

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.

INTRODUCTION	547
I. ELECTION EMERGENCIES IN THE EARLY TWENTY-FIRST CENTURY ...	553
A. <i>September 11 Attacks (New York City, 2001)</i>	553
B. <i>Hurricane Katrina (New Orleans, 2005)</i>	559
C. <i>Hurricane Sandy (New Jersey and New York, 2012)</i>	563
D. <i>Hurricane Matthew (Florida and Georgia, 2016)</i>	572
1. <i>Florida</i>	573
2. <i>Georgia</i>	583
3. <i>A Tale of Two States</i>	585
II. ELECTION EMERGENCIES AND CONSTITUTIONAL CHALLENGES	586
A. <i>Judicial Power to Delay or Reschedule Elections</i>	586
B. <i>Constitutional Challenges Based on Election Emergencies</i>	589
C. <i>The Timing of Election Challenges</i>	595
D. <i>Geographic Scope of the Election and Emergency</i>	597
E. <i>Plaintiffs' Structural Advantages in Election Emergency</i> <i>Litigation</i>	601
F. <i>The Special Case of Polling Place Hour Disputes</i>	603
III. ELECTION EMERGENCY STATUTES	609
A. <i>Current Election Emergency Laws</i>	610
B. <i>A Proposed Framework for Election Emergency Laws</i>	613
CONCLUSION	617

INTRODUCTION

The terrorist attacks of September 11, 2001,¹ 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.² 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.³

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.⁴ 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.⁵ 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.⁶ 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.⁷

Very few academic or other professional works have examined election emergencies in any depth.⁸ A few articles and reports assess the potential

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).

⁴ *See* NAT’L ASS’N OF SEC’YS OF STATE TASK FORCE ON EMERGENCY PREPAREDNESS FOR ELECTIONS, STATE LAWS AND PRACTICES FOR THE EMERGENCY MANAGEMENT OF ELECTIONS 4, 6, 8 (2014) (examining the few state laws addressing emergencies during elections).

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.

⁷ *See, e.g., Fla. Democratic Party v. Scott (Scott I)*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016); *infra* notes 334–42, 414 and accompanying text; *see also* Amended and Restated Petition, *Wallace v. Chertoff*, No. 05-5519 (E.D. La. Dec. 14, 2005), Doc. No. 9 [hereinafter *Wallace* Petition].

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.⁹ Several discuss the unique issues that arise in holding elections when disasters have displaced large numbers of voters from their homes,¹⁰ with a particular focus on Hurricane Katrina in 2006¹¹ and various international elections;¹² a

PLANNING FOR EMERGENCIES (2013), <https://lawyerscommittee.org/wp-content/uploads/2015/07/Emergency-Planning-Report-10-29-13.pdf>.

Some pieces briefly mention election-related disasters while focusing primarily on other issues. See Anthony J. Gaughan, *Ramshackle Federalism: America's Archaic and Dysfunctional Presidential Election System*, 85 *FORDHAM L. REV.* 1021, 1034–35, 1042–43 (2016) (discussing Professor Jerry Goldfeder's work and advocating for the creation of a federal task force to engage in contingency planning and help state authorities conduct elections following disasters); Steven F. Huefner, *Remedying Election Wrongs*, 44 *HARV. J. ON LEGIS.* 265, 276–77 (2007) (explaining how natural disasters can “require an adjustment of when and how . . . elections would occur”); Steven J. Mulroy, *Right Without a Remedy? The “Butterfly Ballot” Case and Court-Ordered Federal Election “Revotes,”* 10 *GEO. MASON L. REV.* 215, 235–36, 245 (2001) (arguing that states have power to reschedule elections due to terrorist attacks or natural disasters); Jim Rossi, *State Executive Lawmaking in Crisis*, 56 *DUKE L.J.* 237, 271 (2006) (briefly mentioning postponements of elections due to disasters); see also Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 *WASH. & LEE L. REV.* 937, 992 (2005) (discussing various circumstances under which a court may order a re-vote).

The Federal Judicial Center has compiled a comprehensive list of federal election cases, including those stemming from natural disasters. *Election Litigation: Studies in Emergency Election Litigation*, FED. JUD. CTR., <https://www.fjc.gov/content/case-studies> (last visited Dec. 31, 2017) (containing brief summaries of election-related rulings).

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).

¹⁰ The seminal piece on this topic is *Developments in the Law: Voting and Democracy*, 119 *HARV. L. REV.* 1127, 1183–86 (2006) [hereinafter *Voting and Democracy*].

¹¹ Kristen Clarke & Damon T. Hewitt, *Protecting Voting Rights in the Context of Mass Displacement*, 51 *HOW. L.J.* 511 (2008) (identifying potential solutions to the problems Hurricane Katrina posed for voter participation); Maya Roy, Note, *The State of Democracy After Disaster: How to Maintain the Right to Vote for Displaced Citizens*, 17 *S. CAL. INTERDISC. L.J.* 203, 206–11, 226–30 (2007) (analyzing litigation over elections in New Orleans following Hurricane Katrina and suggesting electoral reforms); Michelle Rupp, Note, *Internally Displaced Persons and Electoral Participation: A Call for Best Practices*, 25 *GEO. IMMIGR. L.J.* 681, 694–97 (2011) (discussing voting disruptions caused by Hurricane Katrina in the course of examining displaced persons' voting rights under international law).

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

Bosnia); Roy, *supra* note 11, at 211–19 (discussing elections in South Africa, Iraq, and Mexico); Rupp, *supra* note 11, at 692–94 (discussing elections in Bosnia and Sri Lanka).

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 Emergencies: Hurricane Sandy and the 2012 Election*, 14 ELECTION L.J. 66 (2015) (conducting an empirical 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 MASKELL, 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 A.2d 836, 838 (Pa. 1987) (cited in Goldfeder, *supra* note 9, at 532–34).

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

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.

²¹ Cf. Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. 79, 100 (2016).

Fourth, election emergency statutes must balance protecting the integrity of the election (i.e., the “defensive” right to vote)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

²² See Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 192–93 (2014).

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 2016.²³ 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 11.²⁴ In New York City alone, nominations for mayor, city council, and "other city-wide and borough-wide offices" were at stake.²⁵ The polls opened at 6 a.m.; less than three hours later, the first plane struck the World Trade Center.²⁶

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.²⁷ 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.²⁸ He also noted that "breakdowns in public transportation impeded voters and election inspectors in getting to the polls."²⁹ Fisher's ruling was based on his "inherent judicial authority."³⁰

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.*

²⁷ *Id.*; *Primary Elections Are Cancelled*, N.Y. L.J., Sept. 12, 2001, at 3.

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 emergency³¹ and cancelling all primaries throughout the state.³² Exercising his general emergency powers under the New York Executive Law,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.”³⁴ Although a New York statute specifically dealt with election emergencies, it applied only to general elections, not primaries.³⁵ No one filed judicial challenges to either Fisher’s court order or the Governor’s Executive Order.³⁶

Two days later, the state legislature enacted the Emergency Primary Election Rescheduling Act of 2001 (Primary Rescheduling Act).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.”³⁸ The statute rescheduled the primaries for September 25, 2001—only two weeks after the attacks—and any runoffs for October 11, 2001.³⁹

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.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.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

³¹ N.Y. Exec. Order No. 5.113 (Sept. 11, 2001), [https://govt.westlaw.com/nycrr/Document/14f078e3acd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Document/14f078e3acd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).

³² N.Y. Exec. Order No. 5.113.1 (Sept. 11, 2001), [https://govt.westlaw.com/nycrr/Document/14f078e3acd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Document/14f078e3acd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).

³³ N.Y. EXEC. LAW § 29-a(1) (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.”).

³⁴ N.Y. Exec. Order No. 5.113.1, *supra* note 32 (citing N.Y. ELEC. LAW § 8-100 (McKinney Supp. 2018)).

³⁵ N.Y. ELEC. LAW § 3-108 (McKinney Supp. 2018).

³⁶ Goldfeder, *supra* note 9, at 526.

³⁷ Emergency Primary Election Rescheduling Act of 2001, ch. 298, 2001 N.Y. Laws 2616.

³⁸ *Id.* § 1.

³⁹ *Id.* § 3(1)–(2), 2001 N.Y. Laws at 2617.

⁴⁰ *Id.* § 3(4).

