**ELECTION EMERGENCIES AT THE SUPREME COURT**

Michael T. Morley

 This post offers a new perspective on the Supreme Court’s emergency order in [*Republican National Committee v. Democratic National Committee*, No. 19A1016 (U.S. Apr. 6, 2020)](https://electionlawblog.org/wp-content/uploads/19A1016.pdf)*.* It explains that the Court correctly mandated a higher showing for election postponements, which extend or change the deadline for casting votes to subsequent days, than for other types of modifications to election-related rules. The Court had not previously articulated that principle before, however. Thus, under the circumstances of this case, the Court should not have relied on it to reverse the lower court’s ruling. Moreover, the ruling confirms that the Court will enforce the *Purcell* Principle on a categorical basis, presumptively reversing election-related injunctions that lower courts issue too close to an election rather than applying the traditional equitable factors governing stays. The Court must recognize, however, that the *Purcell* Principle cannot fully apply in the context of election emergencies, which by their nature require responses to unexpected threats to the electoral process.

**I. Election Modifications vs. Election Postponements**

 In my article “[Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3160436),” I point out that states historically have responded to election emergencies in three distinct ways: *election modifications*, *election postponements*, and *election cancellations*. An *election modification* is the most common sort of response: the jurisdiction tweaks certain rules of the electoral process to facilitate voting despite the unexpected contingency. One of the most common sorts of election modifications is an extension of polling place hours based on severe weather or power failures.

An *election postponement*, in contrast, is when an unexpected development forces a state to delay holding an election by a few extra days or weeks. That is what happened in New York when the 9/11 terrorist attacks interrupted ongoing primaries. All three branches of state government took action at various points to completely invalidate the in-person voting that occurred on September 11 and re-hold the same election, to the greatest extent possible—involving the same candidates, the same voters, and even (most controversially) the same expenditures of public campaign funds—a few weeks later.

Finally, an *election cancellation* occurs when a catastrophe makes it entirely impossible to hold an election. Hurricane Katrina’s devastation of New Orleans is the most prominent modern example. A substantial portion of the city, including polling places, had been destroyed. A substantial portion of the electorate, including many election officials, had evacuated to surrounding states. And many basic services necessary for society to function were largely lacking. In such cases, it was impracticable, if not impossible, to conduct elections for several months until at least some progress had been made in restoration efforts and voters either began to return or notified election officials where to send absentee ballots.

I read the majority opinion in *RNC v. DNC* as drawing a sharp line between *election modifications* and *election postponements*. The U.S. District Court for the Southern District of Ohio, [in its ruling a few days ago in *League of Women Voters v. LaRose*](https://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVO_v_Larose_57.pdf), had already embraced this distinction, as well.Extending the deadline by which election officials must receive absentee ballots that are cast and postmarked by Election Day is a mere modification. Extending the deadline for casting absentee ballots by allowing them to be postmarked *after* Election Day, in contrast, is effectively a postponement because it allows actual voting to occur on subsequent days. As the majority stated, “Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election.” While the Court invalidated this election postponement, it concluded by emphasizing it was not expressing an opinion on whether “modifications in election procedures in light of COVID-19 are appropriate.”

I believe the Court reached the correct conclusion on the *standards* that govern constitutional remedies in election emergencies. Election postponements should always require a much higher showing than election modifications. And courts should be extremely reluctant to issue them *sua sponte*.

It is more debatable how those standards apply in the context of this case. Under the circumstances, the evidence may have been insufficient to warrant postponement as a constitutionally required remedy. The serious risks of COVID had become generally known, and the Governor issued a stay-at-home order, approximately two weeks before Election Day. Postponement would have been especially inappropriate without an explanation from the district court as to why election modifications (such as extending the deadline for election officials to receive absentee ballots) were insufficient. On the other hand, the record contained evidence of substantial backlogs in fulfilling absentee ballots requests. Consequently, at least some people who reasonably had been planning to vote in person on Election Day may not have had adequate opportunity to cast absentee ballots instead. At a minimum, since the Supreme Court had never clearly articulated the distinction between election modifications and postponements before, equity likely mitigated in favor of allowing the lower court’s order to remain in effect. I fear the Court unnecessarily burdened the rights and jeopardized the health of Wisconsin voters to underscore the importance of this admittedly critical distinction for future lower courts.

