*: where "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>230</sup>

#### B. *The Three Organizing Principles in the Carolene Test*

One key strength of the *Carolene* test is that it responds directly to the challenges of the so-called "counter-majoritarian difficulty,"<sup>231</sup> which expresses a fundamental suspicion of judicial review over the decisions of elected officials functioning within their constitutional authority to determine the time, place, and manner of elections.<sup>232</sup> The judiciary has a well-recognized special role in protecting the interests of groups that are relegated to a "position of political powerlessness" and are not served by the

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227. *Carolene Prods. Co.*, 304 U.S. at 152 n.4; see e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77 (1980) ("[B]oth *Carolene Products* themes . . . ask us to focus . . . on whether the opportunity to participate either in the political process by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 654–55 (2001) ("The premise of both *Carolene Products* and the political process theories . . . is that intervention is required because an electoral lock on power has made the system unresponsive . . .").

228. See *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

229. See *id.*

230. See *id.*

231. See *Legal Theory Lexicon: The Counter-Majoritarian Difficulty*, LEGAL THEORY BLOG (Sept. 9, 2012), <https://lsolum.typepad.com/legaltheory/2012/09/legal-theory-lexicon-the-counter-majoritarian-difficulty.html> [<https://perma.cc/GY5M-6673>]. Generally, the countermajoritarian difficulty, a well-known constitutional theory attributed to Professor Alexander Bickel, expresses the fundamental democratic legitimacy issue raised when unelected judges review—and hold power to nullify—the actions of elected executive or legislative actors. *Id.*

232. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 n.1 (1998) ("[T]he proposition hardly requires citation.").

“majoritarian political process.”<sup>233</sup> Furthermore, Justice Harlan F. Stone addressed the *Carolene* factors in Footnote Four specifically to balance the countermajoritarian difficulty.<sup>234</sup>

Where the highly fact-specific calculus of the *Anderson-Burdick* balancing test serves to limit judicial discretion,<sup>235</sup> the *Carolene* test serves to limit judicial activism by prescribing courts’ particular function as a counterbalance to the political and administrative processes that tend to curtail members of underrepresented groups’ ability to participate in the political process.

### C. *The Carolene Test Applied*

This section applies the *Carolene* test, using the election law case of *Disability Law Center v. Meyer*<sup>236</sup> as a case study that highlights the test’s outcomes and demonstrates its crucial role in filling a much-needed gap in equal protection election law claims.

#### 1. Introduction to *Disability Law Center v. Meyer*

Alaskan Lieutenant Governor Kevin Meyer wrote in May 2020 that “[b]alancing the interest in public health with the constitutional right to vote means the 2020 election will be unlike any we have seen in our lifetime.”<sup>237</sup>

That same month, the Alaska legislature passed legislation extending the governor’s March 11, 2020, State of Alaska COVID-19 Disaster Declaration and providing for many pandemic-related administrative changes, including the unprecedented provision that, for the 2020 calendar year’s elections, “the lieutenant governor may . . . direct that a primary or general election to be held in the state in 2020 be held in the same manner as an election by mail . . . [and] may adopt regulations necessary to implement this section, including emergency regulations.”<sup>238</sup>

233. *See, e.g.,* *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (noting that the judiciary has a “special role in safeguarding the interests of those groups that are ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process’” (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973))); *Reynolds v. Sims*, 377 U.S. 533, 553–54 (1964) (identifying a need for judicial review of malapportionment because “[n]o effective political remedy to obtain relief . . . appears to have been available”).

234. *See Carolene Prods. Co.*, 304 U.S. at 783–84.

235. *See also Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (Stevens, J., concurring) (stating that where feasible, courts may consider allowing “election[s] to proceed without enjoining the statutory provisions at issue” to provide “a better record on which to judge their constitutionality . . . on the basis of historical facts rather than speculation”).

236. 484 F. Supp. 3d 693, 693 (D. Alaska 2020).

237. Press Release, Off. of Lieutenant Governor Kevin Meyer, State of Alaska to Focus on Ballot Access for August Primary (May 15, 2020), <https://ltgov.alaska.gov/newsroom/2020/05/state-of-alaska-to-focus-on-ballot-access-for-august-primary/> [https://perma.cc/PRQ2-LZXT].