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.

⁴⁷ N.Y. City Campaign Fin. Bd., Advisory Opinion 2001-12, §§ 1, 3 (Sept. 20, 2001), <https://www.nycffb.info/law/advisory-opinions/2001-12-effect-new-york-state-legislature-decision-reschedule-new-york-state/>; see also N.Y. CITY CAMPAIGN FIN. BD., *supra* note 46, at 82, 154; Jan Witold Baran, *Regulating Money in Politics: “We’ve Got It All Under Control,”* 32 CUMB. L. REV. 591, 591 (2001).

destroyed in the attacks, however, were permitted to spend additional funds for new office space.⁴⁸

More troublingly,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 25,⁵⁰ except to replicate for September 25 the “election day goods and services” they had already purchased for September 11.⁵¹ 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 war chests by then.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.”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.”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

⁴⁸ N.Y. City Campaign Fin. Bd., Advisory Opinion 2001-12, § 3(B); Baran, *supra* note 47, at 592.

⁴⁹ Editorial, *Tomorrow's Election*, N.Y. POST, Sept. 24, 2001, at 40 (“[I]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.”).

⁵⁰ N.Y. City Campaign Fin. Bd., Advisory Opinion 2001-12, § 4.

⁵¹ *Id.* § 3(A).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

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).

⁵⁸ *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976) (per curiam); see also *Republican Nat'l Comm. v. Fed. Election Comm'n*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

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.”⁵⁹ 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’”⁶⁰ Although the government has greater flexibility to impose restrictions on candidates who accept public financing,⁶¹ 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,⁶² 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.⁶³

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/>.

⁶³ *See* N.Y. ELEC. LAW § 3-108 (McKinney Supp. 2018).

B. Hurricane Katrina (New Orleans, 2005)

Hurricane Katrina hit New Orleans, Louisiana, on August 29, 2005,⁶⁴ causing an estimated \$85 billion in damage⁶⁵ and displacing approximately 1.3 million households.⁶⁶ 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.⁶⁷

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.⁶⁸ The electoral process was required to “resume or be rescheduled as soon thereafter as is practicable.”⁶⁹ 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.⁷⁰ 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.⁷¹ 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.”⁷²

⁶⁴ William P. Quigley, *Katrina Voting Wrongs: Aftermath of Hurricane and Weak Enforcement Dilute African American Voting Rights in New Orleans*, 14 WASH. & LEE J. C.R. & SOC. JUST. 49, 54 (2007).

⁶⁵ Roger Pielke Jr., *Hurricanes and Human Choice*, WALL ST. J. (Oct. 31, 2012, 9:54 PM), <https://www.wsj.com/articles/SB10001424052970204840504578089413659452702>.

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).

⁷⁰ See La. Exec. Order KBB 2005-36, § 1 (Sept. 14, 2005), <http://www.doa.la.gov/osr/other/kbb05-36.htm>.

⁷¹ Quigley, *supra* note 64, at 63.

⁷² La. Exec. Order KBB 2005-36, § 1.

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.⁷³ Governor Blanco issued another executive order postponing the primary, general, and proposition elections for Orleans County that had been scheduled for February and March 2006.⁷⁴ It required those elections to be rescheduled “as soon as practicable.”⁷⁵ Three lawsuits were filed challenging the Governor’s decision,⁷⁶ but were largely mooted when the Governor agreed to hold elections by the end of April.⁷⁷

The legislature also enacted a package of laws to facilitate voting by Hurricane Katrina’s victims.⁷⁸ One permanent provision empowers the secretary of state to propose an emergency voting plan to the state legislature when emergencies threaten impending elections.⁷⁹ Legislators vote by mail on the plan, and it takes effect upon their approval.⁸⁰

A temporary provision, which expired in July 2006,⁸¹ 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.⁸² Another temporary provision, repealed in 2009,⁸³ 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.⁸⁴ 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.⁸⁵

⁷³ La. Exec. Order KBB 2005-96, § 1 (Dec. 9, 2005), <http://www.doa.la.gov/osr/other/kbb05-96.htm>.

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 LA. 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.

⁸³ *See* Act No. 369, § 1, 2009 La. Acts 2584, *repealing* LA. STAT. ANN. 18:433(A)(2) (2009).

⁸⁴ LA. STAT. ANN. § 18:115(F)(1) (Supp. 2018).

⁸⁵ Act No. 2, 2006 La. Acts 3014, *codified at* LA. STAT. ANN. § 18:115(F)(2)(d)(i) (expired June 14, 2006).

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

⁸⁶ See, e.g., *Wallace* Petition, *supra* note 7, ¶¶ 4, 29–30, 42–45; Complaint ¶¶ 8, 76, 85, *ACORN v. Blanco*, No. 06-CV-00611 (E.D. La. Feb. 9, 2006), Doc. No. 1 [hereinafter *ACORN* Complaint]; see also *Williams*, *supra* note 66, at 1132 n.82 (discussing *Wallace* and *ACORN*).

⁸⁷ *Wallace* Petition, *supra* note 7, ¶¶ 4, 66–69.

⁸⁸ *Id.* ¶¶ 36–38, 79, 82.

⁸⁹ Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311 (2012) (*formerly codified at* 42 U.S.C. §§ 1973ff, *et seq.*).

⁹⁰ *Wallace* Petition, *supra* note 7, ¶ 74.

⁹¹ *Id.* ¶ 81.

⁹² *Id.* ¶ 83.

⁹³ *Id.* ¶ 84.

⁹⁴ *Id.* ¶¶ 4.a, 4.c, 75, 75.a, 78, 84.b–84.c.

⁹⁵ *Id.* ¶¶ 80, 84.a.

⁹⁶ *Id.* ¶¶ 79, 82.

the plaintiffs' claims for relief.⁹⁷ 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.⁹⁸

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.⁹⁹ 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.¹⁰⁰ The court dismissed all of the plaintiffs' claims with prejudice.¹⁰¹ ACORN subsequently disbanded over numerous scandals,¹⁰² including filing hundreds of thousands of fraudulent voter registration forms and attempting to assist other illegal activities.¹⁰³ 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.¹⁰⁴

⁹⁷ Order at 2, *Wallace v. Chertoff*, No. 05-5519 (E.D. La. June 13, 2006), Doc. No. 129 (dismissing case); *see also* Order at 4, *Wallace v. Chertoff*, No. 05-5519 (E.D. La. Feb. 23, 2006), Doc. No. 66 (denying motion for preliminary injunction); Order at 2, *Wallace v. Chertoff*, No. 05-5519 (E.D. La. Mar. 7, 2006), Doc. No. 85 (dismissing claims); Order at 2, *Wallace v. Chertoff*, No. 05-5519 (E.D. La. Mar. 29, 2006), Doc. No. 101 (denying motion to reconsider); Roy, *supra* note 11, at 209.

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.

¹⁰¹ Judgment, *ACORN v. Blanco*, No. 06-CV-00611 (E.D. La. June 16, 2006), Doc. No. 62 (dismissing case with prejudice); *see also* Order at 4, *ACORN v. Blanco*, No. 06-CV-00611 (E.D. La. Feb. 23, 2006), Doc. No. 16 (denying motion for preliminary injunction); Order at 2, *ACORN v. Blanco*, No. 06-CV-00611 (E.D. La. Mar. 7, 2006), Doc. No. 40 (dismissing claims); Order at 2, *ACORN v. Blanco*, No. 06-CV-00611 (E.D. La. Mar. 29, 2006), Doc. No. 49 (denying motion to reconsider).

¹⁰² Ian Urbina, *ACORN to Shut All Its Offices by April 1*, N.Y. TIMES (Mar. 22, 2010), <http://www.nytimes.com/2010/03/23/us/23acorn.html>; *After Video Scandal, ACORN Plans to Fold*, DETROIT FREE PRESS, Mar. 23, 2010, at A2.

