

# REDUCING ELECTION LITIGATION

*Derek T. Muller\**

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## INTRODUCTION

Which candidate’s name should be listed first on a ballot?<sup>1</sup> Should inactive voters’ names appear printed in polling place books?<sup>2</sup> Should elections be conducted exclusively by mail?<sup>3</sup> Should online voter registration be available to prospective voters?<sup>4</sup> When voters sign a petition to help a candidate appear on the ballot, must the petition’s circulator reside in the state?<sup>5</sup>

These are the questions that ordinary election administration rules answer. There might be better or worse rules. These rules might advance one set of benefits in exchange for another set of costs. They could benefit one

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\* Professor of Law, Bouma Fellow in Law, University of Iowa College of Law. This Article was prepared for the Symposium entitled *Toward Our 60th Presidential Election*, hosted by the *Fordham Law Review* on February 26, 2021, at Fordham University School of Law. I thank the *Fordham Law Review* and Jerry Goldfeder for a terrific symposium. This paper benefited from feedback from Travis Crum, Rebecca Green, Lisa Marshall Manheim, Michael Morley, Rick Pildes, and Abby Wood, among others. Special thanks to Kevin Kim for his excellent research.

1. *See, e.g., Nelson v. Warner*, 446 F. Supp. 3d 119 (S.D. W. Va. 2020); *Jacobson v. Lee*, 411 F. Supp. 3d 1249 (N.D. Fla. 2019), *vacated sub nom. Jacobson v. Fla. Sec’y of State*, 974 F.3d 1236 (11th Cir. 2020).

2. *See, e.g., Common Cause/New York v. Brehm*, No. 17-CV-6770, 2020 WL 122589 (S.D.N.Y. Jan. 10, 2020).

3. *See, e.g., Paher v. Cegavske*, 457 F. Supp. 3d 919 (D. Nev. 2020).

4. *See, e.g., Democratic Nat’l Comm. v. Bostelmann*, 447 F. Supp. 3d 757 (W.D. Wis. 2020).

5. *See, e.g., Benezet Consulting v. Boockvar*, 433 F. Supp. 3d 670 (M.D. Pa. 2020).

candidate or group over another. Like every rule, they could alter behavior in ways that affect who participates in elections or which candidate wins.

But they have another thing in common: plaintiffs have litigated each dispute. Judges have increasingly evaluated ever-finer points of election administration. This Article posits why the judiciary has done so and offers potential ways to reduce election litigation.

Part I examines the rise in litigation and attributes at least some of that increase to several causes: increased campaign expenditures on litigation; increased partisanship in state legislatures, yielding more contentious election laws; the decline of preclearance under the Voting Rights Act of 1965<sup>6</sup> after *Shelby County v. Holder*;<sup>7</sup> and U.S. Supreme Court extensions of the *Anderson v. Celebrezze*<sup>8</sup> framework to broad areas of election law.

Undoubtedly, one factor that made 2020 an especially litigious election was the arrival and spread of the novel coronavirus, which precipitated extensive actions (or attempted actions) to alter<sup>9</sup> or postpone<sup>10</sup> previously scheduled elections. But this Article sees a challenge: cash-laden litigants pressing judges to provide a preferred set of election practices, seizing on inconsistencies within the states' election codes or an absence of federal oversight to do so.

Part II suggests that less litigation is desirable. While acknowledging that litigation can advance important interests, this part argues that it can also undermine confidence in elections or add needless complexity to election law around election time. To reduce litigation, jurisdictions could increase uniformity in legislation by “leveling up” decisions, which reduces friction in decision-making and incentives to litigate, while increasing consistency both in terms of voter treatment and in terms of judicial precedent. Additionally, federal campaign finance law currently privileges donations earmarked for litigation. This gives campaigns incentives to focus on litigation-centric fundraising. Eliminating these incentives would place money raised for litigation on equal footing with money raised for other

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6. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

7. 570 U.S. 529 (2013).

8. 460 U.S. 780 (1983).

9. Consider one list of tracked changes from Alabama, Arkansas, California, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, West Virginia, and Wyoming. See Quinn Scanlan, *Here's How States Have Changed the Rules Voting amid the Coronavirus Pandemic*, ABC NEWS (Sep. 22, 2020, 6:57 PM), <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089> [<https://perma.cc/ZH6U-F7QV>].

10. Consider changes in Alaska, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, New Jersey, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia, and Wyoming. See Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here's a List.*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html> [<https://perma.cc/LUS5-LL5C>].

purposes and compel campaigns to reconsider their resource-allocation strategies.

### I. THE GROWTH IN ELECTION LITIGATION

Election litigation has grown dramatically in recent years. Professor Richard Hasen has written about the increased trend in litigation between 2000, when *Bush v. Gore* was decided, and 2006.<sup>11</sup> The statistics presented by Professor Hasen pale in comparison to the data from 2020.

Early evidence from 2020 points to two types of election litigation. First, over 300 lawsuits citing the COVID-19 pandemic as a basis for judicial intervention were filed in 2020.<sup>12</sup> Second, President Donald Trump and supporting parties filed over sixty lawsuits in postelection lawsuits concerning matters ranging from election observers' presence during ballot counting<sup>13</sup> to the vice president's role in the counting of electoral votes.<sup>14</sup> But the trend in increased litigation began well before 2020—the events of that year simply accelerated it.

#### A. New Litigation Expenditure Opportunities

In 2014, the combination of a Supreme Court decision and a federal statute yielded a new and powerful earmark for election litigation. Major parties' litigation expenditures have dramatically increased ever since.

When Congress enacted the Federal Election Campaign Act of 1971<sup>15</sup> and amended it in 1974,<sup>16</sup> it limited the amount of money that individuals could contribute to candidates for federal office.<sup>17</sup> The act prohibited individuals from contributing more than \$1000 to any candidate's election campaign.<sup>18</sup> It also prohibited donors from contributing a total of more than \$25,000 to federal candidates in a given year.<sup>19</sup>

These limits survived a constitutional challenge in 1976, when the Supreme Court decided *Buckley v. Valeo*.<sup>20</sup> The Court first worried that “contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing

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11. Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 28–29 (2007).

12. *COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT (Mar. 24, 2021, 8:15 PM), <https://healthyelections-case-tracker.stanford.edu/> [<https://perma.cc/RPT9-F52W>].

13. *See, e.g., In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020).

14. *See Gohmert v. Pence*, 510 F. Supp. 3d 435 (E.D. Tex. 2020), *aff'd*, 832 F. App'x 349 (5th Cir. 2021).

15. Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 18, 47, and 52 U.S.C.).

16. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of the U.S.C.).

17. *See Buckley v. Valeo*, 424 U.S. 1, 12–14 (1976) (per curiam).

18. *Id.* at 13.

19. *Id.*

20. 424 U.S. 1 (1976).

the resources necessary for effective advocacy.”<sup>21</sup> But it went on, “[t]here is no indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.”<sup>22</sup> The Court concluded that the burden on contributors was a “marginal restriction”;<sup>23</sup>

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.<sup>24</sup>

The Court extensively considered the \$1000 contribution limitation in upholding it.<sup>25</sup> The Court’s consideration of the \$25,000 aggregate limitation was cursory, but that restriction also passed constitutional scrutiny.<sup>26</sup>

Pursuant to campaign finance law amendments since *Buckley*, the inflation-adjusted contribution limit increased to \$2600 for individual candidates by 2013.<sup>27</sup> The biennial aggregate limitation rose to \$123,200—\$48,600 in contributions to candidates and \$74,600 in contributions to other committees.<sup>28</sup> Political donors, in other words, could contribute to the maximum limits set for individual candidates but also faced an overall maximum limit in a two-year period.<sup>29</sup>

The Supreme Court considered a challenge to the aggregate limitations in 2014 in *McCutcheon v. Federal Election Commission*.<sup>30</sup> Among other things, Shaun McCutcheon sought to contribute \$1776 to twelve candidates running for federal office, below the \$2600 contribution limit for each of them.<sup>31</sup> He had already given \$33,088 to sixteen other candidates, so the \$1776 contributions would put him over the aggregate limit.<sup>32</sup> He also had a similar desire to contribute to national party committees within the individual limits but beyond the aggregate limits.<sup>33</sup> The Supreme Court found that the aggregate contribution limit violated the First Amendment.<sup>34</sup>

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21. *Id.* at 21.