Going forward, though, I think the Court’s order provides a sound framework. By its nature, extending election deadlines inherently enhances people’s time to vote. And within a large electorate, there will almost always be people able to claim they faced unexpected substantial obstacles to voting by the deadline. An election is a fundamentally bureaucratic process, typically involving hundreds or thousands (or even millions) of people from all walks of life facing a wide range of different personal circumstances. Any deadline will always be somewhat arbitrary and exclusionary, and judicial extensions create a serious likelihood of unfairness, partisanship, and confusion. Political parties, advocacy groups running get-out-the-vote efforts, candidates, and voters plan for voting periods to end on Election Day. A voting deadline provides an important foundation upon which the rest of the electoral process rests, and courts should be very reluctant to disturb it—even moreso than for discrete rules that rest upon that foundation.

Requiring a higher showing for an election postponement is especially important as we head into the November general election. A presidential election is subject to much stricter deadlines than other types of races. Federal law recognizes the possibility that a presidential election may not conclude on Election Day itself, *see* 3 U.S.C. § 2. Nevertheless, federal law sets the day on which presidential electors must cast their electoral votes, 3 U.S.C. § 7, and the Constitution specifies that day must be uniform for all electors across the nation, *see* U.S. Const. art. II, § 1, cl. 4. Federal law likewise specifies the day that Congress must meet in joint session to count electoral votes, 3 U.S.C. § 15, and of course the Constitution establishes the end of the President’s term on January 20, U.S. Const. amend. XX, § 1. Particularly since states typically provide for recounts and election contests, and federal post-election constitutional litigation is a constant possibility, court-ordered delays of presidential elections can have cascading deleterious effects. Again, though, these factors were not in play at the primary stage.

More broadly, states should adopt election emergency statutes that give election officials adequate discretion to modify the rules governing the electoral process as necessary to respond to unanticipated threats. And, in extreme cases where holding an election is truly too dangerous, impractical, or impossible, election officials should be empowered to postpone or even cancel elections. Legislatures should work out these issues in advance, identifying which officials may act, the circumstances under which they may do so, and the types of steps they may—[and may not](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564829)—take, and the scope of such relief. The Wisconsin legislature, despite being called into special session, declined to do so. Adequate election emergency laws help minimize the need for courts to attempt to resolve these issues on an *ad hoc* basis, in hurried emergency proceedings, as a matter of constitutional law. One of the main reasons this litigation even arose in the first place is because Wisconsin lacked such a law.

**II. The *Purcell* Principle and Election Emergencies**

The Court’s ruling also raises one other important issue. Typically, to obtain a stay, a litigant must establish the same factors as for an injunction: irreparable injury, likelihood of success on the merits, the balance of hardships favors it, and relief is in the public interest, *see Nken v. Holder*, 556 U.S. 418 (2009). Here, in contrast, the Court suggests it will enforce the [*Purcell* Principle](https://scholarship.law.uci.edu/faculty_scholarship/395/), which counsels against last-minute changes in election rules, in more categorical terms. It stated, “[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.” Thus, rather than apply the usual requirements for a stay, the Court will more actively police election-related injunctions that lower courts issue close to Election Day to prevent last-minute election modifications (even when such changes may be prospectively appropriate for future races).

The *Purcell* Principle generally makes sense in the context of ordinary election litigation. The balance-of-hardships and public interest factors for injunctions, as well as a need to avoid laches issues, will often counsel in favor of applying remedies purely prospectively to future elections, rather than changing the rules of an impending or ongoing election. Immediately imposing eleventh-hour modifications can confuse the public, increase the chance that administrative personnel will make mistakes, disrupt election preparations, and exacerbate unequal access to opportunities for voting (if only certain voters hear about them). There is also unlikely to be an opportunity for adequate appellate review.

When a serious election emergency occurs, however, the rules of the electoral process frequently must be changed in order to preserve constitutionally adequate voting opportunities without substantial risks or burdens to voters. Thus, the Court should not apply the *Purcell* Principle to categorically preclude lower courts from awarding constitutionally necessary remedies for unexpected disasters. Instead, the Court can rely on three limiting factors. *First*, laches can still preclude plaintiffs from obtaining election modifications if they unnecessarily and prejudicially delay before seeking judicial relief. *Second*, general equitable principles require courts to tailor their relief to the scope of the unexpected burden on constitutional rights. The ordinary rules governing the electoral process should remain in force to the greatest extent possible. *Third*, in accordance with this maxim and as discussed above, election postponements should be impermissible where election modifications are sufficient to remedy the burden or address the threat. Thus, the *Purcell* Principle cannot be applied with full force in circumstances where an emergency requires some change in the rules.

*Disclaimer*: Independent of my academic work, I periodically provide outside legal consulting services to clients, including one of the parties to this case (the RNC). I had nothing to do with this litigation at any stage and, as of this writing, have never spoken to any of the parties, their counsel, or anyone else about it, except for my public Twitter posts. I am writing this solely on my own behalf in my personal capacity and no one has requested, reviewed, or approved this post.