AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Voting/Regulating Elections

**Democratic National Committee v. Wisconsin State Legislature**, \_\_\_ S. Ct. \_\_\_ (2020)

*The Democratic National Committee feared that state legislatures controlled by Republicans would do their best to suppress the vote before the 2020 elections. In particular, they worried with reason that state legislatures would attempt to limit pre-election voting, forcing voters in urban areas to risk COVID by casting ballots in very crowded precincts. They were particularly concerned with the postal service, now headed by a major Republican donor, began slowing down mail service in the summer of 2020 and intimated that delivering absentee ballots might be a problem. To partly alleviate potential problems Democrats brought suit in several states, asking that the deadline for receiving absentee ballots be extended. The Pennsylvania Supreme Court in* Pennsylvania Democratic Party v. Boockvar *(PA 2020) ruled that the state had to accept absentee ballots that were received three days after the deadline. A lower federal court ruled that Wisconsin had to accept absentee ballots that were received six days after the deadline. At the request of the Wisconsin State Legislation, the Court of Appeals for the Seventh Circuit issued a stay, preventing that decision from being implemented. The Democratic National Committee appealed to the Supreme Court.*

*The Supreme Court by a 5-3 vote denied the application to vacate the stay. The justices insisted that federal courts should not interfere with state election rules, should not interfere immediately before an election and that Wisconsin had taken steps to enable citizens to cast ballots during the pandemic. What steps had Wisconsin taken? Why did Justice Neil Gorsuch and Justice Brett Kavanaugh think those steps were sufficient? Why did Justice Elena Kagan disagree? The justices in the majority maintained that governing officials were best suited to make rules for elections. Why do they claim this and are they correct? Do the judicial alignments in this case and other cases decided concerning the 2020 election suggest that courts are more impartial than legislatures when resolving election disputes?*

The application to vacate stay presented to Justice KAVANAUGH and by him referred to the Court is denied.

CHIEF JUSTICE [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I78b7c338177a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I78b7c338177a11ebbea4f0dc9fb69570), concurring in denial of application to vacate stay.

In this case, as in several this Court has recently addressed, a District Court intervened in the thick of election season to enjoin enforcement of a State's laws. Because I believe this intervention was improper, I agree with the decision of the Seventh Circuit to stay the injunction pending appeal. I write separately to note that this case presents different issues than the applications this Court recently denied in *Scarnati* v. *Boockvar* (2020) and *Republican Party of Pennsylvania* v. *Boockvar* (2020). While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin.

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I78b7c338177a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I78b7c338177a11ebbea4f0dc9fb69570), with whom Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I78b7c338177a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I78b7c338177a11ebbea4f0dc9fb69570) joins, concurring in denial of application to vacate stay.

Weeks before a national election, a Federal District Judge decreed that Wisconsin law violates the Constitution by requiring absentee voters to return their ballots no later than election day. The court issued its ruling even though over 30 States have long enforced the very same absentee voting deadline—and for understandable reasons: Elections must end sometime, a single deadline supplies clear notice, and requiring ballots be in by election day puts all voters on the same footing. “Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections,” and States have always required voters “to act in a timely fashion if they wish to express their views in the voting booth.”

Why did the district court seek to scuttle such a long-settled tradition in this area? COVID. Because of the current pandemic, the court suggested, it was free to substitute its own election deadline for the State's. Never mind that, in response to the pandemic, the Wisconsin Elections Commission decided to mail registered voters an absentee ballot application and return envelope over the summer, so no one had to ask for one. Never mind that voters have also been free to seek and return absentee ballots since September. Never mind that voters may return their ballots not only by mail but also by bringing them to a county clerk's office, or various “no touch” drop boxes staged locally, or certain polling places on election day. Never mind that those unable to vote on election day have still other options in Wisconsin, like voting in-person during a 2-week voting period before election day. And never mind that the court itself found the pandemic posed an insufficient threat to the health and safety of voters to justify revamping the State's in-person election procedures.