22. *Id.*

23. *Id.* at 20.

24. *Id.* at 21.

25. *Id.* at 23–35.

26. *Id.* at 38; see *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 198 (2014) (plurality opinion) (per curiam) (noting that the *Buckley* Court considered the aggregate limit “in one paragraph of its 139-page opinion”).

27. 52 U.S.C. § 30116(a)(1)(A), modified by Price Index Adjustments for Contribution and Expenditure Limitations, 78 Fed. Reg. 8530 (Feb. 6, 2013). The \$2600 limit applies to each election separately, so a donor may in fact give \$5200 over the course of an election cycle—\$2600 for the primary election and \$2600 for the general election.

28. 52 U.S.C. § 30116(a)(3), modified by Price Index Adjustments for Contribution and Expenditure Limitations, 78 Fed. Reg. at 8532.

29. *Id.*

30. 572 U.S. 185 (2014) (plurality opinion).

31. *Id.* at 194.

32. *Id.* at 194–95.

33. *Id.*

34. *Id.* at 227.

The Court’s reasoning turned, in part, on the fact that the base limits would remain “undisturbed” as “the primary means of regulating campaign contributions,”<sup>35</sup> reflecting the *Buckley* Court’s overwhelming focus on defending the base limits. As the Court saw the problem, “[i]f there is no corruption concern in giving nine candidates up to \$5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given \$1,801, and all others corruptible if given a dime.”<sup>36</sup>

Political donors may now contribute as much money to campaigns as they see fit, as long as they meet individual contribution limits. Immediately after *McCutcheon*, however, Congress used the case’s holding to expand opportunities to raise larger sums of money earmarked for election litigation.

In December 2014, Congress passed the Consolidated and Further Continuing Appropriations Act, 2015,<sup>37</sup> or the “Cromnibus,” an omnibus spending bill, which, among other things, increased certain contribution limits in federal elections.<sup>38</sup> In the 2019–2020 election cycle,<sup>39</sup> a donor could give a national party committee \$106,500 for litigation expenses “to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.”<sup>40</sup> That means that while donors are capped at contributing \$5600 to a presidential candidate’s primary and general election fund, they can contribute \$106,500 to the party’s lawyers for litigation expenses. In other words, a donor can give nearly twenty times as much to a presidential candidate’s lawyers as it can to the presidential candidate.<sup>41</sup>

Between 2003 and 2015, political parties’ legal expenditures—measured by examining the Democratic and Republican national committees and their congressional and senate entities<sup>42</sup>—hovered around \$5 million per year.<sup>43</sup>

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35. *Id.* at 209.

36. *Id.* at 210.

37. Pub. L. No. 113-235, 128 Stat. 2132 (codified as amended in scattered sections of the U.S.C.).

38. President Obama expressly opposed this provision but signed the law anyway. *See* 160 CONG. REC. H9285 (daily ed. Dec. 11, 2014) (“[T]he Administration is opposed to inclusion of a rider that would amend the Federal Election Campaign Act to allow individual donors to contribute to national political party committee accounts for conventions, buildings and recounts in amounts that are dramatically higher than what the law currently permits.”). Representative John Boehner and Senator Harry Reid defended the provision by explaining that such contributions are subject to “hard money” limits and disclosure requirements, and that they “are not for the purpose of influencing federal elections.” *Id.* at H9286; *see also* 160 CONG. REC. S6814 (Dec. 13, 2014).

39. Price Index Adjustments for Contribution and Expenditure Limitations, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).

40. Pub. L. No. 113-235, div. N, § 101, 128 Stat. 2132, 2773 (codified as amended at 52 U.S.C. § 30116(a)(9)). *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, FEC INFLATION-ADJUSTMENT MEMO FOR 2019-2020 (2019).

41. Special thanks to Professor Abby Wood for her thoughts in approaching this topic.

42. The six entities are the Democratic Congressional Campaign Committee (DCCC), the Democratic National Committee (DNC), the Democratic Senatorial Campaign Committee (DSCC), the National Republican Congressional Committee (NRCC), the National Republican Senatorial Committee (NRSC), and the Republican National Committee (RNC).

43. *See* Appendix A.

That figure dipped to just below \$3 million in 2008 but surpassed \$7.5 million in 2012, but it remained fairly steady between 2003 and 2015.

In 2016, however, legal expenses shot up to over \$15 million in expenditures, more than double the 2012 total.<sup>44</sup> In 2017, the total dipped to just under \$10 million. In 2018, it rose again to nearly \$24 million, went up again in 2019 to \$28 million, and surpassed an astonishing \$66 million in 2020.<sup>45</sup>

Peaks in presidential election years or off-cycle election years are intuitive. The bulk of redistricting occurred in 2011 and 2012, when one might otherwise expect increases in party spending on litigation. But the significant increases from 2015 onward are noteworthy.

One might attribute this trend to particular partisan factors, but the overall rise is emphatically bipartisan. Republican Party expenditures may in part be attributable to costs associated with President Trump's legal defense team during his four years in office. On the Democratic side, heightened legal spending may be due to an increase in initiated litigation or intervention in litigation.

Such expenditures remain a very small part of party entities' total costs, but the percentage of parties' overall spending devoted to legal costs continues to rise. Total legal expenditures in the 2010 cycle were around 1 percent of all expenditures from these six party entities and 0.8 percent in the 2012 cycle.<sup>46</sup> In 2020, they were 3.7 percent of all expenditures.<sup>47</sup>

There is one additional caveat, and it is a significant one. It is possible that there has also been an increase in third-party or nonprofit funding for election-related litigation. While entities like the ACLU or the NAACP have long engaged in impact litigation relating to elections, it is unclear how much their efforts have changed in recent years. Future research might explore whether these entities have proportionately increased their election-related litigation alongside the major parties.<sup>48</sup>

When the parties control lawsuits funded by campaign contributions, they can begin to veer toward "campaigning by litigation,"<sup>49</sup> where the suit becomes a rallying cry for one's partisans. Even a weak case can mobilize

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44. *Id.*

45. *Id.*; see also Matthew Boyle, *Exclusive—GOP Stands Up “Permanent” “Election Integrity Operations” Nationwide to “Kill” Democrat Takeover Attempts “in Their Infancy,”* BREITBART (Aug. 11, 2021), <https://www.breitbart.com/politics/2021/08/11/exclusive-gop-stands-up-permanent-election-integrity-operations-nationwide-kill-democrat-takeover-attempts-their-infancy/> [<https://perma.cc/Q8T5-3KRN>] (examining records of the Republican National Committee that identified “more than \$30 million” spent in 2020 on litigation).

46. *Cf. Democratic Congressional Campaign Comm.*, OPEN SECRETS, <https://www.opensecrets.org/parties/totals.php?cmte=DCCC&cycle=2010> [<https://perma.cc/YB4P-79DD>] (last visited Sept. 17, 2021); *Democratic Congressional Campaign Comm.*, OPEN SECRETS, <https://www.opensecrets.org/parties/totals.php?cmte=DCCC&cycle=2012> [<https://perma.cc/ER6U-H6G7>] (last visited Sept. 17, 2021).

47. *Id.*

48. See *infra* text accompanying notes 132–35 (asking whether reductions in party expenditures would correlate with reduction in litigation or simply hamstringing party control).

49. All credit to Lisa Manheim for inspiring this term.

donors, as the filing of a complaint receives significant media attention and can be a basis to request further contributions. Incentives flourish with funds earmarked for election litigation.

