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The New Laboratories of Democracy

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THE NEW LABORATORIES OF DEMOCRACY

*Gerald S. Dickinson**

Nearly a century ago, Justice Louis D. Brandeis's dissent in *New State Ice Co. v. Liebman*¹ coined one of the most profound statements in American law: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, *serve as a laboratory*; and try novel social and economic experiments without risk to the rest of the country."² Justice Brandeis reminded us of our strong tradition of federalism, where the states, exercising their sovereign power, may choose to experiment with new legislation within their separate jurisdictions without the concern that such experiments would risk damaging the rest of the Nation.

Decades later, Justice William Brennan advanced Brandeis's thesis by calling on state courts to grant greater protections to civil liberties under their state constitutions than the United States Supreme Court has granted under the federal Bill of Rights.³ As Brennan wrote in his dissenting opinion in *Michigan v. Mosley*,⁴ states have the "power to impose higher standards . . . under state law than is required under the Federal Constitution [And are] increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court."⁵ This "New Judicial Federalism" emphasized the central role that state courts and state constitutions played in filling the individual rights gap when the Supreme Court failed to protect certain rights under the federal Constitution.⁶

Justices Brandeis and Brennan's statements were not explicitly directed at voting rights, although we could understand their visions to implicitly include states' experimentation with the right to vote. Still, their visions of federalism—the former focused on state legislatures and the latter on state courts—are salient today. Indeed, the bedrock principles of democracy over the last several years—especially since the 2020 presidential election—have been tested in unprecedented ways. The 2020 presidential election

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¹ 285 U.S. 262 (1932).

² *Id.* at 386–87 (Brandeis, J. dissenting) (emphasis added).

³ See generally William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁴ 423 U.S. 96 (1976).

⁵ *Id.* at 120–21 (Brennan, J., dissenting).

⁶ Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000).

ushered in a new era of judicial federalism where state courts were called upon to serve as bulwarks of democracy to preserve the integrity of elections and to protect the right to vote. State courts continue to be thrust into the political thicket of elections and forced to decide the fate of many at local, state, and federal electoral contests. The sheer volume of litigation challenging the 2020 election results tested the strength and resolve of our institutions and pushed state courts to the brink.⁷ These events have given rise to a new kind of laboratory of democracy.

This modern conception of democratic laboratories rests on the notion that state courts, now more than ever, are increasingly serving distinct dual roles. First, state courts increasingly function as explicit defenders of democratic values and principles in the face of subversive state legislatures and other bad-faith political actors and organizations. Second, state courts are experimenting with and expanding upon innovative legal doctrines in their judicial laboratories that promote democracy. Accordingly, America's new laboratories of democracy—state judiciaries—are becoming some of the most reliable contemporary protectors of and contributors to democracy.

I. BAD-FAITH LEGISLATIVE LABORATORY EXPERIMENTS

State legislatures, supported by national political actors and organizations, have embarked on both overt and quiet attempts to undermine democratic institutions over the last several years. These subnational experiments, many captured by monied anti-democratic forces and interests, employed various legislative strategies to impede the right to vote and thwart the will of the voters before, during, and after the 2020 presidential election.⁸ In the absence of meaningful intervention by Congress or federal courts, states aggressively used their sovereign independence to concoct schemes that encouraged sham audits and investigations, undercut election administration, imposed criminal liability on election

⁷ See Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 502 (2021) (stating that the 2020 presidential election “was the most litigated in American history”); Russell Wheeler, *Trump’s Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-Out*, BROOKINGS INST. (Nov. 30, 2021), <https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-nota-wipe-out> [https://perma.cc/N5UM-MYT7] (noting that there were 150 state court cases brought concerning the presidential election).

⁸ See generally Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022).

administrators, attempted to overturn free and fair elections, and effectively engaged in election subversion.⁹

For example, fictitious audits have grown in some states since 2020.¹⁰ The intent behind these sham audits is to undermine the integrity of elections. The audits, oftentimes permitted by legislative authorization, are conducted for the sole purpose of pursuing conspiracy theories.¹¹ Investigations into wrongdoing, traditionally, serve legitimate public ends by bolstering public confidence in government. However, the pretextual nature of the 2020 election investigations by states had the intent and effect of damaging the public's confidence in elections—upending the administration of elections and intimidating election officials.¹² The consequence is the morphing of election integrity efforts that merely pose as a pretext for election subversion.¹³ The origins of these audits can be linked to the advent of efforts, led by former President Donald J. Trump, to sow doubt into the integrity of elections and call for the decertification of election results by state legislatures. As those calls grew louder, so did the efforts to undermine elections through sham audits. Unfortunately, state legislatures have not let up after the election. As a result, many new audit policies have been enacted through statute or pending authorization for upcoming elections.¹⁴

Another example of bad-faith laboratory experiments by state legislatures is the effort to wrest control and oversight of elections away from independent election boards and into the hands of the very legislatures seeking to undermine election integrity. These proposals include efforts to unilaterally overturn free and fair election results if state legislators, with little evidence of election fraud, object to the result of the winning candidate or party. States such as Arizona, Montana, Kentucky, and North Carolina have either proposed or already passed laws that would give legislators, rather than voters, the final say in how presidential electors cast

⁹ *See id.*

¹⁰ *See id.* at 277–78 (noting that “sham” audits and “bogus investigations” occurred in Arizona, Wisconsin, and Pennsylvania); Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1347 (2022) (explaining that in Arizona, the audit “pursued baseless ideas” such as “searching ballots for bamboo fibers based on a conspiracy theory that the ballots were smuggled from Asia”).

