Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks

Michael T. Morley

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ELECTION EMERGENCIES: VOTING IN THE WAKE OF NATURAL DISASTERS AND TERRORIST ATTACKS

Michael T. Morley*

ABSTRACT

Our electoral system is vulnerable to terrorist attacks, natural disasters, and other calamities that can render polling places inaccessible, trigger mass evacuations, or disrupt governmental operations to the point that conducting an election becomes impracticable. Many states lack “election emergency” laws that empower officials to adequately respond to these crises. As a result, courts are frequently called upon to adjudicate the consequences of election emergencies as a matter of constitutional law, often applying vague, subjective, ad hoc standards in rushed, politically charged proceedings. This Article examines the legal steps various government actors took in response to terrorist attacks and natural disasters that disrupted impending or ongoing elections throughout the early twenty-first century, including the September 11 attacks on New York City, Hurricane Katrina’s destruction of New Orleans, Hurricane Sandy’s devastation of New Jersey and New York, and Hurricane Matthew’s impact along the southeastern United States. It then analyzes the constitutional issues that such election emergencies raise.

Courts may prevent or remedy constitutional violations triggered by election emergencies by postponing elections or modifying the rules governing them, but the Constitution virtually never requires courts to extend deadlines for activities people have a substantial period of time to perform, including registering to vote or participating in early voting. Under the laws of most states, courts also should generally decline to hold open individual polling places past their statutorily designated closing time on Election Day based on ordinary, run-of-the-mill problems that temporarily interfere with their operations. States can and should alleviate the need for such constitutional litigation by enacting laws that specifically empower election officials to respond appropriately to election emergencies. This Article provides principles

* Assistant Professor of Law, Florida State University College of Law. A.B., Princeton University, 2000; J.D., Yale Law School, 2003; Climenko Fellow and Lecturer on Law, Harvard Law School, 2012–2014. Special thanks to Louis Rosen of Barry University School of Law’s Euliano Law Library; Alexander Shalom, Senior Staff Attorney for the ACLU of New Jersey; and Denise Naya, Senior Law Librarian, New York State Supreme Court Library for Queens County, for providing critical information for this Article. I appreciate the valuable feedback I received during the Emory Law Journal’s 2017 Thrower Symposium, as well as the outstanding editorial assistance of Lucy Gauthier and the staff of the Emory Law Journal.
to guide the development of election emergency statutes, which should distinguish among election modifications, postponements, and cancellations. These laws should provide objective, specific criteria to guide and limit election officials’ discretion, and balance preserving the right to vote against protecting the integrity of the electoral process. To the greatest extent possible, election officials should be required to delay, reschedule, or extend voting periods ahead of time, before votes are cast, rather than after voter turnout or preliminary election results are known.

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INTRODUCTION

The terrorist attacks of September 11, 2001, which destroyed the Twin Towers in New York City and killed thousands of innocent people, occurred the same day as the New York Democratic and Republican primary elections. In the years since, natural disasters such as Hurricane Katrina in New Orleans, Hurricane Sandy in New Jersey and New York, and Hurricane Matthew in the southeastern United States have occurred shortly before or during elections, in some cases severely disrupting them.

Most state election codes do not contain provisions that specifically attempt to mitigate the impact of public health crises, extreme weather events, natural disasters, terrorist attacks, and other calamities (collectively, “emergencies”) on the electoral process. State laws dealing with such emergencies typically focus on protecting human life and limiting the extent of collateral damage without addressing impending or ongoing elections. As a result, state officials attempting to manage emergencies that affect pending elections face unnecessary uncertainty concerning the scope of their powers that complicates their decision-making processes. Without a clear-cut statutorily authorized or required response, their actions may be attacked as ultra vires, politically motivated, or unnecessarily narrow or overbroad. In some cases, state law’s failure to authorize executive officials to adequately ameliorate a disaster’s effects on impending elections has led to constitutional challenges, causing federal courts to determine the proper response in the midst of the emergency itself, ostensibly as a matter of constitutional interpretation.

Very few academic or other professional works have examined election emergencies in any depth. A few articles and reports assess the potential

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1 September 11, 2001 has properly been recognized as “a day of immeasurable tragedy.” Bourgeois v. Peters, 387 F.3d 1303, 1312 (11th Cir. 2004).
2 See infra Section I.A.
3 See generally infra Part I (examining recent election emergencies).
5 See infra notes 423–24 and accompanying text.
6 See, e.g., infra notes 122–80 and accompanying text; see also infra note 420.
8 See, e.g., David Huckabee, Cong. Research Serv., RL32660, Deciding to Postpone Elections: Domestic and International Examples (2004) (discussing election delays caused by hurricanes); Lawyers’ Comm. for Civil Rights Under Law, Expecting the Unexpected: Election
impact of terrorist attacks on elections, particularly at the federal level. Several discuss the unique issues that arise in holding elections when disasters have displaced large numbers of voters from their homes, with a particular focus on Hurricane Katrina in 2006 and various international elections; a


9 ERIC A. FISCHER ET AL., CONG. RESEARCH SERV., RL32654, SAFEGUARDING FEDERAL ELECTIONS FROM POSSIBLE TERRORIST ATTACK: ISSUES AND OPTIONS FOR CONGRESS (2004) (discussing state and federal power to delay elections due to terrorist attacks); John C. Fortier & Norman J. Ornstein, If Terrorists Attacked Our Presidential Election, 3 ELECTION L.J. 597 (2004) (identifying each point in the electoral process that might be disrupted by terrorist attacks); Jerry H. Goldfeder, Could Terrorists Derail a Presidential Election?, 32 FORDHAM URB. L.J. 523 (2005) (discussing elections disrupted by the September 11 attacks); James Neiland, Note, Executive Suspension of National Elections: Sacrificing the American Dream to Avoid a Spanish Nightmare?, 15 TRANSNAT’L L. & CONTEMP. PROBS. 389, 396–97 (2005) (discussing terrorist attacks that occurred days before elections in Spain and lessons for the United States); Steven H. Huefner, Withstanding Election Day Terrorism, ELECTION L. @ MORITZ: E-BOOK ON ELECTION L. (July 19, 2004), http://moritzlaw.osu.edu/electionlaw/ebook/part7/elections_pres02.html (arguing that if terrorist attacks disrupt a presidential election, federal law would likely allow the affected states to delay their elections, any delayed elections should be completed before the Electoral College meets at the statutorily designated time, and a state-level response would be preferable to delaying the entire election nationwide); see also Huefner, supra note 8, at 276–77 (mentioning terror attacks as a possible cause of electoral problems).


12 HUCKABEE, supra note 8, at 9–11 (discussing foreign elections held under threats of violence or in the midst of ongoing violence); Voting and Democracy, supra note 10, at 1183–86 (discussing elections in
few pieces analyze elections held in the wake of Hurricane Sandy in 2012.\[^{13}\]
Several researchers have compiled laws governing election emergencies,\[^{14}\]
while others have discussed the power of the federal government and states to
delay elections due to such exigent circumstances.\[^{15}\]
Despite the gradually
increasing attention being paid to election emergencies, several critical aspects
of the issue remain unaddressed in this burgeoning literature. This Article
seeks to begin filling these gaps, offering several main contributions.

Most basically, this Article suggests that three paradigms exist to deal with
disrupted elections: modifications, postponements, and cancellations. An
“election modification” accepts as valid everything that transpired before an
election emergency arose and simply authorizes additional methods of, or time
for, voting. The most common type of election modification is a court order
holding particular polling places open for a few extra hours at the behest of a
candidate.\[^{16}\]
New Jersey’s response to Hurricane Sandy is a prominent and
controversial example of an election modification following a natural
disaster.\[^{17}\]

With an “election postponement,” an election scheduled for a particular
date is held on a different day while holding constant as much as possible,
including the identities of the candidates running, the people entitled to vote,
and potentially even the candidates’ spending. An election postponement is a
“static” approach to addressing election emergencies: the rescheduled election

\[^{13}\] ERIC FISCHER & KEVIN COLEMAN, CONG. RESEARCH SERV., R42808, HURRICANE SANDY AND THE
2012 ELECTION: FACT SHEET 2–4 (2012) (detailing measures various states implemented to conduct elections
despite Hurricane Sandy); Robert M. Stein, Election Administration During Natural Disasters and
analysis of elections held in the wake of Hurricane Sandy).

\[^{14}\] L. PAIGE WHITAKER, CONG. RESEARCH SERV., RS21942, STATE ELECTION LAWS: OVERVIEW OF
STATUTES REGARDING EMERGENCY ELECTION POSTPONEMENT WITHIN THE STATE (2004); FISCHER ET AL.,
supra note 9, at 5–7; Edward B. Foley, Election Emergency Statutes for 25 Critical States in the November
Election, ELECTION L. @ MORITZ: E-BOOK ON ELECTION L., http://moritzlaw.osu.edu/electionlaw/ebook/part7/
elections_pres06.html (last visited Jan. 27, 2018); see also NAT’L ASS’N OF SEC’YS OF STATE, supra note 4, at
4–5.

\[^{15}\] JACK MASELL, CONG. RESEARCH SERV., RL32613, POSTPONEMENT AND RESCHEDULING OF
ELECTIONS TO FEDERAL OFFICE (2014); FISCHER ET AL., supra note 9, at 2–5; KENNETH R. THOMAS, CONG.
RESEARCH SERV., RL32471, EXECUTIVE BRANCH POWER TO POSTPONE ELECTIONS (2004); Huefner, supra
note 9; Nieland, supra note 9, at 414–17.

\[^{16}\] See, e.g., infra note 414.

\[^{17}\] See infra Section I.C. An election modification also occurred in Washington County, Pennsylvania,
in 1985 when flooding caused an election judge to suspend voting in eleven precincts and reschedule it for two
weeks later, allowing results from other precincts to remain undisturbed. In re General Election—1985, 531
seeks to approximate, as closely as possible, what the results of the originally scheduled election would have been. In contrast to an election modification, any votes cast on the originally scheduled election day are ignored; the election is treated as if it occurred entirely on the rescheduled day. New York’s approach to the 2001 primary elections is perhaps the most prominent example of an election postponement.18

An “election cancellation” entirely nullifies the originally scheduled election with the expectation that a new election will be held at some point in the future. The future election is treated as a discrete, independent event. The candidates who will appear on the ballot, the voters who are permitted to cast ballots, and other critical components of the election are determined entirely anew rather than attempting to hold them constant from the originally scheduled election. Unlike an election postponement, an election cancellation is a dynamic approach that largely ignores anything that had occurred in connection with the previously scheduled election. The rescheduled election is therefore able to reflect changes in circumstances to a much greater extent. New Orleans engaged in a well-known election cancellation following Hurricane Katrina.19

A state’s approach to an election emergency—whether it engages in an election modification, postponement, or cancellation—is determined in part by the powers its election-specific emergency laws, or more general emergency statutes, grant to the governor or election officials. When state laws are inadequate or no applicable laws exist, courts are often asked to step in on a largely ad hoc basis as a constitutional matter and craft remedies out of whole cloth.

This Article’s second main contribution is to explore the constitutional issues that arise when states lack laws empowering election officials to adequately respond to election emergencies. It analyzes the circumstances under which the Constitution entitles voters to modifications of election procedures or deadlines due to either widespread disasters or smaller-scale disruptions to particular polling places. It contends that neither the Due Process Clause nor the Equal Protection Clause empowers courts to extend deadlines

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18 See infra Section I.A. Election postponements also occurred in Dade County, Florida, in 1992 when Hurricane Andrew disrupted federal primaries, State v. Dade Cty., No. 80388, 1992 Fla. LEXIS 1563 (Fla. Aug. 31, 1992) (cited in FISCHER ET AL., supra note 9, at 9–10), and in Lewiston, Maine, in 1952 after a severe blizzard prevented the city from holding a local election, State v. Marcotte, 89 A.2d 308, 309 (Me. 1952) (cited in Goldfeder, supra note 9, at 530).

19 See infra Section I.B.
for activities that people were given a substantial amount of time to complete, such as voter registration and early voting. Moreover, particularly when no-excuse absentee voting and lengthy early voting periods are available, the Constitution generally does not require courts to extend hours for individual polling locations due to more limited difficulties caused by run-of-the-mill problems such as inclement weather, power failures, or long lines.20 Indeed, the Constitution may even prohibit courts from extending polling place hours under such circumstances in the absence of statutory authorization.

Finally, this Article maintains that states should reduce the need for such constitutional litigation by enacting election-specific emergency statutes to provide objective, specific, and clear rules in advance for adjusting the electoral process in response to both large-scale emergencies and unexpected difficulties at particular polling places. Such rules, effectively crafted under a Rawlsian veil of ignorance, would minimize both the appearance that election officials may be manipulating or exploiting a tragedy for political advantage, and their opportunity to do so.21

These statutes should generally follow five main principles. First, they should disturb ordinarily applicable election rules and procedures to the least extent possible. Second, they should distinguish among three categories of election emergencies, including: (1) large-scale, long-term displacement of a substantial number of voters from an electoral jurisdiction, for which election cancellation is appropriate; (2) substantial, widespread disruption of an electoral jurisdiction’s normal operations which involve only limited or short-term evacuations, or make it impossible, impracticable, or unreasonably dangerous to conduct an election as scheduled, for which election postponement is appropriate; and (3) problems relating to only a few polling places, for which election modification may be appropriate.

Third, election emergency statutes should provide specific, objective criteria for determining when an election modification, postponement, or cancellation is necessary, as well as the precincts, voters, or political subdivisions to which such relief will apply. Officials’ decisions are less likely to be influenced by political considerations when constrained by reasonably specific criteria.

20 See infra Section II.F.
Fourth, election emergency statutes must balance protecting the integrity of the election (i.e., the “defensive” right to vote)\textsuperscript{22} with providing additional opportunities to vote (i.e., promoting the “affirmative” right to vote). Such laws should facilitate voting while minimizing the extent to which election officials are required to rush and divert resources to implement major last-minute changes. They should likewise be tailored to combat the potential for fraud. Finally, to the greatest extent possible, election emergency statutes should require election officials to delay, reschedule, or extend voting periods ahead of time, before votes are cast, rather than empowering them to extend polling place hours or hold makeup elections after voter turnout or preliminary results are known.

Part I begins by presenting case studies of disasters that affected American elections throughout the early twenty-first century, focusing on the legal mechanisms election officials used to respond. Part II explores constitutional claims that are typically raised due to election emergencies, especially when state law fails to address the underlying issues. It explains that courts generally should not extend deadlines for voter registration or early voting periods, but may reschedule Election Day under extreme circumstances. In the absence of statutory authorization, courts generally lack authority to delay the closing time of particular polling places based on limited, small-scale disruptions.

Part III demonstrates that election emergency statutes can alleviate the need for constitutional litigation. It contends that most laws that authorize governors to declare states of emergency do not confer sufficient power to respond to election emergencies. Statutes specifically addressing the impact of natural disasters, terrorist attacks, and other calamities on the electoral process are necessary, although many current election emergency laws have gaps that can lead to uncertainty and litigation. After reviewing other commentators’ suggestions, this Part presents recommendations for framing an adequate election emergency statute.

While any particular disaster, terrorist attack, or other calamity is difficult to predict, it is almost certain that such emergencies will impact future elections. This Article analyzes the constitutional issues such disasters create so that courts are not rushed or pressured into injudiciously suspending state election laws, and sets forth principles for crafting election emergency statutes

that can alleviate the need for such constitutional litigation and provide all voters with an opportunity to cast a ballot and have their voices heard.

I. ELECTION EMERGENCIES IN THE EARLY TWENTY-FIRST CENTURY

In the twenty-first century, terrorist attacks and natural disasters have already disturbed elections at all levels, including the September 11 attacks interrupting local primaries in New York in 2001, Hurricane Katrina delaying local elections in New Orleans in 2005, Hurricane Sandy disrupting a presidential election in New York and New Jersey in 2012, and Hurricane Matthew interfering with an impending presidential election throughout the southeastern United States in 2016. This Part explores how states responded to such emergencies and their legal authority for doing so.

A. September 11 Attacks (New York City, 2001)

New York State’s 2001 Democratic and Republican primary elections were scheduled for September 11. In New York City alone, nominations for mayor, city council, and “other city-wide and borough-wide offices” were at stake. The polls opened at 6 a.m.; less than three hours later, the first plane struck the World Trade Center.

The New York City Board of Elections contacted Justice Steven Fisher of the New York Supreme Court, Queens County, apparently on an ex parte basis, asking him to postpone the primaries within the city. He orally ordered the suspension of elections in New York City on the grounds that they could not be conducted in accordance with state law, since police had been called from polling locations to help evacuate Ground Zero. He also noted that “breakdowns in public transportation impeded voters and election inspectors in getting to the polls.” Fisher’s ruling was based on his “inherent judicial authority.”

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23 This Article builds upon and extends the work of Professor Jerry Goldfeder, who compiled case studies of election emergencies from throughout the twentieth century. See generally Goldfeder, supra note 9.
24 Id. at 525.
25 Id.
26 Id.
28 Primary Elections Are Cancelled, supra note 27, at 3.
29 Id.
30 Mulroy, supra note 8, at 236.
Hours later, Governor George Pataki issued executive orders declaring a state of emergency\textsuperscript{31} and cancelling all primaries throughout the state.\textsuperscript{32} Exercising his general emergency powers under the New York Executive Law,\textsuperscript{33} he suspended the state statute setting “the date and hours of voting for primary elections,” as well as all other legal provisions relating to the September 11 primaries that could “prevent, hinder or delay action necessary to cope with the disaster.”\textsuperscript{34} Although a New York statute specifically dealt with election emergencies, it applied only to general elections, not primaries.\textsuperscript{35} No one filed judicial challenges to either Fisher’s court order or the Governor’s Executive Order.\textsuperscript{36}

Two days later, the state legislature enacted the Emergency Primary Election Rescheduling Act of 2001 (Primary Rescheduling Act).\textsuperscript{37} The act began with a legislative finding that “the primary election scheduled for September 11, 2001 was impossible owing to the imminent risk then posed to the health, safety and welfare of New York’s citizens.”\textsuperscript{38} The statute rescheduled the primaries for September 25, 2001—only two weeks after the attacks—and any runoffs for October 11, 2001.\textsuperscript{39}

The statute attempted to minimize the consequences of the disruption by providing that only people who were eligible to vote in the original primaries would be permitted to vote in the rescheduled elections.\textsuperscript{40} In general, New York law allows any eligible person who mails his voter registration form at least twenty-five days prior to an election to vote in that race.\textsuperscript{41} Under that provision, anyone who had submitted a registration form by August 17, 2001, could have voted in the original September 11 primaries, and therefore was

\textsuperscript{33} N.Y. EXEC. LAW § 29-a (McKinney Supp. 2018) (“[T]he governor may by executive order temporarily suspend specific provisions of any statute . . . during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.”).
\textsuperscript{34} N.Y. Exec. Order No. 5.113.1, \textit{supra} note 32 (citing N.Y. ELEC. LAW § 8-100 (McKinney Supp. 2018)).
\textsuperscript{35} N.Y. ELEC. LAW § 3-108 (McKinney Supp. 2018).
\textsuperscript{36} Goldfeder, \textit{supra} note 9, at 526.
\textsuperscript{38} \textit{Id.} § 1.
\textsuperscript{39} \textit{Id.} § 3(1)-(2), 2001 N.Y. Laws at 2617.
\textsuperscript{40} \textit{Id.} § 3(4).
\textsuperscript{41} N.Y. ELEC. LAW § 5-210(3) (McKinney Supp. 2018).
eligible to participate in the rescheduled primaries. Had the legislature not frozen the voter rolls for the rescheduled primaries, people whose registrations were postmarked between August 18 and 30 also would have been permitted to participate. By determining voter eligibility based on the primary’s originally scheduled date, rather than the adjusted date, the state excluded those additional putative voters. The Primary Rescheduling Act permitted people to request absentee ballots, however, even if they had not submitted such requests for the original September 11 election.42

Perhaps most controversially, the statute provided that, while absentee and military ballots that election officials had already received would be counted, votes cast on September 11 “at polling places shall not be counted.”43 People who already had voted in person on September 11—including in parts of the state where polling places did not lose any information as a result of the attacks—would be required to cast their ballots again. The law also required the State Board of Elections to issue public notices about both the rescheduled elections and the rules the legislature enacted for them.44 It concluded by declaring that candidates would not be required to file any additional pre-primary campaign finance disclosures as a result of the rescheduling.45

The delay in the election effectively extended the primary campaign, giving candidates an opportunity to inform the public about their views on both rebuilding the city and preventing future attacks. The New York City Campaign Finance Board, which oversees the city’s public financing system for local candidates,46 nevertheless refused to increase either the spending limits for candidates who received public funds or the amount of public funding made available to them.47 Candidates whose offices were damaged or