¹⁰³ Katherine Kersten, Opinion, *Worst Trouble with ACORN Is at the Polls; Nationally, Its Voter Registration Is Often Fraudulent. So What About Here?*, STAR TRIB., Sept. 27, 2009, at 50P; *Vote-Theft, ACORN-Style*, N.Y. POST (Oct. 18, 2008, 7:15 AM), <http://nypost.com/2008/10/18/vote-theft-acorn-style/>; *see, e.g.,* Steve Friess, *ACORN Charged in Voter Registration Fraud Case in Nevada*, N.Y. TIMES (May 5, 2009), <http://www.nytimes.com/2009/05/05/us/05acorn.html>; Heather Heidelbaugh, *The ACORN Way; Its Partisan Voter Registration Drive Probably Violated Pennsylvania Election Law*, PITTSBURGH POST-GAZETTE, Oct. 22, 2009, at B-7.

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 830, 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.¹⁰⁵ 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.¹⁰⁶ New Jersey evacuated residents from its barrier islands and closed Atlantic City casinos.¹⁰⁷

The storm caused billions of dollars in damage.¹⁰⁸ It made landfall in Atlantic City around 8:00 p.m. on October 29.¹⁰⁹ Approximately three-quarters of the city were thrust underwater, and parts of the boardwalk were destroyed.¹¹⁰ “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.”¹¹¹ 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 mooted such concerns.

¹⁰⁵ Gene Cherry, *Massive Hurricane Sandy Takes Aim at East Coast*, REUTERS, Oct. 26, 2012, <https://www.reuters.com/article/us-storm-sandy-hurricane/massive-hurricane-sandy-takes-aim-at-east-coast-idUSBRE89N16J20121027>.

¹⁰⁶ James Barron, *Sharp Warnings as Hurricane Churns In*, N.Y. TIMES (Oct. 29, 2012), <http://www.nytimes.com/2012/10/29/us/east-coast-braces-for-severe-storm-surge.html>.

¹⁰⁷ *Id.*

¹⁰⁸ David M. Halbfinger, *New Jersey Reels from Storm’s Thrashing*, N.Y. TIMES (Oct. 30, 2012), <http://www.nytimes.com/2012/11/01/nyregion/new-jersey-continues-to-cope-with-hurricane-sandy.html>.

¹⁰⁹ Thomas Kaplan & N.R. Kleinfield, *Empty of Gamblers and Full of Water, Atlantic City Reels*, N.Y. TIMES (Oct. 29, 2012), <http://www.nytimes.com/2012/10/30/nyregion/storm-overwhelms-atlantic-city.html?mtref=undefined&gwh=0340ACBB5B886B71113AE5534D377B07&gwt=pay>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

destroyed “entire neighborhoods.”¹¹² Over 2 million New Jersey residents¹¹³ and 6 million New York residents¹¹⁴ were left without power and approximately 161,000 families were displaced.¹¹⁵ Losses were estimated to be as high as \$50 billion,¹¹⁶ and hundreds of polling places were destroyed, left without power, or otherwise rendered inaccessible.¹¹⁷

On October 27, 2012, two days before Sandy hit, New Jersey Governor Chris Christie proclaimed a state of emergency.¹¹⁸ 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.”¹¹⁹ Pursuant to the state’s general emergency statute,¹²⁰ 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.¹²¹

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.”¹²² On November 1, she extended the deadline by which clerks had to receive mailed requests for mail-in ballots from Tuesday, October 30¹²³ to Friday, November 2,¹²⁴ ordered all election offices to remain open over the

¹¹² Halbfinger, *supra* note 108.

¹¹³ James Barron, *Storm Barrels Through Region, Leaving Destructive Path*, N.Y. TIMES (Oct. 29, 2012), <http://www.nytimes.com/2012/10/30/us/hurricane-sandy-churns-up-east-coast.html>.

¹¹⁴ Halbfinger, *supra* note 108.

¹¹⁵ Ted Sherman, *Emergency Voting Measures During Hurricane Sandy Violated N.J. Law, Inviting Fraud, Study Finds*, NJ.COM (Oct. 24, 2014, 10:15 AM), http://www.nj.com/politics/index.ssf/2014/10/emergency_voting_measures_during_hurricane_sandy_violated_nj_law_inviting_fraud_study_finds.html.

¹¹⁶ Mary Williams Walsh & Nelson D. Schwartz, *Estimate of Economic Losses Now Up to \$50 Billion*, N.Y. TIMES (Nov. 1, 2012), <http://www.nytimes.com/2012/11/02/business/estimate-of-economic-losses-now-up-to-50-billion.html?mtref=undefined&gwh=D2EA4F9AECA0704D40559557CB7F61B8&gwt=pay>.

¹¹⁷ Zach Montellaro, *Why You (Still) Can't Vote Online*, ATLANTIC (Jan. 28, 2016), <https://www.theatlantic.com/politics/archive/2016/01/why-you-still-cant-vote-online/459183/>; *see also* Sherman, *supra* note 115.

¹¹⁸ N.J. Exec. Order No. 104 (Oct. 27, 2012), <http://nj.gov/infobank/circular/eocc104.pdf>.

¹¹⁹ *Id.* at 1.

¹²⁰ *See* N.J. STAT. ANN. app. A:9-45 (West 2006); *see also id.* app. A:9-47.

¹²¹ N.J. Exec. Order No. 104, § 6.

¹²² Kim Guadagno, Lieutenant Governor & Sec’y of State, State of N.J., Directive Easing Restrictions on Voters in the Aftermath of Hurricane Sandy (Nov. 1, 2012), <http://nj.gov/state/elections/2012-results/signed-directive-hurricane-sandy-110212.pdf>.

¹²³ *See* N.J. STAT. ANN. § 19:63-3(b) (West 2014). State law also allowed voters to request mail-in ballots in person up through 3:00 p.m. the day before an election. *Id.* § 19:63-3(d).

¹²⁴ Guadagno, *supra* note 122, ¶ 1.

weekend before Election Day and extend their normal operating hours;¹²⁵ and required local election officials to confirm that polling places remained accessible and had power.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.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.¹²⁸

The same day, Guadagno issued two other directives that expanded opportunities to vote, in apparent violation of New Jersey law.¹²⁹ One order authorized any voter displaced by Hurricane Sandy to cast a provisional ballot at any polling place in the state.¹³⁰ Election officials were directed to transmit those provisional ballots to the voters' respective home counties.¹³¹ Only votes for offices for which a person was entitled to vote would be counted.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.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.¹³⁴ It did not permit a person to cast a provisional

¹²⁵ *Id.* ¶¶ 2–3.

¹²⁶ *Id.* ¶ 4.

¹²⁷ *Id.* ¶¶ 5–7.

¹²⁸ Kim Guadagno, Lieutenant Governor & Sec'y of State, State of N.J., Directive Regarding Notice and Communication (Nov. 3, 2012), <http://nj.gov/state/elections/2012-results/directive-notice-communication.pdf>.

¹²⁹ CONSTITUTIONAL RIGHTS CLINIC, RUTGERS LAW SCHOOL-NEWARK, *THE PERFECT STORM: VOTING IN NEW JERSEY IN THE WAKE OF SUPERSTORM SANDY* 3, 40 (2014) [hereinafter *THE PERFECT STORM*]; Larry Greenemeier, *Election 2012: Sandy Prompts N.J. to Extend E-Mail Voting*, *SCI. AM.* (Nov. 5, 2012), <https://blogs.scientificamerican.com/observations/election-2012-sandy-prompts-n-j-to-extend-e-mail-voting/>.

¹³⁰ Kim Guadagno, Lieutenant Governor & Sec'y of State, State of N.J., Directive Expanding Ability of Displaced Voters to Vote (Nov. 3, 2012), <http://nj.gov/state/elections/2012-results/directive-displaced-voters.pdf>.

¹³¹ *Id.* ¶ 1(a)–(b).

¹³² *Id.* ¶ 1(c)(i)–(ii).

¹³³ *See supra* notes 130–32 and accompanying text.

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.¹³⁵ 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.¹³⁶ Thus, Guadagno's decision to unilaterally authorize provisional voting in circumstances not permitted by the Election Code is highly dubious.

She concurrently issued another order¹³⁷ allowing voters displaced by Hurricane Sandy to also take advantage of special voting procedures state law established for military and overseas voters.¹³⁸ 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.¹³⁹ 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)."¹⁴⁰ Voters were permitted to return their completed ballots by email or fax by 8:00 p.m. on Election Day,¹⁴¹ 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).¹⁴²

Numerous commentators immediately attacked Guadagno's order, in particular because it did not provide for an auditable paper trail of votes cast,¹⁴³

she votes at a polling place without displaying a statutorily required form of identification, or she requested a mail-in ballot but did not cast it. *Id.* §§ 19:53C-1(b), 19:53C-3(g)-(j).