¹¹ *See* Bulman-Pozen & Seifter, *supra* note 10, at 1337, 1349, 1351–54.

¹² *See id.* at 1351.

¹³ *See id.* at 1351–54.

¹⁴ *See, e.g.*, STATES UNITED DEMOCRACY CTR. ET AL., A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION (Aug. 2022), <https://s3.documentcloud.org/documents/22187378/dcim-22report-v2-digital.pdf> [<https://perma.cc/SU3K-3RFU>].

votes or how elections are to be administered.¹⁵ Other states, like Kansas, have experimented with restricting courts and executive officials from altering election procedures and administrative rules.¹⁶ In other states, legislators have stripped the secretary of state of the power to extend ballot receipt deadlines.¹⁷

Most concerning, legislators have increasingly employed intimidation tactics like criminalizing certain actions by election administrators.¹⁸ Rather innocuous administrative discretion, such as modifying filing dates or ballot deadlines, have been met with proposals to criminally penalize election personnel.¹⁹ These efforts end up instilling fear into election administrators, ultimately undermining their efforts at administering free and fair elections with the cloud of criminal liability hanging over their heads.²⁰ For example, some election officials in certain states face prosecution if they are found to encourage the distribution of mail-in ballot applications for voters who did not request a ballot.²¹ This ultimately has a chilling effect on election officials, but also on voters' faith in democratic processes. In the overwhelming majority of circumstances, these concerns of election fraud are entirely

¹⁵ See Bulman-Pozen & Seifter, *supra* note 10, at 1349–50. The scope of the legislative arrogation accorded varies among these states. In Arizona, H.B. 2596, which failed to pass in 2022, would have added a new statutory provision “providing that the legislature ‘shall’ call itself into special session to review election results” and either accept or reject those results. See *id.* at 1349 (citing H.B. 2596, 55th Leg., 2d Reg. Sess. (Ariz. 2022)). Under the proposal, if the legislature were to reject the results, then “any qualified elector may file an action in [state] superior court to request that a new election be held.” *Id.* On the other hand, Montana and Kentucky enacted “less drastic versions of legislative arrogation” that require “legislative approval for various aspects of election administration.” *Id.* at 1349–50 (“Montana and Kentucky now bar executive-branch officials from altering election procedures absent the legislature’s approval.”). And in North Carolina, the legislature enacted a law that “removes the discretion of the State Board of Elections to enter into a consent agreement with the courts regarding election matters.” *Id.* at 1350.

¹⁶ See *id.* at 1350.

¹⁷ See *id.*

¹⁸ See STATES UNITED DEMOCRACY CTR. ET AL., *supra* note 14, at 7.

¹⁹ As of July 2022, one report finds that sixty-two bills were introduced (and eighteen more held over from 2021) that impose criminal prosecution of election officials. See *id.* at 7; Bulman-Pozen & Seifter, *supra* note 10, at 1354–56.

²⁰ See Bob Bauer & Benjamin L. Ginsberg, Opinion, *Election Officials Need Our Legal Help Against Repressive Laws and Personal Threats*, WASH. POST (Sept. 7, 2021, 6:04 PM), <https://www.washingtonpost.com/opinions/2021/09/07/bauer-ginsberg-election-official-legal-defense-network> [<https://perma.cc/77XK-B6D9>].

²¹ See Bulman-Pozen & Seifter, *supra* note 10, at 1354 (noting that a new Texas law “makes it a crime for early voting clerks to facilitate mail voting by soliciting the submission of mail ballot applications or distributing a mail ballot application to someone who did not request one.”).

unsubstantiated and lack any evidence.²² Yet, the consequences are far-reaching.

The “independent state legislature” theory has also been wielded in an effort to grant state legislatures enormous power and discretion to control federal elections.²³ The theory is based on the idea that state legislature’s authority over federal elections originates from an independent grant of authority under the federal Constitution, rather than under state constitutions where legislatures enjoy and derive many of their other powers.²⁴ States under this theory, therefore, have the power to regulate federal elections pursuant to inherent authority in the Constitution.²⁵ Many Republican-led state legislatures advocated for the Supreme Court to embrace this theory,²⁶ which would accord state legislatures near-plenary power over regulating federal elections, and therefore limit the role of state courts from intervening with or countermanding the anti-democratic laws that undermine elections.²⁷