### B. Partisanship

Increased partisanship in state government may be contributing to recent litigation over election laws. State government “trifectas”—where a single party holds control of the state house, the state senate, and the governorship—have risen in recent years. Thirty-six states had trifectas in 2020, up from twenty-five in 2010.<sup>50</sup> If one party is in charge of legislation, including election law legislation, it seems reasonable that the party out of power will be more likely to challenge election laws through litigation, particularly if that party believes the new laws harm its interests. The flip side of one-party rule is intractability, which can also lead to litigation if the legislative and executive branches cannot resolve disputes.

Partisanship certainly prompted the disputes in Wisconsin ahead of the 2020 primary and general elections. Consider a brief narrative.

On March 13, 2020, ahead of the April 7 primary, the Democratic National Committee and the Democratic Party of Wisconsin petitioned a federal court asking to extend the deadline for voter registration to prevent enforcement of proof of residency or photo identification requirements “until the COVID-19 crisis is over” and to extend the deadline for ballots to be received after Election Day.<sup>51</sup> On March 20, the court extended the registration deadline from March 18 to March 30.<sup>52</sup>

On April 2, the court extended the absentee ballot request deadline from April 2 to April 3.<sup>53</sup> It also extended the deadline for receiving absentee ballots from 8:00 PM on April 7 to 4:00 PM on April 13.<sup>54</sup> The next day, a panel of the Seventh Circuit denied the motion for a stay and allowed these deadlines to remain in place.<sup>55</sup>

That same day, April 3, Governor Tony Evers signed an executive order calling the legislature into a special session. Governor Evers sought to have the legislature convene on April 4 to extend the election date to May 19 and

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50. *2020 State Elections Coverage*, MULTISTATE (Dec. 1, 2020), <https://www.multistate.us/pages/2020-state-elections-coverage> [https://perma.cc/G9ER-DVCT].

51. Complaint at 15, *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952 (W.D. Wis. 2020) (No. 20-cv-249), *rev’d*, Nos. 20-1538, 20-1539, 20-1546, 20-1545, 2020 WL 3619499 (7th Cir. Apr. 3, 2020).

52. *Democratic Nat’l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 700 (W.D. Wis. 2020), *rev’d*, No. 20-1538, 2020 WL 3619499 (7th Cir. Apr. 3, 2020).

53. *Bostelmann*, 451 F. Supp. 3d at 977.

54. *Id.* at 983. Another order about witness certifications was enjoined by the Seventh Circuit on appeal. *See Bostelmann*, 2020 WL 3619499, at \*2.

55. *Bostelmann*, 2020 WL 3619499, at \*1.

provide other accommodations.<sup>56</sup> The legislature met on April 4 but adjourned without taking action.<sup>57</sup>

On the litigation front, the Republican National Committee, as an intervenor, appealed to the U.S. Supreme Court with one narrow issue. It did not appeal the absentee ballot request deadline (which had already passed), and it did not appeal the six-day extension of the deadline for absentee ballots to be received, as long as they were mailed by April 7 (election day).

The governor issued another order on April 6, again calling the legislature into a special session and asking it to enact voting-related laws.<sup>58</sup> The order also attempted to “suspend in-person voting for April 7, 2020, until June 9, 2020, unless the Legislature passes and the Governor approves a different date for in-person voting”<sup>59</sup>—days after the governor claimed he lacked the power to do so.<sup>60</sup> The Wisconsin Supreme Court, in a 4–2 decision, stayed that portion of the order.<sup>61</sup> The legislature met on April 7 and again did not act.<sup>62</sup>

The 2020 Wisconsin presidential primary (which included other state elections on the ballot, too) had remarkably high turnout,<sup>63</sup> and retrospectives showed that in-person voting would be relatively safe.<sup>64</sup> But by the fall, the Wisconsin legislature and the governor remained unable (or unwilling) to resolve their differences. On September 21, a federal district court decided four consolidated cases, issuing an injunction to extend voter registration by a week, allowing late-arriving absentee ballots to be counted if postmarked

56. Governor Tony Evers, Wis. Exec. Order No. 73 (Apr. 4, 2020), <https://evers.wi.gov/Documents/COVID19/EO073-SpecialSessionElections%20searchable.pdf> [<https://perma.cc/P4QZ-83UF>].

57. *April 2020 Special Session*, STATE OF WISCONSIN ASSEMBLY J. (Apr. 4, 2020, 4:09 PM), <https://docs.legis.wisconsin.gov/2019/related/journals/assembly/20200404ap0> [<https://perma.cc/T2M8-A9VM>]; *April 2020 Special Session*, STATE OF WISCONSIN ASSEMBLY J. (Apr. 4, 2020, 4:00 PM), <https://docs.legis.wisconsin.gov/2019/related/journals/senate/20200404ap0> [<https://perma.cc/2UA4-CKVC>].

58. Wis. Exec. Order No. 74 (Apr. 7, 2020), <https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf> [<https://perma.cc/R7L4-8DJX>].

59. *Id.*

60. See Natasha Korecki & Zach Montellaro, *Wisconsin Supreme Court Overturns Governor, Orders Tuesday Elections to Proceed*, POLITICO (Apr. 6, 2020, 7:59 PM), <https://www.politico.com/news/2020/04/06/wisconsin-governor-orders-stop-to-in-person-voting-on-eve-of-election-168527> [<https://perma.cc/N592-7QS4>].

61. Wis. Legislature v. Evers, No. 2020AP608-OA (Wis. Apr. 6, 2020).

62. *April 2020 Special Session II*, STATE OF WISCONSIN ASSEMBLY J. (Apr. 7, 2020, 2:02 PM), <https://docs.legis.wisconsin.gov/2019/related/journals/assembly/202004072ap0> [<https://perma.cc/6SGM-Z996>]; *April 2020 Special Session II*, STATE OF WISCONSIN ASSEMBLY J. (Apr. 7, 2020 2:00 PM), <https://docs.legis.wisconsin.gov/2019/related/journals/senate/202004072ap0> [<https://perma.cc/4YZB-XBCW>].

63. Richard H. Pildes & Charles Stewart III, *The Wisconsin Primary Had Extraordinarily High Voter Turnout*, WASH. POST (Apr. 15, 2020), <https://www.washingtonpost.com/politics/2020/04/15/wisconsin-primary-had-extraordinarily-high-voter-turnout/> [<https://perma.cc/E3MK-NNX5>].

64. Russell Berman, *If You Can Grocery Shop in Person, You Can Vote in Person*, ATLANTIC (Sept. 8, 2020), <https://www.theatlantic.com/politics/archive/2020/09/voting-during-pandemic-pretty-safe/616084/> [<https://perma.cc/JN7N-959C>].

by Election Day and received within six days and permitting replacement absentee ballots to be provided online.<sup>65</sup> The court did not, however, enjoin the enforcement of the requirement that absentee voters obtain witness signatures, and it did not ease a photo identification requirement for absentee ballot requests.<sup>66</sup>

The Seventh Circuit, after briefly referring the case to the Wisconsin Supreme Court to determine whether the state legislature could pursue an appeal, stayed the injunction on October 8.<sup>67</sup> Its principal basis was that the district court had issued its order too late; federal courts, the Supreme Court has held, ought not alter election laws on the eve of an election.<sup>68</sup> In an October 26 decision, the Supreme Court declined to vacate the stay, allowing Wisconsin's original rules to remain in place. This order was part of a series of Supreme Court opinions weighing in on the matter of the ballot receipt deadline.<sup>69</sup>

Sclerotic legislatures assuredly heightened litigant interest and judicial suspicion.<sup>70</sup> But an additional litigation peril is the consent decree, in which the executive might attempt to undermine a legislative scheme by negotiating a judicially enforceable settlement with the plaintiff.<sup>71</sup> For example, Michigan's secretary of state, a Democrat, attempted to negotiate a consent decree shortly after taking office to resolve a lawsuit contending that the state's legislative districts were the product of a Republican gerrymander. The deal would have required a new map, a move opposed by the Republican-controlled legislature, and was blocked only after a federal court rejected it.<sup>72</sup>

In 2020, a consent decree in North Carolina was the source of extensive litigation. Unlike the stagnant Wisconsin legislature, the North Carolina legislature made a series of changes to its election statutes in light of the pandemic.<sup>73</sup> The North Carolina State Board of Elections ("the Board")

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65. *Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 787–88 (W.D. Wis. 2020).