42 Emergency Primary Election Rescheduling Act, § 3(6), 2001 N.Y. Laws at 2617.
43 Id. § 3(5).
44 Id. § 3(3).
45 Id. § 5.
46 The Board’s offices were located at 40 Rector Street, “three blocks south of the World Trade Center.” N.Y. CITY CAMPAIGN FIN. BD., AN ELECTION INTERRUPTED . . . THE CAMPAIGN FINANCE PROGRAM AND THE 2001 NEW YORK CITY ELECTIONS xvii (2002). The offices were evacuated immediately following the attacks and were inaccessible for the following seven weeks. Id. at x, xvii. Throughout that time, Board staff worked out of their homes and in temporary office space at Fordham University to address candidate inquiries, process disclosure forms, and make matching funds payments totaling over $10 million. Id. at x, xvii–xviii.
destroyed in the attacks, however, were permitted to spend additional funds for new office space.\textsuperscript{48}

More troublingly,\textsuperscript{49} the Board prohibited candidates who had accepted public financing from spending any money between September 11 and the date of the rescheduled election on September 25,\textsuperscript{50} except to replicate for September 25 the “election day goods and services” they had already purchased for September 11.\textsuperscript{51} The Board explained that “all participating candidates assumed that spending for the primary election would end on September 11,” and most candidates had likely exhausted their campaign warchests by then.\textsuperscript{52} Because the public financing system was enacted to “level[] the playing field among candidates,” those “who had not reached their spending limit[s]” and retained leftover funds should not have an “advantage as a consequence of the events of September 11, 2001.”\textsuperscript{53} The Board concluded, “Given the extraordinary circumstances presented by the World Trade Center tragedy, the only legal, practical, and fair course of action is to limit all spending by participating candidates until September 25 except as otherwise described above.”\textsuperscript{54}

Both the state legislature and the New York City Campaign Finance Board attempted to implement an election postponement rather than a modification or cancellation. They sought to hold the circumstances of the September 11 primaries as constant as possible in the undeniably vain hope that their outcomes would be unaffected by the delay until September 25. The rescheduled primaries were to involve the same candidates, the same voters, and even the same campaign spending as would have been the case on September 11. On the one hand, this is a commendable impulse: terrorists should not be permitted to derail the democratic process. Moreover, in light of both the relative brevity of the delay and the tremendous difficulty of organizing a new election so soon, it is understandable that election officials

\begin{itemize}
  \item \textsuperscript{48} N.Y. City Campaign Fin. Bd., Advisory Opinion 2001-12, § 3(B); Baran, supra note 47, at 592.
  \item \textsuperscript{49} Editorial, Tomorrow’s Election, N.Y. Post, Sept. 24, 2001, at 40 (“[J]n an act of breathtaking arrogance, the Campaign Finance Board chose not to permit a campaign dialogue during the past two weeks.”); see also Robert Hardt Jr., Campaign Board Stops Cash Flow, N.Y. Post (Sept. 15, 2001, 4:00 AM), http://nypost.com/2001/09/15/campaign-board-stops-cash-flow/ (“The board’s action ensures that the postponed primary race . . . will stay below the radar screen in the wake of the terror attack on the city.”).
  \item \textsuperscript{50} N.Y. City Campaign Fin. Bd., Advisory Opinion 2001-12, § 4.
  \item \textsuperscript{51} Id. § 3(A).
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} Id.
\end{itemize}
would be reluctant to divert their attention and resources by processing new voter registration applications.

On the other hand, September 11 changed the world. Voters’ fears, hopes, and priorities changed in a heartbeat. Rudy Giuliani’s adroit leadership in the aftermath of the attacks caused many voters to develop a newfound respect for him; his post-attack endorsement of Michael Bloomberg very well may have given Bloomberg the decisive margin of victory.\(^{55}\) The notion that the September 11 primaries could simply be transplanted to September 25 while holding everything constant was unavoidably flawed.

Moreover, although the terrorist attacks thrust a host of compelling new policy issues onto the political agenda, the city’s campaign finance board effectively silenced publicly funded candidates by precluding them from spending any remaining funds,\(^ {56}\) except to recreate their election day operations on September 25.\(^ {57}\) By effectively prohibiting those candidates from campaigning, even if they had available funds to do so, the Board took its desire to preserve the status quo as it existed on September 11 to an unreasonable extreme. Candidates had both a right and a compelling interest in using all means at their disposal to inform voters about their positions on new security measures to prevent future terrorist attacks, rebuilding Manhattan, and other attendant issues.

Attempting to preserve the state of political discourse as it existed prior to the September 11 attacks was not only futile and flatly against the public interest, but also likely unconstitutional. In Buckley v. Valeo, the Supreme Court held, “Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.”\(^ {58}\) A complete prohibition on spending any funds in the two weeks immediately preceding an

\(^{55}\) See, e.g., Michael Cooper, Rich Are Different: They Get Elected, N.Y. TIMES (Dec. 5, 2001), http://www.nytimes.com/2001/12/05/nyregion/rich-are-different-they-get-elected.html (“New York’s mayoral race was clearly influenced by the Sept. 11 attack on the World Trade Center, which made Mayor Rudolph W. Giuliani enormously popular and gave his endorsement of Mr. Bloomberg unusual weight . . . .”); John Harwood et al., Voters Hope Bloomberg’s Business Savvy Can Help Rejuvenate a Shellshocked City, WALL ST. J. (Nov. 8, 2001, 12:01 AM), https://www.wsj.com/articles/SB1005172732564406680 (noting that Bloomberg “reaped enormous benefit from a late endorsement by Mayor Giuliani, whose own popularity had soared as a result of his post September 11 leadership”).

\(^{56}\) N.Y. City Campaign Fin. Bd., Advisory Opinion 2001-12, § 4.

\(^{57}\) Id. § 3(A).

election, however, would likely be deemed too great a burden on political communications to survive scrutiny. Additionally, one of the main reasons the Supreme Court approved public financing schemes is because they “facilitate communication by candidates with the electorate.” The Board’s restriction was flatly antithetical to that goal.

The prohibition is even more objectionable because it was imposed in the middle of the election cycle—albeit in response to a tragic unforeseen disaster—after candidates had already decided to accept public financing. The Board’s express goal of prohibiting candidates from spending additional money out of fairness to those who had already exhausted their campaign funds also seems to violate a core tenet of campaign finance law. Buckley held, “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed ‘to secure the widest possible dissemination of information from diverse and antagonistic sources’ . . . .” Although the government has greater flexibility to impose restrictions on candidates who accept public financing, the Board’s concerns about fairness or equality are unlikely to warrant completely silencing any candidates. While candidates neither publicly opposed nor litigated the validity of these restrictions, the Board’s decision should not be seen as a model for adapting public financing restrictions to election emergencies.

None of this is to criticize the good faith and dedication of the public servants who made these decisions. Having just suffered a devastating attack, they did their best in the face of unprecedented obstacles to make a series of difficult judgment calls to quickly organize a new election. They were forced to make such decisions on an ad hoc basis, however, because the state’s election emergency statute neither applied to primaries nor addressed all aspects of the issue, such as campaign finance.

59 Buckley, 424 U.S. at 91.
60 Id. at 48–49 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).
61 See, e.g., id. at 95 (“[A]cceptance of public financing entails voluntary acceptance of an expenditure ceiling.”).
62 See N.Y. CITY CAMPAIGN FIN. BD., supra note 46, at xi; Maggie Haberman, Election Is on but Campaign Is Over, N.Y. POST (Sept. 16, 2001, 4:00 AM), http://nypost.com/2001/09/16/election-is-on-but-campaign-is-over/.
B. Hurricane Katrina (New Orleans, 2005)

Hurricane Katrina hit New Orleans, Louisiana, on August 29, 2005, causing an estimated $85 billion in damage and displacing approximately 1.3 million households. Nearly 60% of the population of New Orleans Parish, constituting between a quarter and half of the parish’s electorate, evacuated as a result of the hurricane.

State law allowed the governor to “suspend or delay any qualifying of candidates, early voting, or elections” when the secretary of state certified that an emergency existed. The electoral process was required to “resume or be rescheduled as soon thereafter as is practicable.” In September 2005—six months after the storm—the Louisiana Secretary of State certified that a state of emergency continued to exist in Jefferson and Orleans Parishes. Two hundred and two of New Orleans’s 442 voting precincts remained destroyed, and most of the city’s 2,300 election commissioners still had not reported in with the clerk. Accordingly, Governor Kathleen Blanco issued an executive order postponing all elections in those parishes for the rest of the year, including the October primary election and November general election in Jefferson Parish, and the November proposition election in Orleans Parish, “until such time as [they] may be rescheduled.”

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66 Voting and Democracy, supra note 10, at 1177. For discussions of the challenges in conducting elections following Hurricane Katrina, see Quigley, supra note 64; Roy, supra note 11, at 226 (advocating satellite voting locations to facilitate voting by displaced voters); Damian Williams, Note, Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform, 116 YALE L.J. 1116 (2007) (arguing that Section 5 of the Voting Rights Act hindered the rapid changes to election laws necessary to facilitate voting by displaced minorities following Hurricane Katrina by using pre-Katrina voting data as benchmarks for determining their validity, despite the widespread destruction and displacements the hurricane caused); see also Jalila Jefferson-Bullock, The Flexibility of Section 5 and the Politics of Disaster in Post-Katrina New Orleans, 16 J. GENDER RACE & JUST. 825, 837–43 (2013) (criticizing Louisiana election officials for resuming updating voter registration rolls, as required by state law, La. Rev. Stat. Ann. § 18:192 (2012), in July 2007—more than two years after Hurricane Katrina—on the grounds that thousands of voters still had not returned to New Orleans).
67 Roy, supra note 11, at 206.
68 LA. STAT. ANN. § 18:401.1(B) (2012).
69 Id. § 18:401.1(C).
71 Quigley, supra note 64, at 63.
That December, ten months after Hurricane Katrina hit, the Secretary of State again certified that a state of emergency continued to exist in Orleans Parish. Governor Blanco issued another executive order postponing the primary, general, and proposition elections for Orleans County that had been scheduled for February and March 2006. It required those elections to be rescheduled “as soon as practicable.” Three lawsuits were filed challenging the Governor’s decision, but were largely mooted when the Governor agreed to hold elections by the end of April.

The legislature also enacted a package of laws to facilitate voting by Hurricane Katrina’s victims. One permanent provision empowers the secretary of state to propose an emergency voting plan to the state legislature when emergencies threaten impending elections. Legislators vote by mail on the plan, and it takes effect upon their approval.

A temporary provision, which expired in July 2006, designated the registrar’s office of any parish with a population of 100,000 or more as a “satellite voting” location at which any displaced person could vote. Another temporary provision, repealed in 2009, made it easier for displaced residents to vote by mail. Louisiana law generally requires a person who submits his voter registration form by mail to cast his first vote following that registration in person. The legislature allowed displaced people who first registered by mail between October 5, 2004, and September 25, 2005, to vote by mail in any elections through July 2006 without meeting that requirement.

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74 Id.
75 Id.
76 John Hill, New Orleans Elections May Be Held in April, THE TIMES, Dec. 18, 2005, at 1A; see, e.g., Tisserand v. Blanco, No. 05-6487, 2006 WL 4045926, at *1 (E.D. La. Aug. 18, 2006); Wallace Petition, supra note 7, ¶¶ 60.g, 72–73 (alleging that the Governor’s decision to delay elections violated Section 5 of the Voting Rights Act because it had not been pre-cleared by the Department of Justice); see also Voters Sue Blanco to Schedule Elections, NEW ORLEANS CITYBUSINESS (Dec. 9, 2005), http://neworleanscitybusiness.com/blog/2005/12/09/voters-sue-blanco-to-schedule-elections.
77 Quigley, supra note 64, at 67; see Tisserand, 2006 WL 4045926, at *2.
78 Jefferson-Bullock, supra note 66, at 836.
79 L A. STAT. ANN. § 18:401.3(B) (2012).
80 Id. § 18:401.3(C)–(D).
81 Id. § 18:401.4(C) (2012).
82 Id. § 18:401.4(A); see Jefferson-Bullock, supra note 66, at 836–37; Roy, supra note 11, at 208.
Various left-wing groups sued, arguing that the state had not done enough to facilitate voting by displaced voters, who were disproportionately African-American.86 One federal suit, *Wallace v. Chertoff*, alleged that holding elections in accordance with ordinary procedures would violate displaced residents’ right to vote, have a disparate impact on African-Americans, and dilute their vote.87 It also claimed that displaced residents’ voter registrations in Louisiana should not be cancelled simply because they registered to vote in another state or indicated that they wished to change their voting addresses when obtaining driver’s licenses in other states.88

The *Wallace* plaintiffs sought an order requiring the State of Louisiana to grant displaced voters opportunities to vote “equal to or better than” the avenues that federal law89 establishes for military voters.90 They wished to compel the state to either allow displaced residents to vote “by mail, by facsimile, [or] via e-mail,” establish satellite polling locations in the states to which displaced residents had resettled, or instead pay for displaced residents to travel to New Orleans to vote.91 The plaintiffs requested additional wide-ranging relief, as well, including orders suspending voter identification requirements;92 allowing any person who submitted her voter registration form by mail to vote by mail rather than having to appear in person, after the legislature’s emergency suspension of that requirement lapsed;93 and compelling FEMA to provide the state and candidates with displaced voters’ contact information and fund the reconstruction of voting facilities.94

The *Wallace* plaintiffs also attempted to require the state to notify displaced residents about their voting rights “by mail, newspaper advertising, radio, television, internet, and/or other media,”95 and reinstate nearly all voters who had been removed from the rolls.96 The court repeatedly rejected most of

87 *Wallace Petition*, supra note 7, ¶ 74.
88 *Id.* ¶¶ 36–38, 79, 82.
90 *Wallace Petition*, supra note 7, ¶ 74.
91 *Id.* ¶ 81.
92 *Id.* ¶ 83.
93 *Id.* ¶ 84.
94 *Id.* ¶¶ 4.a, 4.e, 75, 75.a, 78, 84.b–84.c.
95 *Id.* ¶¶ 80, 84.a.
96 *Id.* ¶¶ 79, 82.
the plaintiffs’ claims for relief. The state agreed, however, to allow the plaintiffs to station monitors to observe polling locations and the tabulation of ballots, and the case was ultimately dismissed by joint stipulation.

Another lawsuit, filed by ACORN, claimed that the Secretary of State’s Emergency Plan violated displaced residents’ constitutional right to vote and Section 2 of the Voting Rights Act. The plaintiffs sought to force the state to mail unsolicited absentee ballots to as many displaced residents as possible, establish satellite voting locations in other states where displaced residents could vote in person, and permit displaced residents to vote without showing proper identification. The court dismissed all of the plaintiffs’ claims with prejudice. ACORN subsequently disbanded over numerous scandals, including filing hundreds of thousands of fraudulent voter registration forms and attempting to assist other illegal activities. Other plaintiffs attempted to block Louisiana’s emergency adjustments to its voting procedures on the grounds they violated Section 5 of the Voting Rights Act, but courts rejected those claims, as well.

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98 Order at 2, Wallace v. Chertoff, No. 05-5519, supra note 97.
99 ACORN Complaint, supra note 86, ¶¶ 8, 76, 85.
100 Id. at 19.
104 See Segue v. Louisiana, No. 07-5221, 2007 U.S. Dist. LEXIS 74428, at *2–3 (E.D. La. Oct. 3, 2007); see also Wallace Petition, supra note 7, ¶¶ 63–65. Commentators have argued that Section 5 hinders efforts to ensure racial justice in the aftermath of crises and have proposed alternate approaches to assessing retrogression under such circumstances. Jefferson-Bullock, supra note 66, at §30, 854–56 (arguing that, when a state suspends its laws following a disaster, it should be required to satisfy preclearance requirements before implementing them again); Williams, supra note 66, at 1141, 1143–44 (arguing that in the wake of a disaster, a
Thus, Louisiana responded to the mass displacements and widespread destruction caused by Hurricane Katrina through election cancellations. The Secretary of State completely cancelled elections in Jefferson and New Orleans Parishes well before they began, until more displaced residents returned and the infrastructure necessary to conduct elections could be restored. The rescheduled elections did not attempt to hold anything constant from the originally scheduled dates, as in New York following the September 11 attacks, but rather were treated as completely new, independent events.

C. Hurricane Sandy (New Jersey and New York, 2012)

Hurricane Sandy hit the Northeast barely one week before the hotly contested November 6, 2012, presidential election. New York City ordered the evacuation of 370,000 people from low-lying areas of Manhattan and Brooklyn, shut down its public transit system, closed public schools, and opened shelters; the New York Stock Exchange, Broadway, and the United Nations all closed, as well. New Jersey evacuated residents from its barrier islands and closed Atlantic City casinos.

The storm caused billions of dollars in damage. It made landfall in Atlantic City around 8:00 p.m. on October 29. Approximately three-quarters of the city were thrust underwater, and parts of the boardwalk were destroyed. "Water as much as eight feet deep coursed through some streets, leaving them impassable. Heavy rains and sustained winds of more than 40 miles an hour, with gusts of more than 60 miles an hour, battered the city." The hurricane flooded Hoboken and several other suburbs; wiped out "[a]musement parks, arcades and restaurants" throughout the Jersey Shore; and

covered jurisdiction’s actual voting laws should not be used as a benchmark for measuring retrogression, but rather a hypothetical set of voting requirements fabricated by the court based on input from local stakeholders). The Supreme Court’s ruling in Shelby County v. Holder prevents enforcement of Section 5 for the foreseeable future, 133 S. Ct. 2612 (2013), largely mooting such concerns.

106 Id.
107 Id.
110 Id.
111 Id.
destroyed “entire neighborhoods.” Over 2 million New Jersey residents and 6 million New York residents were left without power and approximately 161,000 families were displaced. Losses were estimated to be as high as $50 billion, and hundreds of polling places were destroyed, left without power, or otherwise rendered inaccessible.

On October 27, 2012, two days before Sandy hit, New Jersey Governor Chris Christie proclaimed a state of emergency. The proclamation recognized that the impending storm could “cause outages of power, impede transportation . . . [and] make it difficult or impossible for the citizens [of New Jersey] to obtain the necessities of life, as well as essential services such as police, fire, and first aid.” Pursuant to the state’s general emergency statute, he authorized the heads of executive agencies to “waive, suspend, or modify” any rules that “would be detrimental to the public welfare during this emergency,” notwithstanding any other provision of law.

A few days later, after the storm hit, the state’s chief election official, Lieutenant Governor Kim Guadagno, issued a series of six directives “to address election-day polling issues that have arisen as a result of Hurricane Sandy.” On November 1, she extended the deadline by which clerks had to receive mailed requests for mail-in ballots from Tuesday, October 30 to Friday, November 2; ordered all election offices to remain open over the
weekend before Election Day and extend their normal operating hours;\textsuperscript{125} and required local election officials to confirm that polling places remained accessible and had power.\textsuperscript{126} The directive also waived residency requirements for local election board members, restrictions on polling place locations, and certain restrictions on ballot couriers for voters who had relocated to state-run shelters.\textsuperscript{127} Two days later, Guadagno directed election officials to notify voters of any changes to their polling locations, and further disseminate such information through newspaper notices, public service announcements, and on their websites.\textsuperscript{128}

The same day, Guadagno issued two other directives that expanded opportunities to vote, in apparent violation of New Jersey law.\textsuperscript{129} One order authorized any voter displaced by Hurricane Sandy to cast a provisional ballot at any polling place in the state.\textsuperscript{130} Election officials were directed to transmit those provisional ballots to the voters’ respective home counties.\textsuperscript{131} Only votes for offices for which a person was entitled to vote would be counted.\textsuperscript{132} In other words, a voter who took advantage of this option by presenting to vote at a polling place other than her assigned location would be limited to voting only for offices, such as President and U.S. Senator, that appeared on the ballots for both her assigned location and the polling place at which she wished to vote.\textsuperscript{133}

This order appears to be invalid under New Jersey law. State law allowed a voter who moved within her county without updating her voter registration record and then attempted to vote at the polling place for her new address to cast a provisional ballot.\textsuperscript{134} It did not permit a person to cast a provisional

\textsuperscript{125} Id. ¶¶ 2–3.

\textsuperscript{126} Id. ¶ 4.

\textsuperscript{127} Id. ¶¶ 5–7.


\textsuperscript{131} Id. ¶ 1(a)–(b).

\textsuperscript{132} Id. ¶ 1(c)(i)–(ii).

\textsuperscript{133} See supra notes 130–32 and accompanying text.

