

The coronavirus has disrupted one of the foundations of our democracy—voting. Several states delayed primaries during the shut-downs. Now states are expanding, or hindering, voting options so that citizens may vote safely during this pandemic. Pew Research polled registered voters and found that 63percent were uncomfortable voting in person because of the coronavirus outbreak.¹ Unfortunately how citizens can vote safely during this time is falling along partisan lines.

I live in Texas, and our law requires an excuse to vote absentee. These excuses include being away from your county on Election Day and during early voting, are sick or disabled, are 65 years of age or older, or are confined in jail, but eligible to vote.²

Texas' Republican Attorney General Ken Paxton is not in favor of mail-in voting and is fighting counties, individuals, and civil rights groups trying to expand absentee (mail-in) ballot options. Texas held primary elections early in March, but in some races there are run-off elections that were to be held in May, that are now postponed until July. Mail-in voting seems like an obvious solution to allow people to vote safely by avoiding the need for social distancing and cleaning of voting machines while voting in person. Some Texans thought Texas law would allow people fearing contracting the coronavirus as a reason to vote by mail. The Election Code defines "disability" to include "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of *injuring the voter's health*." (Sec. 82.002) (italics mine). In April, a state judge ruled that people could request a ballot by mail as fear of contracting a virus with no herd immunity or vaccine as a disability according to the Texas Election Code.³

Paxton's office issued a letter saying that fear of catching the virus did not qualify as a disability and a month later requested the Texas Supreme Court to order election officials in counties that were allowing the expanded mail-in voting to follow his interpretation of requirements for absentee voting.⁴ In May a federal district judge agreed that the state's failure to provide a safe option to vote by mail during the pandemic to voters under 65 violates the Equal Protection Clause of the 14th Amendment and the 26th Amendment's protections against voting restrictions that discriminate based on age. "One's right to vote should not be elusively based on the whims of nature," the justice wrote. "Citizens should have the option to choose voting by letter carrier versus voting with disease carriers." But days later

the Fifth Circuit Court temporarily blocked the expansion of voting by mail.⁵

Texas Lieutenant Governor Dan Patrick also weighed in, saying "There is no reason—capital N, capital O—no reason that anyone under 65 should be able to say I am afraid to go vote. . . . This is a scam by the Democrats to steal the election."⁶ Patrick stressed that mail-in voting was more susceptible to fraud and added, "when you have an opportunity to steal a vote, the democrats will take advantage of it."⁷

This is deeply disturbing. Claiming they are trying to prevent voter fraud, republican government officials are not taking steps to protect the health of citizens trying to exercise their right to vote. Trump at a news conference in May said, "We don't want to have vote by mail," but then went on to say since he votes in Florida it was reasonable for him to vote by mail.⁸ Tweeting about California's move to mail-in ballots, Trump called mail-in voting "substantially fraudulent" and caused Twitter to apply a fact-check to his tweet, leading Trump to threaten social media companies with new regulations or shut-downs.⁹ The Republican Party sued California Governor Gavin Newsom alleging his executive order "deprives Californians of their constitutional right to vote by making fraudulent voting inevitable." This order was suspended by a California judge, but state lawmakers are advancing bills that would mandate what Newsom ordered for the upcoming election.¹⁰

Another safety issue concerns election workers. Most election workers who oversee the voting in person are usually retirees who fall under the CDC's "people who are at higher risk for severe illness."¹¹ The NCSL reported that more than 200,000 polling places and 600,000 poll workers operated on Election Day in 2018.¹²