66. *Id.* at 805–06. It also concluded that the failure of the Wisconsin Elections Commission to "take adequate action" to reduce "intimidation" of voting during a pandemic was not a violation of the Voting Rights Act. *Id.* at 816.

67. *See Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020).

68. *Id.* at 641 (citing *Frank v. Walker*, 574 U.S. 929 (2014)); *id.* at 642 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)).

69. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (mem.); *id.* at 28 (Roberts, C.J., concurring in denial of application to vacate stay); *id.* (Gorsuch, J., concurring in denial of application to vacate stay); *id.* at 30 (Kavanaugh, J., concurring in denial of application to vacate stay); *id.* at 40 (Kagan, J., dissenting).

70. *See, e.g., id.* at 43 (Kagan, J., dissenting) (noting that the Wisconsin legislature had failed to enact legislation pertaining to election administration during the COVID-19 pandemic).

71. *See generally* ROSS SANDLER & DAVID SCHOENBROAD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2004); Michael W. McConnell, *Why Hold Elections?: Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. L.F. 295.

72. For details about the attempted consent decree, see Derek T. Muller, *Nonjudicial Solutions to Partisan Gerrymandering*, 62 *How. L.J.* 791, 807–08 (2019).

73. 2020 N.C. Sess. Laws 104–11.

entered into a consent decree in another lawsuit, altering, among other things, the absentee ballot receipt deadline.<sup>74</sup> On October 14, 2020, a federal district court concluded that the Board appeared to have exceeded its authority in some components of its consent decree, but the court declined to alter election rules at such a late date.<sup>75</sup> Ultimately, the Board's consent decree remained in place on appeal, despite dissenting opinions before the Fourth Circuit en banc<sup>76</sup> and the U.S. Supreme Court.<sup>77</sup>

Finally, partisans might disapprove of the rules their party advanced—or that they themselves advanced—in subsequent challenges. Consider two more disputes.

Before the pandemic, Michigan had a policy dispute about pre-processing ballots early.<sup>78</sup> Michigan allows voters to spoil absentee ballots up until the day before an election.<sup>79</sup> Processing ballots before Election Day prevents voters from being able to spoil their ballots. Last year, Secretary of State Jocelyn Benson proposed allowing clerks to begin processing ballots the Friday before Election Day (i.e., four days before Election Day).<sup>80</sup> Michigan's former Secretary of State, Ruth Johnson, introduced a bill<sup>81</sup> earlier in 2020—before the pandemic—to allow processing on the Monday before (i.e., the day before) Election Day. During the pandemic, the bill was amended to increase pre-processing time from eight hours to ten and to expand its coverage to include cities with more than 25,000 residents. The bill also shortened the time during which voters could spoil their ballots by moving the spoliation deadline up from 4:00 PM on the day before Election Day to 10:00 AM on the day before Election Day. This bill was passed by the legislature and signed by the governor.<sup>82</sup>

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74. See *Moore v. Circosta*, 141 S. Ct. 46, 46 (2020) (mem.) (Gorsuch, J., dissenting from denial of application for injunctive relief).

75. *Moore v. Circosta*, 494 F. Supp. 3d 289, 331 (M.D.N.C. 2020).

76. *Wise v. Circosta*, 978 F.3d 93, 104 (4th Cir. 2020) (Wilkinson, J., dissenting); *id.* at 117 (Niemeyer, J., dissenting).

77. *Moore*, 141 S. Ct. at 46 (Gorsuch, J., dissenting from denial of application for injunctive relief).

78. See Christine Ferretti, *Benson, Detroit Clerk Press for Early Processing of Absentee Ballots*, DETROIT NEWS (Jan. 28, 2020, 2:21 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2020/01/28/benson-detroit-clerk-press-early-absentee-ballot-processing/4596454002/> [<https://perma.cc/3KC5-4Z79>] (quoting Secretary of State Benson's proposal for absentee ballots and a rejoinder by a member of the House that "an early tally of absentee ballots carries challenges because Michigan voters are allowed to change their ballots up to the day before the election").

79. In the 2020 primary election, Michigan had more than 77,000 ballots spoiled for a variety of reasons. Paul Egan, *Michigan's Election Has More Than 77,000 Spoiled Ballots: Here's What That Means*, DETROIT FREE PRESS (Nov. 5, 2020, 12:13 PM), <https://www.freep.com/story/news/politics/elections/2020/11/03/michigan-spoiled-ballots-election/6145212002/> [<https://perma.cc/YE99-E8ZQ>].

80. Beth LeBlanc, *Benson Pushes for Early Counting of Absentee Ballots, Among Other Changes*, DETROIT NEWS (Mar. 6, 2019, 11:17 PM), <https://www.detroitnews.com/story/news/local/michigan/2019/03/06/benson-pushes-early-counting-absentee-ballots-other-changes/3081439002/> [<https://perma.cc/7U6W-73DQ>].

81. S.B. 757, 100th Leg., Reg. Sess. (Mich. 2020).

82. 2020 Mich. Pub. Acts 177.

After Election Day, ballot processing took demonstrably longer in Michigan than it did in most other states.<sup>83</sup> As it appeared that President Trump was on pace to lose both the tight race in Michigan and the Electoral College, the Trump campaign began to fixate on Michigan's ballot-counting practices in a torrent of litigation.<sup>84</sup>

Ask *ex ante*: What's more important, voter choice to spoil ballots in the relatively rare instances voters want to change their minds before Election Day, or swift processing and counting of ballots to ensure public confidence in prompt results? Before Election Day, Republicans in Michigan pressed more for the former. The Michigan legislature made a small step in the direction of the latter. But when it took Michigan (entirely predictably) longer than most states to process and count the large number of absentee ballots, Republican challengers alleged something nefarious and sought assorted forms of legal relief, all of which were ultimately denied.<sup>85</sup>

In Iowa's 2nd Congressional District election,<sup>86</sup> the margin separating Mariannette Miller-Meeks from Rita Hart was just forty-seven votes among nearly 400,000 votes cast by the end of the canvass.<sup>87</sup> Hart requested a recount in all twenty-four counties in the district. Each county had its own recount board, consisting of a Hart designee, a Miller-Meeks designee, and a third mutually agreed-upon designee. State law permitted the boards to determine whether to conduct a machine recount, a hand count, or both.<sup>88</sup>

Disparate county recount opportunities led to disparate strategies. The Hart designees pressed for hand counts (or their equivalent) in Democratic-leaning counties, presumably hoping to "pick up" more undervotes and overvotes that the machines might have missed.<sup>89</sup>

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83. See, e.g., Miles Parks, *Why Vote Counting in Pennsylvania and Michigan Takes So Long*, NPR (Nov. 4, 2020, 6:00 AM), <https://www.npr.org/2020/11/04/931136905/we-ll-be-working-24-hours-vote-counting-to-continue-through-the-week> [https://perma.cc/34ZH-CNXXV].

84. See, e.g., Donald J. Trump for President, Inc. v. Benson, No. 20-000225-MZ (Mich. Ct. Cl. Nov. 6, 2020) (denying a motion for declaratory judgment seeking to halt the counting of ballots due to allegations that an election observer had been denied access); Stoddard v. City Election Comm'n of Detroit, No. 20-014604-CZ (Mich. 3d Jud. Cir. Nov. 6, 2020) (denying a petition for an injunction to block the certification of election results until plaintiffs could investigate and compare ballots with reported results); Constantino v. City of Detroit, No. 20-014780-AW (Mich. 3d Jud. Cir. Nov. 13, 2020) (issuing order in response to allegations of fraud at the TCF Center ballot-counting location).