238. 2020 Alaska Sess. Laws ch. 10. Previous versions of S.B. 241 contemplated not the calendar year 2020, but rather the “duration of the public health crisis.” *Id.*

The Alaska legislature provided a clear and unambiguous allowance for a fully by-mail election in 2020, contemplating the uncertainty and health crisis around the COVID-19 pandemic.<sup>239</sup> However, despite the rising popularity of mail-in elections both generally and as a safety measure responding to the pandemic in the West Coast states of California, Hawaii, and Washington, Lieutenant Governor Meyer decided to proceed with in-person elections.<sup>240</sup> He urged recruitment of poll workers statewide and encouraged voters concerned about their health risks to request absentee ballots, which require a timely request and a witness signature from an individual who is not a U.S. Postal Service employee.<sup>241</sup>

In June 2020, Lieutenant Governor Meyer announced that the Alaska Division of Elections would automatically mail absentee ballot applications to all registered Alaska voters aged sixty-five and older.<sup>242</sup> Immediately, members of the Alaska legislature and other community leaders urged Lieutenant Governor Meyer that easing the burdens on older voters not only discriminates on the basis of age but also favors white voters; while one-third of Alaskans younger than sixty-five are people of color, less than a quarter of Alaskans older than sixty-five are people of color. These leaders instead encouraged the Alaska Division of Elections to automatically send mail-in ballot applications to *all* registered Alaska voters.<sup>243</sup>

On July 17, 2020, a group of plaintiffs, including the Disability Law Center of Alaska, Native Peoples Action Community Fund, Alaska Public Interest Research Group, and two individuals, filed a complaint for declaratory and injunctive relief against the State of Alaska. They requested that the state mail every registered Alaska voter a vote-by-mail ballot application ahead of the primary and general elections in August and November.<sup>244</sup> The plaintiffs argued that choosing only a specific subset of the population to receive additional ease-of-voting access is a direct violation of the Twenty-Sixth

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239. *See id.*

240. James Brooks, *Lieutenant Governor Rules Out By-Mail Elections for Alaska's August Primary*, ANCHORAGE DAILY NEWS (May 16, 2020), <https://www.adn.com/politics/2020/05/15/lieutenant-governor-rules-out-by-mail-elections-for-alaskas-august-primary/> [<https://perma.cc/33Z7-MVPX>].

241. *See* James Brooks, *In Rule Change, Postal Service Forbids Employees from Signing Absentee Ballots as Witnesses*, ANCHORAGE DAILY NEWS (Aug. 19, 2020), <https://www.adn.com/politics/2020/08/18/in-rule-change-postal-service-forbids-employees-from-signing-absentee-ballots-as-witnesses/> [<https://perma.cc/SAA6-QJX2>]; Emily Hofstaedter, *Lt. Governor Calls for More Poll Workers in Western Alaska Ahead of Primary Election*, ALASKA PUB. MEDIA (Aug. 9, 2020), <https://www.alaskapublic.org/2020/08/09/lt-governor-calls-for-more-poll-workers-in-western-alaska-ahead-of-primary-election/> [<https://perma.cc/YX6K-H4AQ>].

242. *See* Andrew Kitchenman, *State Will Mail Absentee Ballot Applications to Seniors. Critics Say That Makes Ballot Access Unequal.*, ALASKA PUB. MEDIA (June 21, 2020), <https://www.alaskapublic.org/2020/06/21/state-will-mail-absentee-ballot-applications-to-seniors-critics-say-that-suppresses-young-minority-votes/> [<https://perma.cc/8C3P-M5QN>].

243. *See id.*

244. Complaint for Declaratory and Injunctive Relief at 1–3, Disability L. Ctr. of Alaska v. Meyer, No. 3AN-20-07060-CI (Alaska Super. Ct. July 17, 2020), <https://public.courts.alaska.gov/web/media/docs/dlc2/complaint.pdf> [<https://perma.cc/6YB7-H7MU>].

Amendment, which explicitly prohibits age discrimination in voting, and also brought challenges under the U.S. Constitution (First and Fourteenth Amendments), the Alaska Constitution (Article 1, Sections 1 and 3; Article 2, Section 19; and Article 5, Section 1), and Title II of the Americans with Disabilities Act of 1990.<sup>245</sup> The defendants, Lieutenant Governor Kevin Meyer and the Alaska Division of Elections, removed the case to federal court.<sup>246</sup>

## 2. Issues Raised in *Disability Law Center*

The analysis presented in *Disability Law Center* implicates constitutional provisions, including the First Amendment (construing voting's expressive function),<sup>247</sup> the Fourteenth Amendment (construing the burdens and unequal ease on the right to vote as implicating the Due Process clause, the Privileges and Immunities Clause, and the Equal Protection Clause),<sup>248</sup> the Fifteenth Amendment (forbidding the denial or abridgement of the right to vote on the basis of race),<sup>249</sup> and the Twenty-Sixth Amendment (forbidding the denial or abridgement of the right to vote on the basis of age).<sup>250</sup>