¹³⁵ *Cf.* N.J. STAT. ANN. § 19:53C-3(d)-(e) (providing that a voter may not be given a provisional ballot in her current county of residence if she is registered to vote in another county).

¹³⁶ *See* N.J. STAT. ANN. app. A:9-34, 9-45. The governor may suspend or ignore motor vehicle and other regulatory laws during emergencies. *Id.* at app. A:9-47 ("The Governor is authorized to provide . . . that any . . . traffic act provision or any other regulatory provision of law, the enforcement of which will be detrimental to the public welfare during any . . . emergency, shall be suspended . . .").

¹³⁷ Kim Guadagno, Lieutenant Governor & Sec'y of State, State of N.J., Directive Regarding Email Voting and Mail-in Ballots for Displaced Voters (Nov 3, 2012), <http://nj.gov/state/elections/2012-results/directive-email-voting.pdf>.

¹³⁸ N.J. STAT. ANN. §§ 19:59-1-19:59-16 (West Supp. 2017); *see also* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311 (2012), *as amended by* National Defense Authorization Act for Fiscal Year 2010 (Subtitle H), Pub. L. No. 111-84, §§ 575-589, 123 Stat. 2190, 2318-35 (Oct. 28, 2009).

¹³⁹ Guadagno, *supra* note 137.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See, e.g.,* Greenemeier, *supra* note 129 ("The central point of contention is that whereas military absentee voters are required by law to mail a paper ballot in addition to voting by e-mail or fax, Guadagno's directive makes no mention of a backup paper trail."); Herb Jackson & Anthony Campisi, *Sandy: An Election Day Like No Other*, NORTHJERSEY.COM, <http://www.northjersey.com/story/weather/2017/10/05/archive-sandy-election-day-like-no-other/735510001/> (last updated Oct. 5, 2017, 12:14 PM).

which the statute governing military and overseas voters requires.¹⁴⁴ 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.¹⁴⁵ Moreover, it is unclear whether election officials would count electronic ballots from voters who failed to submit hard copies as well.¹⁴⁶

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.¹⁴⁷ 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 19.¹⁴⁸ 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.¹⁴⁹

Over 50,000 ballots were submitted by electronic mail or fax.¹⁵⁰ Clerks lacked the infrastructure and personnel necessary to timely respond to the deluge of electronically submitted ballot requests and completed ballots.¹⁵¹ 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.

¹⁴⁷ N.J. STAT. ANN. § 19:63-18 (West 2014).

¹⁴⁸ Guadagno, *supra* note 137.

¹⁴⁹ Kim Guadagno, Lieutenant Governor & Sec’y of State, State of N.J., Directive Regarding the Certification of Election Results for the November 2012 General Election (Nov. 9, 2012), <http://nj.gov/state/elections/2012-results/directive-certification-of-results.pdf>.

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.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.¹⁵³ One election official had voters transmit ballot requests to his personal e-mail address.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,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.¹⁵⁶ Federal law requires states to accept FWABs from military and overseas voters who timely request absentee ballots, but do not receive them.¹⁵⁷ The court rejected the petition.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 9.¹⁵⁹ 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."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 9.¹⁶¹ The directive

¹⁵² THE PERFECT STORM, *supra* note 129, at 17.

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/>.

¹⁵⁴ Zetter, *supra* note 153.

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).

¹⁵⁶ See 52 U.S.C. § 20303(c) (2012); see also N.J. STAT. ANN. § 19:59-2(j) (West 2017).

¹⁵⁷ 52 U.S.C. § 20303(a)(1), (b)(2)–(3). New Jersey law does not expressly incorporate federal law's restrictions on military and overseas voters' use of FWABs. See N.J. STAT. ANN. §§ 19:59-14, 19:59-15(a) (West 2017).

¹⁵⁸ Order ¶¶ 1–3, *Ertel v. Essex Cty. Bd. of Elections* (N.J. Super. Ct. Law Div. Nov. 7, 2012), https://www.aclu-nj.org/files/8913/5238/9713/2012_11_06_ORDER.pdf.

¹⁵⁹ *Id.* ¶¶ 4–5.

¹⁶⁰ Baxter, *supra* note 151, at 001.

¹⁶¹ Kim Guadagno, Lieutenant Governor & Sec'y of State, State of N.J., Directive to Accommodate Processing of Electronically Transmitted Mail-in Ballot Applications and to Preserve Displaced Voters' Right to Vote (Nov. 6, 2012), <http://nj.gov/state/elections/2012-results/directive-volume-and-extension.pdf>.

required voters to mail or fax completed ballots by 8:00 p.m. on November 9.¹⁶² 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.¹⁶³

Guadagno's emergency orders led to serious problems with a public referendum on reducing rent control restrictions in Hoboken, New Jersey.¹⁶⁴ Under her orders, Hoboken voters who requested and cast ballots electronically¹⁶⁵ were permitted to vote on the public question.¹⁶⁶ Voters who instead cast provisional ballots in person at polling locations outside of Hoboken¹⁶⁷ did not have the opportunity to vote on it since the question did not appear on the ballots those polling locations distributed.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."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.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.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."¹⁷² The Appellate Division emphasized that displaced voters had not been informed that provisional ballots in alternate polling locations did not

¹⁶² *Id.* ¶ 4.

¹⁶³ *Id.* ¶ 5.

¹⁶⁴ *In re* Contest of the Nov. 6, 2012 Election Results for the City of Hoboken, Public Question No. 2, No. A-3218-12T3, 2013 N.J. Super. Unpub. LEXIS 2250 (N.J. Super. Ct. App. Div. Sept. 11, 2013) [hereinafter *In re Election Contest*]; see Hoboken Public Question No. 2, Barbara A. Netchert, Hudson Cty. Clerk, County of Hudson General Election Sample Ballot (Nov. 6, 2012), <http://www.hudsoncountyclerk.org/elections/2012%20General%20Election%20Sample%20Ballots/Hbkn%20Smpl%20f7.pdf>.

¹⁶⁵ Guadagno, *supra* note 137.

¹⁶⁶ *In re Election Contest*, 2013 N.J. Super. Unpub. LEXIS 2250, at *6.

¹⁶⁷ Guadagno, *supra* note 130.

¹⁶⁸ *In re Election Contest*, 2013 N.J. Super. Unpub. LEXIS 2250, at *6.

¹⁶⁹ *Id.*

¹⁷⁰ Barbara A. Netchert, Hudson Cty. Clerk, 2012 General Election Totals, "Hoboken Public Question No. 2," http://www.hudsoncountyclerk.org/elections/SOV%20Amended%20Municipal%20Total%20General%20Election%2011_6_2012.pdf.

¹⁷¹ *In re Election Contest*, 2013 N.J. Super. Unpub. LEXIS 2250, at *6.

¹⁷² *Id.* at *5 (citing N.J. STAT. ANN. § 19:29-1(e) (West 2014)).

provide an opportunity to vote on Hoboken's public questions.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."¹⁷⁴ It ordered that the public question "be placed on the November 5, 2013 ballot."¹⁷⁵

The Lawyers' Committee for Civil Rights Under Law termed New Jersey's election a "catastrophe."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.¹⁷⁷ It claimed that her last-minute order confused and overwhelmed county clerks and "left votes vulnerable to online hacking."¹⁷⁸ Counties lacked the infrastructure necessary to ensure that voting was secure, voters' information was protected, and results could not be manipulated.¹⁷⁹ The report concluded, "Internet voting should never be permitted, especially in emergencies when governmental infrastructure is already compromised."¹⁸⁰

New York took a very different approach toward preserving its citizens' right to vote.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."¹⁸² The order directed state agencies "to take appropriate action to protect State

¹⁷³ *Id.* at *8.

¹⁷⁴ *Id.* at *9.

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%2011_5_2013.pdf.

¹⁷⁶ Mitchell Landsberg, *Voting Rights Coalition Describes Problems in N.J., Other States*, L.A. TIMES (Nov. 6, 2012), <http://articles.latimes.com/2012/nov/06/news/la-pn-voting-rights-problems-election-day-20121106>.

¹⁷⁷ THE PERFECT STORM, *supra* note 129, at 83.