This was not the kind of legislative behavior Justice Brandeis envisioned when he reminded us that the states could, if they chose, function as laboratories of democracy. He very clearly presumed good-faith attempts by states to use the levers of legislative power to experiment with social and economic policies. The merits of such laws were certainly debatable within our democracy, and if the voters determined the laws were ill-advised or wrong, then elections would take care of the matter. Justice Brandeis did not, however, have in mind today’s bad-faith efforts by legislators to undermine election integrity. The problem, of course, is that these bad-faith experiments were part of a broader nationwide effort to subvert election results, putting the Nation at risk as a whole. If anything, the novel laws passed by states were part of a broader national effort by state legislators to subvert local and state elections. The failure of many lawsuits targeting the integrity of election laws arguably “fueled a wave of Republican-initiated state

²² See Hasen, *supra* note 8, at 267 (“[V]oter fraud in the contemporary United States is rare and [] when such fraud occurs it tends to happen on a small scale that does not tip the results of elections.”).

²³ See STATES UNITED DEMOCRACY CTR. ET AL., *supra* note 14, at 9–10.

²⁴ Drawing primarily on textualist analyses, proponents of the theory contend that when the Constitution refers to a state “Legislature” in the Elections and Electors Clauses, it refers solely to the representative legislative body. See Morley, *supra* note 7, at 502–03.

²⁵ See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995).

²⁶ See, e.g., *Harper v. Hall*, 868 S.E.2d 499, 510 (N.C. 2022), *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022).

²⁷ See Helen White, *The Independent State Legislature Theory Should Horrify Supreme Court Originalists*, JUST SEC. (June 30, 2022), <https://www.justsecurity.org/81990/the-independent-state-legislature-theory-should-horrify-supreme-courts-originalists> [<https://perma.cc/ZQZ4-GYBG>].

legislative proposals to limit or claw back broader ballot access initiatives.”²⁸

Accordingly, anti-democratic laws attacking election integrity continue to this day. And while the federal government (both courts and Congress) have abdicated their responsibility over elections to the states, state courts have been thrust to the forefront of the battle over democracy, inverting the laboratories of democracy that Justice Brandeis once proclaimed. Indeed, Justice Brennan’s call for state courts to exercise adequate and independent state grounds when civil liberties are at stake resonates with today’s outsized influence of state courts over election integrity.²⁹

II. STATE COURTS AND THE NEW LABORATORIES OF DEMOCRACY

State courts have been called upon to meet these new challenges to democracy with multiple weapons in their state constitutional arsenals. One of the most important features is the adequate and independent state grounds doctrine. The doctrine immunizes a state court ruling from federal court review,³⁰ especially when the court decides to grant greater protections to certain rights, such as the right to vote, or depart markedly from the federal Constitution, which is devoid of any explicit right to vote. This is important because state courts are not dependent upon state laws that enable the enforcement of voting rights. Rather, their state constitutions already enshrine strong franchise rights.³¹

Judicial lock-stepping—the practice of state courts mimicking and following federal rulings and doctrine when interpreting state constitutional provisions—has long been a hallmark of judicial federalism.³² This practice, however, is less prominent in the areas of election law and the right to vote, as the Supreme Court and federal courts tend to abdicate their role over elections. The Court’s decision in *Rucho v. Common Cause*,³³ where the Court held partisan gerrymandering is a nonjusticiable

²⁸ Julie Novkov, *Donald Trump, Constitutional Failure, and the Guardrails of Democracy*, 81 MD. L. REV. 276, 289 (2021).

²⁹ See Brennan, *supra* note 3, at 501 n.80.

³⁰ See generally Stewart G. Pollock, *Adequate and Independent State Grounds As a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985).

³¹ See generally David Schultz, *State Courts and Democratic Theory: Toward a Theory of State Constitution and Judicial Review*, 45 MITCHELL HAMLINE L. REV. 578 (2019); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 93 (2014) (“In fact, unlike virtually every state constitution, the U.S. Constitution does not actually confer the right to vote on anyone.”).

³² See generally Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

³³ 139 S. Ct. 2484 (2019).

claim under the federal Constitution, is just one of many examples of such abnegation.³⁴ Since the 2020 presidential election, many state courts have turned inward to their state constitutions to find innovative constitutional arguments that guard against attacks on election integrity and instead focus on fostering, not subverting, democracy.³⁵

State constitutions are uniquely positioned to serve as blueprints for this new era of laboratories of democracy. Indeed, they promote principles of democracy through hallmark provisions that explicitly protect voting rights, in contrast to the federal Constitution, which lacks such explicit protections and does not hardwire franchise rights in the way that state constitutions do. The popular sovereignty emphasized in state constitutions is notably distinct from their federal counterpart.³⁶ For example, state constitutions enshrine the right to vote, mandate “free and equal” and “free and open” elections, and generally provide more substantive protections from disenfranchisement than the federal Constitution.³⁷ Further, while legislatures are traditionally the representative body of the people that have served as the laboratories of democracy, the democratic nature for which state court judges are elected creates a different kind of laboratory, one that entails the power to defend democratic ideals using state constitutional doctrine to protect against anti-democratic legislation.