85. See *supra* note 84.

86. I served as a designee to a county recount board on behalf of the Miller-Meeks campaign.

87. See generally Todd E. Pettys, *A View from the Recount Room*, 105 IOWA LAW REVIEW ONLINE 37 (2021), [https://ilr.law.uiowa.edu/assets/Uploads/ILROnline\\_Volume105\\_Pettys.pdf](https://ilr.law.uiowa.edu/assets/Uploads/ILROnline_Volume105_Pettys.pdf) [https://perma.cc/CL3A-VS75]; Kate Payne, *Hart to Request Recounts in All 24 Counties in Iowa's 2nd Congressional District*, IOWA PUB. RADIO (Nov. 12, 2020, 10:43 AM), <https://www.iowapublicradio.org/ipr-news/2020-11-12/hart-to-request-recounts-in-all-24-counties-in-iowas-2nd-congressional-district> [https://perma.cc/LD4J-MKVR].

88. IOWA ADMIN. CODE r. 721-26.105(2) (2021).

89. See Motion to Dismiss Notice of Contest Regarding the Election for Representative in the 117th Congress from the Second Congressional District of Iowa, at 12–13, U. S. House of Representatives (Jan. 21, 2021), <https://cha.house.gov/sites/democrats.cha.house.gov/>

Meanwhile, Hart designees sought machine recounts in Republican-leaning counties, presumably under the theory that machine recounts would keep the count in those counties as close to Election Day totals as possible. By the end of the recount, the margin had narrowed to just six votes in Miller-Meeks's favor.<sup>90</sup> Hart filed an election contest in the House of Representatives, requesting a new recount and alleging, among other things, that voters had been treated inconsistently across counties—inconsistencies, however, driven by her own delegates' strategic decisions.<sup>91</sup>

All told, partisanship in state government could give rise to various types of problems in litigation—skepticism of partisan legislative action or inaction, consent decrees to circumvent legislative decisions, or adherence to inconsistent positions when a partisan position fails. While the litigation is responding to the partisanship, at times the litigation exacerbates partisanship or acts to undermine a different branch of government's preferences. And in many of these cases, the litigation didn't change a thing.<sup>92</sup>

### C. Additional Litigation Considerations

Two additional possibilities are worth mentioning, with empirical work to be done. The first is the decline of preclearance after *Shelby County v. Holder*.<sup>93</sup> The Voting Rights Act required that some jurisdictions, mostly in the South, submit proposed election laws for the review and approval of the Department of Justice, which was charged with ensuring that the laws “neither ha[d] the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”<sup>94</sup> While most laws easily

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files/documents/committee\_docs/Miller-Meeks%20Motion%20to%20Dismiss.pdf [https://perma.cc/9AMF-HHW7].

90. See, e.g., Brienne Pfannenstiel, *Pelosi to Provisionally Seat Iowa Republican Miller-Meeks in Congress amid Election Challenge*, DES MOINES REG. (Dec. 30, 2020, 4:59 PM), <https://www.desmoinesregister.com/story/news/politics/2020/12/30/miller-meeks-seated-congress-provisionally-rita-hart-election-challenge/4073901001/> [https://perma.cc/2VD8-4Y87].

91. See, e.g., Notice of Contest Regarding the Election for Representative in the One Hundred Seventeenth Congress from Iowa's Second Congressional District, U.S. House of Representatives (Dec. 22, 2020), [https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/committee\\_docs/Notice%20of%20Contest%20Hart%20v%20Miller-Meeks.pdf](https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/committee_docs/Notice%20of%20Contest%20Hart%20v%20Miller-Meeks.pdf) [https://perma.cc/HKF2-2VS7]; Motion to Dismiss Notice of Contest, *supra* note 89, at 26–27 (describing how the Hart campaign created lack of uniformity); Contestant's Initial Brief in Response to Chairperson Lofgren's Letter of March 10, 2021, at 29–31, U.S. House of Representatives (Mar. 22, 2021), [https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/committee\\_docs/Hart%20v.%20Miller-Meeks\\_March%2010%20Letter%20Initial%20Brief\\_COS\\_FINAL1.pdf](https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/committee_docs/Hart%20v.%20Miller-Meeks_March%2010%20Letter%20Initial%20Brief_COS_FINAL1.pdf) [https://perma.cc/F6YQ-FKYL] (describing how the Hart designee to the board advocated for certain methods in some counties and different methods in other counties). See generally *Cases Properly Filed Under the Federal Contested Election Act in the 117th Congress*, COMM. ON HOUSE ADMIN., <https://cha.house.gov/Contested-Elections> [https://perma.cc/MLQ5-9LYQ] (last visited Sept. 17, 2021).

92. A separate concern, of course, is whether courts are too hostile to certain types of election law claims. See *infra* note 115 and accompanying text.

93. 570 U.S. 529 (2013).

94. 52 U.S.C. § 10304(a).

survived preclearance,<sup>95</sup> it required state legislatures to be careful in enacting new laws, and it provided leverage to out-of-power political groups to bargain around the law and to negotiate settlements.<sup>96</sup> The Court in *Shelby County* found that the coverage formula that identified which jurisdictions needed to submit their laws for preclearance was unconstitutional, as it had not been materially updated since 1975.<sup>97</sup> States that previously had been subject to preclearance began enacting statutes in the same unencumbered manner like other jurisdictions.<sup>98</sup> Litigants seeking to assert voting rights claims might rely on alternative avenues once preclearance disappeared.<sup>99</sup> But preclearance only covered some states, and election litigation remains outside of previously covered jurisdictions. Nevertheless, preclearance assuredly slowed potential legislative changes, which also stymied litigation—and its demise likely turned parties to judicial remedies.

Second, as the introduction of this Article notes, courts have increasingly waded into ever-finer points of election administration.<sup>100</sup> This is likely attributable in part to the Supreme Court's willingness to expand the test refined in cases like *Anderson v. Celebrezze*<sup>101</sup> and *Burdick v. Takushi*<sup>102</sup>—which had previously been applicable principally in ballot access cases—to all election laws, as demonstrated in *Crawford v. Marion County*.<sup>103</sup> While *Crawford* is famous for the Court's decision upholding an Indiana voter identification law, its more significant impact may be the unanimous Court's tacit approval of using the *Anderson-Burdick* balancing test for election laws more generally.<sup>104</sup> Indeed, the Wisconsin litigation before the Court turned in part before the lower court on the appropriate application of the *Anderson-Burdick* balancing test to absentee ballot deadlines.<sup>105</sup>

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95. See Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 264 (2003).

96. See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1, 24 (2007); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 200–01 (2007); Recent Case, *Arizona v. Reno*, 887 F. Supp. 318 (D.D.C. 1995), 109 HARV. L. REV. 681, 684 (1996); cf. Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 732–33 (2006).

97. Derek T. Muller, *Judicial Review of Congressional Power Before and After Shelby County v. Holder*, 8 CHARLESTON L. REV. 287, 312 (2013).

98. See, e.g., Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, GUARDIAN (June 25, 2013, 3:32 PM), <http://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision> [<https://perma.cc/55GB-BRCL>].

99. See generally Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015); Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

100. See generally Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451 (2019); Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313 (2007).

101. 460 U.S. 780 (1983).

102. 504 U.S. 428 (1992).

103. 553 U.S. 181 (2008).

104. *Id.* at 190 (plurality opinion); *id.* at 204–05 (Scalia, J., concurring in the judgment); *id.* at 210–11 (Souter, J., dissenting).

105. *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 970 (W.D. Wis. 2020).