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.

¹⁷⁹ THE PERFECT STORM, *supra* note 129, at 83; *see also* Zetter, *supra* note 153.

¹⁸⁰ THE PERFECT STORM, *supra* note 129, at 83.

¹⁸¹ Greenemeier, *supra* note 129.

¹⁸² N.Y. Exec. Order No. 47 (Oct. 26, 2012), http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO47_0.pdf.

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.”¹⁸³

The day before Election Day, Cuomo issued another executive order focusing specifically on the impending election.¹⁸⁴ 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.”¹⁸⁵ Cuomo used his statutory authority to suspend state laws during declared emergencies¹⁸⁶ to permit voters registered in New York City or other counties within the federally declared disaster zone¹⁸⁷ to cast provisional ballots (called “affidavit ballots”) at any polling location,¹⁸⁸ not just the ones at which they were registered.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ The Governor did not authorize internet voting, ostensibly on the grounds it was too insecure.¹⁹²

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

¹⁸³ *Id.*

¹⁸⁴ N.Y. Exec. Order No. 62 (Nov. 5, 2012), http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO62_0.pdf.

¹⁸⁵ *Id.*

¹⁸⁶ See N.Y. EXEC. LAW § 29-a(1) (McKinney Supp. 2018).

¹⁸⁷ By Election Day, the federal government had declared the following counties to be disaster zones: Bronx, Kings, Nassau, New York, Queens, Richmond, and Suffolk. See New York; Major Disaster and Related Determinations, 77 Fed. Reg. 69,647, 69,648 (Nov. 20, 2012) (discussing the President’s October 30, 2012 declaration of major disaster for the State of New York and identifying “adversely affected” counties); New York; Amendment No. 2 to Notice of a Major Disaster Declaration, 77 Fed. Reg. 67,015, 67,015 (Nov. 7, 2012) (designating two additional New York counties as disaster areas, effective November 2); New York; Amendment No. 3 to Notice of a Major Disaster Declaration, 77 Fed. Reg. 69,646, 69,646–47 (Nov. 20, 2012) (reiterating list of New York counties designated as disaster areas as of November 3); see also N.Y. Exec. Ord. No. 47 (Oct. 26, 2012), http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO47_0.pdf; *New York Hurricane Sandy (DR-4085)*, FED. EMERGENCY MGMT. AGENCY, https://gis.fema.gov/maps/dec_4085.pdf (last updated Nov. 19, 2012).

¹⁸⁸ N.Y. Exec. Ord. No. 62, *supra* note 188.

¹⁸⁹ Cf. N.Y. ELEC. LAW §§ 8-302(3)(e)(ii), (3-a), 9-209(2)(a)(i)(E)(iii) (McKinney Supp. 2018).

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

¹⁹³ Fla. Exec. Ord. No. 16-230 (Oct. 3, 2016), <http://www.flgov.com/wp-content/uploads/2016/10/SLG-BIZHUB16100301110.pdf>.

¹⁹⁴ Ga. Exec. Ord. No. 10.04.16.02 (Oct. 4, 2016), https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/10.04.16.02.pdf; *see also* Ga. Exec. Ord. No. 10.11.16.01 (Oct. 11, 2016), https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/10.11.16.01.pdf; Ga. Exec. Ord. No. 10.05.16.02 (Oct. 5, 2016), https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/10.05.16.02.pdf (declaring state of emergency in additional counties).

¹⁹⁵ N.C. Exec. Ord. No. 129 (Oct. 26, 2012), https://www2.ncdps.gov/cit/ExecutiveOrders/EO129_SOETropicalStormSandy.pdf; *see also* N.C. Exec. Ord. No. 131 (Oct. 29, 2012), <https://www2.ncdps.gov/cit/ExecutiveOrders/EO131WinterStorm.pdf>.

¹⁹⁶ S.C. Exec. Ord. No. 2016-26 (Oct. 4, 2016), http://dc.statelibrary.sc.gov/bitstream/handle/10827/23222/GOV_Executive_Order_2016-26.pdf; *see also* S.C. Exec. Ord. No. 2016-39 (Oct. 18, 2016), http://dc.statelibrary.sc.gov/bitstream/handle/10827/23436/GOV_Executive_Order_2016-39.pdf.

¹⁹⁷ J.D. Gallop et al., *Matthew Marching Closer to U.S. Coast*, FLA. TODAY, Oct. 6, 2016, at B1; *see* S.C. Exec. Ord. No. 2016-31 (Oct. 5, 2016), <http://www.scstatehouse.gov/reports/ExecutiveOrders/exor2016-31.pdf> (ordering evacuations); S.C. Exec. Ord. No. 2016-32 (Oct. 6, 2016), http://dc.statelibrary.sc.gov/bitstream/handle/10827/23228/GOV_Executive_Order_2016-32.pdf (ordering evacuation of parts of two additional counties); S.C. Exec. Ord. No. 2016-33 (Oct. 6, 2016), http://dc.statelibrary.sc.gov/bitstream/handle/10827/23229/GOV_Executive_Order_2016-33.pdf (ordering further evacuations of parts of two other counties).

¹⁹⁸ *See* Willie Drye, *Hurricane Matthew: The Timeline*, NAT'L GEO. (Oct. 13, 2016), <http://voices.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-up-florida-georgia-south-carolina-coast-as-a-category-3/in-georgia-assessing-the-damage-from-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 11.²⁰¹ 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.²⁰²

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 12.²⁰³

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."²⁰⁴ 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."²⁰⁵ 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 18.²⁰⁶

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

²⁰⁰ See Eileen Kelley, *Gov. Scott Visits Jacksonville Beach on Tour of Storm Damage*, FLA. TIMES-UNION (Oct. 9, 2016, 10:41 AM), <http://jacksonville.com/news/2016-10-09/gov-scott-visits-jacksonville-beach-tour-storm-damage>; see also Annie Martin, *Volusia Residents, Businesses Clean Up; More Than 95,000 Still Don't Have Power*, ORLANDO SENTINEL (Oct. 10, 2016), http://digitaledition.orlandosentinel.com/tribune/article_popover.aspx?guid=48b531e8-4c78-4318-b44e-72e4e77b235f.

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/289df7fb69bf43ed943b54e7447dfc99/judge-asked-extend-voter-registration-due-hurricane>.

²⁰³ *Scott I*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016).

²⁰⁴ Fla. Democratic Party v. Scott (*Scott II*), No. 4:16-CV-626-MW/CAS, 2016 WL 6080225, at *1 (N.D. Fla. Oct. 12, 2016).

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.²⁰⁷ The court noted that Hurricane Matthew’s “[l]ife-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.²⁰⁸ It further stated that the “U.S. Postal Service also suspended operations in the affected areas,”²⁰⁹ though the closures were far more limited and brief than the court’s ruling may have suggested.²¹⁰ 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.²¹¹ Following the court’s order, nearly 64,000 additional registration forms were filed.²¹²

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.²¹³ The registration deadline was therefore subject to strict scrutiny, which it failed.²¹⁴ The U.S. Supreme Court, however, has upheld the constitutionality of voter registration deadlines that

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.

²¹⁰ Many post offices in Florida closed early on Thursday, October 6. By Friday, October 7, a substantial number of post offices throughout the affected areas reopened and resumed ordinary mail operations. *See, e.g.*, Press Release, U.S. Postal Serv., Postal Service Updates After Hurricane Matthew (Oct. 6, 2016), http://about.usps.com/news/state-releases/fl/2016/fl_2016_1007.htm (“The U.S. Postal Service will deliver mail in Broward, Miami-Dade, Monroe, and Palm Beach counties today, Friday, Oct. 7.”); Press Release, U.S. Postal Serv., Postal Service Resumes Delivery and Opens Many Post Offices in ZIP Code 338 As Hurricane Matthew Passes (Oct. 7, 2016), http://about.usps.com/news/state-releases/fl/2016/fl_2016_1007a.htm (noting that many Suncoast District post offices resumed service on Friday, October 7). Many remaining post offices reopened on Saturday, October 8. *See, e.g.*, Press Release, U.S. Postal Serv., Postal Service Resumes Delivery in Hurricane-Affected Areas Today (Oct. 8, 2016), http://about.usps.com/news/state-releases/fl/2016/fl_2016_1008.htm (“Today the Postal Service has resumed mail delivery in [multiple] hurricane-impacted areas . . .”); Press Release, U.S. Postal Serv., Postal Service Suspends Additional Delivery, Retail Operations As Hurricane Matthew Nears (Oct. 6, 2012), http://about.usps.com/news/state-releases/fl/2016/fl_2016_1006c.htm (“All Post Offices in the Suncoast District are scheduled to resume normal business hours on Saturday, October 8 and mail delivery will resume.”). Virtually all resumed ordinary operations by Tuesday, October 11. *See, e.g.*, Press Release, U.S. Postal Serv., Post Office Operations Restored in North Florida and Southern Georgia (Oct. 12, 2016), http://about.usps.com/news/state-releases/fl/2016/fl-ga_2016_1012.htm (stating that only one post office in northern Florida remained closed).