\textsuperscript{134} N.J. STAT. ANN. §§ 19:53C-1(b), 19:53C-3(b)–(c) (West 2014). A voter also may cast a provisional ballot if her registration information does not appear in the records of the polling place for the address at which she claims to be registered, she votes after a polling place’s designated closing time pursuant to a court order,
ballot outside of the county at which she was registered to vote. Moreover, New Jersey did not have an election emergency statute authorizing the governor or lieutenant governor to waive election-related laws, and the state’s general emergency statutes did not empower the governor to suspend, ignore, or violate many types of state laws. Thus, Guadagno’s decision to unilaterally authorize provisional voting in circumstances not permitted by the Election Code is highly dubious.

She concurrently issued another order allowing voters displaced by Hurricane Sandy to also take advantage of special voting procedures state law established for military and overseas voters. The order permitted displaced voters to email or fax requests for mail-in ballots to their respective county clerks until 5:00 p.m. on Election Day. After confirming that an applicant was a qualified voter, the clerk was required to “electronically send” a mail-in ballot, along with a “waiver of secrecy form . . . by the method chosen by the voter (email/fax).” Voters were permitted to return their completed ballots by email or fax by 8:00 p.m. on Election Day, along with the waiver of secrecy form relinquishing their right to a secret ballot (since election officials would be able to see which candidates they voted for).

Numerous commentators immediately attacked Guadagno’s order, in particular because it did not provide for an auditable paper trail of votes cast.
which the statute governing military and overseas voters requires. Guadagno later claimed that voters who cast electronic ballots would be required to mail hard copies of their ballots to the appropriate county clerk, but none of her orders actually required this and “many county clerks . . . were unaware” of any such requirement. Moreover, it is unclear whether election officials would count electronic ballots from voters who failed to submit hard copies as well.

This order also extended the deadline for receiving ballots from voters who chose to mail them in, rather than casting them electronically. Under state law, ballots had to be received by an appropriate election official by Election Day—November 6, 2012—to be valid. Guadagno’s directive provided that mail-in ballots had to be postmarked by November 5, but election officials did not have to receive them until November 19. Thus, the outcomes of tight races might not be known for at least two weeks after the election. She issued a subsequent order extending the deadlines for certifications of election results, recounts, and election contests.

Over 50,000 ballots were submitted by electronic mail or fax. Clerks lacked the infrastructure and personnel necessary to timely respond to the deluge of electronically submitted ballot requests and completed ballots. In

144 N.J. STAT. ANN. § 19:59-15(a) (West Supp. 2017) (“Immediately after a copy of an overseas voter’s or overseas federal election voter’s voted ballot . . . has been transmitted by electronic means to the appropriate county board of elections . . . [that person] shall place the original voted ballot in a secure envelope . . . and send [it, along with a secrecy waiver,] by air mail to the appropriate county board of elections.”). Although state law does not directly address the issue, it appears that if military or overseas voters fail to submit a hard copy of their ballots, or if the hard copies they submit do not match their electronic ballots, the electronic ballots still count. See id. § 19:59-14 (West Supp. 2017) (specifying the circumstances under which a military or overseas voter’s electronically submitted ballot will be accepted as valid and omitting any requirement that the voter mail a hard copy of it); cf. § 19:59-15(a), (d) (requiring military and overseas voters to submit hard copies of ballots they cast electronically and identifying steps election officials must take if they do not receive such a hard copy or a voter’s hard copy does not match their electronic ballot, without specifying that the electronic ballot will not be counted).

145 Christopher Baxter, Rutgers Seeks Info on Handling of Post-Sandy Ballots, STAR LEDGER, Nov. 28, 2012, at 021; see also Jackson & Campisi, supra note 143.

146 Cf. supra note 144.


148 Guadagno, supra note 137.


150 See THE PERFECT STORM, supra note 129, at 17; Montellaro, supra note 117.

151 Christopher Baxter, Voting by E-mail, Fax Spurs Massive Jam-Ups in Jersey, Decision to Extend Election, NEWARK STAR-LEDGER, Nov. 7, 2012, at 001; Amy Ellis Nutt, Chaos at County Clerks’ Offices May Leave Voters Waiting for Results, NEWARK STAR-LEDGER, Nov. 7, 2012, at 012.
one county, 1,500 electronic requests for ballots remained pending, apparently unfulfilled, the day after the election.\textsuperscript{152} Other counties were unable to accept requests because their e-mail inboxes were full or their fax machines ran out of paper or toner.\textsuperscript{153} One election official had voters transmit ballot requests to his personal e-mail address.\textsuperscript{154}

Due to the deluge of electronic voting requests and the substantial number of displaced people unable to vote electronically, the ACLU of New Jersey orally filed an emergency petition on Election Day,\textsuperscript{155} asking the Superior Court for Essex County to require election officials to accept Federal Write-in Absentee Ballots (FWABs), which are essentially blank pieces of paper on which voters may write the names of the candidates or even political parties for which they wish to vote.\textsuperscript{156} Federal law requires states to accept FWABs from military and overseas voters who timely request absentee ballots, but do not receive them.\textsuperscript{157} The court rejected the petition.\textsuperscript{158} It nevertheless directed county clerks to accept renewed ballot requests from voters who had attempted to request absentee ballots by Guadagno’s deadline, but were unsuccessful due to county clerks’ equipment failures, until noon on Friday, November 9.\textsuperscript{159} During oral argument on the emergency petition, Judge Walter Koprowski “acknowledged questions about the constitutionality of [Guadagno’s] directive, but said those issues were not for him to decide.”\textsuperscript{160}

Pursuant to the court’s order, Guadagno issued a directive on Election Day, which reiterated that the deadline for submitting initial requests for absentee ballots was 5:00 p.m. that day, and required clerks to continue processing timely submitted requests through noon on November 9.\textsuperscript{161} The directive

\textsuperscript{152} THE PERFECT STORM, supra note 129, at 17.
\textsuperscript{153} Id. at 18; Sherman, supra note 115; see also Kim Zetter, Hotmail Takes On Election Duties as Servers in New Jersey Crash, WIRED (Nov. 6, 2012, 2:04 PM), https://www.wired.com/2012/11/new-jersey-email-fai/.
\textsuperscript{154} Zetter, supra note 153.
\textsuperscript{155} See E-mail from Alexander Shalom, Senior Staff Attorney, Am. Civil Liberties Union of N.J., to author (July 2, 2017, 7:17 PM) (on file with author).
\textsuperscript{156} See 52 U.S.C. § 20303(c) (2012); see also N.J. STAT. ANN. § 19:59-2(j) (West 2017).
\textsuperscript{159} Id. ¶¶ 4–5.
\textsuperscript{160} Baxter, supra note 151, at 001.
required voters to mail or fax completed ballots by 8:00 p.m. on November 9.\textsuperscript{162} It further reiterated that county boards of election were required to verify that a voter had not already voted in person or by mail before counting an electronically submitted ballot.\textsuperscript{163}

Guadagno’s emergency orders led to serious problems with a public referendum on reducing rent control restrictions in Hoboken, New Jersey.\textsuperscript{164} Under her orders, Hoboken voters who requested and cast ballots electronically\textsuperscript{165} were permitted to vote on the public question.\textsuperscript{166} Voters who instead cast provisional ballots in person at polling locations outside of Hoboken\textsuperscript{167} did not have the opportunity to vote on it since the question did not appear on the ballots those polling locations distributed.\textsuperscript{168} The New Jersey Superior Court, Appellate Division noted that her directives, “however well-intentioned, failed to advise voters” of this important “difference [in] their ability to vote on any of the Public Questions on the Hoboken ballot.”\textsuperscript{169}

Based on Election Day vote tallies, the rent control question failed by fifty-three votes out of more than 16,000 cast on it\textsuperscript{170}. An election contest was brought challenging this result on the grounds that 114 Hoboken voters who cast provisional ballots at polling places outside the city pursuant to Guadagno’s order were deprived of the opportunity to vote on the question.\textsuperscript{171} Under New Jersey law, a court generally must “order a re-vote on a public question where eligible voters have been denied access to vote on that question, provided the number of voters was sufficient to change the result of the election.”\textsuperscript{172} The Appellate Division emphasized that displaced voters had not been informed that provisional ballots in alternate polling locations did not

\begin{footnotes}
\item[162] Id. \S 4.
\item[163] Id. \S 5.
\item[165] Guadagno, supra note 137.
\item[166] In \textit{re Election Contest}, 2013 N.J. Super. Unpub. LEXIS 2250, at *6.
\item[167] Guadagno, supra note 130.
\item[168] In \textit{re Election Contest}, 2013 N.J. Super. Unpub. LEXIS 2250, at *6.
\item[169] Id.
\item[171] In \textit{re Election Contest}, 2013 N.J. Super. Unpub. LEXIS 2250, at *6.
\item[172] Id. at *5 (citing N.J. STAT. ANN. \S 19:29-1(e) (West 2014)).
\end{footnotes}
provide an opportunity to vote on Hoboken’s public questions.\textsuperscript{173} The court added, “[W]e perceive a significant potential for manipulation of the vote if, in a year where there are contentious local election issues, voters can be directed by [an] emergency directive to remote polling places where they will be provided with ballots that do not include the local questions or candidates.”\textsuperscript{174} It ordered that the public question “be placed on the November 5, 2013 ballot.”\textsuperscript{175}

The Lawyers’ Committee for Civil Rights Under Law termed New Jersey’s election a “catastrophe.”\textsuperscript{176} The Constitutional Law Clinic at Rutgers Law School-Newark issued a report after the election severely criticizing Guadagno’s decision to allow internet voting.\textsuperscript{177} It claimed that her last-minute order confused and overwhelmed county clerks and “left votes vulnerable to online hacking.”\textsuperscript{178} Counties lacked the infrastructure necessary to ensure that voting was secure, voters’ information was protected, and results could not be manipulated.\textsuperscript{179} The report concluded, “Internet voting should never be permitted, especially in emergencies when governmental infrastructure is already compromised.”\textsuperscript{180}

New York took a very different approach toward preserving its citizens’ right to vote.\textsuperscript{181} On October 26, Governor Andrew M. Cuomo declared a “State Disaster Emergency” for all counties within the state based on Sandy’s potential to cause “widespread power outages and flooding, [as well as] damage to homes, apartments, businesses, and public and private property.”\textsuperscript{182} The order directed state agencies “to take appropriate action to protect State

\textsuperscript{173} Id. at *8.

\textsuperscript{174} Id. at *9.

\textsuperscript{175} Id. at *10. The public question, redesignated as Hoboken Public Question number 1, was defeated at the November 2013 election by 122 votes. Barbara A. Netchert, Hudson Cty. Clerk, 2013 General Election Totals, “Hoboken Public Question No. 1,” http://www.hudsoncountyclerk.org/SOV_GENERAL%20ELECTION%20DISTRICT%20CANVASS%202013.pdf.


\textsuperscript{177} THE PERFECT STORM, supra note 129, at 83.

\textsuperscript{178} Id. For discussions of the perils of internet voting, see Jeremy Epstein, Internet Voting, Security, and Privacy, 19 WM. & MARY BILL OF RTS. J. 885, 906 (2011) (“Blank ballot distribution may be feasible, especially with dedicated systems, but other types of Internet voting are too risky to be used for public elections.”); Montellaro, supra note 117.

\textsuperscript{179} THE PERFECT STORM, supra note 129, at 83; see also Zetter, supra note 153.

\textsuperscript{180} THE PERFECT STORM, supra note 129, at 83.

\textsuperscript{181} Greeneemer, supra note 129.

property and to assist affected local governments and individuals in responding to and recovering from this disaster, and to provide such other assistance as necessary to protect the public health and safety.”

The day before Election Day, Cuomo issued another executive order focusing specifically on the impending election. The order recognized that “Hurricane Sandy has struck a deadly blow, destroying lives, countless houses[,] and businesses[,] displacing thousands of New Yorkers from their homes[,] disrupting transportation, the flow of commerce[,] and daily life[,] and complicating even the simplest and most routine acts of living.” Cuomo used his statutory authority to suspend state laws during declared emergencies to permit voters registered in New York City or other counties within the federally declared disaster zone to cast provisional ballots (called “affidavit ballots”) at any polling location, not just the ones at which they were registered. As in New Jersey, voters would have their votes counted for any races on the provisional ballots for which they were legally eligible to vote. The order further directed each board of elections to transmit such provisional ballots to the counties in which the voters who cast them were registered. The Governor did not authorize internet voting, ostensibly on the grounds it was too insecure.

New Jersey and New York’s responses to Hurricane Sandy are examples of election modifications. Rather than postponing or cancelling the elections, both states modified the rules to varying extents to facilitate voting by displaced voters.

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183 Id.
185 Id.
188 N.Y. Exec. Ord. No. 62, supra note 188.
190 N.Y. Exec. Ord. No. 62, supra note 188.
191 Id.
192 Greenemeier, supra note 129.
voters. New Jersey’s modifications were more extensive, incorporating a last-
minute decision to allow voting by fax and e-mail, although many county 
clerks’ offices apparently lacked both the hardware and personnel necessary to 
process those electronically submitted ballots.

D. Hurricane Matthew (Florida and Georgia, 2016)

The most recent major election emergency occurred approximately one 
month before the 2016 presidential election, when Hurricane Matthew 
threatened to ravage the eastern seaboard of the United States. As the hurricane 
prepared to make its way up the coast, the Governors of Florida,193 Georgia,194 
North Carolina,195 and South Carolina196 declared states of emergency; 
hundreds of thousands of people evacuated Florida and South Carolina.197 The 
hurricane passed Florida on October 6 and 7, continuing north along the coast 
over the following days.198 It flooded several coastal communities throughout 
the Southeast, including St. Augustine and Savannah, causing billions in 
damage199 and leaving over a million people without power.200

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related_files/document/10.04.16.02.pdf; see also Ga. Exec. Ord. No. 10.11.16.01 (Oct. 11, 2016), 
16.02.pdf (declaring state of emergency in additional counties).
TropicalStormSandy.pdf; see also N.C. Exec. Ord. No. 131 (Oct. 29, 2012), https://www2.ncdps.gov/cit/
ExecutiveOrders/EO131WinterStorm.pdf.
197 J.D. Gallop et al., Matthew Marching Closer to U.S. Coast, FLA. TODAY, Oct. 6, 2016, at B1; see 
bitstream/handle/10827/23228/GOV_Executive_Order_2016-32.pdf (ordering evacuation of parts of two 
10827/23229/GOV_Executive_Order_2016-33.pdf (ordering further evacuations of parts of two other 
counties).
nationalgeographic.com/2016/10/13/hurricane-matthew-the-timeline/.
199 Pam Huff, Nearly 460,000 Tampa Bay Area Homes at Risk for Storm Surge, Report Says, TAMPA 
BAY BUS. J. (June 5, 2017, 7:46 AM), https://www.bizjournals.com/tampabay/news/2017/06/05/nearly-460-
000-tampa-bay-area-homes-at-risk-for.html; Kimberly Miller, Did You Evacuate for Hurricane Matthew?, 
PALM BEACH POST, May 28, 2017, at S1; Camille Pendley, In Georgia, Assessing the Damage from Matthew, 
WASH. POST, https://www.washingtonpost.com/local/2016/live-updates/weather/hurricane-matthew-churns-
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matthew/?utm_term=.25999559262c (last updated Oct. 8, 2016, 10:44 AM).
Although Election Day was not until Tuesday, November 8, 2016, the deadline in these states for registering to vote in the 2016 general election was Tuesday, October 11. Democrats and various left-leaning groups brought a succession of suits to force these states to extend their voter registration deadlines as they struggled to recover from the hurricane and prepare for Election Day. A comparison of the manner in which the Florida and Georgia courts handled these claims is instructive.

1. Florida

On Monday, October 10, the Florida Democratic Party, represented by Democratic presidential candidate Hillary Clinton’s attorney, Marc E. Elias, obtained a temporary restraining order (TRO) extending Florida’s voter registration deadline by one day, until 5:00 p.m. on Wednesday, October 12.

That Wednesday, the court held a brief evidentiary hearing at which the State stopped defending the constitutionality of its statutory registration deadline and instead “took no position.” The plaintiffs presented evidence “that some soon-to-be citizens who planned to register in advance of the deadline had their naturalization ceremonies delayed due to Hurricane Matthew.” Based on such considerations, the court converted its TRO into a preliminary injunction, extending the voter registration deadline to 5:00 p.m. on Tuesday, October 18.

The court first held that the Florida Democratic Party had associational standing to challenge the registration deadline on behalf of its putative future members, even though the party was unable to identify a single person who

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201 See FLA. STAT. ANN. § 97.055(1)(a) (West 2017); GA. CODE ANN. § 21-2-224(a) (West 2017); S.C. CODE ANN. § 7-5-150 (2017).

202 A North Carolina state court also extended the voter registration deadline in thirty-six counties, but rejected Democrats’ request to extend the deadline throughout the entire state. Russ Bynum & Gary D. Robertson, Judges Extend Voter-Registration in North Carolina, Georgia, ASSOCIATED PRESS, Oct. 15, 2016, https://apnews.com/289df7bf69bf43ed943b54e7447fc99/judge-asked-extend-voter-registration-due-hurricane.


205 Id. at *1 n.2.

206 Id. at *1.
wished to register as a Democrat, but would be unable to do so as a result of Hurricane Matthew. The court noted that Hurricane Matthew’s “life-threatening winds and rain forced many Floridians to evacuate or, at a minimum, hunker down in shelters or their homes” and led Governor Scott to close state offices in over thirty of Florida’s sixty-seven counties. It further stated that the “U.S. Postal Service also suspended operations in the affected areas,” though the closures were far more limited and brief than the court’s ruling may have suggested. The court estimated that the hurricane prevented “in excess of a hundred thousand aspiring eligible Florida voters” from registering to vote in the 2016 election. Following the court’s order, nearly 64,000 additional registration forms were filed.

The district court misapplied the Constitution, misconstrued Florida law, and wholly overlooked important remedial issues. Starting with the court’s constitutional analysis, it held that “Florida’s statutory framework would categorically deny the right to vote” to unregistered people who could not register due to evacuation or office closures. The registration deadline was therefore subject to strict scrutiny, which it failed. The U.S. Supreme Court, however, has upheld the constitutionality of voter registration deadlines that

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207 Scott I, 215 F. Supp. 3d at 1254 (“Plaintiff need not identify specific aspiring eligible voters who intend to register as Democrats and who will be barred from voting; it is sufficient that some inevitably will.”).
208 Id. at 1253, 1257 n.2.
209 Id. at 1257 n.2.
211 Scott I, 215 F. Supp. 3d at 1257 n.2.
213 Scott I, 215 F. Supp. 3d at 1257.
214 Id.
fell as many as fifty days before an election. Judges by those standards, enforcing Florida’s twenty-nine-day voter registration deadline would have been constitutional even if, as the court assumed, people displaced by Hurricane Matthew were prevented from registering to vote for a few extra days before that deadline (which, as discussed below, was not actually the case).

The district court also erred in concluding that strict scrutiny should apply on the grounds that Florida’s voter registration deadline would preclude some people from voting. The fact that a person must satisfy certain election-related requirements or follow particular procedures in order to vote is neither sufficient to trigger strict scrutiny nor constitutes “disenfranchise[ment].” To the contrary, that is how many generally accepted election rules work, from the requirement that a person present herself at a polling location before the polls close, to restrictions on the polling location at which a person must cast her ballot. Indeed, whenever someone does not register by the applicable deadline, she is prohibited from voting in the following election. Such deadlines do not trigger strict scrutiny, however, but rather have been

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215 See Marston v. Lewis, 410 U.S. 679, 681 (1973) (per curiam) (“[T]he 50-day voter registration cutoff (for election of state and local officials) is necessary to permit preparation of accurate voter lists.”); Burns v. Fortson, 410 U.S. 686, 686–87 (1973) (per curiam) (upholding constitutionality of law requiring people to register to vote at least fifty days before an election, though it “approaches the outer constitutional limits in this area”); see also Dunn v. Blumstein, 405 U.S. 330, 348 (1972) (“Thirty days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much.”); cf. Rosario v. Rockefeller, 410 U.S. 752, 760–62 (1973) (upholding law requiring a person to register with a political party up to eleven months before a primary election to be eligible to vote in that primary).

216 As a matter of federal law, however, there must be a method of registering to vote for President up to thirty days before a presidential election. 52 U.S.C. § 10502(d) (2012) (“Each State shall provide by law for the registration . . . of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for . . . President and Vice President in such election . . . .”).


218 Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (holding that a state’s “important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions,” even though election laws “govern[ing] the registration . . . of voters . . . inevitably affect[ing]—at least to some degree—the individual’s right to vote”); see also Burdick v. Takushi, 504 U.S. 428, 433 (1992) (“To subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”).