## II. THE DESIRABILITY AND POSSIBILITY OF REDUCING ELECTION LITIGATION

Election litigation has unquestionably increased. Reducing that litigation is desirable, but I acknowledge that this may be a contested claim. Some might view certain types of litigation as desirable and other types less so. Others might argue that living with litigation's excesses is an acceptable cost of maintaining powerful checks on state election administration. Looking to nonjudicial solutions is hardly a novel proposition. Professor Rebecca Green, for instance, has suggested that mediation offers opportunities to resolve postelection disputes.<sup>106</sup>

One factor that counts against litigation might be voter confidence. Measuring voter confidence is difficult and can take many forms.<sup>107</sup> But as Professor Hasen has explained, "When courts get involved in election disputes, . . . they run a risk of undermining the public's faith in the electoral process and in the fairness of the courts."<sup>108</sup> Professor Hasen has recommended that election law encourage litigation far in advance of an election and discourage litigation after an election if the suit could have been brought earlier.<sup>109</sup> That is consistent with the Court's oft-cited opinion in *Purcell v. Gonzalez*.<sup>110</sup>

Another aspect of election litigation may undermine voter confidence even more fundamentally. The body principally tasked with administering elections is not the judiciary. There is ample Supreme Court precedent that emphasizes deference to the state legislatures' policy judgments in matters of election administration, as opposed to the judiciary, particularly the federal judiciary.<sup>111</sup> This is not to understate the repeated invitations from the

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106. See Rebecca Green, *Mediation and Post-Election Litigation: A Way Forward*, 27 OHIO ST. J. ON DISP. RESOL. 325 (2012); see also Jessica Becerra, Note, *The Possibility of Using Alternative Dispute Resolution for Election Law Disputes*, 18 PEPP. DISP. RESOL. L.J. 117 (2018).

107. See, e.g., R. Michael Alvarez et al., *Are Americans Confident Their Ballots Are Counted?*, 70 J. POL. 754 (2008); Lonna Rae Atkeson & Kyle L. Saunders, *The Effect of Election Administration on Voter Confidence: A Local Matter?*, 40 PS: POL. SCI. & POL. 655 (2007); Shaun Bowler et al., *Election Administration and Perceptions of Fair Elections*, 38 ELECTORAL STUD. 1 (2015); Thad E. Hall et al., *The Human Dimension of Elections: How Poll Workers Shape Public Confidence in Elections*, 62 POL. RES. Q. 507 (2009).

108. Hasen, *supra* note 11, at 37.

109. *Id.*

110. 549 U.S. 1 (2006) (per curiam).

111. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019) ("The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress . . . . At no point was there a suggestion that the federal courts had a role to play."); *Perry v. Perez*, 565 U.S. 388, 392 (2012) (per curiam) ("Redistricting is 'primarily the duty and responsibility of the State.' The failure of a State's newly enacted plan to gain preclearance prior to an upcoming election does not, by itself, require a court to take up the state legislature's task." (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975))); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, 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

Supreme Court for judicial intervention in elections.<sup>112</sup> Judicial involvement is sometimes warranted. Indeed, some critics have complained about too little judicial intervention in preelection<sup>113</sup> or postelection<sup>114</sup> contests or about the judiciary itself becoming a suspect source of reviewing election litigation.<sup>115</sup>

But since *Bush v. Gore*,<sup>116</sup> there has arisen an assumption—I might even say a pernicious assumption—that the Supreme Court will be called upon to decide the presidential election.<sup>117</sup> Commentary surrounding the nomination of Merrick Garland to the Supreme Court in 2016 and then-judge Amy Coney

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individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.”); *Burns v. Richardson*, 384 U.S. 73, 85 (1966) (“Until this point is reached [of failing to reapportion according to *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)], a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.”); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (“[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.”).

112. See, e.g., *Baker v. Carr*, 369 U.S. 186, 209 (1962) (“We hold that this challenge to an apportionment presents no nonjusticiable ‘political question.’”); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (“We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that ‘No State shall . . . deny to any person . . . the equal protection of the laws.’”); *Bush v. Palm Beach Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam) (“As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.”).

113. See, e.g., Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, U. CHI. L. REV. ONLINE (June 26, 2020), <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-stephanopoulos/> [<https://perma.cc/7UPK-NCN9>]; Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3720065](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720065) [<https://perma.cc/D2YG-KEH6>].

114. See Kevin Johnson, *Why Judges, Not Lawmakers, Should Rule on Disputed Elections*, GOVERNING (Mar. 2, 2021), <https://www.governing.com/now/Why-Judges-Not-Lawmakers-Should-Rule-on-Disputed-Elections.html> [<https://perma.cc/674R-2VS5>]; cf. EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2016).

115. See, e.g., Luis Fuentes-Rohwer, *Back to the Beginning: An Essay on the Court, the Law of Democracy, and Trust*, 43 WAKE FOREST L. REV. 1045 (2008); James A. Gardner, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467 (2003).

116. 531 U.S. 98 (2000) (per curiam).

117. Richard L. Hasen, *The Supreme Court May No Longer Have the Legitimacy to Resolve a Disputed Election*, ATLANTIC (Feb. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/supreme-court-elections/605899/> [<https://perma.cc/9C4S-MBMP>].

Barrett in 2020 made the prospect of the Court's involvement a crucial issue.<sup>118</sup> But judicial neutrality in election disputes also has value.<sup>119</sup>

This Article's proposal suggests ways to reduce the volume of litigation without necessarily weighing in on the propriety of particular judicial decisions—as substantively neutral a proposal as possible. Of course, less litigation gives courts fewer opportunities to examine cases. But a call for reducing litigation simply reflects a preference for legislative solutions. It also seeks to reduce some effects of litigation, like incongruity of standards across jurisdictions, which are the product of an absence of legislative guidance. And it presses for a reduction in litigation funding, which will force political parties to reduce their legal efforts on more marginal cases.

#### A. Leveling Up

One way to reduce litigation would be to implement federal statutes that provide uniform rules. Congress has broad power over the manner of congressional elections.<sup>120</sup> Whether one describes this as a “Grand Election Bargain,” a proposal that unites voter integrity efforts and voter access efforts in coordination with one another as Professor Dan Tokaji has recommended,<sup>121</sup> or national scaling of projects like the American Law Institute's efforts to facilitate a convergence of state election law doctrines,<sup>122</sup> it would provide uniform ceilings and floors. The ripest targets for litigation are states that have outlier practices or that make late-breaking changes to election laws. Uniform federal rules eliminate any outliers and preclude last-minute changes.

The path to federal statutory uniformity has precedent. Extensive litigation in the wake of *Bush v. Gore* over punch card machines, among other problems, was an impetus for Congress to enact the Help America Vote Act of 2002.<sup>123</sup> Litigation over the last few years, and particularly in 2020, may

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118. See Mark Sherman, *Nightmare: Election Dispute Goes to 8-Member Supreme Court*, AP NEWS (Nov. 4, 2016), <https://apnews.com/article/a4ed2fc9d9e34d70b5f7f940a692a686> [<https://perma.cc/W54U-NSG4>]; Michael Kenny, *U.S. Supreme Court Should Avoid Another Bush v. Gore*, LAW.COM (Oct. 8, 2020), <https://www.law.com/dailyreportonline/2020/10/08/u-s-supreme-court-should-avoid-another-bush-v-gore/>; Sheldon Whitehouse, Opinion, *A Justice Barrett Must Recuse Herself from Deciding the Future of the President Who Picked Her*, WASH. POST (Oct. 11, 2020, 2:38 PM), <https://www.washingtonpost.com/opinions/2020/10/11/justice-barrett-must-recuse-herself-deciding-future-president-who-picked-her/> [<https://perma.cc/5NND-JDC2>].

119. See Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1098–1103 (2010).

120. See generally Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 BOS. U. L. REV. 317 (2019).

121. See Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71 (2014).

122. See *The Story of ALI*, AM. L. INST., <https://www.ali.org/about-ali/story-line/> [<https://perma.cc/JFU7-Y3RT>] (last visited Sept. 17, 2021) (describing projects by the ALI that have served as popular secondary sources for courts throughout the country).

123. Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of the U.S.C.); see Daniel P. Tokaji, *Early Returns on Election Reform: Discretion*,

provide a similar impetus. Congress has broad power to regulate federal elections, and rules ranging from absentee ballot requirements to ballot receipt deadlines could be fixed for federal elections.<sup>124</sup> While recent versions of H.R. 1, the For the People Act of 2021,<sup>125</sup> assuredly have some components that would fit this definition, as a sweeping omnibus it is hardly the best vehicle for the kind of fit identified in this Article as most desirable.

Uniform federal rules undoubtedly restrict state decision-making. But rules that provide both ceilings and floors ensure consistency of treatment and reduce the likelihood of litigation. If states *could* enact certain laws but chose not to do so, courts might be inclined to conclude that some of them ought to do so. But if states were constrained by the federal standard, judicial review would be a simpler matter of statutory interpretation.

It also increases the political salience of litigation. A litigant who asks a federal judge to construe a federal statute in an arguably incongruous or unconstitutional way would face appellate and potentially Supreme Court review. An appellate court construing a federal statute would have multistate influence, and the Supreme Court could develop uniform nationwide precedent.<sup>126</sup> In a way, it increases the power of litigation; but in another way, it requires litigants to reckon with the likelihood of appellate review and long-term precedent contrary to their interests.

Another way to reduce litigation would be for state legislatures to provide uniform guidance to local election officials in election administration. Litigation surrounding lack of uniform voter treatment has exploded since *Bush v. Gore*.<sup>127</sup> But much of that litigation stems from the intuitive notion that like voters should be treated alike—and that means all voters in a statewide election, or all voters within a district, should have similar treatment.

To the extent discretionary decisions should be made, state administrators should strive for increased uniformity. This would allow *ex ante* challenges to their decisions (rather than reactionary *ex post* lawsuits responding to a lack of uniformity), consistency of treatment of voters across counties, and consistency of judicial remedies when issued. But state legislatures ought to be developing holistic regimes for participation in elections. And legislatures are capable of acting even during the coronavirus pandemic, as they demonstrated in many jurisdictions.

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*Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1209–14 (2005).

124. Cf. Tolson, *supra* note 120, at 387–92 (describing the breadth of the scope of authority).

125. H.R. 1, 117th Cong.

126. See Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 528–29 (2008) (critiquing the lack of uniformity from Supreme Court precedent in myriad election law cases).

127. 531 U.S. 98 (2000) (per curiam); see Michael T. Morley, *Bush v. Gore's Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229 (2020).

Consider litigation in a Pennsylvania legislative district that arose after the 2020 election. A federal court considered a challenge to the unequal treatment of ballots between counties—Allegheny County counted ballots that lacked a voter’s written date beside their signature, but Westmoreland County did not.<sup>128</sup> The plaintiff sued Allegheny County to preclude its officials from counting ballots. There was a dispute about whether the date requirement was “mandatory,” meaning such votes could not be counted, or “directory,” meaning they could.<sup>129</sup> The court recognized that a Pennsylvania Supreme Court decision suggested the ballots could be counted, but there was disparate treatment between the counties.<sup>130</sup> The remedy, however, could not be to invalidate the ballots to create equal treatment; the better solution would be to ask Westmoreland to count the ballots it did not count. But Westmoreland was not a party, and that wasn’t the relief sought, so the disparity remained.

The entire litigation, however, could have been prevented with a uniform *ex ante* rule. The Pennsylvania Supreme Court was asked to resolve an ambiguity in the statute about whether counting the ballots in Allegheny County was mandatory or directory. But without a uniform legislative rule—or other counties joined in the case and bound by its holding—the disparity lingered past Election Day. Resolving disputes like this or others mentioned above could be remedied with greater uniformity of state election rules, which would reduce disparities and, accordingly, reduce litigation about disparities.

### B. Eliminating Litigation Earmark

Finally, Congress should abolish the Cronnibus election litigation earmark.<sup>131</sup> The economic incentives it creates are perverse. It is much easier for wealthy donors to fund the party’s litigation than it is for them to fund the candidate’s campaign. And it sets aside vast sums of money exclusively for election litigation. Because recounts occur rarely, and still more rarely alter the outcome of an election, the money is more likely to flow to preelection litigation or other sorts of postelection contests. There are many opportunities between both those lawsuits with a relatively high likelihood of success and those frivolous cases subject to sanctions—more money to spend means more litigation among those opportunities.

Previously, political campaigns had to allocate resources carefully across domains, making decisions about advertising, get-out-the-vote efforts, consultant services, travel, and legal expenses. Each competed for resources within the campaign. That would serve as a natural check to ensure that only the lawsuits most likely to succeed would be filed.

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128. See *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. 2:20-CV-01831, 2021 WL 101683 (W.D. Pa. Jan. 12, 2021).

129. *Id.* at \*3.

130. *Id.* at \*1.

131. See *supra* note 40.

The major political parties are hardly starved for money in presidential elections. The 2020 presidential election yielded record fundraising levels for the candidates; a rocky economy didn't stifle contributions and the inability to plan traditional campaign events didn't stifle expenditures.

It is not clear what the direct effect of the Cromnibus earmark had on litigation, and it is not clear what the direct effect of removing it would have, either. But the evidence presented in the Appendix suggests some correlation. And cutting litigation funding certainly wouldn't lead to *more* litigation.

The reduction in funding would be agnostic as to any given litigation. Instead, it would simply require campaigns to winnow out the challenges least likely to succeed. An alternative might be that campaigns would shift their resources only to the jurisdictions they anticipate would be the most winnable and litigate even marginal claims there. But this would still require campaigns to make more careful judgments about pursuing litigation, including assessments about likelihood of success.

It is also entirely plausible to posit that the litigation could have asymmetric consequences on the parties. Democrats in 2020, for instance, spent more money than Republicans on legal fees.<sup>132</sup> Conversely, it appears there are more opportunities at America's largest law firms to support Democratic-initiated litigation<sup>133</sup> and more hostility toward Republican-led efforts,<sup>134</sup> which may exert disproportionate consequences in litigation strategy if funding becomes more limited and parties rely on outside groups litigating by proxy. Furthermore, as described above,<sup>135</sup> it is entirely possible that strong outside third-party funding would strip the parties of control over some of that litigation. And it might be the case that because these third-party groups are overwhelmingly left-of-center, the proposal to remove the Cromnibus earmark would tilt litigation in a decidedly partisan direction.

There are more aggressive options that could be included. One might be inclined to sanction attorneys more aggressively or mete out punishments against law firms. Some election law attorneys have faced just such penalties in the aftermath of the 2020 election.<sup>136</sup> But this Article seeks to address the

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132. See Appendix.

133. Jane C. Timm, *Top Private Law Firms Plan 'SWAT Teams' to Fight Voting Restrictions in Court*, NBC NEWS (Apr. 12, 2021, 11:25 PM), <https://www.nbcnews.com/politics/elections/top-private-law-firms-plan-swat-teams-fight-voting-laws-n1263891> [<https://perma.cc/T3HD-5K5R>].

134. *Jones Day Statement Regarding Election Litigation*, JONES DAY (Nov. 2020), <https://www.jonesday.com/en/news/2020/11/jones-day-statement-regarding-election-litigation> [<https://perma.cc/FP44-QUDC>]; Dan Packel, *Polarizing Election Work, Discrimination Suits May Dent Jones Days' Appeal to Young Lawyers*, LAW.COM (Dec. 17, 2020), <https://www.law.com/americanlawyer/2020/12/17/polarizing-election-work-discrimination-suits-may-dent-jones-days-appeal-to-young-lawyers/> [<https://perma.cc/WL2X-CV98>].