²¹¹ *Scott I*, 215 F. Supp. 3d at 1257 n.2.

²¹² Steve Bousquet, *Voter Signups Surge to Record*, TAMPA BAY TIMES (Oct. 20, 2016), <http://pqasb.pqarchiver.com/tampabay/doc/1830360847.html?FMT=FT&pf=1>.

²¹³ *Scott I*, 215 F. Supp. 3d at 1257.

²¹⁴ *Id.*

fell as many as fifty days before an election.²¹⁵ Judged 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).²¹⁶

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].”²¹⁷ To the contrary, that is how many generally accepted election rules work,²¹⁸ from the requirement that a person present herself at a polling location before the polls close,²¹⁹ to restrictions on the polling location at which a person must cast her ballot.²²⁰ 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

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) (“[E]ach 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 . . .”).

²¹⁷ Cf. *Scott I*, 215 F. Supp. 3d at 1257.

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[]—at least to some degree—the individual’s right to vote”); see also *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“[T]o 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

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 YTDTotal.PDF, 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.

²²⁹ See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

²³⁰ *Scott II*, No. 4:16-CV-626-MW/CAS, 2016 WL 6080225, at *1 n.2 (N.D. Fla. Oct. 12, 2016).

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,"²³³ it issued a Defendant-Oriented Injunction²³⁴ 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."²³⁵

The court's reasoning conflated facial and as-applied challenges to Florida's voter registration deadline.²³⁶ 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.²³⁷ 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.²³⁸ The court held that the plaintiff Democratic Party had standing to enforce the rights of individuals wishing to register as Democrats;²³⁹ 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

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.").

²³⁵ *Scott I*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016).

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 motivated²⁴⁰ and potentially raised First Amendment or Equal Protection concerns.²⁴¹ The order’s scope raises questions about whether indispensable parties were missing²⁴² or whether the case should have been required to proceed as a Rule 23(b)(2) class action.²⁴³

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.²⁴⁴ 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 test²⁴⁵ and rational basis scrutiny.²⁴⁶ 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

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. CHI. 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.”²⁴⁷ Indeed, the court found the refusal of Florida—like thirty-four other states²⁴⁸—to allow people to register on Election Day itself “incomprehensible.”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.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.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 standard²⁵²—calls into question its objectivity.²⁵³ Virtually nothing fails under the extraordinarily permissive rational basis standard.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),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

²⁴⁷ *Id.* at 1257–58 (reiterating that “fifteen other states, including, for example, Iowa, even allow registration on Election Day”).

²⁴⁸ *See id.* at 1258.

²⁴⁹ *Id.*

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).

²⁵¹ *Scott I*, 215 F. Supp. 3d at 1257.

²⁵² *Id.*

²⁵³ *See also infra* note 385 (discussing the court’s partisan commentary).

²⁵⁴ *See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1, 8 (1971) (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.’”).

²⁵⁵ FLA. STAT. ANN. § 101.657(1)(d) (West 2015).

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."²⁵⁶ 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.").

²⁵⁹ *See* *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1326–27 (S.D. Fla. 2008); *see also* Dara Kam, *Groups' Voter Sign-Up Drives Raise Fears About Fraudulent Applications*, PALM BEACH POST, Sept. 28, 2008, at 6A.

²⁶⁰ *Diaz*, 541 F. Supp. 2d 1319.

²⁶¹ *Id.* at 1333–34.

their registrations *long before books close twenty-nine days before an election.*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."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."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."²⁶⁵ It identified and discussed ten discrete sets of responsibilities election officials must fulfill, primarily within that short period.²⁶⁶ As a result, election officials face "enormous pressure" and "stress" that should not be unnecessarily exacerbated.²⁶⁷ Enforcing the deadline "decreases the confusion and distraction . . . and thereby reduces the risk of error and disorder in Florida's election process."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 *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.

²⁶² *Id.* at 1334–35 (emphasis added).

²⁶³ *Id.* at 1335.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1336–39.

²⁶⁷ *Id.* at 1340.

²⁶⁸ *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.²⁶⁹ 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.²⁷⁰ 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 potentially 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.²⁷¹

The plaintiffs asked the court to extend the voter registration deadline to October 18 in Chatham County.²⁷² The state objected, arguing that extending the deadline would significantly burden election officials, particularly since early voting was scheduled to begin on October 17.²⁷³ The court expressed "significant reservations" about the plaintiffs' claims and recognized that the state "may not be under any obligation" to extend the deadline.²⁷⁴ It opined that granting an extension was nevertheless "the right thing to do."²⁷⁵ 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."²⁷⁶ 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."²⁷⁷

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>.

²⁷⁰ Ga. Coalition for the Peoples' Agenda, Inc. v. Deal, 214 F. Supp. 3d 1344, 1344–45 (S.D. Ga. 2016).

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 18.²⁷⁸ It limited its relief to that county, however, and refused to extend its order statewide.²⁷⁹ 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.²⁸⁰ 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.²⁸¹ It further declared that the State of Georgia had not burdened anyone's right to vote.²⁸² 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."²⁸³

Setting aside its state action concerns, the court went on to apply the *Anderson-Burdick* balancing test.²⁸⁴ 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.²⁸⁵ The state, in contrast, had a substantial interest in allowing the election to proceed without reopening voter registration.²⁸⁶ Early voting had already commenced; forcing the state to register new voters while voting was occurring would cause substantial "administrative and technological difficulties."²⁸⁷ Thus, enforcing the voter registration deadline throughout the state would not violate people's right to vote.²⁸⁸ The court denied the request for a statewide TRO,²⁸⁹ and the plaintiffs voluntarily dismissed the case.

²⁷⁸ *Id.* at 1344, 1346.

²⁷⁹ *Id.* at 1346 n.2.

²⁸⁰ *Bethea v. Deal*, No. CV-216-140, 2016 WL 6123241, at *1 (S.D. Ga. Oct. 19, 2016).

²⁸¹ *Id.*

²⁸² *Id.* at *3.

²⁸³ *Id.* at *2.

²⁸⁴ *Id.*; *see supra* note 245.

²⁸⁵ *Bethea*, 2016 WL 6123241, at *2.

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 disputes²⁹² 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

²⁹⁰ *Scott I*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016).

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.>").

²⁹⁷ *Foster v. Love*, 522 U.S. 67, 72 (1997).

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

²⁹⁸ 2 U.S.C. § 8(a) (2012).

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 or Senate 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.

³⁰⁶ Legislative Branch Appropriations Act, 2006, Pub. L. No. 109-55, § 301(2), 119 Stat. 565, 588–89 (Aug. 2, 2005) (codified at 2 U.S.C. § 8(b) (2012)).

routinely permitted Senate run-offs to be held after Election Day when required by state law,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.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.”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.”³¹⁰ But the Constitution consistently uses the word “appoint” to refer to the selection of electors,³¹¹ and no one questions the propriety of state legislatures choosing electors through elections.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.”³¹³ At least one court has held that this provision requires that electors be chosen on the same day throughout the nation: Election Day.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

³⁰⁷ *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); *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”).

³⁰⁸ 3 U.S.C. § 1 (2012).

³⁰⁹ *Id.* § 2.

³¹⁰ *Id.*

³¹¹ U.S. CONST. art. II, § 1.

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

³¹³ U.S. CONST. art. II, § 1, cl. 4.