219 FLa. STAT. ANN. § 100.011(1) (West 2015) (“The polls . . . shall be kept open until 7:00 p.m., of the same day . . . . Any elector who is in line at the time of the official closing of the polls shall be allowed to cast a vote in the election.”).

220 Id. § 101.045(1) (“A person is not permitted to vote in any election precinct or district other than the one in which the person has his or her legal residence and in which the person is registered.”).
repeatedly upheld by the Supreme Court. 221 Thus, the court’s explanation for applying strict scrutiny was insufficient and unpersuasive.

The most pervasive, fundamental flaw in the court’s analysis, however, is that it misunderstood how Florida’s voter registration law works. A major assumption of the court’s ruling was that people were being deprived of the chance to register for the election because numerous county election offices were closed due to the hurricane. 222 Such closures, though, would only inconvenience people seeking to register in person, who constitute a small fraction of registrants. 223 Voters remained free to submit registration forms by mail, 224 regardless of whether county Supervisor of Elections offices were open. The effective date of an application submitted by mail is its postmark date. 225 In the event the postmark is unclear, the application is deemed timely if the Supervisor’s office receives it “within 5 days” of the voter registration deadline. 226

Many post offices had resumed operations as early as Friday, October 7. 227 Virtually all were fully operational by the registration deadline of Tuesday October 11. 228 Any applications that had been mailed either during the preceding days or on October 11 itself would be timely postmarked. Consequently, the fact that voter registration offices were closed in the days before the registration deadline had only a limited impact on people’s ability to register, and was far from the complete prohibition on registration the court found it to be.

A potentially more promising basis for the court’s ruling would have been the storm’s impact on voters, rather than on election officials. The problem

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221 See supra notes 215; see also supra note 218.
222 Scott I, 215 F. Supp. 3d at 1257 & n.2 (finding that, by “direct[ing] the state offices of more than thirty of Florida’s sixty-seven counties to close” due to Hurricane Matthew, Governor Scott “foreclosed the only methods of registering to vote: in person or by mail”).
223 In 2012, only 18% of Florida voters registered by completing a form in person at the Department of Elections. See DIV. OF ELECTIONS, FLA. DEP’T OF STATE, VOTER REGISTRATION YEARLY REPORT, JANUARY 2012 THROUGH DECEMBER 2012, at 6 (2013), http://dos.myflorida.com/media/694075/voter-registration-report-archive-2012.zip (file YTDTotalPDF, located in folder 2012/December). The closure of a Supervisor of Election’s office in the days before the registration deadline would also prevent a person from mailing or calling the office to request that a blank voter registration form be mailed to them, but it seems unlikely that many voters obtain registration forms in that manner, or that putative applicants would have relied on that method so soon before the registration deadline.
224 FLA. STAT. ANN. § 97.053(4) (West 2017).
225 Id.
226 Id.
227 See supra note 210.
228 Id.
with that alternate approach, however, is that voters had approximately four years—since the 2012 presidential election—to register to vote in the 2016 presidential election. The Constitution forbids a state from unreasonably burdening the right to vote. 229 If a person chooses to wait until the last few days before the deadline to complete and submit a registration form, however, she runs the risk that an unexpected tragedy, medical emergency, accident, or other obstacle will hinder her filing. To determine the constitutionality of Florida’s voter registration deadline, the substantial obstacles Hurricane Matthew created during the last few days of the registration period cannot be considered in isolation, as the court viewed them, but rather must be assessed in the context of the entire 1,300-plus day registration period. The State of Florida did nothing to substantially burden the voting rights of people displaced by the hurricane; so long as Florida citizens submitted their registration forms at any point before the statutory deadline, they would have been registered to vote in the 2016 election. The state is not under a constitutional obligation to expand opportunities to register for people who do not become interested in an election until the last minute.

In its ruling granting the preliminary injunction, the court pointed out that some people could not have registered earlier. 230 Its only example, however, was that “some soon-to-be citizens who planned to register in advance of the deadline had their naturalization ceremonies delayed due to Hurricane Matthew.” 231 Without emergency relief, “through no fault of their own,” those putative future citizens “would not have . . . the opportunity to vote in the 2016 election.” 232

As an initial matter, the court’s analysis is faulty. It is highly unlikely that Florida’s voter registration deadline can be rendered unconstitutional by the federal government’s decision to reschedule naturalization ceremonies. The putative future citizens awaiting naturalization did not have a constitutional right to be naturalized on any particular day; indeed, they did not even have a right to demand their naturalizations occur prior to the 2016 presidential election. Had the federal government rescheduled the naturalization ceremonies for any other reason, the putative future citizens would not have been able to demand an exemption from Florida’s voter registration deadline. Thus, the sole example upon which the district court relied is inapposite.

231 Id.
232 Id.
Even if the court’s analysis were correct, however, yet another substantial problem remains: the disparity between the scope of its holding and the remedy it ordered. Although the court held that the voter registration deadline was unconstitutional as applied to “those who may have been affected by Hurricane Matthew’s destruction,” it issued a Defendant-Oriented Injunction completely suspending the deadline across the state, for everyone, as if it were facially unconstitutional. The court explained, “It would be grossly inappropriate . . . to hold that aspiring eligible voters in Jacksonville could register later than those in Pensacola.”

The court’s reasoning conflated facial and as-applied challenges to Florida’s voter registration deadline. Its order was not limited to people who were displaced by Hurricane Matthew or the counties substantially affected by the hurricane. Nor did the court require people seeking to register after the deadline to submit an affidavit affirming that they had been displaced by Hurricane Matthew, lost power, had their mail service discontinued, or faced some other substantial burden in registering on time. By extending the deadline for the entire state, the court suspended application of state law to millions of people to whom, even under the court’s reasoning, it could have been constitutionally applied, including people not displaced by the hurricane who could have mailed a voter registration form without facing an unconstitutionally severe burden.

The court also failed to recognize the extremely difficult jurisdictional, rule-based, prudential, and other problems that arise from issuing a Defendant-Oriented Injunction in a non-class case. The court held that the plaintiff Democratic Party had standing to enforce the rights of individuals wishing to register as Democrats; by extension, it lacked standing to enforce the rights of individuals who did not wish to join that party. The court’s order prohibiting the state from applying its statutory deadline to anyone raised serious Article

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233 Id. at *1.
234 Michael T. Morley, De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases, 39 HARV. J.L. & PUB. POL’Y 487, 500 (2016) (“A Defendant-Oriented Injunction . . . allows a single judge of ostensibly limited territorial jurisdiction to completely prohibit the defendant agency or official from enforcing the challenged provision against anyone throughout the state or nation. Defendant-Oriented Injunctions turn non-class, individual-plaintiff cases into modern analogues to ‘spurious’ class actions.”).
236 See FLA. STAT. ANN. § 97.055(1)(a) (West 2017).
237 See Scott II, 2016 WL 6080225, at *1 (extending the voter registration deadline for all Floridians, without limitation).
238 Morley, supra note 234, at 494.
239 Scott I, 215 F. Supp. 3d at 1250, 1254.
III and Due Process issues by enforcing the rights of third-party non-litigants not before the court, whose rights the plaintiffs lacked standing to assert. Of course, a narrower order—allowing only putative Democrats to register after the deadline—would have appeared even more politically motivated and potentially raised First Amendment or Equal Protection concerns. The order’s scope raises questions about whether indispensable parties were missing or whether the case should have been required to proceed as a Rule 23(b)(2) class action.

Of course, the court cannot be faulted for failing to recognize or work through all of these difficult remedial issues in the rushed context of an emergency proceeding. Yet they are precisely the types of problems that recur in emergency election litigation. It is critical to determine the proper remedial approach in advance of such disputes, when the pertinent issues can be fully ventilated, to ensure judges faced with statewide (and potentially even nationwide) TRO requests neither overlook nor minimize them.

The court went on to hold in the alternative that, even if Florida’s voter registration deadline were not subject to strict scrutiny, the state’s “statutory framework” for voter registration failed both the ad hoc Anderson-Burdick balancing test and rational basis scrutiny. These alternate holdings cannot withstand serious analysis. The court emphasized that, because other states allow same-day voter registration on Election Day, “[t]here is no reason

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240 Cf. infra note 385 (discussing the court’s unusual partisan rhetoric).
241 But see Morley, supra note 234, at 548–49.
242 See FED. R. CIV. P. 19.
243 See Morley, supra note 234, at 549–56 (arguing that a court should require a public-law case to proceed as a Rule 23(b)(2) class action when, if the plaintiffs succeed on the merits, the court would be required to grant relief to all right holders, rather than just the plaintiffs before it).
244 I have addressed these issues for both class actions, Michael T. Morley, Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts, 97 B.U. L. REV. 615 (2017), and non-class cases, Morley, supra note 234. In a forthcoming piece, I will present a more comprehensive proposal for reform.
245 The Anderson-Burdick balancing test, derived from the Supreme Court’s rulings in Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), and Burdick v. Takushi, 504 U.S. 428, 434 (1992), requires a court, on a largely ad hoc basis, to subjectively weigh the burden an election-related requirement imposes upon the plaintiffs’ right to vote against the state’s interest in enforcing that requirement. See Michael T. Morley, Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment, 2015 U. Cin. LEGAL F. 279 (2015) (arguing that the Anderson-Burdick test is unnecessarily subjective and suggesting it be replaced by a more objective standard rooted in Section 2 of the Fourteenth Amendment). The Court has recognized that most election laws will survive Anderson-Burdick balancing. Anderson, 460 U.S. at 788; accord Burdick, 504 U.S. at 434.
246 Scott I, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (“Even assuming that Florida’s statutory framework was subject to a more flexible Anderson-Burdick test, it still would be unconstitutional . . . . Florida’s statutory framework is unconstitutional even if rational basis review applied (which it does not).”).
Florida could not do the same.”\textsuperscript{247} Indeed, the court found the refusal of Florida—like thirty-four other states\textsuperscript{248}—to allow people to register on Election Day itself “incomprehensible.”\textsuperscript{249} Accordingly, the court concluded that Florida’s voter registration deadline was unconstitutional, even without regard to the hurricane. Neither the Anderson-Burdick test nor the rational basis test requires states to adopt the most permissive possible procedures for voter registration, however. Indeed, the Supreme Court has expressly held that states’ voter registration requirements are not unconstitutional simply because other states have adopted more liberal alternatives.\textsuperscript{250}

The district court also unilaterally declared, without any supporting evidence, that the burden of extending the voter registration deadline would be “de minimis,” and that it was “irrational” for the state to refuse to do so.\textsuperscript{251} The court’s eagerness to gratuitously declare that the deadline could not survive even rational basis scrutiny—which the court expressly held was not the correct standard\textsuperscript{252}—calls into question its objectivity.\textsuperscript{253} Virtually nothing fails under the extraordinarily permissive rational basis standard.\textsuperscript{254}

The state had—at a minimum—a legitimate interest in focusing its resources on recovering from the hurricane, processing and confirming the accuracy of timely submitted voter registration forms, assessing the availability of polling locations following the hurricane, conducting early voting (which commences ten days before federal elections),\textsuperscript{255} and preparing for a smooth Election Day. It was reasonable for the state to seek to protect election officials from having to handle tens of thousands of additional, late-submitted voter registration forms while simultaneously recovering from Hurricane Matthew and preparing for early voting and Election Day. The Supreme Court itself has

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{247} Id. at 1257–58 (reiterating that “fifteen other states, including, for example, Iowa, even allow registration on Election Day”).
\item \textsuperscript{248} See id. at 1258.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} See Marston v. Lewis, 410 U.S 679, 681 (1973) (per curiam) (holding that, even though other states required voters to register only thirty days before an election, an Arizona law requiring registration fifty days before a primary was constitutional).
\item \textsuperscript{251} Scott I, 215 F. Supp. 3d at 1257.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} See also infra note 385 (discussing the court’s partisan commentary).
\item \textsuperscript{254} See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court, 86 Harv. L. Rev. 1, 8 (1973) (characterizing the rational basis test as “minimal scrutiny in theory and virtually none in fact”); see also Marcy Strauss, Reevaluating Suspect Classifications, 35 Seattle U. L. Rev. 135, 136 n.8 (2011) (“Rational basis review is deemed so minimal that academics and other observers of the Court often maintain that when a law is struck down under a purported rational basis test, the Court is not actually applying ‘true rational basis’ review but rather is employing ‘rational basis with a bite.’”).
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recognized that enforcing voter registration deadlines promotes a state’s important interests in “prepar[ing] adequate voter records and protect[ing] its electoral processes from possible fraud.” These interests only grow in magnitude as an election draws closer.

Moreover, allowing late registrations after the deadline passed would deprive third parties, including candidates, from reviewing new voter registrations to identify fraudulent ones. Particularly when third-party groups such as the former ACORN and its affiliates,257 as well as their counterparts on the right,258 engage in voter registration efforts shortly before the deadline, there is a high risk that substantial numbers of registrations will be erroneous or fraudulent, requiring even closer scrutiny from election officials.259

In concluding that Florida’s voter registration deadline failed Anderson-Burdick balancing and was irrational, the court also failed to address the fact that, only eight years earlier, a sister court in the Southern District of Florida upheld the deadline’s constitutionality.260 The Southern District held that Florida “provides ample opportunities for all of its citizens to submit completed voter registration forms in a timely fashion.”261 It explained:

The year-round nature of voter registration, the liberal availability of voter registration applications, the assistance that election officials offer to applicants and third-party groups, the numerous means of submitting completed applications, and the requirement of prompt notice to applicants who submit incomplete applications refute any suggestion that the registration deadline practically burdens the ability of Floridians to register to vote.

Florida law provides every opportunity for applicants to effect

256 Marston v. Lewis, 410 U.S 679, 680 (1973) (per curiam); see also Dunn v. Blumstein, 405 U.S. 330, 348 (1972) (recognizing that election officials reasonably could require at least thirty days to “complete whatever administrative tasks are necessary to prevent fraud” with regard to new voter registrations).

257 See supra notes 102–03.

258 See Joseph Tanfani et al., RNC Dumps Vote Consultant; Florida Investigating Allegations of Fraud by Company Hired to Register Voters, ORLANDO SENTINEL, Sept. 28, 2012, at A3 (explaining that a consulting firm hired by the RNC was under investigation for allegedly submitting fraudulent voter registration forms); see also Joseph Tanfani, In Voter Registration Drives, Some See License for Fraud; Abuses at Sign-Up Events Eclipse Deception at Polls, ORLANDO SENTINEL, Nov. 2, 2012, at A10 (“Almost every election season, these [voter registration] campaigns—which typically pay workers to collect registrations—lead to charges of trickery and fraud: forged signatures, made-up names, voters who say they were duped into registering with the wrong party.”).


260 Diaz, 541 F. Supp. 2d 1319.

261 Id. at 1333–34.
their registrations long before books close twenty-nine days before an election.\textsuperscript{262}

While Hurricane Matthew imposed unexpected substantial burdens on voters in the days immediately preceding the 2016 voter registration deadline, nearly all of the Southern District’s observations remained applicable.

The Southern District went on to declare that enforcing the deadline served a public interest that was not merely “important,” but “compelling.”\textsuperscript{263} The deadline “provides a certainty and reliability that enable election officials to direct their efforts to the essential tasks of election preparation and thus minimizes the degree of disorder and the risk of error and even chaos.”\textsuperscript{264} The court recognized that, “between the registration deadline and election day, local election officials operate under immense pressure to complete the multitude of critical tasks imposed on them by law and by practice.”\textsuperscript{265} It identified and discussed ten discrete sets of responsibilities election officials must fulfill, primarily within that short period.\textsuperscript{266} As a result, election officials face “enormous pressure” and “stress” that should not be unnecessarily exacerbated.\textsuperscript{267} Enforcing the deadline “decreases the confusion and distraction . . . and thereby reduces the risk of error and disorder in Florida’s election process.”\textsuperscript{268} All of the compelling interests the court identified are only magnified following the dislocation, delay, and last-minute adjustments to polling places and election personnel that a hurricane entails.

Thus, in the Hurricane Matthew litigation, the Northern District erred in applying strict scrutiny and concluding that enforcement of Florida’s deadline could not survive rational basis scrutiny. Though it is a more subjective call, the court’s \textit{Anderson-Burdick} analysis was one-sided and likely incorrect, as well, minimizing or ignoring most of the considerations the Southern District found persuasive. The Constitution did not require extension of the voter registration deadline due to Hurricane Matthew.

\textsuperscript{262} \textit{Id.} at 1334–35 (emphasis added).
\textsuperscript{263} \textit{Id.} at 1335.
\textsuperscript{264} \textit{Id.}
\textsuperscript{265} \textit{Id.}
\textsuperscript{266} \textit{Id.} at 1336–39.
\textsuperscript{267} \textit{Id.} at 1340.
\textsuperscript{268} \textit{Id.}
2. Georgia

The Georgia NAACP and several other left-wing groups filed multiple federal lawsuits in Georgia, seeking to extend that state’s voter registration deadline of Tuesday, October 11, as well. The first case, filed on October 12 in the U.S. District Court for the Southern District of Georgia, sought to extend the deadline only for Chatham County. As the court explained:

[T]he Chatham County Board of Elections office was closed from October 6 to October 12, 2016. Moreover, post office closures and the suspension of mail service during this period also prevented individuals from submitting their registration applications. Finally, many individuals were potentially unable to register, either in person or electronically, due to evacuation or recovery efforts.

The plaintiffs asked the court to extend the voter registration deadline to October 18 in Chatham County. The state objected, arguing that extending the deadline would significantly burden election officials, particularly since early voting was scheduled to begin on October 17. The court expressed “significant reservations” about the plaintiffs’ claims and recognized that the state “may not be under any obligation” to extend the deadline. It opined that granting an extension was nevertheless “the right thing to do.” The undeniable “administrative difficulty” of extending the deadline, the court explained, “pale[s] in comparison to the physical, emotional, and financial strain Chatham County residents faced in the aftermath of Hurricane Matthew.” It added, “Extending a small degree of common courtesy by allowing impacted individuals a few extra days to register to vote seems like a rather small consolation.”

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269 The Democratic Party did not directly devote any resources to this case. Georgia was not considered a “swing state” in the 2016 presidential election. See Charles Mahtesian, What Are the Swing States in 2016?, POLITICO (June 15, 2016, 5:37 AM), http://www.politico.com/blogs/swing-states-2016-election/2016/06/what-are-the-swing-states-in-2016-list-224327.
271 Id. at 1345.
272 Id.
273 Id.
274 Id.
275 Id. at 1345.
276 Id.
277 Id. at 1345–46.
On October 14, the court granted a preliminary injunction extending the voter registration deadline in Chatham County to October 18. It limited its relief to that county, however, and refused to extend its order statewide. On October 18, the NAACP filed another TRO request before the same judge, this time seeking to extend the voter registration deadline to October 25 for the entire state. The court noted that, while the Chatham County Board of Elections had been closed for the week before the deadline and did not reopen until the deadline had passed, other counties’ boards of elections had closed for only two or three days and reopened prior to the deadline. It further declared that the State of Georgia had not burdened anyone’s right to vote. Neither Hurricane Matthew, nor the resulting power failures and home damage, were “impediments created by the State of Georgia that require it to provide an extension to the voter registration deadline.”

Setting aside its state action concerns, the court went on to apply the Anderson–Burdick balancing test. It concluded that enforcing the voter registration deadline on people outside of Chatham County imposed only a limited burden on their rights, because other counties’ voter registration offices had reopened before it passed. The state, in contrast, had a substantial interest in allowing the election to proceed without reopening voter registration. Early voting had already commenced; forcing the state to register new voters while voting was occurring would cause substantial “administrative and technological difficulties.” Thus, enforcing the voter registration deadline throughout the state would not violate people’s right to vote. The court denied the request for a statewide TRO, and the plaintiffs voluntarily dismissed the case.

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278 Id. at 1344, 1346.
279 Id. at 1346 n.2.
281 Id.
282 Id. at *3.
283 Id. at *2.
284 Id.; see supra note 245.
286 Id. at *3.
287 Id.
288 Id.
289 Id. at *4.
3. A Tale of Two States

The differences between the Florida and Georgia rulings arising from Hurricane Matthew raise two key questions common to all election emergencies. First, at what point is a disruption sufficiently severe to warrant suspending voting laws, requirements, or procedures? Second, how broadly should any such suspension apply? The Florida court unilaterally extended the voter registration deadline for all voters throughout the state.\(^{290}\) The Georgia court, in contrast, extended the registration deadline exclusively for Chatham County, the only county whose board of elections remained closed past the deadline as a result of Hurricane Matthew.\(^{291}\)

In one sense, the Florida court’s ruling was fairer because it ensured that voter registration would not be extended only within geographic areas favorable to one political party, or only for people seeking to join a particular party. On the other hand, it was impermissibly overbroad because it enjoined enforcement of state law, even under circumstances in which it could have been constitutionally applied. The Georgia court’s approach, in contrast, was likely procedurally proper, yet opened the door to political manipulation. Partisan or ideological groups could bring limited lawsuits seeking relief only for geographic areas whose residents are likely to vote for their preferred candidates, leaving the rights of others throughout the state unenforced.