## 3. *Anderson-Burdick* Analysis in *Disability Law Center*

In *Disability Law Center*, the district court applied an *Anderson-Burdick* analysis and found that strict scrutiny did not apply in the state's decision to send out mail-in ballot applications for the 2020 primaries to all Alaska voters over the age of sixty-five, a policy that eased the burden on elders to procure mail-in ballots for federal elections. The court refused to grant the requested injunction to send out mail-in ballot applications to all registered Alaska voters.<sup>251</sup> The plaintiffs appealed to the Ninth Circuit; amicus briefs arrived from a coalition of Alaskan disability rights groups including the Statewide Independent Living Council of Alaska, Access Alaska, and the Independent Living Center.

## 4. *Disability Law Center* and the *Carolene* Test

Like many of the 2020 election cases,<sup>252</sup> the underlying facts of *Disability Law Center* demonstrate the pressing need for the *Carolene* test's threshold consideration of whether judicial intervention is appropriate, before

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245. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.); Complaint, *supra* note 244, at 1–3.

246. *Disability L. Ctr. of Alaska v. Meyer*, 484 F. Supp. 3d 693, 697 (D. Alaska 2020); Defendant's Notice of Removal, *Disability L. Ctr. of Alaska*, 484 F. Supp. 3d 693 (No. 20-cv-00173), 2020 WL 4086630.

247. *Disability L. Ctr. of Alaska*, 484 F. Supp. 3d at 702–04; *see also* U.S. CONST. amend. I.

248. *See id.* at 702–04; *see also* U.S. CONST. amend. XIV, §§ 1–2, 5.

249. U.S. CONST. amend. XV.

250. *See Disability L. Ctr. of Alaska*, 484 F. Supp. 3d at 702–04; U.S. CONST. amend. XXVI.

251. *See Disability L. Ctr. of Alaska*, 484 F. Supp. 3d at 701.

252. *See supra* Part II.

proceeding to the merits of the constitutional Equal Protection Clause claim. This Note applies the *Carolene* test to *Disability Law Center*, demonstrating the *Carolene* test's threshold analysis for the appropriateness of judicial intervention. As noted in Parts III.B.1 and III.B.3, the District of Alaska employed the *Anderson-Burdick* balancing test, determining that the burden on voters was slight and that the state interest was sufficiently weighty to justify imposing such a burden.<sup>253</sup> Further, while the district court cited the *Purcell* principle as one legal element in its standard of review,<sup>254</sup> it did not expressly apply the principle in its analysis, leaving unanswered the question of whether the court pursued a threshold analysis of the appropriateness of judicial intervention.<sup>255</sup> Thus, this case provides a stellar example of an equal protection voting rights matter in which: (1) the *Purcell* principle fails to fully determine whether judicial intervention is appropriate or not;<sup>256</sup> (2) judicial intervention would be found appropriate based on the outcome of the *Carolene* test,<sup>257</sup> justifying the reviewing court in proceeding to the constitutional analysis under the *Anderson-Burdick* balancing test; and (3) invalidation or alteration of the law in question would not necessarily be required based on the outcome of the *Anderson-Burdick* balancing test.<sup>258</sup>

### 5. The *Carolene* Test Applied

As a threshold matter, *Disability Law Center* presents all three *Carolene* test factors, and thus judicial intervention is justified. The change to be considered is the decision to automatically mail ballot applications to voters over the age of sixty-five but not to other groups disproportionately impacted by the COVID-19 pandemic.

The first prong considers whether the change is a state action in election administration that affects the ability to participate in the political process.<sup>259</sup> Here, the change relates directly to the ability to participate in the political process: the citizen's right to vote is fundamental and well-recognized as one of the core avenues of participation in the political process.<sup>260</sup> Thus, like many voting rights claims, *Disability Law Center* presents a clear and direct implication of participation in the political process.

The second prong considers whether the change may affect discrete and insular minorities.<sup>261</sup> Here, the change made a big impact by easing the

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253. See *supra* Parts III.C.1, III.C.3.