³¹⁴ Fladell v. Elections Canvassing Comm’n of Fla., Nos. CL 00-10965 AB et al., 2000 Fla. Cir. LEXIS 755, at *6 (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.³¹⁵ 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 [s]tates.”³¹⁶ 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.³¹⁷ State constitutions contain a range of other election-related provisions that limit states’ discretion,³¹⁸ but most involve legal standards substantially equivalent to the Fourteenth Amendment.³¹⁹ In general, a person’s Fourteenth Amendment right to vote may be violated only by intentional government conduct³²⁰ such as the adoption of malapportioned redistricting schemes,³²¹ enactment of statutes that restrict the franchise³²² or impose undue burdens on the electoral process,³²³ or racial discrimination.³²⁴

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.

³¹⁸ *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–05 (2014).

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) (holding that adoption of state legislative districts with substantially unequal populations violates the Equal Protection Clause).

³²² *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (“[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.”).

³²³ *Bullock v. Carter*, 405 U.S. 134, 144, 149 (1972) (invalidating substantial mandatory filing fee for candidates).

³²⁴ *Anderson v. Martin*, 375 U.S. 399, 402–03 (1964) (invalidating statute requiring that ballots specify candidates’ races next to their names); *see also* *Hunter v. Underwood*, 471 U.S. 222, 224–25 (1985).

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. Kasper*, 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”³³⁴ where it is “fundamental[ly] unfair.”³³⁵ 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.”³³⁶ 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.³³⁷

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.”³³⁸

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.³³⁹ 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.³⁴⁰ 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).

³³⁴ *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008).

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. Polythress*, 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.

³³⁸ *Id.*; *see also Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969).

³³⁹ *See In re Gen. Election*, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987).

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.³⁴¹ 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.³⁴²

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.³⁴³ 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.³⁴⁴

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,³⁴⁵ 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.³⁴⁶ By choosing to wait until the end of a lengthy registration

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).

³⁴³ See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–91 (2008).

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.

³⁴⁶ *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1334–35 (S.D. Fla. 2008).

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.³⁴⁷ 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,³⁴⁸ 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.³⁴⁹ 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).³⁵⁰ 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.³⁵¹ A deadline for

³⁴⁷ *Bethea v. Deal*, No. CV-216-140, 2016 WL 6123241, at *3 (S.D. Ga. Oct. 19, 2016); *see also* *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam); *Diaz*, 541 F. Supp. 2d at 1336–40.

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).

³⁵⁰ *See Absentee and Early Voting*, NAT'L CONF. STATE LEGISLATURES (Aug. 17, 2017), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

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”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.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.³⁵⁴ Modifying the rules governing elections raises separation of powers and sometimes federalism concerns.³⁵⁵ In most cases, such as Hurricane Sandy,³⁵⁶ election modifications—discrete changes to particular election laws to remedy substantial burdens on the right to vote³⁵⁷—should be sufficient. In extreme cases, such as September 11,³⁵⁸ 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.

presidential election was inappropriate despite “poor weather” that reduced voter turnout to half the level from the previous presidential election); *cf.* *Corning v. Bd. of Elections*, 454 N.Y.S.2d 164, 165–66 (N.Y. App. Div. 1982) (holding that a law establishing different polling hours for different counties within a state did not burden the fundamental right to vote, did not trigger strict scrutiny, and survived rational basis scrutiny).

³⁵² *Crawford*, 553 U.S. at 203 (plurality).

³⁵³ *Id.*

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.”).

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”).

³⁵⁶ *See supra* Section I.C.

³⁵⁷ *See supra* note 188 and accompanying text.

³⁵⁸ *See supra* Section I.A.

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 re-votes,³⁶³ they should apply the doctrine of laches³⁶⁴ aggressively to impose a strong presumption against *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, *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).

³⁶¹ Geraldine Baum et al., *N.Y. City Closes as Irene Threatens: Thousands Leave, Streets Deserted*, BUFFALO NEWS, Aug. 28, 2011, at A6.

³⁶² *Goodbye, Irene: CNY Dodges Another Bullet*, POST-STANDARD (Aug. 30, 2011, 10:00 AM), http://blog.syracuse.com/opinion/2011/08/goodbye_irene_cny_dodges_anoth.html; see also Erin Einhorn, *Analysis: Too Much Just Right for Bloomy*, N.Y. DAILY NEWS (Aug. 29, 2011, 4:00 AM), <http://www.nydailynews.com/new-york/mayor-bloomberg-sky-is-falling-act-hero-hurricane-irene-article-1.944610> (“Plenty of New Yorkers grumbled that mandatory evacuations and constant warnings were an extreme overreaction, but history will remember Hurricane Irene as a victory for Mayor Bloomberg.”); Editorial, *Apocalypse Not*, N.Y. POST (Aug. 29, 2011, 4:00 AM), <http://nypost.com/2011/08/29/apocalypse-not-4/> (“[B]y most accounts the New York City metro area dodged a high-caliber weather bullet from Hurricane Irene—which, in the end, turned out to be more bluster than blowout.”).

³⁶³ See Hasen, *supra* note 8, at 992; Mulroy, *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.³⁶⁵ 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.³⁶⁶

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.³⁶⁷ “[T]he 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”³⁶⁸

Laches bars a claim when a party has prejudiced its opponent by failing to diligently assert it.³⁶⁹ 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.

³⁶⁵ 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.”).

³⁶⁶ *Id.* at 994.

³⁶⁷ *N. Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 509 (1913).

³⁶⁸ *Id.*

³⁶⁹ *Costello v. United States*, 365 U.S. 265, 282 (1961).

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.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

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

³⁷¹ Huefner, *supra* note 8, at 299–302.

³⁷² U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may . . . make or alter such Regulations . . .”); *id.* at art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing [sic] the [presidential] Electors . . .”). In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), by a 5-4 vote, the progressive wing of the Supreme Court rejected the plain meaning of “legislature” in order to allow independent commissions to draw congressional district lines. See Morley, *supra* note 21, at 83–92 (critiquing *Arizona Independent Redistricting Commission*); cf. Michael T. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, 109 NW. U. L. REV. 847, 849 (2015) (arguing that “legislature” refers exclusively to “the entity within each state comprised of elected representatives that enacts statutes”). Even under *Arizona Independent Redistricting Commission*'s extraordinarily broad interpretation of “legislature,” the term would not embrace courts.

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 . . .”).

³⁷⁴ U.S. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE PLAN 8 (2004).

political questions;³⁷⁵ 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.³⁷⁶ 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.³⁷⁷ 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.

³⁷⁵ See *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 51–52 (D.D.C. 2010) (noting that decisions regarding terrorism should remain with the politically accountable branches, not the courts).

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.”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.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 *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.”³⁸⁵

³⁸³ *Id.* at 243–44.

³⁸⁴ *Id.* at 243.

³⁸⁵ *Scott I*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016). The judge who presided over the suit to extend Florida’s voter registration deadline due to Hurricane Matthew, U.S. District Judge Mark Walker, offered inflammatory and partisan-sounding rhetoric in other litigation against Secretary of State Ken Detzner concerning the 2016 election. He accused Detzner of engaging in an “undeclared war” on Floridians’ voting rights. Matt Galka, *Judge Rebukes Florida’s Top Election Official in Ballot Case*, WCTV (Oct. 16, 2016, 7:14 AM), <http://www.wctv.tv/content/news/Dems-file-lawsuit-over-mail-in-ballot-signature-requirement-395883511.html>. The judge added that he “knows disenfranchisement when [he] sees it and it is obscene” and “egregious.” Mark Joseph Stern, *Federal Judge Excoriates Florida’s “Obscene” “Undeclared War” on Voting Rights*, SLATE (Oct. 17, 2016, 12:02 PM), http://www.slate.com/blogs/the_slatest/2016/10/17/federal_judge_florida_s_obsene_war_on_voting_rights_is_unconstitutional.html. Such comments seem more appropriate for a political advertisement than a sitting federal judge adjudicating a voting rights case. Detzner

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*.

³⁸⁶ See, e.g., Kira Lerner, *Florida Governor Won't Extend Voter Registration as State Flees for Hurricane Matthew*, THINKPROGRESS (Oct. 7, 2016, 1:08 PM), <https://thinkprogress.org/hurricane-matthew-voting-d412126ec0e6> (arguing that Hurricane Matthew "isn't the first time [Florida Governor Rick] Scott attempted to suppress votes"); Zachary Roth & Alexander Jaffe, *Florida Gov. Rick Scott Under Fire for Voter Registration Decision*, NBC NEWS (Oct. 7, 2016, 11:36 AM), <http://www.nbcnews.com/politics/elections/florida-gov-rick-scott-under-fire-voter-registration-decision-n661796> ("If [Scott] continues to stand on this ground, we do see it as voter suppression." (quoting Barbara Goodman, President of the Florida League of Women Voters)).