So it's indisputable that Wisconsin has made considerable efforts to accommodate early voting and respond to COVID. The district court's only possible complaint is that the State hasn't done *enough*. But how much is enough? If Wisconsin's statutory absentee voting deadline can be discarded on the strength of the State's status as a COVID “hotspot,” what about the identical deadlines in 30 other States? How much of a “hotspot” must a State (or maybe some sliver of it) be before judges get to improvise? . . .

The Constitution dictates a different approach to these how-much-is-enough questions. The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules. And the Constitution provides a second layer of protection too. If state rules need revision, Congress is free to alter them.  Nothing in our founding document contemplates the kind of judicial intervention that took place here, nor is there precedent for it in 230 years of this Court's decisions.

Understandably so. Legislators can be held accountable by the people for the rules they write or fail to write; typically, judges cannot. Legislatures make policy and bring to bear the collective wisdom of the whole people when they do, while courts dispense the judgment of only a single person or a handful. Legislatures enjoy far greater resources for research and factfinding on questions of science and safety than usually can be mustered in litigation between discrete parties before a single judge. In reaching their decisions, legislators must compromise to achieve the broad social consensus necessary to enact new laws, something not easily replicated in courtrooms where typically one side must win and the other lose.

Of course, democratic processes can prove frustrating. Because they cannot easily act without a broad social consensus, legislatures are often slow to respond and tepid when they do. The clamor for judges to sweep in and address emergent problems, and the temptation for individual judges to fill the void of perceived inaction, can be great. But what sometimes seems like a fault in the constitutional design was a feature to the framers, a means of ensuring that any changes to the status quo will not be made hastily, without careful deliberation, extensive consultation, and social consensus.

. . . .

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I78b7c338177a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I78b7c338177a11ebbea4f0dc9fb69570), concurring in denial of application to vacate stay.

. . . .

*. . . .* [T]he District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents. This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election

The Court's precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor. Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election. Then, thousands of state and local officials and volunteers must participate in a massive coordinated effort to implement the lawmakers’ policy choices on the ground before and during the election, and again in counting the votes afterwards. And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting.

. . . .

. . . [E]ven apart from the late timing, the District Court misapprehended the limited role of the federal courts in COVID–19 cases. This Court has consistently stated that the Constitution principally entrusts politically accountable state legislatures, not unelected federal judges, with the responsibility to address the health and safety of the people during the COVID–19 pandemic. . . . [F]ederal judges do not possess special expertise or competence about how best to balance the costs and benefits of potential policy responses to the pandemic, including with respect to elections. For that reason, this Court's cases during the pandemic have adhered to a basic jurisprudential principle: When state and local officials “ ‘undertake[ ] to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad.’ . . .

. . . .

[T]he District Court did not sufficiently appreciate the significance of election deadlines. . . . To state the obvious, a State cannot conduct an election without deadlines. It follows that the right to vote is not substantially burdened by a requirement that voters “act in a timely fashion if they wish to express their views in the voting booth.”  For the same reason, the right to vote is not substantially burdened by a requirement that voters act in a timely fashion if they wish to cast an *absentee ballot*. Either way, voters need to vote on time. . . .

For important reasons, most States, including Wisconsin, require absentee ballots to be *received* by election day, not just *mailed* by election day. Those States want to avoid the chaos and suspicions of impropriety that can ensue if thousands of absentee ballots flow in after election day and potentially flip the results of an election. And those States also want to be able to definitively announce the results of the election on election night, or as soon as possible thereafter. Moreover, particularly in a Presidential election, counting all the votes quickly can help the State promptly resolve any disputes, address any need for recounts, and begin the process of canvassing and certifying the election results in an expeditious manner. . . .

. . .

. . . . In reinstating the District Court's order extending Wisconsin's deadline for receipt of absentee ballots, the dissent's approach would necessarily invalidate (or at least call into question) the laws of approximately 30 States for the upcoming election and compel all of those States to accept absentee ballots received after election day. The dissent's *de facto* green light to federal courts to rewrite dozens of state election laws around the country over the next two weeks seems to be rooted in a belief that federal judges know better than state legislators about how to run elections during a pandemic. But over the last several months, this Court has consistently rejected that federal-judges-know-best vision of election administration.