The fight over mail-in voting is not just happening in Texas. When Michigan mailed out absentee voter applications in May, Trump (who originally thought they were mailing out ballots) threatened to cut federal funding to Michigan.¹³ In April, the Wisconsin legislature went before the Wisconsin Supreme Court who ruled to block Governor Tony Evers's executive order suspending in-person voting, causing election officials to have to prepare in-person polling places and protect voters and workers hours before balloting was scheduled to begin.¹⁴ The court ruled, "the question presented to this court is whether the Governor has the authority to suspend or rewrite state election laws. Although we recognize the extreme seriousness of the pandemic that this state is currently facing, we conclude

that he does not.”¹⁵ The confusion of how to vote led to another Wisconsin case going up to the US Supreme Court where the focus was on whether a district court should have intervened so close to the election to relax the deadline for casting absentee ballots. More voters requested absentee ballots and election officials needed time to count them. The district court allowed a deadline extension where mail-in ballots received by April 13 could still be counted, even if they were postmarked after the day of election, April 7. The Supreme Court held that courts should not alter election rules on the eve of an election. Justice Ginsberg, as part of the dissent wrote, “The Court’s suggestion that the current situation is not ‘substantially different’ from ‘an ordinary election’ boggles the mind.”¹⁶ Law professor Stephen Pershing said of this ruling, “the Supreme Court’s decision in *RNC v. DNC* is, to put it politely, paradoxical. It violated the Court’s professed non-intervention value in order to enforce it. And it required thousands of voters to risk their and their fellow citizens’ health in order to avoid complete disenfranchisement. In both respects the ruling effectively tainted an election in order to save it.”¹⁷

Some states have already have all-mail elections: Colorado, Hawaii, Oregon, Utah, and Washington have voting primarily conducted by mail. Other states have been able to move to mail-in elections. You can track those through BallotPedia—https://ballotpedia.org/All-mail_voting. Nevada held an all-mail election for their June primary in spite of court challenges.¹⁸ A federal court ruling blocked a South Carolina requirement that forced people who vote absentee to obtain a witness signature.¹⁹

Voting by mail does have issues. Jacqueline De Leon of the Native American Rights Fund noted that many homes on reservations have “not-traditional addresses” that the postal service does not deliver to, so they would be disenfranchised by an all vote by mail system. She went on to explain that rural post offices do not provide a decent substitute as PO boxes require a fee, are limited in number, and are often far from Native American communities. She did point out that Washington State came up with a solution to this problem that tribes may designate tribal buildings where tribal members may register, pick up, and drop off ballots.²⁰ The concept of “leakage” is another potential problem when voting by mail and was discussed by political science professor Charles Steward. He explained “leakage” has the potential to occur in between all the steps involved in voting by mail. Votes can be “lost” when voters request a ballot and do not receive one, ID validation is incorrect, and by not mailing the ballot.²¹

Much of this partisan bickering stems from the belief that mail-in voting favors particular demographics, yet research

shows voting by mail does not seem to favor one party over another.²²

Those states that attempted voting by mail are assessing their elections. The Wisconsin Election Commission’s report on the April 2020 election stated,

The April 7, 2020 election introduced countless challenges that Wisconsin clerks successfully overcame, enabling a record number of voters to cast their ballots through the absentee process. Moreover, the final election data conclusively indicates that the election did not produce an unusual number unreturned or rejected ballots. Despite the overwhelming success of absentee voting as a whole, the experiences leading up to Election Day were not trouble-free and illuminated several critical areas for improvement.²³

Maryland also had issues that need to be addressed before the November election and recommended a hybrid mail-in system.²⁴ These assessments only emphasize the need for states to spend the time before the November election on how to deal with these issues, rather than in courts fighting against safe and convenient voting. On a broader level, these battles between executive, legislative, and judicial branches are showing how partisan politics interferes with governance and citizen rights during a world-wide crisis.

I hope you are able to vote easily and safely. I understand that we need to follow laws to make sure elections are held legally and to get legitimate results, but this must be done in conjunction with safety. If you do have to choose between your safety and the safety of others, and exercising your right to vote, remember the officials who were not willing to find compromises to enable safe voting alternatives and vote accordingly.

For more info, see <https://electionlab.mit.edu/elections-and-covid-19>.

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