The litigation process is generally better suited for resolving traditional disputes\(^{292}\) than recrafting the complex, bureaucratic, fundamentally adversarial electoral process. Moreover, the Supreme Court has interpreted the Constitution as requiring courts to apply vague, ad hoc, unavoidably subjective standards in deciding whether voting-related restrictions are permissible.\(^{293}\) In light of these concerns, courts should not be forced to constitutionalize election-related emergencies by adjudicating their consequences, particularly in the context of rushed TRO and preliminary injunction hearings. Rather, states should pass election-specific emergency laws that empower election


\(^{291}\) Bethea, 2016 WL 6123241, at *3.

\(^{292}\) See Lon L. Fuller, The Form and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978) (contrasting the types of disputes the adjudicative process is structured to resolve with “polycentric” disputes that courts are ill-equipped to handle); cf. Owen Fiss, The Forms of Justice, 93 Harv. L. Rev. 1 (1978) (arguing that courts are well-suited to adjudicate cases involving public values, rather than solely traditional disputes between parties).

\(^{293}\) See supra note 245.
officials to address terrorist attacks, natural disasters, and other calamities based on objective, specific provisions.294

II. ELECTION EMERGENCIES AND CONSTITUTIONAL CHALLENGES

When emergencies occur shortly before or during an election, candidates or political parties often seek TROs or preliminary injunctions to compel election officials to modify the applicable rules and procedures. Such litigation is especially likely when states lack emergency laws that specifically empower election officials to adjust to unexpected exigencies.

This Part begins by exploring courts’ power to delay or reschedule elections, including federal races. It then examines the circumstances under which election emergencies warrant constitutional relief. This Part goes on to consider the proper timing of constitutional challenges based on election emergencies and the appropriate geographic scope of relief. After explaining why courts should be especially cautious in adjudicating such cases, this Part concludes by discussing the special case of polling place hour extensions.

A. Judicial Power to Delay or Reschedule Elections

Courts may postpone elections or order re-votes, despite laws governing elections’ timing, when necessary to prevent or correct constitutional violations stemming from election emergencies.295 For example, federal law provides that elections for the U.S. House of Representatives must be held on the “Tuesday next after the 1st Monday in November, in every even numbered year.”296 The Supreme Court has held this law requires that “the final act of selection” for congressional candidates be made on Election Day.297 Under 2 U.S.C. § 8, however, “the laws of the several States” may require House elections be held on a different day when a vacancy exists due to “a failure to

294 See infra Part III.

295 See, e.g., Mulroy, supra note 8 (arguing that the Florida Circuit Court for Palm Beach County had power to order a re-vote in the 2000 presidential election because the “butterfly ballot” was unconstitutionally confusing).

296 2 U.S.C. § 7 (2012). Despite this statute, courts have approved both early voting, Millsaps v. Thompson, 259 F.3d 535, 549 (6th Cir. 2001) (affirming validity of early voting laws because a “final selection of federal officeholders” is not made until Election Day); Voting Integrity Project, Inc. v. Bomer, 199 F.3d 773, 777 (5th Cir. 2000) (same), and state laws requiring federal elections to be conducted entirely by mail, Voting Integrity Project, Inc. v. Keisling, 259 F.3d 1169, 1176 (9th Cir. 2001) (“Although voting takes place, perhaps most voting, prior to election day” under Oregon’s vote-by-mail system, “the election is not ‘consummated’ before election day because voting still takes place on that day.”).

elect [a Representative] at the time prescribed by law.” 298 Thus, state election emergency statutes may authorize state officials to change the date of a House election due to exigent circumstances. 299 Moreover, if a state or federal court concludes that an election emergency will cause (or has caused) violations of the U.S. Constitution or a federal statute, its remedial powers would supersede the federal statute adopting a uniform Election Day. 300

Federal law also requires that U.S. Senate elections be held, as necessary, at the same time as House elections. 301 The plain text of 2 U.S.C. § 8 is limited solely to House elections, however, 302 and no other federal law authorizes Senate elections to be held on a different day if a senator is not elected on Election Day. The courts that have considered the issue have nevertheless held that § 8 applies equally to Senate elections. 303 The only reason the statute does not mention rescheduling Senate elections is that it was enacted prior to the Seventeenth Amendment’s ratification, 304 when state legislatures still appointed senators. 305 This argument has weakened over time, however, because Congress amended § 8 in 2005 to address major disasters that kill more than 100 members of the House of Representatives, yet did not take the opportunity to include senators. 306 Nevertheless, since federal courts have

299 See Busbee v. Smith, 549 F. Supp. 494, 526 (D.D.C. 1982) (three-judge court) (“Congress did not expressly anticipate that a natural disaster might necessitate a postponement, yet no one would seriously contend that [federal law] would prevent a state from rescheduling its congressional elections under such circumstances.”); see also infra Section II.B.
300 See Busbee, 549 F. Supp. at 525.
301 2 U.S.C. § 1 (2012) (“At the regular election held in any State next preceding the expiration of the term for which any Senator was elected . . . at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected . . .”).
302 Id. § 8(a) (authorizing “elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy”).
303 See Judge v. Quinn, 623 F. Supp. 2d 933, 935 (N.D. Ill. 2009) (rejecting the argument that an election to fill a Senate vacancy may be held only on Election Day because, although 2 U.S.C. § 8 “refers only to ‘Representative[s]’ and ‘Delegate[s],’” it “has been construed to apply by implication to Senators as well”), aff’d on other grounds, 612 F.3d 537, 557 (declining to “comment on this argument”), amended and reh’g en banc den’d, 387 F. App’x 629 (7th Cir. 2010); Public Citizen, Inc. v. Miller, 813 F. Supp. 821, 829 n.8 (N.D. Ga. 1993) (“Because the election of Senators is governed by the same timing restriction as is the election of Representatives in 2 U.S.C. § 7, this Court is convinced that section 8 applies equally to Senators and Representatives.”), aff’d mem., 992 F.2d 1548 (11th Cir. 1993); see also Foster v. Love, 522 U.S. 67, 71 n.3 (1997) (holding that, under 2 U.S.C. § 8, if no House candidate “receives a majority vote on federal election day, there has been a failure to elect and a subsequent run-off election is required”).
304 See Act of Feb. 2, 1872, ch. 11, § 4, 17 Stat. 28, 29 (1872); see also Miller, 813 F. Supp. at 829 n.8 (“The United States Congress enacted 2 U.S.C. § 8 in 1872, 41 years before the ratification of the Seventeenth Amendment which provides for the popular election of United States Senators.”).
305 U.S. Const. art. I, § 3, cl. 1.
routinely permitted Senate run-offs to be held after Election Day when required by state law.\textsuperscript{307} Federal law would likely pose no obstacle to election officials or courts postponing Senate elections until after Election Day due to an election emergency. In any event, as with House races, the federal statutory requirement that Senate races to be held on Election Day would not prevent courts from rescheduling a Senate election or ordering a re-vote when necessary to prevent an election emergency from causing violations of federal constitutional or statutory rights.

Presidential elections raise more difficulties. Federal law requires states to appoint presidential electors on Election Day in presidential election years.\textsuperscript{308} When a state holds a presidential election but “fail[s] to make a choice” on Election Day, “the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct.”\textsuperscript{309} Like 2 U.S.C. § 8, this provision authorizes states to delay elections due to emergencies. It may be objected that this provision allows electors only to be “appointed” rather than elected, “on a subsequent day.”\textsuperscript{310} But the Constitution consistently uses the word “appoint” to refer to the selection of electors,\textsuperscript{311} and no one questions the propriety of state legislatures choosing electors through elections.\textsuperscript{312}

The Constitution contains an additional provision, however, that applies solely to presidential races. It states, “Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.”\textsuperscript{313} At least one court has held that this provision requires that electors be chosen on the same day throughout the nation: Election Day.\textsuperscript{314} This reading is mistaken, however. While Article II states that electors throughout the nation must cast their votes on the same day, it does not expressly require that electors also be selected on

\textsuperscript{307} \textit{Foster}, 522 U.S. at 71 (recognizing that 2 U.S.C. § 8 allows states to hold run-off elections when no candidate receives a majority on Election Day); \textit{Miller}, 813 F. Supp. at 831 (holding that, when a state experiences a “legitimate failure to elect” a senator because no candidate obtained a majority on Election Day, 2 U.S.C. § 8 permits a state to hold a subsequent run-off election due to “exigent circumstances”).

\textsuperscript{308} 3 U.S.C. § 1 (2012).

\textsuperscript{309} Id. § 2.

\textsuperscript{310} Id.

\textsuperscript{311} U.S. Const. art. II, § 1.

\textsuperscript{312} Mulroy, supra note 8, at 239; \textit{see also} Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

\textsuperscript{313} U.S. Const. art. II, § 1, cl. 4.

\textsuperscript{314} Fladell v. Elections Canvassing Comm’n of Fla., Nos. CL 00-10965 AB et al., 2000 Fla. Cir. LEXIS 755, at 76 (Fla. Cir. Ct. Nov. 20, 2000) (“Because Presidential elections are the only national elections held in our country, our forefathers included clear and unambiguous language in the Constitution of the United States which require that Presidential ‘electors’ be elected on the same day throughout the United States.”), aff’d on other grounds sub nom. Fladell v. Palm Beach Cty. Canvassing Bd., 772 So. 2d 1240, 1242 (Fla. 2000).
a uniform day. This plain-meaning interpretation is consistent with historical practice; in the decades following the Constitution’s ratification, “presidential elections were held on different days in different states.” Thus, there are no impediments to a court postponing or ordering a re-vote in federal elections, including presidential races, in extreme cases when an electoral emergency requires it.

B. Constitutional Challenges Based on Election Emergencies

Federal constitutional challenges to impending or ongoing elections generally arise under the Fourteenth Amendment’s Due Process or Equal Protection Clauses. State constitutions contain a range of other election-related provisions that limit states’ discretion, but most involve legal standards substantially equivalent to the Fourteenth Amendment. In general, a person’s Fourteenth Amendment right to vote may be violated only by intentional government conduct such as the adoption of malapportioned redistricting schemes, enactment of statutes that restrict the franchise or impose undue burdens on the electoral process, or racial discrimination.

Note:

315 Harris v. Fla. Elections Canvassing Comm’n, 122 F. Supp. 2d 1317, 1324 (N.D. Fla. 2000) (“[T]he Day that ‘shall be the same throughout the United States’ is the Day that the already-chosen Electors give their votes, not the ‘Time of chusing’ [sic] them. Thus, this clause, standing alone does not require that individual voters all choose the Electors on the same day.”); Lynne H. Rambo, The Lawyers’ Role in Selecting the President: The Complete Legal History of the 2000 Election, 8 TEX. WESLEYAN L. REV. 105, 127 n.131 (2002) (“Because the Framers chose to use the term ‘Time’ in the first clause, dealing with Election Day, and yet the term ‘Day’ in the second clause, dealing with the date of the electoral college, and then repeated the term ‘Day’ in the third clause, one could conclude that the Constitution requires only that the date of the electoral college be uniform throughout the United States.”); see also Mulroy, supra note 8, at 230 (same).

316 Mulroy, supra note 8, at 230.

317 U.S. CONST. amend. XIV, § 1.


319 Morley, supra note 22, at 190–91.

320 See, e.g., Welker v. Clarke, 239 F.3d 596, 597 n.3 (3d Cir. 2001) (exercising jurisdiction over plaintiff’s claim that election officials intentionally conspired to allow non-residents and people registered at fraudulent addresses to vote in order to benefit a particular candidate).

321 Reynolds v. Sims, 377 U.S. 533, 568 (1964) (“[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.”); Carrington v. Rush, 380 U.S. 89, 94 (1965) (“‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”).


Changing the rules governing an election after it has occurred also raises a serious threat of due process violations.325

A state’s failure to accept or count people’s votes due to “garden variety election irregularities,” in contrast, generally does not raise constitutional issues.326 A voter’s due process and equal protection rights are not violated when state officials inadvertently or negligently violate state election statutes,327 miscount or disregard votes,328 allow ineligible people to vote,329 misapply rules,330 or improperly count invalid absentee ballots,331 or where mechanical error, “human error,” or “[v]oting device malfunction[s]”332 occur.333

325 Bennett v. Yoshino, 140 F.3d 1218, 1226–27 (9th Cir. 1998) (holding that a due process violation occurs where there has been “likely reliance by voters on an established election procedure and/or official pronouncements” and “significant disenfranchisement . . . results from a change in the election procedures”); Roe v. Alabama, 43 F.3d 574, 582 (11th Cir. 1995) (holding that a state court’s new interpretation of its absentee voting law after votes were cast violated due process because, “had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary . . . would suffice” to render an absentee ballot valid, “campaign strategies would have taken this into account” and some people “who did not vote would have voted absentee”); Griffin v. Burns, 570 F.2d 1065, 1078–79 (1st Cir. 1978) (holding that the Secretary of State’s refusal to count absentee ballots in a primary election after election officials had issued them and voters cast them violated due process); Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970) (holding that the Due Process Clause prohibited an election board from refusing to accept candidate petitions based on a newly announced interpretation of the rules).

326 Griffin, 570 F.2d at 1076; accord Bennett, 140 F.3d at 1226; Hutchinson v. Miller, 797 F.2d 1279, 1283 (4th Cir. 1986); see also Hennings v. Grafton, 523 F.2d 861, 864 (7th Cir. 1975) (“It is not every election irregularity . . . which will give rise to a constitutional claim . . . .”).

327 Snowden v. Hughes, 321 U.S. 1, 7, 11 (1944) (holding that the State Primary Canvassing Board did not violate the Fourteenth Amendment by excluding a candidate who had placed second in the Republican primary from the general election ballot, even though the Republican party was entitled to nominate two candidates); see also Hennings, 523 F.2d at 864 (refusing to recognize due process claim where election officials improperly failed to distribute paper ballots after voting machines malfunctioned).

328 Bodine v. Elkhart Cty. Election Bd., 788 F.2d 1270, 1271, 1273 (7th Cir. 1986) (holding that no constitutional violation occurred when election officials used an untested vote tabulation system that repeatedly generated errors in violation of state law); Gamza v. Aguirre, 619 F.2d 449, 451, 454 (5th Cir. 1980) (holding that no constitutional violation occurred where erroneously configured voting machines caused a dispositive number of votes for a candidate to be disregarded).

329 Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970) (rejecting a constitutional challenge to primary election results where election officials improperly allowed non-party members to vote in a closed party primary).

330 Curry v. Baker, 802 F.2d 1302, 1307–08, 1317 (11th Cir. 1986) (holding that the plaintiff’s due process rights were not violated when a state party committee rejected 14,000 votes cast in violation of a party anti-crossover rule, and reduced candidates’ vote tallies based on public opinion polls and speculation as to the candidates for whom those ballots had been cast).

331 Pettengill v. Putnam Cty. R-1 Sch. Dist., 472 F.2d 121, 122 (8th Cir. 1973) (holding that no constitutional violation arose from election officials’ decision to count absentee ballots that were “void” due to “irregularities in [their] application, delivery or execution”).

332 Shannon v. Jacobowitz, 394 F.3d 90, 91–92, 97 (2d Cir. 2005) (holding that the plaintiffs had not stated a due process claim when a voting machine failed to record between sixty-nine and 139 votes for a
An election violates the Due Process Clause only in the “exceptional case” where it is “fundamentally unfair.” A refusal to hold a statutorily or constitutionally required election, for example, “would work a total and complete disenfranchisement of the electorate, and therefore would constitute a violation of due process.” Likewise, the Sixth Circuit found that the plaintiffs had stated a due process claim arising from Ohio’s 2006 congressional elections in alleging:

[R]egistered voters were denied the right to vote because their names were missing from the rolls. Inadequate provision of voting machines caused 10,000 Columbus voters not to vote. Poll workers improperly refused assistance to disabled voters. Provisional ballots were not distributed to appropriate voters, causing voters to be denied the right to vote.

The court concluded that these allegations “could support a troubling picture of a system so devoid of standards and procedures as to violate substantive due process.”

Under these standards, election emergencies that have a reasonable likelihood of substantially disrupting an impending or ongoing election and denying a significant proportion of the electorate an opportunity to vote would violate due process. To rise to the extreme level of a due process violation, an election emergency must make voting or the conduct of the election unreasonably dangerous or impracticable, rather than merely inconvenient or time-consuming. Moreover, the emergency must completely preclude voting by a substantial fraction of the electorate, rather than causing only isolated, candidate who lost by twenty-five votes because government officials had not engaged in intentional misconduct).

333 *Hennings*, 523 F.2d at 864 (holding that plaintiffs had not stated a constitutional claim when their votes were not recorded due to voting machine malfunctions).
335 *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1971); accord *Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996).
336 *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 75 (1st Cir. 2001); *see also Duncan v. Polylkress*, 657 F.2d 691, 703 (5th Cir. 1981) (holding that “the denial of a legally-required election obviously” violates constitutional rights).
337 *Brunner*, 548 F.3d at 478.
340 See, e.g., *State v. Marcotte*, 89 A.2d 308, 312 (Me. 1952) (“There was a storm of such unusual proportions and such unexpected violence that it might well be considered that there was no election due to an ‘act of God.’”).
discrete problems. Ordinary obstacles such as heavy rain or snow are insufficient to empower a court to delay or cancel an election:

Elections must of necessity be held in all kinds of weather. If an election is held in fact, it is valid, though there may have been interference as there was here by the elements. The vote may be reduced thereby or the outcome changed, but qualified voters who fail to go to the polls to vote under the circumstances will be bound by the expressed will of those who do.

When voters have an extended period of time to engage in an activity, such as registering to vote or engaging in early voting, the Constitution generally does not entitle them to deadline extensions due to election emergencies. Election laws, restrictions, and procedures generally do not violate Due Process or Equal Protection restrictions unless they are unduly burdensome under the Anderson-Burdick standard. In determining the burden imposed by a voting-related requirement, among the most important considerations are the amount of time a person had to comply with it and alternative ways of satisfying it.

For example, people may register to vote for an impending election at any time between the voter registration cutoff for the previous election and the voter registration deadline for that upcoming race. Depending on the event chosen as the starting point, this period often will typically be months or even years long. Requiring a person to submit a voter registration form at some point over the course of several months or years is not an undue burden, even if circumstances unexpectedly wind up making it more difficult to register at the last minute. By choosing to wait until the end of a lengthy registration

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341 See Peterson v. Cook, 121 N.W.2d 399, 400–02 (Neb. 1963) (holding that an election conducted five days after a major blizzard was valid, despite the fact that some voters “wholly or partly isolated by drifts could not get out to vote”); cf. State ex rel. Sch. Dist. v. Schmiesing, 66 N.W.2d 20, 27 (Minn. 1954) (holding that an election remained valid even though three precincts did not open due to a heavy snowstorm, because the proposition being voted on overwhelmingly passed and votes from those precincts would not have made a difference).

342 Peterson, 121 N.W.2d at 402 (quoting Schmiesing, 66 N.W.2d at 27).


344 Cf. Morley, supra note 245, at 297 (“The severity of the remedy set forth in § 2 [of the Fourteenth Amendment] strongly implies that the right to vote protects individuals against acts that are sufficiently serious to warrant the extreme relief of reduction in representation: actual, literal disenfranchisement.”).

345 For example, for a voter seeking to register to vote specifically in a presidential or congressional election, one might reasonably measure the time since the voter registration cutoff for the previous presidential or congressional election, which would be approximately two or four years earlier. If one measures instead from the voter registration cutoff for the primary election or the most recent state or local general election, the registration period may be only months long.

period before attempting to register, a person necessarily runs the risk that circumstances ranging from personal tragedy to natural disaster might interfere with registration.

States, conversely, have important interests in adhering to voter registration deadlines in the wake of election emergencies to allow them to focus their resources on recovering from the emergency, ensuring the accuracy of voter registrations they have received, relocating polling places as needed, ensuring adequate staffing for the voting period, and otherwise minimizing the likelihood of errors or delays in voting. Even if a person’s individualized circumstances may occasionally give rise to an as-applied due process claim warranting relief specifically for him or her, an election emergency should seldom warrant extending a voter registration deadline on a large-scale basis.