As a result, a new era of laboratories of democracy is flourishing, where state courts, as opposed to state legislatures, are at the forefront of experimenting with state constitutional law and state court doctrines to promote democracy and simultaneously address the retrenchment of voting rights. State courts are wielding their judicial power to protect democratic values and principles. Most state court judges are elected throughout the United States, meaning voters get a say in who they want on the bench.³⁸ This

³⁴ See *id.* at 2507.

³⁵ See, e.g., Chad M. Oldfather, Rucho in the States: Districting Cases and the Nature of State Judicial Power, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 111, 119–21 (2023) (detailing the North Carolina Supreme Court’s decision in finding a claim of extreme partisan gerrymandering as justiciable and violative of the state constitution); *Alaska Supreme Court Rules Partisan Gerrymandering Violates State Constitution*, DEMOCRACY DOCKET (Apr. 24, 2023), <https://www.democracydocket.com/news-alerts/alaska-supreme-court-rules-that-partisan-gerrymandering-violates-state-constitution> [https://perma.cc/7B6R-RTQN] (noting that the Alaska Supreme Court ruled that partisan gerrymandering violates the Equal Protection Clause of the Alaska Constitution).

³⁶ See Douglas, *supra* note 31, at 101 (“In contrast to the U.S. Constitution, all fifty states provide explicit voting protection for their citizens.”).

³⁷ See *id.* at 101–05.

³⁸ See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1063–64 (2010) (stating

facet of state courts is, of course, very different than federal courts.³⁹ Indeed, judicial elections are not the “obscure electoral afterthoughts” once believed, but rather central features of democracy that influence the rule of law, politics, and policy.⁴⁰ For example, the April 2023 Wisconsin Supreme Court election to fill a vacancy centered on one policy issue: abortion rights.⁴¹ Described as “the single most important American election of 2023,”⁴² the contest was a striking example of the judicial federalism dimension of democracy influenced directly by the U.S. Supreme Court’s abdication of its role in protecting abortion rights.⁴³

The new judicial laboratories are the outgrowth, in part, of the “strategic allure of capturing control over a small court versus a large legislature.”⁴⁴ The electoral nature of states’ high courts has been pivotal in building the groundwork for “high-profile decisions about partisan gerrymandering and other election law issues.”⁴⁵ As a result, the democracy tides are turning towards state courts, as the electorate is looking for institutional actors beyond legislatures to advance democratic values and principles. In this sense, the legislative laboratories that Justice Brandeis once spoke of have now morphed into judicial laboratories, where elected state judges wield enormous power to curtail legislative efforts to subvert elections through innovative interpretations of state election law and constitutional provisions.

State courts’ efforts to push back against rogue legislatures are precisely the kinds of new judicial laboratory experiments being conducted across the country. Each subsequent state court ruling in favor of democratic principles and values serves as a guidebook—a blueprint—for similar pro-democracy efforts by other state

that almost “ninety percent of state judges face some kind of popular election” and that “thirty-eight states put all of their judges up before the voters”).

³⁹ See Oldfather, *supra* note 35, at 114–15 (arguing that elected state judges have a “democratic pedigree” that their federal counterparts lack).

⁴⁰ See, e.g., Lawrence Baum, *Supreme Court Elections: How Much They Have Changed, Why They Changed, and What Difference It Makes*, 42 L. & SOC. INQUIRY 900, 916–17 (2017).

⁴¹ See Reid J. Epstein, *Strong Democratic Showing in Wisconsin Court Race Sets up a Frenzied Finish*, N.Y. TIMES (Feb. 22, 2023), <https://www.nytimes.com/2023/02/22/us/politics/wisconsin-supreme-court-race.html> [<https://perma.cc/AGS5-AU5R>].

⁴² Reid J. Epstein, *The Year’s Biggest Election*, N.Y. TIMES (Apr. 3, 2023), <https://www.nytimes.com/2023/04/03/briefing/wisconsin-supreme-court.html> [<https://perma.cc/PA2L-AGZJ>].

⁴³ See Epstein, *supra* note 41.

⁴⁴ Jane S. Schacter, *Polarization, Nationalization, and the Constitutional Politics of Recent State Supreme Court Elections*, 2022 WIS. L. REV. 1311, 1313 (2022).

⁴⁵ *Id.* at 1314.

judiciaries.⁴⁶ This has led to many high-profile cases by state supreme courts that explicitly recognized the importance of constitutional provisions in challenges to laws that seek to undermine democratic processes.⁴⁷ For instance, the North Carolina Supreme Court struck down a partisan gerrymandered map on the grounds that the “fundamental right to vote” was crucial to political equality.⁴⁸ Ohio and New York’s high courts followed suit, handing down rulings that invalidated gerrymandered maps on the grounds that they ran afoul of constitutional amendments adopted by voters.⁴⁹

While partisan gerrymandering has been a mainstay battleground issue for state courts, the 2020 presidential election brought an onslaught of novel challenges to democratic processes that forced state courts—installed by the voters—to wield their judicial power in ways that defended *and* promoted democracy. As Part III describes, Pennsylvania was illustrative of the new judicial laboratories of democracy.⁵⁰