254. See *Disability L. Ctr. of Alaska*, 484 F. Supp. 3d at 699–700.

255. See *id.*

256. See *id.*

257. See *infra* Part III.C.5.

258. Crucially, *Disability Law Center* demonstrates that it is possible to find contrary outcomes between the *Carolene* test's threshold question of the appropriateness of judicial intervention and the *Anderson-Burdick* balancing test's constitutional analysis weighing burdens and state interests. See *supra* Part III.C.3. These contrary outcomes illustrate that the *Carolene* test is not determinative of, reiterative of, or coextensive with the *Anderson-Burdick* balancing test. See *id.*

259. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

260. See *supra* Parts III.A, III.B.1.

261. See *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

burden on voters over the age of sixty-five but also impacted rural Alaska Native voters, who already face immense procedural and logistical hurdles to accessing the voting process and exercising the franchise.<sup>262</sup> It also favors white voters because, while one-third of Alaskans younger than sixty-five are people of color, less than a quarter of Alaskans older than sixty-five are people of color.<sup>263</sup> Easing the requirements for some voters does not necessarily directly burden others. Nevertheless, this change has the potential to disproportionately affect discrete and insular minorities because it may lead to increased ease of access for some voters, while failing to extend a significant benefit to voters who already face immense challenges.

The third prong is whether the change would, in effect, diminish access to, or exercise of, the franchise.<sup>264</sup> This third prong synthesizes the findings of the first two prongs.<sup>265</sup> If implemented, this proposed change would entirely remove the burden of applying for an online ballot application on voters over the age of sixty-five, while leaving the burden in place as an additional step required of all other voters in order to access and exercise their right to vote.<sup>266</sup> It is important to note that this threshold test is not a replacement of the *Anderson-Burdick* balancing test. Under the *Carolene* test, it is sufficient to demonstrate that the change has the effect of diminishing access to, or exercise of, the franchise for some voters relative to others. Here, the change would, in effect, leave in place an administrative burden on rural Alaskan voters, Alaskans with disabilities, and indeed all other voters under the age of sixty-five when that burden diminishes their opportunity to access and exercise the franchise relative to all other voters in the state.

Since all three *Carolene* test factors are met, judicial review and intervention is appropriate. The reviewing court may proceed to a

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262. See *supra* Part III.C.1; see also Nathaniel Herz, *Here's Why Alaska Is the Slowest in the Nation When It Comes to Vote Counting*, ALASKA PUB. MEDIA (Nov. 5, 2020), <https://www.alaskapublic.org/2020/11/05/every-state-except-alaska-has-counted-more-than-60-of-its-votes-heres-why/> [<https://perma.cc/56XN-9YR6>] (“State officials said the [long process] stems from Alaska’s huge size and complicated logistics: It has polling places in dozens of villages with no road access.”); Patty Ferguson-Bohnee, *How the Native American Vote Continues to Be Suppressed*, AM BAR ASS’N (Feb. 9, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed/) [<https://perma.cc/4QL7-CVVL>] (“While 84 percent of the U.S. population lives in urban areas, many Native Americans and Alaska Natives live in rural communities that lack residential addresses. Homes are usually described in terms of landmarks, crossroads, and directions. Numerous roads on reservations are unimproved dirt or gravel roads in poor quality and are often unnamed. After storms, many roads are impassable. Due to these poor conditions, the U.S. Postal Service does not deliver mail to the majority of the reservation residents at their homes . . . . [C]oncerns exist for Alaska Native voters in rural villages who rely on shared P.O. boxes, and at times, mail delivery may take up to three weeks due to weather. In addition, many Native American languages are oral; therefore, language assistance to Native American voters requires in-person translations, which cannot be done through mail.”).

263. See *supra* Part III.C.1.

264. See *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

265. See *supra* Parts III.A, III.B, III.C.1.

266. See *supra* Part III.C.1.

constitutional analysis of the equal protection claim and may intervene, reverse, or alter the change, if it is found unconstitutional.

#### CONCLUSION

Challenges brought by litigants seeking to protect their voting rights during the 2020 election demonstrated significant tension between state autonomy and authority to act, challenges to equity and expanding the franchise with the *Anderson-Burdick* framework, and the challenges of judicial intervention, including the *Purcell* principle. Given the vulnerability of the *Anderson-Burdick* equal protection framework in interaction with the *Purcell* principle demonstrated in the 2020 election cases and the inadequacies of the existing proposed resolutions to surmount the challenge, the *Carolene* test presents a strong case for courts considering equal protection claims under the *Anderson-Burdick* framework to reject the *Purcell* principle and instead apply a threshold determination of the appropriateness of judicial intervention, which examines changes in election law and evaluates—based on whether the change is a state action in election administration that affects the ability to participate in the political process—whether the change demonstrates prejudice against discrete and insular minorities and whether the change would expand or diminish the franchise.