. . . . The dissent claims that the State's election-day deadline for receipt of absentee ballots will “disenfranchise” some Wisconsin voters. But that is not what a reasonable election deadline does. This Court has long explained that a State's election deadline does not disenfranchise voters who are capable of meeting the deadline but fail to do so. . . .

. . .

Since August, moreover, the Wisconsin Elections Commission has been regularly reminding voters of the need to act early so as to avoid backlogs and potential mail delays. . . . Returning an absentee ballot in Wisconsin is also easy. To begin with, voters can return their completed absentee ballots by mail. But absentee voters who do not want to rely on the mail have several other options. Until election day, voters may, for example, hand-deliver their absentee ballots to the municipal clerk's office or other designated site, or they may place their absentee ballots in a secure absentee ballot drop box. Some absentee ballot drop boxes are located outdoors, either for drive-through or walk-up access, and some are indoors at a location like a municipal clerk's office. . . . Alternatively, absentee voters may vote “in-person absentee” beginning two weeks before election day. . . .

. . . .

The dissent . . . seizes on the fact that Wisconsin law allows voters to request absentee ballots until October 29, five days before election day. But the dissent does not grapple with the good reason why the State allows such late requests. The State allows those late requests for ballots because it wants to accommodate late requesters who still want to obtain an absentee ballot so that they can drop it off in person and avoid lines at the polls on election day. No one thinks that voters who request absentee ballots as late as October 29 can both receive the ballots and *mail* them back in time to be received by election day. . . .

. . . .

Contrary to the dissent's attempt to characterize our disagreement as factual, the facts in this case are largely undisputed. I have zero disagreement with the dissent on the question of whether COVID–19 is a serious problem. It is. Instead, I disagree with some of the District Court's and the dissent's speculative predictions about how the voting process might unfold with an election-day deadline for receipt of absentee ballots. And I disagree with the District Court's and the dissent's legal analysis of whether, given the agreed-upon facts, the State has done enough to protect the right to vote under the Constitution and this Court's precedents, given the necessity of having election deadlines.

. . . .

Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I78b7c338177a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I78b7c338177a11ebbea4f0dc9fb69570), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I78b7c338177a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I78b7c338177a11ebbea4f0dc9fb69570) and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I78b7c338177a11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I78b7c338177a11ebbea4f0dc9fb69570) join, dissenting.

. . . .

To ensure that these mail ballots are counted, the district court ordered in September the same relief afforded in April: a six-day extension of the receipt deadline for mail ballots postmarked by Election Day. The court supported that order with specific facts and figures about how COVID would affect the electoral process in Wisconsin. The court found that the surge in requests for mail ballots would overwhelm state officials in the weeks leading up to the October 29 ballot-application deadline. And it discovered unusual delays in the United States Postal Service's delivery of mail in the State. The combination of those factors meant, as a high-ranking elections official testified, that a typical ballot would take a full two weeks “to make its way through the mail from a clerk's office to a voter and back again”—even when the voter instantly turns the ballot around.  Based on the April election experience, the court determined that many voters would not even *receive* mail ballots by Election Day, making it impossible to vote in that way. And as many as 100,000 citizens would not have their votes counted—even though timely requested and postmarked—without the six-day extension. . . . In the court's view, the discarding of so many properly cast ballots would severely burden the constitutional right to vote. The fit remedy was to create a six-day grace period, to allow those ballots a little extra time to arrive in the face of unprecedented administrative and delivery delays.

. . . .