III. PENNSYLVANIA’S LABORATORY AND THE HIGH COURT’S 2020 EXPERIMENTS

The Pennsylvania Supreme Court dramatically shifted in partisan composition in 2015. After one of the most expensive campaign cycles, voters handed Democrats a five-to-two majority on the state’s high court.⁵¹ Within three years, the newly composed

⁴⁶ See, e.g., Oldfather, *supra* note 35, at 114–15; Douglas, *supra* note 31, at 110–19. See also Joshua A. Douglas, *State Constitutions and Youth Voting Rights*, 74 RUTGERS L. REV. 1729, 1736–42 (2022).

⁴⁷ See, e.g., N.C. State Conf. of NAACP v. Moore, 876 S.E.2d 513, 527–528, 528 n.5 (N.C. 2022).

⁴⁸ Harper v. Hall, 881 S.E.2d 156, 175 (N.C. 2022), *reh’g granted* 882 S.E.2d 548 (N.C. 2023). After the 2022 midterms, however, the North Carolina Supreme Court—whose justices are elected in partisan elections—shifted to a Republican majority. On April 28, 2023, the new Republican majority issued a five-to-two party-line opinion overturning its prior decision in *Harper v. Hall*. See *North Carolina Supreme Court GOP Majority Permits Partisan Gerrymandering and Reverses Prior Decisions in Redistricting Lawsuit*, DEMOCRACY DOCKET (Apr. 28, 2023), <https://www.democracymatters.com/news-alerts/north-carolina-supreme-court-gop-majority-permits-partisan-gerrymandering-and-reverses-prior-decisions-in-redistricting-lawsuit> [https://perma.cc/CTG7-LTQ4].

⁴⁹ See Adams v. DeWine, 167 Ohio St.3d 499 (2022); Harkenrider v. Hochul, 38 N.Y.3d 494 (2022).

⁵⁰ I focus on Pennsylvania in this Essay as a Pennsylvania native, current resident, law professor at the University of Pittsburgh School of Law, and an expert who frequently offered legal commentary on the many election challenges that emanated from state and federal courts in Pennsylvania between 2020 and 2021.

⁵¹ See Tyler Bishop, *The Most Expensive Judicial Election in U.S. History*, THE ATLANTIC (Nov. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/11>

liberal state supreme court struck down the Republican-led state legislatures' gerrymandered congressional maps, leaning into the adequate and independent state grounds doctrine to find that the map violated the state constitution.⁵² These events were evidence that Pennsylvania's judicial laboratory had shifted markedly. Moreover, the state's high court was prepared to defend democratic principles and the right to vote by exercising its sovereign judicial independence under the state constitution to promote election integrity.

It is no surprise, then, that Pennsylvania became a judicial and electoral battleground state during the 2020 presidential election. The COVID-19 pandemic fueled an unprecedented number of mail-in ballots by voters.⁵³ The advent of mail-in ballots, however, was accompanied by a nationwide effort by political actors to delegitimize the electoral process through unsubstantiated claims of voter fraud.⁵⁴ The extraordinary requests for mail-in ballots only further inflamed the distrust of the electoral system, as concerns were raised that the mail-in ballot process overwhelmed county election offices and risked the integrity of the vote count.⁵⁵ As a result, a flurry of litigation ensued, thrusting Pennsylvania state courts into the thicket of concerns over whether the processing of mail-in ballots disenfranchised voters.⁵⁶

The Republican Party and other Republican elected officials intervened in a dispute in Pennsylvania seeking to challenge mail-in ballot deadline extensions, drop-box policies, and residency requirements for poll watchers.⁵⁷ The efforts were part of a broader

/the-most-expensive-judicial-election-in-us-history/415140 [https://perma.cc/L2AU-9HBE].

⁵² See Amber Phillips, *Pennsylvania's Supreme Court Just Gave Democrats a Big Win on Redistricting*, WASH. POST (Jan. 22, 2018, 3:46 PM), <https://www.washingtonpost.com/news/the-fix/wp/2018/01/22/pennsylvanias-supreme-court-just-gave-democrats-a-big-win-on-redistricting> [https://perma.cc/H87Q-C53V].

⁵³ See *infra* note 85 (detailing the rise of mail-in ballots in Pennsylvania); Hasen, *supra* note 8, at 268 ("The rate of voting by mail unsurprisingly exploded during the pandemic because many voters and election officials saw it as a safer way of balloting than voting in person at polling places . . .").

⁵⁴ See Hasen, *supra* note 8, at 268–69.

⁵⁵ See Elaine S. Povich, *Fearing Delays and Chaos, Swing States Weigh Early Counting of Mail-in Ballots*, PEW CHARITABLE TRS. (Aug. 28, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/08/28/fearing-delays-and-chaos-swing-states-weigh-early-counting-of-mail-in-ballots> [https://perma.cc/ZTH3-2ZDM].