A similar analysis applies to early voting periods. Voters do not have a constitutional right to engage in absentee or early voting. Indeed, approximately a dozen states do not have early voting and allow absentee voting only for certain groups of voters, such as the disabled (“excuse-based” absentee voting). Because early voting is constitutionally gratuitous, a state may satisfy the constitutional right to vote by offering an opportunity to vote on Election Day itself. If people in some regions of a state receive a few extra days of early voting because an election emergency requires that polling places elsewhere be shut down, such circumstances do not constitute intentional discrimination that would trigger Equal Protection concerns. A deadline for

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348 See Morley, supra note 234, at 550–53 (arguing that courts should presumptively award Plaintiff-Oriented Injunctions enforcing the rights only of the litigants before them).

349 Although few precedents squarely address early voting, the Supreme Court has held that the Constitution does not require absentee voting, which may be considered a type of early voting. McDonald v. Bd. of Election Comm’rs, 394 U.S. 802, 807 (1969) (holding that the “claimed right to receive absentee ballots” is not a component of the constitutionally protected “right to vote”); see also Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 209 (2008) (Scalia, J., concurring) (“That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.”); O’Brien v. Skinner, 414 U.S. 524, 536 (1974) (Blackmun, J., dissenting) (“The State, after all, as a matter of constitutional requirement, need not have provided for any absentee registration or absentee voting.”); Griffin v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004) (declining to recognize “a blanket right of registered voters to vote by absentee ballot”); but see Obama for Am. v. Husted, 697 F.3d 423, 435–36 (6th Cir. 2012) (holding that ending in-person early voting earlier for civilians than members of the military was unconstitutional).


351 Snowden v. Hughes, 321 U.S. 1, 8–9 (1944) (rejecting a candidate’s Equal Protection claim arising from his exclusion from the ballot because the state had not engaged in intentional discrimination); see also Southerland v. Fritz, 955 F. Supp. 760, 762 (E.D. Mich. 1996) (holding that an election modification in a
early voting remains “a neutral, nondiscriminatory regulation of voting procedure”\textsuperscript{352} that does not trigger heightened constitutional scrutiny, even when an election emergency cuts it short for some people. The need to extend early voting periods is even further reduced in the twenty-seven states that allow no-excuse absentee voting.\textsuperscript{353} In such jurisdictions, voters who do not wish to vote in person on Election Day may request absentee ballots and vote by mail. Consequently, Due Process and Equal Protection concerns virtually never require the extension of early voting periods due to election emergencies.

In cases where an election emergency actually threatens to cause or causes a constitutional violation, a court should tailor its relief to allow the state to enforce its election laws to the greatest extent practicable.\textsuperscript{354} Modifying the rules governing elections raises separation of powers and sometimes federalism concerns.\textsuperscript{355} In most cases, such as Hurricane Sandy,\textsuperscript{356} election modifications—discrete changes to particular election laws to remedy substantial burdens on the right to vote\textsuperscript{357}—should be sufficient. In extreme cases, such as September 11,\textsuperscript{358} an election postponement will be the only appropriate remedy. A court should not order a complete election cancellation, however. Such an extreme step should not be considered a possible remedy for constitutional violations, but rather is appropriate only when deemed necessary by government officials acting pursuant to an election emergency statute. Postponements and modifications are more finely tailored remedial tools for constitutional violations than complete cancellations.

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\textsuperscript{352} Crawford, 553 U.S. at 203 (plurality).
\textsuperscript{353} Id.
\textsuperscript{354} See Lewis v. Casey, 518 U.S. 343, 357 (1996) (holding that a judicial remedy for a constitutional violation “must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established”); Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (“[T]he nature of the [constitutional] violation determines the scope of the remedy.”).
\textsuperscript{355} The Constitution places primary responsibility for regulating elections on the political branches, including Congress and state legislatures. Morley, supra note 21, at 90–92; cf. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (recognizing that selection of government officials is “a decision of the most fundamental sort for a sovereign entity”).
\textsuperscript{356} See supra Section I.C.
\textsuperscript{357} See supra note 188 and accompanying text.
\textsuperscript{358} See supra Section I.A.
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C. The Timing of Election Challenges

The timing of requests for emergency relief concerning impending elections based on natural disasters, terrorist attacks, or other calamities is a critical consideration. A court may properly reject a request submitted too early before a potential disaster on the grounds that the plaintiffs have failed to show that a sufficiently imminent likelihood of future injury exists.\(^{359}\) It can be difficult to predict the path of a hurricane or tornado even a few days in advance.\(^{360}\) Hurricanes that appear potentially devastating may change direction or be downgraded to tropical storms before making landfall.

In 2011, for example, the New York City subway system was closed, Broadway shuttered, and approximately 370,000 residents evacuated in preparation for Hurricane Irene.\(^{361}\) Irene was redesignated a tropical storm before hitting New York City, however, and “the worst nightmare scenarios did not materialize”; the Hudson River did not overflow and subway tunnels did not flood as predicted.\(^{362}\) Courts should avoid delaying or modifying the rules of an election unless such relief is highly likely to be necessary. They should generally decline to do so as a purely prophylactic measure, based on a possibility short of a substantial likelihood that a disaster will hit in a few days.

Conversely, while courts in appropriate circumstances may order revotes,\(^{363}\) they should apply the doctrine of laches\(^{364}\) aggressively to impose a strong presumption against \textit{ex post} constitutional challenges to elections based

\(^{359}\) See, e.g., Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983) (holding that a plaintiff seeking injunctive relief must prove the existence of a “real and immediate threat” to its rights).

\(^{360}\) See Brian Helmuth, \textit{Forecasting the Impacts of Climate Change on Coastal Ecosystems: How Do We Integrate Science and Policy?}, 16 S.E. ENVTL. L.J. 207, 218 (2007).


\(^{363}\) See Hasen, supra note 8, at 992; Malroy, supra note 8; supra notes 17, 39 and accompanying text.

\(^{364}\) See Bowman v. Wathen, 42 U.S. (1 How.) 189, 194 (1843) (“The doctrine of an equitable bar by lapse of time, so distinctly announced by the chancellors of England and Ireland . . . should now be regarded as settled law by this court.”); see also McQuiddy v. Ware, 87 U.S. (20 Wall.) 14, 19 (1874) (“Equity always refuses to interfere where there has been gross laches in the prosecution of rights.”).
on disasters after voter turnout and, especially, the results of the election are
known. As Professor Richard L. Hasen explains:

Allowing post-election review when pre-election review would
have been relatively easy to request essentially gives a campaign
the “option” whether to sue: The campaign identifying a potential
election problem can sit on its hands until it sees the election
results, and if it does not like the election results it can use the
problem as an excuse to get a more favorable outcome. It is far
better to have a legal system that discourages such speculation
and encourages preventing harm in elections that would prove
difficult to undo after the fact.

One potential difficulty in applying laches in this context is that,
particularly if courts assiduously refuse to entertain premature or unripe
claims, as recommended above, the window for bringing a lawsuit may be only
a day or two long, and a post-election challenge may be untimely by only a
few days. The Supreme Court, however, has recognized that laches is a flexible
doctrine, and the concept of “undue delay” must be assessed based on the
individualized circumstances of each case. The doctrine of estoppel by
laches is not one which can be measured out in days and months, as though it
were a statute of limitations. For what might be inexcusable delay in one case
would not be inconsistent with diligence in another.

Laches bars a claim when a party has prejudiced its opponent by failing to
diligently assert it. When an emergency appears likely to arise prior to an
election, but a litigant waits until afterwards to press its claims, it has failed to
act with the diligence the circumstances require. Moreover, once a jurisdiction
goes through the substantial time and expense of holding an election and
people have exercised their fundamental right to vote, the government, those
voters, and the prevailing candidates all would be substantially prejudiced by a
belated order nullifying the election. Thus, under the doctrine of laches, even
circumstances that amount to a constitutional violation and would have
warranted an ex ante election modification or postponement seldom should
warrant the extreme ex post relief of reopening or nullifying a completed
election.

See Hasen, supra note 8, at 998 (“Courts should see it as in the public interest in election law cases to
aggressively apply laches so as to prevent litigants from securing options over election administration
problems.”).

Id. at 994.


Id.

Thus, to be timely, a request for emergency relief concerning an upcoming election should be filed at the earliest reasonably possible point after it is substantially certain that an impending or ongoing disaster will impact the election. If such likelihood is reasonably ascertainable prior to an election, claims for relief once the election has commenced—and especially once it is over—should be denied due to laches. A plaintiff should be able to overcome laches in a post-election claim for relief only when: (1) one or more polling places closed permanently on Election Day and were not replaced, (2) the closures could not have been reasonably foreseen prior to the election, and (3) the number of uncast ballots from registered voters in the affected polling locations is sufficient to affect the outcome of the race(s) at issue.

D. Geographic Scope of the Election and Emergency

A court’s willingness to modify or postpone an election based on an election emergency should also depend on the geographic scope of both the election and the emergency. At one extreme, the easiest scenario is when an emergency encompasses the entire jurisdiction in which an election is to occur or occurred. In such cases, courts should be more willing to grant jurisdiction-wide relief because all voters participating in the election are affected, albeit to varying degrees. At the other extreme, if an emergency does not affect either government services or the ordinary course of business anywhere within the jurisdiction in which an election is being held, a court generally should not order relief there.

Two scenarios are much more difficult and admit no easy answers. It is precisely because such intractable circumstances are susceptible to multiple arguably reasonable solutions that states should settle on a particular approach ex ante and codify it in an election emergency statute.\textsuperscript{370} Judges should not be left to craft such remedies on an ad hoc basis in the midst of the emergency, purportedly as a matter of constitutional law, particularly when the likely beneficiaries of various potential remedies are known.

The first most troubling scenario is when a terrorist attack occurs during, or immediately before, early voting or Election Day. A terrorist attack at a polling place will damage it or render it a crime scene, thereby making that polling place unavailable. Election officials could attempt to redirect voters to a nearby replacement polling site, but such an attack is likely to frighten voters assigned

\textsuperscript{370} See infra Part III.
to other polling places, as well. People reasonably may fear that the attack is part of a coordinated effort, and that follow-up attacks may occur.

Voters assigned to any polling location that election officials shut down due to a terrorist attack, whether because the polling location is the site of the attack or as a precautionary measure, are entitled to an adequate alternate means of voting before the polls close. Part III of this Article proposes principles to guide development of an election emergency statute establishing the bounds of election officials’ authority to close polling places under such circumstances. In the event affected voters are not provided an adequate opportunity to vote before the election ends, the proper remedy depends on whether the number of disenfranchised voters exceeds the prevailing candidates’ margins of victory.371

The U.S. Constitution cannot reasonably be interpreted, however, as automatically entitling voters assigned to functional and accessible polling places that remain open following a terrorist attack to a court order granting another day of voting. First, courts are the constitutionally least appropriate branch to assess whether the severity of a terrorist attack is sufficient to warrant stopping or delaying an election. The Constitution specifically makes state legislatures and Congress—not the courts—responsible for determining the “times” of both congressional and presidential elections.372 Likewise, federal and state executive officials are primarily responsible for public safety. The President plays a unique anti-terrorism function in his capacity as Commander-in-Chief,373 while the state governor is primarily responsible for public safety.374 Subjective risk assessments concerning the need to postpone elections due to the possibility of additional attacks are quintessentially

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371 Hufnner, supra note 8, at 299–302.  
373 U.S. CONST. art. II, § 1; see Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) (“The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security . . . .”).  
political questions; the judiciary should not be in a position of second-guessing election officials’ decisions in this area.

Second, the fact that people may be deterred from voting after a terrorist attack occurs at some other location—potentially even in another municipality, county, or state—constitutes neither a substantial burden on their right to vote that triggers strict scrutiny, nor an unreasonable burden under Anderson-Burdick balancing. Any number of circumstances, including attacks either at home or abroad at any type of location, can reasonably cause people to be concerned about their safety at polling locations. If a polling place is open and operational, a person’s subjective fears about traveling there to cast a vote does not amount to state action violating anyone’s right to vote.

Third, holding as a matter of constitutional law that ongoing elections should be cancelled if a polling place is attacked would give terrorists a de facto veto over the conduct of American elections. Moreover, cancelling an election would magnify the consequences of the attack. Beyond the loss of life and devastation the attack itself caused, cancelling elections would create additional disruption and uncertainty.

If terrorists attack multiple polling places in succession, the prudential case for cancelling the election grows exponentially. As a practical matter, should the state or nation face such a coordinated series of strikes, it is virtually certain that executive or election officials would suspend the election before a court would be constitutionally obligated to do so. In the event that only one or two polling places are attacked, however, a court generally should not unilaterally assume power to declare that continuing the election would be unconstitutional.

Under this standard, Judge Fisher’s decision to suspend the ongoing primaries in New York City following the September 11 attacks was defensible. The initial attack destroyed and rendered inaccessible numerous polling places. A succession of follow-up attacks—the second plane, Flight 93, the Pentagon—made the extent of the terrorists’ plans uncertain. Given both the breadth of the destruction and number of attacks, cancelling the primaries throughout the city was a constitutionally defensible measure.

376 See supra note 245 (explaining the Anderson-Burdick balancing test).
377 See supra notes 27–30 and accompanying text.
Governor Pataki’s subsequent order cancelling primaries throughout the state was more debatable.\(^{378}\) He issued it pursuant to his statutory authority as Governor to suspend state laws during declared emergencies.\(^{379}\) It would have been less appropriate for a court to issue such a sweeping order on purportedly constitutional grounds. Though September 11 presents the extreme case in which broad protective measures would have been understandable, it is not clear that the attacks in Manhattan made it unconstitutional for elections to continue in Buffalo or upstate New York. Regardless, Governor Pataki’s actions following the September 11 attacks demonstrate that executive officials are virtually certain to cancel an election in the face of successive attacks, alleviating the need for courts to get involved.

A second difficult scenario arises when a natural disaster affects, or will affect, some but not all of the polling locations involved in an election—should the election be delayed everywhere, or just in the areas that are likely to be affected or actually affected? When run-of-the-mill issues develop on Election Day at only a few polling places, courts generally should deny constitutional relief.\(^{380}\) Beyond that, the scope of relief depends on the type of election at issue. Any disaster that is sufficiently serious to interfere with a local election will likely affect most or all of the voters in the relevant jurisdiction. Consequently, when relief is appropriate, courts generally should extend it to all voters and polling places within the affected locality or localities, but allow parallel elections in other municipalities to continue.

For congressional and statewide elections, including presidential elections, the issue is much more difficult. A disaster may affect, or be predicted to affect, only part of a state or large congressional district. Professor Steven J. Mulroy persuasively defends geographically limited relief in such cases, explaining it “target[s] relief narrowly to the places where the problem arose.”\(^{381}\) He points out that it may be “inequitable” to extend relief to “counties (or precincts) which did not suffer” problems.\(^{382}\) And granting geographically limited relief is preferable to simply “shrug[ging] off

\(^{378}\) See supra notes 32–34 and accompanying text.
\(^{379}\) See supra notes 33–35 and accompanying text.
\(^{380}\) See infra Section II.F.
\(^{381}\) Mulroy, supra note 8, at 242, 248 (“[A] partial revote might become desirable in a presidential election . . . [due to] fraud, terrorism, or natural disasters [that] . . . irreparably corrupt the election results, or prevent election results from even being recorded in the first place.”). Although Professor Mulroy wrote primarily about ex post re-votes, his reasoning applies equally to ex ante election modifications or postponements.
\(^{382}\) Id. at 242 (emphasis omitted).
acknowledged violations of voting rights by saying no remedy is available.”\textsuperscript{383} Although he recognizes that geographically limited relief may “skew” the results of the election by leading to a different result than otherwise would have occurred, “[t]he court must balance the unquantifiable ‘skewing’ potential . . . against the likelihood that the election results have already been skewed significantly” by the election emergency.\textsuperscript{384} Again, executive or election officials acting pursuant to well-crafted election emergency statutes have greater flexibility to approve election modifications, postponements, or cancellations than courts purporting to prevent or remedy constitutional violations.

E. Plaintiffs’ Structural Advantages in Election Emergency Litigation

Courts must be extremely cautious in granting petitions for emergency relief concerning impending or ongoing elections because plaintiffs in such cases enjoy several structural advantages. First, emergency petitions are often filed by prominent specialists, interest groups, or political parties that not only have tremendous experience in challenging election rules, but typically have extensively researched pleadings, motions, and briefs prepared in advance of major elections for key jurisdictions to address any contingencies that may occur. Litigators for defendant states and counties, in contrast, often lack such expertise in election law, are forced to defend against such suits and prepare responsive filings with virtually no notice, and usually lack any comparable motivation to vigorously defend the challenged provisions.

Second, due to the harried nature of most election litigation, the judge’s initial ruling will likely become a \textit{fait accompli}. Through careful forum shopping, plaintiffs can bring their emergency requests before a “progressive” judge who is most likely to grant relief and reject the government’s position as “poppycock.”\textsuperscript{385}

\textsuperscript{383} Id. at 243–44.
\textsuperscript{384} Id. at 243.
Third, election officials sometimes fail to vigorously defend challenged provisions, even when substantial arguments exist. In some cases, they are deterred from defending state election laws because the challengers stand ready to accuse them of voter suppression or disenfranchisement for seeking to enforce the provisions at issue.386 Knowing that some candidates rely upon voter suppression narratives for partisan ends, election officials sometimes take no position in litigation or fail to appeal adverse rulings, focusing primarily on minimizing adverse media coverage and avoiding last-minute attacks.387

Moreover, since challenges to election-related laws are typically brought as § 1983 civil rights actions,388 successful plaintiffs can recover substantial attorneys’ fees,389 even when the cases are brought pro bono.390 Defendants—particularly municipalities and counties—may be reluctant to risk being held liable for hundreds of thousands, or even millions, of dollars in fees, even when they have meritorious defenses. The threat of attorneys’ fees can intimidate officials into agreeing to injunctions against election laws that are likely constitutionally valid. Additionally, in some cases, the secretary of state or county clerk may actually oppose the requirements they are charged with enforcing. Though nominally defendants, they may eagerly exploit lawsuits brought by ideologically aligned groups by agreeing to nullify or narrowly

 provoked Judge Walker’s ire by asking for additional briefing time while defending the validity of a state law requiring that a voter’s signature on an absentee ballot match her signature of record for her vote to be counted, FLA. STAT. ANN. § 101.68(1), (2)(c)(1) (West Supp. 2017). Walker was apparently angry that voters who failed to sign their absentee ballots were permitted to correct the oversight, while voters with mismatched signatures were not given an opportunity to attempt to cure the defect. Stern, supra.


389 Id. § 1988; Perdue v. Kenny A., 559 U.S. 542, 552–57 (2010) (outlining principles for calculating attorneys’ fees); see also Riverside v. Rivera, 477 U.S. 561 (1986) (plurality) (holding that courts may award attorneys’ fees in civil rights cases that exceed the amount of compensatory damages recovered).

390 Blum v. Stetson, 465 U.S. 886, 895 (1984) (“‘[R]easonable fees’ under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel.”).
construe laws or regulations they would be unable to amend or repeal through the normal legislative or regulatory processes.\footnote{See Michael T. Morley, Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases, 16 U. PA. J. CONST. L. 637 (2014) (discussing the risk of collusive consent decrees in which plaintiffs and ideologically aligned government officials ask a court to invalidate and enjoin a legal provision).}

Finally, because plaintiffs incur no risk by bringing such lawsuits, ideologically aligned groups have every incentive to litigate repeatedly until they prevail, even when their claims are weak. The worst consequence for them is only maintenance of the status quo. A governmental defendant must successfully defend against every challenge to continue enforcing an election statute, while only one plaintiff need prevail to obtain an injunction.\footnote{See Morley, supra note 234, at 494, 522 (describing the asymmetrical claim preclusion that arises when courts issue Defendant-Oriented Injunctions in non-class cases).} In light of these considerations, courts should be particularly cautious in adjudicating emergency challenges to election-related rules to avoid giving an unfair advantage to one party or candidate.