. . . . Last-minute changes to election processes may baffle and discourage voters; and when that is likely, a court has strong reason to stay its hand. But not every such change poses that danger. And a court must also take account of other matters—among them, the presence of extraordinary circumstances (like a pandemic), the clarity of a constitutional injury, and the extent of voter disenfranchisement threatened. . . . Yes, there is a danger that an autumn injunction may confuse voters and suppress voting. But no, there is not a moratorium on the Constitution as the cold weather approaches. Remediable incursions on the right to vote can occur in September or October as well as in April or May.

. . . . It is hard to see how the extension of a ballot-receipt deadline could confuse citizens about how to vote: At worst, a voter not informed of the new deadline would (if she could) put her ballot in the mail a few days earlier than needed. Nor would that measure discourage Wisconsin citizens from exercising their right to the franchise. To the contrary, it would prevent the State from throwing away the votes of people actively participating in the democratic process. And what will undermine the “integrity” of that process is not the counting but instead the discarding of timely cast ballots that, because of pandemic conditions, arrive a bit after Election Day.  On the scales of both constitutional justice and electoral accuracy, protecting the right to vote in a health crisis outweighs conforming to a deadline created in safer days.

. . . . Th[e] [lower federal] court separately argued that “the design of electoral procedures” is a solely “legislative task.” But that is not so when those procedures infringe the constitutionally enshrined right to vote. To be sure, deference is usually due to a legislature's decisions about how best to manage the COVID pandemic. But the Wisconsin legislature has not for a moment considered whether recent COVID conditions demand changes to the State's election rules; that body has not even met since April. And if there is one area where deference to legislators should not shade into acquiescence, it is election law. For in that field politicians’ incentives often conflict with voters’ interests—that is, whenever suppressing votes benefits the lawmakers who make the rules.

Justice KAVANAUGH's concurring opinion . . . concludes that Wisconsin's election rules, as applied during the COVID pandemic, do not violate the right to vote. That follows, in his view, because voting by mail is “easy” in Wisconsin and because in-person voting is “reasonably safe.” The first problem with that reasoning is that the district court found to the contrary. . . . The concurrence fails to give th[e] [lower court] findings the respect they are due. Of course, the concurrence *says* it is not committing that elementary error; according to Justice KAVANAUGH, he disputes only the district court's “speculative predictions,” not its statement of “historical facts.”  But the concurrence alternately rejects, ignores, or accepts only *pro forma* the district court's account of the facts (just the facts). In responding to this dissent, the concurring opinion acknowledges that in-person voting in Wisconsin “can pose a health risk.”  Yet in condemning the injunction, it continues to insist—how else could it reach the decision it does?—that going to the polls is “reasonably safe” for Wisconsin's citizens, contrary to the expert testimony the district court relied on.  Similarly, the concurrence nods glancingly to increased ballot applications, but it fails to recount (as the district court did in detail) how that influx has created heavy backlogs and prevented ballots from issuing in timely fashion. And it does not discuss the evidence of unusual, even unprecedented, delays in postal delivery service in Wisconsin. . . .

A related flaw in the concurring opinion is how much it reasons from normal, pre-pandemic conditions. A “reasonable election deadline,” the concurrence says, “does not disenfranchise voters.”  I have no argument with that statement, even though some voters may overlook the deadline. But what is “reasonable” in one set of circumstances may become unreasonable in another. And when that switch occurs, a constitutional problem arises. So it matters not that Wisconsin could apply its ballot-receipt deadline when ballots moved rapidly through the mails and people could safely vote in person. At *this*time, neither condition holds—again, according to the district court's eminently believable findings. Today, mail ballots often travel at a snail's pace, and the elderly and ill put themselves in peril if they go to the polls. So citizens—thousands and thousands of them—who have followed all the State's rules still cannot cast a successful vote. And because that is true, the ballot-receipt deadline that once survived constitutional review no longer does.

. . . .

The facts, as found by the district court, are clear: Tens of thousands of Wisconsinites, through no fault of their own, may receive their mail ballots too late to return them by Election Day. Without the district court's order, they must opt between “brav[ing] the polls,” with all the risk that entails, and “los[ing] their right to vote.”  The voters of Wisconsin deserve a better choice.