⁵⁶ See generally Clifford B. Levine & Jacob S. Finkel, *Shall Your Vote be Counted?: Evaluating Whether Election Code Provisions Are Directory or Mandatory*, 82 U. PITT. L. REV. 525 (2021).

⁵⁷ See *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

nationwide effort to attack election processes.⁵⁸ In *Pennsylvania Democratic Party v. Boockvar*,⁵⁹ the Pennsylvania Supreme Court leaned into the Free and Equal Elections Clause of the state constitution, which requires that “all aspects of the electoral process . . . be kept open and unrestricted . . . in a manner which guarantees . . . a voter’s right to equal participation in the electoral process.”⁶⁰ The court read the clause to mean that the judiciary “can and should act to extend the received-by deadline for mail-in ballots to prevent the disenfranchisement of voters” due to the unforeseen problems caused by the pandemic—such as the flow of processing mail-in ballot applications and the viral exposure voters would be subject to if forced to vote at the polls.⁶¹

The court also pushed back against attempts by Republicans to use unsubstantiated claims of voter fraud to argue that the statutory residency requirement for poll watchers weakened the protective safeguards against voter fraud.⁶² Specifically, the Republicans argued that the requirement created an uneven distribution of poll watchers, leaving some counties without enough poll watchers and thus heightening the risk of voter fraud.⁶³ The court made short shrift of this argument, explaining that the claims of voter fraud and lack of poll watchers were “speculative” and “unsubstantiated.”⁶⁴ Such a policy did not run afoul of the state or federal constitutions. The question, however, as to whether a state court could alter election law provisions unilaterally without legislative consent was a quintessential issue that implicated the independent state legislature theory. Thus, the matter was subsequently brought to federal court, and ultimately before the U.S. Supreme Court in two consolidated cases: *Republican Party of Pennsylvania v. Degraffenreid* and *Corman v. Pennsylvania Democratic Party*.⁶⁵

⁵⁸ See Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 FORDHAM L. REV. 335, 360–70 (2021) (detailing requests to overturn adverse election results in Michigan, Pennsylvania, Georgia, Nevada, Minnesota, and Wisconsin).

⁵⁹ 238 A.3d 345 (Pa. 2020). Around the time the Pennsylvania Democratic Party filed suit in state court, President Trump’s reelection campaign, the Republican National Committee, and several Republican candidates brought suit in federal court to challenge, in part, the new absentee voting law. See Donald J. Trump for President, Inc. v. Boockvar, 481 F. Supp. 3d 476 (W.D. Pa. 2020).

⁶⁰ *Pa. Democratic Party*, 238 A.3d at 369.

⁶¹ *Id.* at 371.

⁶² See *id.* at 385.

⁶³ See *id.*

⁶⁴ *Id.* at 386.

⁶⁵ *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2020) (denying certiorari).

The Court declined to expedite the petition for certiorari.⁶⁶ Nonetheless, Justices Clarence Thomas and Samuel Alito dissented, questioning whether the Pennsylvania Supreme Court had the constitutional authority to modify existing state election law pursuant to state constitutional law, and whether the federal Constitution granted only the state legislatures the power to alter the manner for which federal elections are administered.⁶⁷ Justice Thomas's dissent, in particular, focused on how unelected bodies, with the blessing of state judiciaries, that altered election rules would "sow confusion" and "dampen confidence" in election integrity.⁶⁸ He elaborated, "[c]hanging the rules in the middle of the game is bad enough. Such rule changes by officials who may lack authority to do so is even worse."⁶⁹

Justice Alito took a slightly different tact, noting that the state supreme court had wielded its constitutional provisions liberally to "override even very specific and unambiguous rules adopted by the legislature for the conduct of federal elections."⁷⁰ Justice Alito's primary concern is that if state courts can decide to alter state election rules in response to emergency circumstances like the pandemic, there may be a risk that similar modifications could be made in the future when no emergency exists. According to Justice Alito, litigants will have learned that they can go directly to the state courts to change the rules on the fly when the impending electoral decisions are not in their favor.⁷¹

During the 2020 election cycle, Pennsylvania courts received an inordinate number of challenges.⁷² For example, the state supreme court was also asked to decide whether mail-in voters' failure to handwrite their name and address violated state election law and whether to count those defective ballots.⁷³ The case arose,

⁶⁶ *See id.*

⁶⁷ *See id.* at 732–38 (Thomas, J., dissenting from denial of certiorari); *Id.* at 738–40 (Alito, J., dissenting from denial of certiorari). As Professor Carolyn Shapiro details, Justices Thomas and Alito invoked arguments arising from the independent state legislature theory. *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 139–40 (2023).

⁶⁸ *Degraffenreid*, 141 S. Ct. at 734 (Thomas, J., dissenting from denial of certiorari).

⁶⁹ *Id.* at 735.

⁷⁰ *Id.* at 739 (Alito, J., dissenting from denial of certiorari).

⁷¹ *See id.* ("[I]t would be surprising if parties who are unhappy with the legislature's rules do not invoke this decision and ask the state courts to substitute rules that they find more advantageous.")