F. The Special Case of Polling Place Hour Disputes

Most laws governing polling place hours do not contain provisions authorizing judges to hold polling places open longer in case of emergency. When an election statute establishes a closing time for polling places, neither election officials\footnote{State ex rel. Mitchell v. Wolcott, 83 A.2d 762, 764 (Del. 1951) (holding it was “beyond question” that an agreement among election officials and political party leaders to hold a polling place open for an additional hour and forty-five minutes because numerous people had yet to vote was “a violation of the election laws”); Hogg v. Caudill, 71 S.W.2d 1020, 1021 (Ky. App. 1934) (holding that, because state law “fixes the hour for closing the polls at 4 p.m.,” election officials lacked authority to delay a polling place’s closing time by an additional three hours, and “ballots cast after 4 p.m. are illegal”); Easler v. Blackwell, 10 S.E.2d 160, 163 (S.C. 1940) (holding that an election official lacked power to keep a polling place open for an extra two hours, “even though there is no suggestion of fraud”); Terry v. Sencindiver, 171 S.E.2d 480, 482, 484 (W. Va. 1969) (holding that a statute specifying the closing time for polling places was mandatory, and election officials lacked power to hold a polling place open for an additional hour and ten minutes, even though fifty to seventy-five people were seeking to vote); see also Boone v. Humphrey, 349 S.W.2d 822, 823 (Ky. 1961) (holding that election officials lack power to accept votes after a polling place closes); Varney v. Justice, 6 S.W. 457, 458–60 (Ky. 1888) (holding it was “illegal” for election officials to extend voting hours where voting problems at the precinct earlier in the day had prevented “a considerable number of the legal voters of the precinct” from voting, because the state constitution specified a mandatory closing time); Attorney ex rel. Pearson v. Folsom, 45 A. 410, 410 (N.H. 1899) (holding that election officials have “no right” to accept a vote after “the polls were legally closed”). But see Lane v. Fern, 20 Haw. 290, 300 (Haw. 1910) (noting that a statute requiring that polls be kept open until a certain time did not implicitly require they close at that time).} nor courts\footnote{Southerland v. Fritz, 955 F. Supp. 760, 761–62 (E.D. Mich. 1996) (refusing to issue temporary restraining order or preliminary injunction extending polling place hours at certain precincts due to} may unilaterally extend it for policy or
general fairness-related reasons. As the Supreme Court of Delaware explained, “The desire to give every citizen the opportunity to vote is natural and understandable, but it may not be allowed to override the law,” even if election officials and political party representatives agree to it.395

Enforcing statutes governing polling place closing times “ensure[s] that only those entitled to vote are allowed to cast a ballot.”396 In the absence of statutory authorization, the hours of particular polling places may not be extended on the grounds that they opened late,397 malfunction398 or inadequate supplies399 prevented people from voting, unexpectedly long lines developed,400 poor weather impeded voting,401 people wished to vote after closing time,402 or other impediments to voting arose. Votes cast after a polling place’s statutory closing time are generally deemed illegal,403 although

malfunctioning voting machines and long lines); Republican Party of Ark. v. Kilgore, 98 S.W.3d 798, 800 (Ark. 2002) (voiding a TRO issued by a trial judge extending voting hours because “[t]here is no provision in our Election Code authorizing an extension of voting times by the judiciary”); State ex rel. Bush-Cheney 2000 v. Baker, 34 S.W.3d 410, 411–12 (Mo. Ct. App. 2000) (issuing writ of prohibition against trial judge who issued emergency order keeping polls in presidential election open until midnight due to long lines, voting machine malfunctions, and inadequate supplies at polling places); Newcomb v. Leary, 128 A.D. 329, 329–30 (N.Y. App. Div. 1908) (per curiam) (“The polls are to close at five o’clock. . . . Therefore, at five o’clock the delivery of official ballots to electors must cease and no elector to whom an official ballot has not been delivered before five o’clock can be allowed to vote.”); see also Robert O’Brien et al., Election Day Challenges to Polling Hours and the Judiciary’s Cautious Response, 27 Buff. Pub. Int. L.J. 1, 3–4 (2008) (“[C]ourts across the country have generally found that the judicial branch lacks the jurisdiction and authority to grant orders altering poll closing times in certain situations.”). But see infra note 414. 395 Mitchell, 83 A.2d at 765; see also Boone, 349 S.W.2d at 823 (holding that people should not be “allowed to vote at a time when the law says no more ballots should be cast”). But see McShane, 492 S.W.3d at 182–83 (extending voting hours at certain polling places in part because representatives from both political parties agreed). 396 Bush-Cheney 2000, 34 S.W.3d at 413. 397 Hogg, 71 S.W.2d at 1021 (holding that polling place officials lacked power to extend a polling place’s hours despite a fifty-minute delay in opening it due to the discovery of completed primary ballots in the general election ballot box). 398 Souterland, 955 F. Supp. at 761–62; Bush-Cheney 2000, 34 S.W.3d at 411. 399 Kilgore, 98 S.W.3d at 798–99; Bush-Cheney 2000, 34 S.W.3d at 411. 400 Varney v. Justice, 6 S.W. 457, 458–60 (Ky. 1888); Bush-Cheney 2000, 34 S.W.3d at 411. 401 Souterland, 955 F. Supp. at 762. 402 See Easler v. Blackwell, 10 S.E.2d 160, 163 (S.C. 1940); see also State ex rel. Mitchell v. Wolcott, 83 A.2d 762, 764 (Del. 1951); Terry v. Sencindiver, 171 S.E.2d 480, 484 (W. Va. 1969). 403 Hogg v. Caudill, 71 S.W.2d 1020, 1021 (Ky. App. 1934) (holding that ballots cast after statutory closing time were “illegal”); Terry, 171 S.E.2d at 484 (holding that ballots cast after the statutory closing time were “illegal and void”); see also Bishop v. Smith, 350 S.W.2d 494, 496 (Ky. 1961) (holding that votes cast after the polling place’s closing time were “illegal”); Varney, 6 S.W. at 459 (holding that votes cast after the polling closing time specified in the state constitution were “illegal”); Attorney ex rel. Pearson v. Folsom, 45 A. 410, 410 (N.H. 1899) (holding that election officials had no authority to accept a ballot after the polling location closed). But see Lane v. Hern, 20 Haw. 290, 300 (Haw. 1910) (holding that, even if a statute specifying the closing time for polling places were mandatory, votes cast after the closing time would be valid); In re Contest of the Special Election at Chagrin Falls, 110 N.E. 491, 492 (Ohio 1915) (holding that
violations of polling hour statutes do not necessarily require that an election’s results be set aside, particularly in the absence of fraud, corruption, or bias.404

State election codes typically authorize a variety of remedial measures other than extensions of polling place hours to address the types of disruptions that frequently arise. Nearly every state has a law specifying that anyone waiting in line at a polling location at the time the polls close must be permitted to vote.405 Such provisions are valuable, particularly when they require election officials to affirmatively prevent impermissibly late votes.406

“[t]he failure of the election officials” to comply with the statutory closing time “did not render the votes of qualified electors cast after the time fixed by law illegal”).

404 People ex rel. Seegren v. Sackett, 184 N.E. 646, 652–53 (Ill. 1933); Duncan v. Vernon Par. Sch. Bd., 76 So. 2d 403, 404-05 (La. 1954); Special Election at Chagrin Falls, 110 N.E. at 492 (holding that the statute specifying a closing time for polling places was merely directory, so election officials’ failure to comply did not affect validity of votes cast late); Hamilton v. Marshall, 282 P. 1058, 1059–60 (Wyo. 1929).

405 See, e.g., ALASKA STAT. ANN. § 15.15.320 (West 2007); ARIZ. REV. STAT. ANN. § 16-565(D) (West 2015); ARK. CODE ANN. § 7-5-304(b) (West 2014); CAL. ELEC. CODE § 14401 (West 2003); COLORADO REV. STAT. ANN. § 1-7-101(1) (West Supp. 2017); CONN. GEN. STAT. ANN. §§ 9-174, 9-438 (West 2009); DEL. CODE tit. 15, § 4947 (West 2011); FLA. STAT. ANN. § 100.011(1) (West 2015); GA. CODE ANN. § 21-2-413(g) (West Supp. 2017); HAW. REV. STAT. ANN. § 11-131 (West 2008); IDAHO CODE ANN. § 34-1101(2) (West 2006); INDIANA CODE ANN. § 3-11-8-11(a) (West Supp. 2017); IOWA CODE ANN. § 49.74 (West 2012); KY. REV. STAT. ANN. § 118.035(1) (West Supp. 2017); LA. STAT. ANN. § 18:542 (West 2012); ME. REV. STAT. ANN. tit. 21-a, § 626(2)(A) (2017); MD. CODE ANN., ELEC. LAW § 10-301(b) (West 2013); MASS. GEN. LAWS ANN. ch. 54, § 70 (West 2007); MICH. COMP. LAWS ANN. § 168.720 (West 2008); MINN. STAT. ANN. § 204C.052(2)(a) (West 2016); MISS. CODE ANN. § 23-15-541(1) (West 2017); MO. STAT. ANN. § 115.407 (West 2014); NEW JERSEY REV. STAT. ANN. § 32-908(3) (West 2009); NEV. REV. STAT. ANN. § 293.305(1) (West 2008); N.J. STAT. ANN. §§ 19:15-9 (West 2014); N.M. STAT. ANN. § 1-12-26 (West 2003); N.Y. ELEC. LAW § 8-104(5) (McKinney 2018); N.C. GEN. STAT. ANN. § 163A-1130 (West 2017); N.D. CENT. CODE ANN. § 16.1-01-03 (West 2008); OHIO REV. CODE ANN. § 3501.32(A) (West 2017); OKLA. STAT. ANN. tit. 26 § 7-104(A) (West 1997); OR. REV. STAT. ANN. § 254.470(10) (West Supp. 2017); PA. STAT. AND CONS. STAT. ANN. § 3060(e) (West 2016); R.I. GEN. LAWS ANN. § 17-18-11 (West Supp. 2016); S.C. CODE ANN. § 7-13-850 (West 1977); S.D. CODIFIED LAWS §§ 12-2-3 (2004); TENN. CODE ANN. § 2-7-127 (West 2009); TEX. ELEC. CODE ANN. § 41.032 (West 2010); UTAH CODE ANN. § 20A-1-302(2) (West 2012); VT. STAT. ANN. tit. 17, § 254(1) (West Supp. 2017); VA. CODE ANN. § 24.2-603 (West 2013); WASH. REV. CODE ANN. § 29A.40.160(14) (West Supp. 2018); W. VA. CODE ANN. §§ 3-1-32 (West 2014); WIS. STAT. ANN. § 6.78(4) (West 2013); WYO. STAT. ANN. § 22-13-117 (West 2007); see also ALA. CODE §§ 11-46-28(b), 11-46-52 (2008); N.H. REV. STAT. ANN. § 659.6 (2016). It appears that the laws of the District of Columbia, Illinois, Kansas, and Montana do not expressly address this issue. See, e.g., 10 ILL. COMP. STAT. ANN. § 5/17-1 (West 2010); KAN. STAT. ANN. § 25-106 (West 2008); MONT. CODE ANN. § 13-1-106 (West Supp. 2016).

406 Several states require election officials to take affirmative steps to ensure people who arrive at a polling place after its statutorily designated closing time are not permitted to vote. In some states, an election official or police officer must stand at the end of the line at the designated closing time, and no one who joins the line afterwards is permitted to vote. CONN. GEN. STAT. ANN. § 9-174; IOWA CODE ANN. § 49.74; KY. REV. STAT. ANN. § 118.035(1); MASS. GEN. LAWS ANN. ch. 54, § 70; TENN. CODE ANN. § 2-7-127. A few states require election officials to secure the doors of polling locations at closing time so that voters who are already present are admitted, but others may not enter. IOWA CODE ANN. § 49.74; NEV. REV. STAT. ANN. § 293.305(1). Still other states either require election officials to take the names of everyone waiting in line at closing time, MASS. GEN. LAWS ANN. ch. 54, § 70; VA. CODE ANN. § 24.2-603, provide them with hand stamps or written passes, W. VA. CODE ANN. § 3-1-32, or grant election officials discretion as to the most appropriate way to
Many states also require election officials to use emergency or paper ballots when mechanical or electronic voting machines malfunction. Courts have recognized that such remedial measures provide a mechanism for ensuring that people do not lose their opportunity to vote due to mechanical failures, inadequate resources, long lines, or other problems at polling locations. These remedies both alleviate the need to extend the closing time for polling places and implicitly bar courts from doing so.

Allowing courts to extend polling place hours when such relief is unnecessary to remedy an actual constitutional violation raises troubling constitutional issues, at least in federal elections. The Elections Clause specifies that the “Legislature” of each state shall be responsible for regulating the “Times, Places, and Manner” of congressional elections, and only Congress may “make or alter” such rules. The Constitution likewise empowers the “Legislature” of each state to determine the manner in which it chooses presidential electors. These provisions allow only a state’s legislature—not its executive or judicial personnel—to determine the rules for federal elections. By extending polling place hours without statutory authorization, courts usurp the legislature’s constitutional prerogative.

prevent latecomers from voting, IND. CODE § 3-11-8-11(b)(2); N.M. STAT. ANN. § 1-12-26; N.D. CENT. CODE ANN. § 16.1-01-03; TEX. ELEC. CODE ANN. §§ 41.032(b)–(c); WIS. STAT. ANN. § 7.15(6) (West 2013). See, e.g., GA. CODE ANN. § 21-2-450(g) (West 2011); IDAHO CODE ANN. § 34-2421(3) (West 2006); MICH. COMP. LAWS ANN. § 168.782b (West Supp. 2017); MO. ANN. STAT. § 115.265 (West 2014); N.J. STAT. ANN. §§ 19:48-7, 19:53B-3 (West 2014); N.Y. ELEC. LAW § 7-120(1) (McKinney 2007); S.C. CODE ANN. § 7-13-1870 (West 1977); TEX. ELEC. CODE ANN. § 125.006(c) (West 2010); VA. CODE ANN. § 24.2-642(C) (West 2016).

Source: Southerland v. Fritz, 955 F. Supp. 760, 761–62 (E.D. Mich. 1996) (recognizing that such laws are a “remedy [that] prevents any voter from being denied the right to vote due to lines or delays at the precinct”); Bush-Cheney 2000 v. Baker, 34 S.W.3d 410, 412 (Mo. Ct. App. 2000) (recognizing that such laws ensure that “anyone in line” at the statutory closing time “will eventually be permitted to vote no matter how late the hour and their vote will count”); see also O’Brien, supra note 394, at 7 (“The most common remedy for Election Day delays at polling places is to allow voters to take a place in line before the polls close pursuant to the applicable statute.”).

Source: Southerland, 955 F. Supp. at 762 (holding that a statute allowing voters waiting on line at closing time to vote is the “exclusive” remedy for voting delays); Republican Party of Ark. v. Kilgore, 98 S.W.3d 798, 800 (Ark. 2002) (same).

Source: Valenti v. Mitchel, 970 F. Supp. at 551, 555 (E.D. Pa.) (holding that, by “setting a schedule for the election of senators and representatives, the court [would be] acting in a role assigned and entrusted by the Constitution to the legislature”), aff’d on other grounds, 962 F.2d 288, 297 (3d Cir. 1992).
Courts may extend polling place hours when necessary to prevent or remedy constitutional violations, of course, but such relief is granted infrequently, generally in extreme cases, and tailored narrowly. In *St. Louis County Board of Election Commissioners v. McShane*, for example, the court of appeals emphasized that the request to extend polling hours had been filed by election officials, rather than a candidate or political party; was supported by both major parties; and was warranted because the complete lack of ballots at numerous polling locations for several hours would otherwise lead to “the total disenfranchisement of affected voters.” Moreover, the court specifically required that voters affirm “that they had tried to vote during regular hours” to be eligible to vote during the extended hours. Likewise, in *Ohio Democratic Party v. Blackwell*, a federal court extended polling hours only for voters standing in line at polling locations as of 7:30 p.m.

Polling place hour extensions seldom are constitutionally required. As discussed earlier, “garden-variety” election problems such as voting machine malfunctions, long lines, inclement weather, or equipment shortages generally do not rise to the level of constitutional violations empowering courts to grant relief. Courts should also be extremely cautious in considering requests to extend the polling hours for certain precincts because of the substantial risk of partisan manipulation.

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414 E.g., Ohio Democratic Party v. Blackwell, No. 2:04-CV-1055, 2005 U.S. Dist. LEXIS 18126, at *2, *4 (S.D. Ohio Aug. 26, 2006) (explaining that the court had previously ordered that polls be kept open for voters standing in line as of 7:30 p.m. because voters had been waiting in long lines for up to five hours); Levy v. Bexar Cty. Republican Party, No. SA-02-CA-408-EP, 2002 U.S. Dist. LEXIS 25916, at *1 (W.D. Tex. Dec. 5, 2002) (noting that a state trial court had extended polling hours because fifty-six polling sites had been relocated on Election Day itself, making it difficult for voters to “find[] their polling locations”); see, e.g., St. Louis Cty. Bd. of Election Comm’rs v. McShane, 492 S.W.3d 177, 183–85 (Mo. Ct. App. 2016) (issuing writ of mandamus, with the support of both political parties, compelling election board to hold polling places open for an additional two hours because several hundred voters had been turned away over several hours due to a lack of ballots); People ex rel. Woodside v. Bd. of Inspectors of Election of 56th Election Dist., 389 N.Y.S.2d 242, 245–47 (N.Y. Sup. Ct. 1976) (holding that, where hundreds of valid voter registrations had been lost, requiring those people to obtain court orders confirming their eligibility to vote, election officials were required to accept their votes after closing time); see also Lake v. State Bd. of Elections, 798 F. Supp. 1199, 1202–03, 1207–08 (M.D.N.C. 1992) (three-judge court) (holding that the state court’s decision to extend voting hours at all polling places in two counties in a statewide election due to voting machine malfunctions and long lines did not violate due process). Provisional ballots and electronic voting machines have reduced the frequency of many of these sorts of problems.

415 *McShane*, 492 S.W.3d at 183.

416 Id. at 184.


418 See supra notes 326–33 and accompanying text.

419 Easler v. Blackwell, 10 S.E.2d 160, 163 (S.C. 1940) (“Such a practice, if permitted, might result in fraud or favoritism . . . .”); Terry v. Sencindiver, 171 S.E.2d 480, 484 (W. Va. 1969) (recognizing that allowing election officials to extend polling hours “could readily open an avenue to fraud and injustice”).
watchers in precincts that primarily support it to obtain affidavits about any irregularities that occur. Obtaining polling hour extensions only for such precincts gives that party and its candidates a tremendous advantage, enabling them to rack up additional votes while voting has ended in areas that predominantly support their opponents. The candidate or party that obtained the extension can focus its resources to “employ ‘knock and drag’ tactics to bring favorable votes to the polling places.”

Courts should guard against strategies that render elections vulnerable to last-minute manipulation.

Extending polling place hours is also permissible when authorized by appropriately tailored statutes. For example, North Carolina law provides, “If the polls are delayed in opening for more than 15 minutes, or are interrupted for more than 15 minutes after opening, the State Board may extend the closing time by an equal number of minutes.” The South Dakota election code likewise provides:

[T]he county auditor may, upon request of the superintendent of an election precinct, if an emergency exists by reason of mechanical failure of a voting machine or an unanticipated shortage of ballots[,] or like unforeseen event warrants it, extend the polling hours for that precinct until the emergency situation has been resolved.

Such statutes are a more appropriate means of dealing with polling place problems than constitutional litigation since they are crafted by the legislature, which may authorize adjustments to the rules governing elections as a matter of policy even when they are not constitutionally required. These provisions are crafted ahead of time, before the beneficiaries of any particular decision are known, rather than in time-sensitive, high-pressure situations. They place primary responsibility for extending polling place hours on election officials, rather than leaving it to candidates or political parties to selectively seek extensions. And they provide, at least to some extent, objective criteria for determining both the propriety and geographic breadth of any extensions,

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422 S.D. CODIFIED LAWS § 12-2-4 (2017); see also D.C. CODE ANN. § 1-1001.10(b)(1) (West 2017) (“The Board may, upon request of the precinct captain or upon its own initiative, if an emergency exists by reason of mechanical failure of a voting machine, an unanticipated shortage of ballots, excessive wait times, bomb threats, or similar unforeseen event warrants it, extend the polling hours for that precinct until the emergency situation has been resolved.”); MD. CODE ANN., ELEC. LAW § 8-103(b) (West 2013) (permitting a state or local election board to petition a court in “emergency circumstances” for “a remedy that is in the public interest and protects the integrity of the electoral process”).
rather than leaving it to the subjective, ad hoc discretion of judges. Such measures are one example of how laws specifically tailored to addressing election emergencies may alleviate the need for constitutional litigation concerning elections.

III. ELECTION EMERGENCY STATUTES

Election emergencies become constitutionalized in part because states lack emergency statutes adequately addressing them. Some states lack election emergency statutes altogether, relying instead on their general emergency laws. Such emergency laws are often inadequate for addressing election-related problems because they do not expressly empower governors to suspend the enforcement of statutes or statutory deadlines.423 In these states, even when a governor declares an emergency, he or she is required to continue enforcing the law as written.

A substantial majority of states, in contrast, allow governors to suspend at least certain types of state laws during declared emergencies.424 By their very


424 Some states broadly permit the governor to suspend any state law. See, e.g., ALA. CODE § 31-9-13 (2016); MD. CODE ANN., PUB. SAFETY § 14-107(d)(1)(i) (West Supp. 2017); N.Y. EXEC. LAW § 29-a (McKinney Supp. 2016); VA. CODE ANN. § 44-146.17 (West 2014); see also UTAH CODE ANN. § 53-2a-209 (West Supp. 2016) (allowing the governor to suspend any statutes except for laws establishing felonies); cf. N.J. STAT. ANN. app. A:9-47 (West 2006) (allowing the governor to suspend “any motor vehicle regulation or traffic act provision or any other regulatory provision of law” during emergencies). A few enumerate various categories of laws the governor may suspend. TEX. GOV’T CODE ANN. § 418.016 (West 2018); WASH. REV. CODE ANN. § 43.06.220(2) (West 2009).