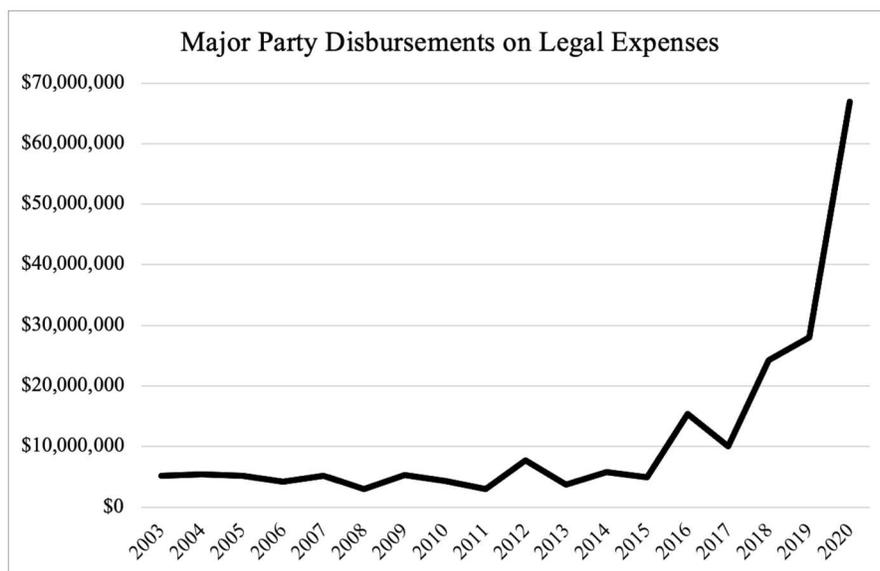
135. See *supra* note 48 and accompanying text.

136. See, e.g., *Tex. All. for Retired Ams. v. Hughes*, No. 20-40643 (5th Cir. Mar. 11, 2021) (sanctioning attorneys at Perkins Coie for filing a "redundant and misleading" motion in election litigation); *Wis. Voters All. v. Pence*, No. 20-03791, 2021 WL 686359 (D.D.C. Feb. 19, 2021) (referring matter to Committee on Grievances for attorney's election litigation

next tranche of election law litigation—the stuff that is not frivolous or brought in bad faith but the stuff that is the next-most marginal litigation.

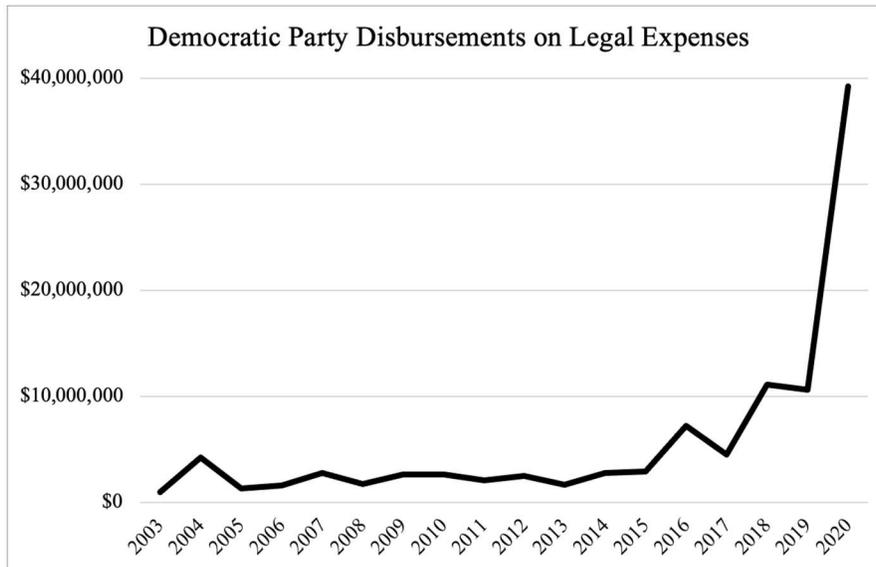
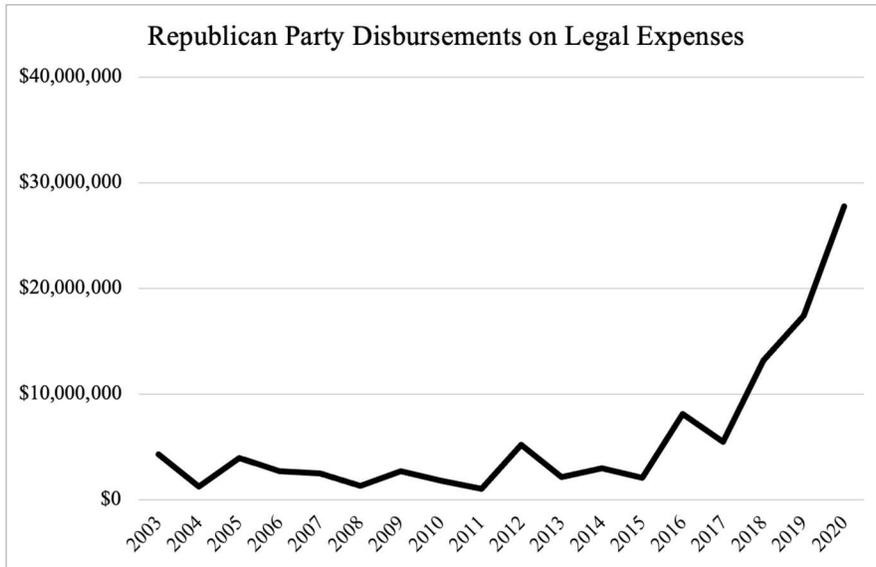
It is a challenge to develop ways of reducing election-related litigation without undermining a given set of substantive commitments to voting rights and election integrity, which are part of a greater concern about public confidence in the legitimacy of election systems and outcomes. But these modest solutions could, I hope, make election laws less susceptible to becoming litigation targets in a substantively neutral fashion.

#### APPENDIX<sup>137</sup>



filings as “political grandstanding”). See generally Brett Kendall & Alexa Corse, *Trump 2020 Election Lawsuits Lead to Requests to Discipline Lawyers*, WALL ST. J. (May 9, 2021, 10:00 AM), <https://www.wsj.com/articles/trump-2020-election-lawsuits-lead-to-requests-to-discipline-lawyers-11620568801> [<https://perma.cc/D85R-AJ8V>].

137. Data on receipts was pulled directly from the campaign finance data resource on the Federal Election Commission’s website. Disbursement data covers six major party groups: DCCC, DNC, DSCC, NRCC, NRSC, and RNC (values added under “Spender Name or ID”). To capture any data relating to legal recount-related spending, results were narrowed by filtering for lines relating to legal costs, i.e., the word “legal,” “lawyer,” or “attorney.” The reporting period for the data covers 2003–2020. Contribution data would be superior to identify new earmarked donations for legal expenses, but there are greater challenges in aggregating that data, and it would not as easily allow pre-2014 comparisons. Special thanks to Kevin Kim for assembling this data.



Year	Democratic	Republican	Total
2003	\$912,575	\$4,282,283	\$5,194,858
2004	\$4,220,411	\$1,239,832	\$5,460,243
2005	\$1,285,385	\$3,911,448	\$5,196,834
2006	\$1,547,883	\$2,648,857	\$4,196,740
2007	\$2,731,100	\$2,485,324	\$5,216,425
2008	\$1,691,182	\$1,299,528	\$2,990,711
2009	\$2,621,561	\$2,679,356	\$5,300,917
2010	\$2,606,548	\$1,762,231	\$4,368,779
2011	\$2,057,986	\$986,969	\$3,044,956
2012	\$2,482,184	\$5,187,997	\$7,670,181
2013	\$1,610,839	\$2,144,646	\$3,755,485
2014	\$2,769,338	\$2,984,671	\$5,754,010
2015	\$2,878,111	\$2,038,542	\$4,916,653
2016	\$7,218,312	\$8,119,833	\$15,338,145
2017	\$4,516,914	\$5,477,101	\$9,994,015
2018	\$11,073,203	\$13,155,833	\$24,229,036
2019	\$10,624,914	\$17,385,252	\$28,010,166
2020	\$39,215,995	\$27,748,225	\$66,964,220