⁷² *See* Levine & Finkel, *supra* note 56, 547–69.

⁷³ *See In re* Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1061–62 (Pa. 2020). In this case, the Pennsylvania Supreme Court exercised its extraordinary jurisdiction authority, which allows the court to hear matters of important policy. *See* 42 PA. CONS. STAT. § 726 (West 2022).

again, by Republican-affiliated litigants, including the Trump reelection campaign, to attack the right to vote. The lawsuit sought to throw out mail-in ballots that were not properly signed and dated on the outer portion of the envelope, arguing that accepting such ballots constituted fraud.⁷⁴ The court, however, noted that the state's election statutes must be "liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice" and that the aim of state law is to preserve, rather than void, the vote.⁷⁵ The court also noted that pursuant to the state constitution, the election statutes were designed to protect voter privacy and prevent fraud, but that a voter's failure to comply with date and signature requirements meant that the ballots could not be counted.⁷⁶ To avoid the specter of voiding thousands of ballots, and thus arguably disenfranchising the vote and possibly upending a free and fair election, the court liberally construed the state law as it related to constitutional requirements and determined that a voter's failure to handwrite their name or address on the declaration of the outer envelope of the ballot was not a material violation.⁷⁷

The Trump reelection campaign and the Republican National Committee separately sought to convince the court that the state election code required county election boards to throw out ballots that had alleged signature variances, because the discrepancy raised suspicions of voter fraud.⁷⁸ The purpose behind the challenge, then, was to interpret the election code to give election officials broader discretion to engage in signature comparisons and, if they chose, to determine that any discrepancies were grounds for voiding the ballots.⁷⁹ The result would have been the disenfranchisement of thousands of ballots that were otherwise compliant with state law.⁸⁰ The state supreme court gave curt treatment to the challenge, holding that the county boards were barred from throwing out ballots that were subject to a signature comparison conducted by election officials or employees.⁸¹

Perhaps the most remarkable laboratory experiment by the Pennsylvania Supreme Court originated in *Kelly v. Commonwealth*,⁸² where the court faced a major constitutional challenge that would later land before the U.S. Supreme Court. In 2019, the Pennsylvania General Assembly passed Act 77, a broad

⁷⁴ See 241 A.3d at 1062.

⁷⁵ *Id.* at 1071 (citing Ross Nomination Petition, 190 A.2d 719, 920 (1963)).

⁷⁶ See *id.*

⁷⁷ See *id.* at 1062, 1071–79.

⁷⁸ See *In re* Nov. 3, 2020 Gen. Election, 240 A.3d 591, 604 (Pa. 2020).

⁷⁹ See *id.* at 595–97, 604–05.

⁸⁰ See *id.* at 601.

⁸¹ See *id.* at 606–07.

⁸² 240 A.3d 1255, 1256 (Pa. 2020), *cert. denied sub nom.* Kelly v. Pennsylvania, 141 S. Ct. 1449 (2020).

sweeping statute that, for the first time in the state's history, implemented universal mail-in ballots with overwhelming bipartisan support.⁸³ The Act expanded upon the state constitution's general grant of the right to vote.⁸⁴ When the COVID-19 pandemic hit the United States in 2020, an unprecedented number of Pennsylvanians exercised the new statutory right to vote by mail.⁸⁵ The partisan split between mail-in ballots and in-person voting was significant, with most Democrats exercising the former and Republicans the latter.⁸⁶ In November 2020, however, Republican candidates for the U.S. House of Representatives and Pennsylvania House filed a lawsuit seeking to stop the certification of the election.⁸⁷ The Republican candidates posited that Act 77 was unconstitutional because the state constitution requires only voting in-person on Election Day, and that universal mail-in voting should have been achieved through constitutional amendment rather than legislation.⁸⁸

The state supreme court took the case, finding that the challengers had waited until after most ballots had been tallied and the results were unfavorable before raising constitutional objections.⁸⁹ The court dismissed their constitutional claims, holding that the challenge was barred by the doctrine of laches and explaining that the challengers could and should have sued at the time of the June 2020 primaries, which was the first election where universal mail-in ballots were permissible.⁹⁰ Notably, the court did not take kindly to the Republican challenger's unaccountable decision to postpone a suit until after the November elections.⁹¹

In its per curiam opinion, the court was stinging in its rebuke of the challengers, stating that it was "beyond cavil that [they] failed to act . . . as such inaction would result in the disenfranchisement of

⁸³ At the time of Act 77's enactment, the Republican controlled state legislature passed the bill, and it was signed by the Democratic governor. *See* Levine & Finkel, *supra* note 56, 531–32.

⁸⁴ *See* 25 PA. CONS. STAT. §§ 3150.11, 3159.12 (West 2021).