Almost a majority of states allows the governor to suspend any “regulatory statute prescribing the procedures for the conduct of state business.” E.g., ALASKA STAT. ANN. § 26.23.020(g)(1) (West 2007); ARK. CODE ANN. § 12-75-114(a)(1) (West 2014); COLO. REV. STAT. ANN. § 24-33.5-704(7)(a) (West 2015); DEL. CODE ANN. tit. 20, § 3116(a)(2) (West 2017); FLA. STAT. ANN. § 252.36(5)(a) (West 2017); GA. CODE ANN. § 38-3-51(d)(1) (West 2017); 20 ILL. COMP. STAT. ANN. § 3305/7(a)(1) (West 2015); IND. CODE ANN. § 10-14-3-12(d)(1) (West 2016); IOWA CODE ANN. § 29C.6(6) (West 2017); KAN. STAT. ANN. § 48-925(c)(1) (West 2008); LA. REV. STAT. § 29:766(d)(1) (2007); ME. REV. STAT., tit. 37-B, § 742(C)(1) (West 2017); MICH. COMP. LAWS ANN. § 30.405(1)(a) (West 2012); MISS. CODE ANN. § 33-15-11(1)(a)(1) (West 2017); MONT. CODE ANN. § 10-3-104(2)(a) (West 2009); NEB. REV. STAT. ANN. § 81-829.40(6)(a) (West 2016); N.D. CENT. CODE ANN. § 37-17.1-05(6)(a) (West Supp. 2017); OKLA. STAT. ANN. tit. 63, § 6403(B)(1) (West 2015); 35 PA. STAT. AND CONS. STAT. ANN. § 7301(f)(1) (West 2017); R.I. GEN. LAWS ANN. § 30-15-9(e)(1) (West 2016);
nature, however, such broad statutes do not offer any specific guidance or place restrictions upon governors’ discretion. They leave governors to determine the appropriate response in the midst of an actual emergency, while protecting the public from imminent threats and remediating myriad other consequences of a disaster.

Several states have responded by crafting election emergency statutes of varying specificity and complexity. This Part begins by exploring the wide range of existing election emergency laws, then turns to past proposals for reform and offers a new statutory framework for addressing election emergencies.

A. Current Election Emergency Laws

Some states have enacted laws specifically addressing emergencies that threaten to disrupt impending or ongoing elections, but they vary widely in breadth and specificity. Florida, 425 Oklahoma, 426 and Virginia, 427 for example, have detailed statutes addressing many aspects of the electoral process, while other jurisdictions have more limited provisions concerning discrete issues. 428 Rather than statutorily codifying any particular response, a few states instead direct election officials to develop emergency contingency plans for dealing with election-related disasters.429 Others, including Iowa 430 and North Carolina, 431 grant their chief election officers “emergency power” over

W. VA. CODE ANN. § 15-5-6(a)(7) (West Supp. 2017); cf. CAL. GOV’T CODE § 8571 (2012) (empowering the governor to “suspend any regulatory statute, or statute prescribing the procedure for conduct of state business”).

Others have enacted a slightly broader variation of that provision, allowing the governor to suspend any statute—not just “regulatory statute[s]”—prescribing procedures for conducting state business. See, e.g., ARIZ. REV. STAT. ANN. § 26-303(A)(1) (2017); TENN. CODE ANN. § 58-2-107(e)(1) (West 2014); see also MO. ANN. STAT. § 44.100(1)(3)(g)–(h) (West 2013) (allowing the governor to suspend such laws, as well as any statutory requirements concerning licensure, certification, or permitting).

427 VA. CODE ANN. §§ 24.2-603.1, 24.2-713 (West 2014).
428 See infra notes 436–42 and accompanying text. Delaware has an antiquated statute to facilitate elections in the event of a foreign invasion. DEL. CODE ANN. tit. 15, §§ 5301–5312 (West 2011). Texas, in contrast, allows the governor to authorize elections to be held before the scheduled date if an emergency exists, but does not expressly authorize elections to be delayed. TEX. ELEC. CODE § 41.0011 (West 2010).
429 See, e.g., CONN. GEN. STAT. ANN. § 9-174(a) (West 2009); MINN. STAT. ANN. § 204B.181 (West 2018); see also FLA. STAT. ANN. § 101.733(1) (West 2017) (requiring the Department of State to adopt an election emergency contingency plan); LA. STAT. ANN. § 18:401.3(B)(1) (2012) (requiring the secretary of state to develop an election emergency plan when the governor declares a state of emergency).
430 IOWA CODE ANN. § 47.1(2) (West 2017).
elections when a “natural or other disaster,” “extremely inclement weather,” or armed conflict occurs.

Florida allows the governor to “suspend or delay any election” upon declaring a state of emergency or “impending emergency.” Maryland goes further, empowering the governor to issue an emergency proclamation to postpone an election or specify “alternate voting locations” and “alternate voting systems.” In the absence of a declaration of emergency, a state or local board of elections may petition a court to “provide a remedy that is in the public interest and protects the integrity of the electoral process.” Utah likewise delegates broad discretion to the lieutenant governor to designate a special “method, time, or location for, or relating to[]” voting, absentee ballots, and the determination of election returns in response to election emergencies.

The most common election emergency laws authorize election officials to relocate polling places or use paper ballots when problems arise only at certain locations. State election codes also frequently waive restrictions on absentee ballots during emergencies, although some codes permit only more limited election modifications concerning absentee ballots. Missouri, for example, allows the secretary of state to authorize voters to return completed

432 FLA. STAT. ANN. § 101.733(1)–(2) (requiring postponed elections to be rescheduled within ten days).
433 Md. CODE ANN., ELEC. LAW § 8-103(a) (West 2013).
434 Id. § 8-103(b)(1).
435 UTAH CODE ANN. § 20A-1-308(1)(b), (2) (West 2016).
436 E.g., COLO. REV. STAT. ANN. § 1-5-108(1)(a) (West 2017); FLA. STAT. ANN. § 101.74 (West 2013); GA. CODE ANN. § 21-2-265(a) (West 2011); HAW. REV. STAT. ANN. § 11-92.3 (West 2013); KAN. STAT. ANN. § 25-2701(d)(1) (West 2017); LA. STAT. ANN. § 18:401.2(A) (2012); ME. REV. STAT. ANN. tit. 21-A, § 631-A(3) (2008); MICH. STAT. ANN. §§ 204B.14(2)(c), 204B.175(2) (West 2018); MONT. CODE ANN. § 13-3-211 (West 2009); S.C. CODE ANN. § 7-7-910(B) (1977); TENN. CODE ANN. §§ 2-3-101(a)(4), 2-3-302(b) (West 2016); VT. STAT. ANN. tit. 17, § 2502(c)(2) (West 2017).
437 See supra note 407.
438 E.g., HAW. REV. STAT. § 11-92.3(a) (providing that, “[i]f the extent of damage caused by any natural disaster” should “substantially impair[]” the ability of voters “to exercise their right to vote,” the chief election officer may require “voters of the affected precinct to vote by absentee ballot”); INDIAN. CODE ANN. § 3-11-4-1(c) (West 2017) (“The commission, by unanimous vote of its entire membership, may authorize a person who is otherwise qualified to vote in person to vote by absentee ballot if the commission determines that an emergency prevents the person from voting in person at a polling place.”); N.D. CENT. CODE ANN. § 16.1-07-05(2) (West 2017) (allowing a person who is prevented from voting “on the day of the election due to an emergency” to request an emergency absentee ballot through an agent, who “may represent only one individual”); VA. CODE ANN. § 24.2-713 (West 2017) (empowering the state commissioner of elections to “designate alternative methods and procedures” for handling absentee ballots and applications during emergencies); see also KAN. STAT. ANN. § 25-622 (West 2008) (“The secretary of state may designate temporary alternative methods for the distribution of ballots in cases of war, natural or man-made disasters, equipment failures or other emergency conditions or circumstances which make it impossible for voters in a voting area to obtain ballots as provided by law.”).
absentee ballots by fax during declared emergencies, while Maine permits election officials to apply the special rules for military and overseas voters to people living in declared emergency zones.

Some laws are tailored specifically to facilitate voting by people at risk of losing their opportunity to vote because they are responding to an emergency. Several states, for example, authorize emergency absentee ballots for emergency service personnel who are unexpectedly called to help manage a disaster. Others allow election officials to apply special rules to military and overseas voters when “a national or local emergency” makes it “impossible or unreasonable” to enforce the federal and state laws that usually govern them.

Some states go beyond election modifications, expressly allowing for election postponements. Colorado, for example, specifies that election officials may petition a state trial judge for permission to reschedule an election due to “an unforeseeable emergency,” or if proceeding as scheduled “would be impossible or impracticable.” Georgia likewise allows the secretary of state to “postpone or extend” candidates’ qualifying periods, and to “postpone the date of any primary, special primary, election, or special election” for up to forty-five days in any area “affected” by “a state of emergency or disaster.”

New York contains a unique provision stating that, if less than 25% of the voters in a jurisdiction vote in an election “as the direct consequence of a fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack or other disaster,” a county or state board of elections may authorize “an

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441 ALA. CODE § 17-11-3(e) (2017); N.H. REV. STAT. ANN. § 657:21-a(I), (VI) (2016); N.M. STAT. ANN. § 1-6B-9 (West 2016); N.Y. ELEC. LAW § 11-308 (McKinney 2018); OKLA. STAT. tit. 26, § 14-115.6(A) (West 2015); see also CAL. ELEC. CODE § 3021.5(a)(2) (West 2018).
442 FLA. STAT. ANN. § 101.698 (West 2015); see also ARIZ. REV. STAT. § 16-543(C) (2015); COLO. REV. STAT. ANN. § 1-8.3-105(2) (West 2016); DEL. CODE ANN. tit. 15, § 5524(a) (West 2017); IDAHO CODE ANN. § 34-201 (West 2017); MISS. CODE ANN. § 23-15-701(2) (West 2017); N.C. GEN. STAT. § 163A-1370 (West 2017); N.D. CENT. CODE ANN. § 16.1-07-34 (West 2017); OHIO REV. CODE ANN. § 3511.15 (West 2017); OKLA. STAT. tit. 26, § 14-135 (West 2015).
443 See, e.g., HAW. REV. STAT. § 11-92.3(a) (requiring postponed elections to be held in the “affected precincts” within twenty-one days); VA. CODE ANN. § 24.2-603.1 (West 2017) (requiring elections postponed by the governor to be held within fourteen days, or within thirty days if authorized by a panel of the state supreme court); see also infra notes 444–45 and accompanying text (discussing other statutes empowering state officials to postpone elections).
444 COLD. REV. STAT. ANN. §§ 1-1-104(46), 32-1-103(21) (West 2017).
additional day of election” for that jurisdiction. The additional day of voting must be conducted within twenty days of the original election, and all voting must be in-person. The election’s results are based on the combined vote totals from both days of voting. New York law also allows election officials to extend any filing deadline under the election code when a disaster “substantially impair[s]” the “ability to make [the] filing.” The majority of states, however, has not yet enacted election emergency statutes.

B. A Proposed Framework for Election Emergency Laws

Commentators have offered a range of suggestions for ensuring that election emergency statutes preserve the right to vote, protect the integrity of the electoral process, and avoid unnecessarily constitutionalizing issues in the face of terrorist attacks, natural disasters, and extreme weather. Some have focused on requiring election officials to engage in contingency planning and coordinate with federal and state disaster relief personnel. Several pieces also suggest expanding opportunities to vote in general, such as absentee and early voting, to minimize the number of voters adversely affected by Election Day disasters. The Internet can also play an important role in alleviating the impact of disasters on voting, though important concerns about hacking, fraud, and protecting public confidence in the electoral system likely limit the feasibility of certain technological alternatives for the foreseeable future.

Advocates have also suggested waiving many standard election procedures, such as voter registration deadlines and voter identification requirements, during or following election emergencies. Such measures, however, play important roles in ensuring the eligibility of potential voters, preventing double

447 Id. § 3-108(2), (4).
448 See id. § 3-108(3)–(4).
449 Id. § 3-108(5).
450 See, e.g., Goldfeder, supra note 9, at 565 (proposing standards for determining whether to postpone a presidential election in a particular jurisdiction).
451 Gaughan, supra note 8, at 1042–43; Roy, supra note 11, at 229.
452 STANDING COMMITTEE ON ELECTION LAW, AM. BAR ASS’N, ELECTION DELAYS IN 2012, at 54 (2013); Clarke & Hewitt, supra note 11, at 518; Roy, supra note 11, at 226; see also Stein, supra note 13, at 66 (demonstrating that in-person absentee voting facilitated voter participation following Hurricane Sandy); Rupp, supra note 11, at 295–96 (arguing that Louisiana should have permitted broader no-excuse absentee voting following Katrina).
453 STANDING COMMITTEE ON ELECTION LAW, supra note 452, at 54; Clarke & Hewitt, supra note 11, at 522.
454 Roy, supra note 11, at 227.
455 Clarke & Hewitt, supra note 11, at 525–26; Roy, supra note 11, at 226–27; Rupp, supra note 11, at 699.
voting, and reducing the likelihood of administrative errors—a likelihood which is magnified in the wake of natural disasters or terrorist attacks. States should generally avoid waiving voter registration deadlines or voter identification requirements in the chaos election emergencies create.

A “Developments” piece in the Harvard Law Review recommends that election officials cancel registrations of voters displaced by election emergencies who choose to register in a different jurisdiction.\footnote{456 Voting and Democracy, supra note 10, at 1187–88.} Ensuring greater interoperability among states’ voter registration databases to identify and eliminate double registrations is a compelling idea, even outside the context of election emergencies. Although election officials are ostensibly required to ensure the accuracy of voter registration rolls,\footnote{457 See, e.g., 52 U.S.C. § 21083(a)(1)(A)(iv), (a)(2)(A)(ii), (a)(4)(A), (a)(5)(B) (2012).} a major shortcoming of the Help America Vote Act (HAVA) is that many of its provisions aimed at achieving that goal are unenforceable by private litigants,\footnote{458 Ohio Republican Party v. Brunner, 555 U.S. 5 (2008) (per curiam) (vacating restraining order compelling Ohio Secretary of State Jennifer Brunner to update the state’s voter registration database as required by HAVA). In contrast, private litigants may sue to compel compliance with the National Voter Registration Act’s requirements for updating voter registration lists. See 52 U.S.C. § 20510(b); see, e.g., Am. Civil Rights Union v. Martinez-Rivera, 166 F. Supp. 3d 779, 799–802 (W.D. Tex. 2015) (holding that a public interest group had standing to challenge the state’s alleged failure to maintain its voter registration list); Judicial Watch, Inc. v. King, 993 F. Supp. 2d 919, 925 (S.D. Ind. 2012) (same). Professor Daniel Tokaji has compellingly argued that courts should allow private litigants to sue to enforce election-related laws and restrictions without inquiring whether the statute creates a private right of action. Daniel Tokaji, Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws, 44 IND. L. REV. 113, 115 (2010).} enabling partisan election officials to retain outdated and inaccurate registrations. HAVA should be amended to facilitate such private enforcement litigation. The National Voter Registration Act should also be changed to make it easier for election officials to update and ensure the accuracy of voter registration rolls,\footnote{459 Cf. 52 U.S.C. §§ 20507(a)(3), (b)(2), (c)(2)(A), (d). The Supreme Court is presently hearing a case concerning the scope of states’ authority to remove individuals who have not cast a ballot in several years from the rolls. See Husted v. A. Philip Randolph Inst., 838 F.3d 699 (6th Cir. 2016), cert. granted, 137 S. Ct. 2188 (2017).} particularly since the federal government severely limits their ability to confirm voters’ eligibility when they register.\footnote{460 See, e.g., Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2257 (2013) (requiring election officials to register any person who submits the “federal” voter registration form created by the U.S. Election Assistance Commission to vote in federal elections, even if they fail to provide proof of U.S. citizenship); Fish v. Kobach, 840 F.3d 710, 715, 719, 726 (10th Cir. 2016) (requiring election officials to accept voter registrations submitted through state motor vehicle agencies pursuant to the National Voter Registration Act, even if they are not accompanied by proof of citizenship).}
One recurring suggestion in the literature is for states to establish out-of-state satellite voting centers when natural disasters displace their citizens. Unlike most traditional polling locations, which are limited to voters from one or more specified precincts, such satellite voting centers would be open to all displaced voters from a particular county or potentially even state. This solution would be most helpful when substantial numbers of voters from a jurisdiction have relocated to the same general area or a few such areas.

States should craft election emergency laws to provide clear guidance and necessary authorizations for election officials, protect voters’ ability to participate in elections, and preserve the integrity of the electoral process when circumstances become particularly challenging. Election emergency statutes should distinguish among three main types of situations, each of which warrants a different type of relief. First, an emergency that is either of limited duration or affects only a limited geographic area is best addressed through an election modification, in which the election is allowed to proceed with only minor changes to the generally applicable laws. Examples of election modifications may include relocating polling places, extending the hours of polling places that were temporarily inoperable, using paper ballots instead of electronic voting machines, permitting voters to cast ballots through alternate means, or allowing re-votes if certain cast ballots are destroyed before being counted. One important issue such laws present is whether election officials should have discretion to implement such measures on their own, must wait for a declaration of emergency from local or county officials or the governor, or instead must seek a court order before implementing such changes. A statute requiring judicial permission before extending polling place hours, or making other substantial modifications to the rules governing an election, would be a particularly prudent safeguard.

Second, for emergencies that make it impracticable, unreasonably dangerous, or impossible to carry out an election on its scheduled day, or that involve temporary displacement of a substantial number of voters, an election postponement is the appropriate form of relief. An election postponement attempts to hold everything about an election as constant as possible—

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461 Clarke & Hewitt, supra note 11, at 516; Roy, supra note 11, at 226; Voting and Democracy, supra note 10, at 1187; see also Stein, supra note 13, at 68.
462 See, e.g., supra note 436 and accompanying text.
463 See, e.g., supra notes 421–22 and accompanying text.
464 See, e.g., supra note 407.
465 See, e.g., supra notes 130, 137, 188, 433, 438–42 and accompanying text.
466 Cf. supra notes 175, 295 and accompanying text.
including the identities of the candidates and voters—while conducting it on a different day, typically within thirty days or fewer. To the extent possible, election postponements should be ordered when a catastrophe is extremely likely to occur, but before voting on Election Day commences. Postponements of deadlines should generally be avoided for aspects of elections that spanned several months, such as candidate qualification or voter registration. When elections are postponed, candidates should not be prohibited from making additional expenditures in support of their campaigns.

Finally, an election cancellation is the proper remedy only in the extraordinarily rare case when a disaster causes a mass, long-term displacement of a substantial portion of a jurisdiction’s electorate, such as Hurricane Katrina caused. When the election is ultimately held, it is considered an entirely new and distinct event from the originally scheduled election. The candidates who will appear on the ballot, the voters who are permitted to cast ballots, and other critical components of the election are determined entirely anew.

Several principles should guide states in applying this framework. States should opt for the least extreme form of relief possible, relying primarily on election modifications rather than postponements, and reserving election cancellations only for the most extreme circumstances. Election emergency statutes should provide detailed, objective criteria for determining when relief is appropriate, to minimize the opportunity for partisan considerations to improperly influence the process. They must be crafted to not only preserve the opportunity for voters to cast ballots, but also maintain the integrity of the electoral process after it has been dealt a potentially severe blow from a terrorist attack or natural disaster. Specifically, an election emergency statute must ensure only qualified individuals are permitted to vote, multiple voting does not occur, paper or electronic ballots are adequately protected, and opportunities for hacking, fraud, or partisan manipulation are minimized.

Finally, as discussed earlier, election modifications, postponements, and cancellations should be ordered at “just the right time”: after the occurrence of a disruptive election emergency is sufficiently certain, but (if at all possible) before Election Day itself. A comprehensive election emergency statute that builds upon these principles can provide an essential bulwark for protecting both the right to vote and public faith in the electoral process.
CONCLUSION

Though we are barely two decades into the twenty-first century, we have already seen the dramatic ways in which terrorist attacks, natural disasters, extreme weather, and other calamities can affect impending and ongoing elections. We can help preserve the fundamental right to vote by carefully considering the issues such election emergencies raise ahead of time and crafting emergency statutes to empower election officials to respond appropriately.