³⁸⁷ See, e.g., *Fla. Democratic Party v. Detzner*, No. 4:16-CV-607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) (noting that "[d]efendants raised no defense on the merits" of Florida's law governing signatures for absentee ballots); *Scott II*, No. 4:16-CV-626-MW/CAS, 2016 WL 6080225, at *1 (N.D. Fla. Oct. 12, 2016).

³⁸⁸ 42 U.S.C. § 1983 (2012).

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.³⁹¹

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.³⁹² 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 officials³⁹³ nor courts³⁹⁴ may unilaterally extend it for policy or

³⁹¹ 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).

³⁹² 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).

³⁹³ *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).

³⁹⁴ *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

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) (“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 *Southerland*, 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 *Southerland*, 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 poll 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); COLO. 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); IND. 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.05(2)(a) (West 2016); MISS. CODE ANN. § 23-15-541(1) (West 2017); MO. ANN. STAT. § 115.407 (West 2014); NEB. 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); 25 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, § 2561(b) (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.⁴⁰⁷ 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.⁴⁰⁸ These remedies both alleviate the need to extend the closing time for polling places and implicitly bar courts from doing so.⁴⁰⁹

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.⁴¹⁰ The Constitution likewise empowers the “Legislature” of each state to determine the manner in which it chooses presidential electors.⁴¹¹ These provisions allow only a state’s legislature—not its executive or judicial personnel—to determine the rules for federal elections.⁴¹² By extending polling place hours without statutory authorization, courts usurp the legislature’s constitutional prerogative.⁴¹³

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).

⁴⁰⁷ 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).

⁴⁰⁸ *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.”).

⁴⁰⁹ *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).

⁴¹⁰ U.S. CONST. art. I, § 4, cl. 1.

⁴¹¹ *Id.* art. II, § 1, cl. 2.

⁴¹² *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (holding that, when a legislature enacts a law regulating federal elections, it “is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority” under the U.S. Constitution).

⁴¹³ See *Valenti v. Mitchel*, 790 F. Supp. 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.⁴¹⁴ 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.”⁴¹⁵ 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.⁴¹⁶ 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.⁴¹⁷

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.⁴¹⁸ 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.⁴¹⁹ A political party or candidate can station poll

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); *Levya 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.

⁴¹⁷ *Blackwell*, 2005 U.S. Dist. LEXIS 18126, at *4.

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.”⁴²⁰ 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.”⁴²¹ 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.⁴²²

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,

⁴²⁰ O’Brien, *supra* note 394, at 2 n.8; *see also* James J. Woodruff II, *Where the Wild Things Are: The Polling Place, Voter Intimidation, and the First Amendment*, 50 U. LOUISVILLE L. REV. 253, 262–63 (2011) (explaining the “knock and drag” technique).

⁴²¹ N.C. GEN. STAT. ANN. § 163A-1130 (West 2017).

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

⁴²³ See, e.g., CONN. GEN. ANN. STAT. § 28-9(b)(1) (West Supp. 2017); HAW. REV. STAT. ANN. § 127A-13(a)(3) (West Supp. 2016); KY. REV. STAT. ANN. § 39A.100 (West 2015); NEV. REV. STAT. §§ 414.060–414.070 (2010); N.H. REV. STAT. ANN. § 4:47(III) (2013); N.M. REV. STAT. § 12-10-4 (West 2014); OHIO REV. CODE ANN. §§ 5502.22–5502.25 (West 2008); VT. STAT. ANN. tit. 20, § 9 (West 2007); WYO. STAT. ANN. § 19-13-104 (West Supp. 2017). Some states permit governors only to suspend regulations, not statutes. See, e.g., IDAHO CODE ANN. § 46-1008(5)(a) (West Supp. 2017); MINN. STAT. ANN. § 12.32 (West 2013); N.C. GEN. STAT. ANN. § 166A-19.30(b)(4) (West Supp. 2017); OR. REV. STAT. ANN. § 401.168(2) (West Supp. 2017); S.C. CODE ANN. § 25-1-440(a)(3) (Supp. 2017); S.D. CODIFIED LAWS § 34-48A-5(4) (2011); WIS. STAT. ANN. § 323.14(4) (West Supp. 2017).

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(e)(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(c)(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 Iowa⁴³⁰ and North Carolina,⁴³¹ grant their chief election officers “emergency power” over

W. VA. CODE ANN. § 15-5-6(c)(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).

⁴²⁵ Elections Emergency Act, FLA. STAT. ANN. §§ 101.731–101.74 (West 2017).

⁴²⁶ OKLA. STAT. ANN. tit. 26, §§ 22-101–22-110 (West 2011).

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. § 9-174a(a) (West 2009); MINN. STAT. ANN. § 204B.181 (West 2018); *see also* FLA. STAT. ANN. § 101.733(3) (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).

⁴³¹ N.C. GEN. STAT. ANN. § 163A-750(a) (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.”⁴³² Maryland goes further, empowering the governor to issue an emergency proclamation to postpone an election or specify “alternate voting locations” and “alternate voting systems.”⁴³³ 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.”⁴³⁴ 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.⁴³⁵

The most common election emergency laws authorize election officials to relocate polling places⁴³⁶ or use paper ballots when problems arise only at certain locations.⁴³⁷ State election codes also frequently waive restrictions on absentee ballots during emergencies,⁴³⁸ 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); MINN. 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”); IND. 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,⁴³⁹ while Maine permits election officials to apply the special rules for military and overseas voters to people living in declared emergency zones.⁴⁴⁰

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.⁴⁴¹ 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.⁴⁴²

Some states go beyond election modifications, expressly allowing for election postponements.⁴⁴³ 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.”⁴⁴⁴ 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.”⁴⁴⁵

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

⁴³⁹ MO. ANN. STAT. § 115.291(3) (West 2017).

⁴⁴⁰ ME. REV. STAT. ANN. tit. 21-A, § 663 (2008).

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 COLO. REV. STAT. ANN. §§ 1-1-104(46), 32-1-103(21) (West 2017).

⁴⁴⁵ GA. CODE ANN. § 21-2-50.1 (West 2011).

additional day of election” for that jurisdiction.⁴⁴⁶ The additional day of voting must be conducted within twenty days of the original election, and all voting must be in-person.⁴⁴⁷ The election’s results are based on the combined vote totals from both days of voting.⁴⁴⁸ 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.”⁴⁴⁹ 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.⁴⁵⁰ Some have focused on requiring election officials to engage in contingency planning and coordinate with federal and state disaster relief personnel.⁴⁵¹ 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.⁴⁵² The Internet can also play an important role in alleviating the impact of disasters on voting,⁴⁵³ 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 deadlines⁴⁵⁴ and voter identification requirements,⁴⁵⁵ during or following election emergencies. Such measures, however, play important roles in ensuring the eligibility of potential voters, preventing double

⁴⁴⁶ N.Y. ELEC. LAW § 3-108(1) (McKinney Supp. 2016).

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 COMM. 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 COMM. 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.⁴⁵⁶ 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,⁴⁵⁷ 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,⁴⁵⁸ 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,⁴⁵⁹ particularly since the federal government severely limits their ability to confirm voters’ eligibility when they register.⁴⁶⁰

⁴⁵⁶ *Voting and Democracy*, *supra* note 10, at 1187–88.

⁴⁵⁷ *See, e.g.*, 52 U.S.C. § 21083(a)(1)(A)(iv), (a)(2)(A)(ii), (a)(4)(A), (a)(5)(B) (2012).

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).

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).

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, 756 (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.⁴⁶¹ 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,⁴⁶² extending the hours of polling places that were temporarily inoperable,⁴⁶³ using paper ballots instead of electronic voting machines,⁴⁶⁴ permitting voters to cast ballots through alternate means,⁴⁶⁵ or allowing re-votes if certain cast ballots are destroyed before being counted.⁴⁶⁶ 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—

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.