⁸⁵ *See* Kate Huangpu, *1.4 Million Pennsylvanians Asked to Vote by Mail. Here's What That Means for Election Week 2022 Counting.*, SPOTLIGHT PA (Nov. 3, 2022), <https://www.spotlightpa.org/news/2022/11/pa-election-2022-mail-ballot-requests-data-counting-delays> [<https://perma.cc/FBG3-9ZAH>]. *See also* Daniel J. Hopkins et al., *How Many Naked Ballots Were Cast in Pennsylvania's 2020 General Election?*, MIT ELECTION DATA & SCI. LAB (Aug. 26, 2021), <https://electionlab.mit.edu/articles/how-many-naked-ballots-were-cast-pennsylvanias-2020-general-election> [<https://perma.cc/5DD2-C7NZ>].

⁸⁶ *See* Huangpu, *supra* note 85.

⁸⁷ *See* Kelly, 240 A.3d at 1256.

⁸⁸ *See id.*

⁸⁹ *See id.* at 1256–57.

⁹⁰ *See id.*

⁹¹ *See id.* at 1257.

millions of Pennsylvania voters.”⁹² The concurring opinion was equally scathing, cognizant that basic principles of democracy and the right to vote were at stake.⁹³ Justice David Wecht explained that the challengers, who happened to be a joint party in a similar federal lawsuit with the Trump reelection campaign, “failed to allege that even a single mail-in ballot was fraudulently cast or counted.”⁹⁴ He went on to explain the courts role—a new laboratory of democracy—as protector and promoter of election integrity by warning that the challengers were “play[ing] a dangerous game at the expense of every Pennsylvania voter . . . scattering to the shadows the votes of millions of Pennsylvanians.”⁹⁵ The court was adamant that it was not the role of the state high court to “lend legitimacy to such transparent and untimely efforts to subvert the will of Pennsylvania voters.”⁹⁶

The case reached the U.S. Supreme Court on an application for injunctive relief.⁹⁷ The petitioners asked the Court to answer the question of whether Pennsylvania’s election certification could be invalidated because Act 77’s universal mail-in voting violated the state and federal constitutions.⁹⁸ It was, as I stated, “unlikely the [C]ourt [would] decide a case that actually affects the safe harbor deadline and upends the entire Pennsylvania election based off of the mail-in ballots.”⁹⁹ The application was, indeed, denied with no recorded dissents.¹⁰⁰ As I explained shortly after the denial, “[w]hile the rule of law prevailed and the [C]ourt rightly rejected relief, the onslaught of election litigation broadly speaking may have an indelible, and perhaps irreparable, negative impact on public perception of our electoral system.”¹⁰¹

⁹² *Id.*

⁹³ *See id.* at 1257–62 (Wecht, J., concurring).

⁹⁴ *Id.* at 1259.

⁹⁵ *Id.* at 1261.

⁹⁶ *Id.*

⁹⁷ 240 A.3d 1255, 1256 (2020), *cert. denied sub nom.* Kelly v. Pennsylvania, 141 S. Ct. 1449 (2020).

⁹⁸ *See generally* Petition for Writ of Certiorari, Kelly, 141 S. Ct. 1449 (2020) (No. 20-810).

⁹⁹ Paula Reed Ward, *Supreme Court Sets Date for State Response in Mike Kelly Election Suit. Is It a Day Late?*, TRIB.-REV. (Dec. 4, 2020, 4:08 PM), <https://triblive.com/local/regional/supreme-court-sets-date-for-state-response-in-mike-kelly-election-suit-is-it-a-day-late> [<https://perma.cc/KL42-FDBT>].

¹⁰⁰ Kelly, 141 S. Ct. 1449 (2021) (denying certiorari).

¹⁰¹ Paula Reed Ward, *U.S. Supreme Court Denies Republican Injunction Request in Pa. Mail-in Ballot Challenge*, TRIB.-REV. (Dec. 8, 2020), <https://triblive.com/local/regional/pa-officials-tell-supreme-court-disqualifying-mail-in-votes-would-sow-chaos-and-confusion> [<https://perma.cc/C5X5-HELB>].

CONCLUSION

The 2020 presidential election brought an urgent call to action by state courts to serve as bulwarks of democracy. The events over the last several years have given rise to a new kind of laboratory of democracy. This new modern conception of democratic laboratories rests on the notion that state courts—many elected bodies—function to expressly defend democratic values and principles from subversive state legislatures and other bad-faith political actors and organizations, while simultaneously expanding upon or refining innovative legal doctrines in their judicial laboratories to promote and encourage democracy. Indeed, America's new laboratories of democracy—state judiciaries—are becoming some of the most reliable contemporary protectors and contributors of democracy. The Pennsylvania Supreme Court, as illustrated by its recent experiences, stepped up to protect voters and the rule of law in our electoral system.

However, there still exists the specter of the U.S. Supreme Court embracing the independent state legislature theory, which would threaten the institutional safeguards and protections that emanate from the new laboratories of democracy.¹⁰² This is all the more reason why legal academia and the legal profession must continue to recognize and acknowledge the underappreciated protections and contributions that state courts serve in our democracy.

¹⁰² See *supra* text accompanying notes 23–27; Shapiro, *supra* note 67, at 139–40.