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## Postponing Federal Elections Due to Election Emergencies

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# Postponing Federal Elections Due to Election Emergencies

Michael T. Morley\*

## *Abstract*

*Federal Election Day didn't just happen. Rather, it reflects the culmination of a series of federal laws enacted over the course of nearly seventy years. Each of those laws requires states to hold a different type of federal election on the same day. These statutes also grant states flexibility to hold federal elections at a later date if there is a "failure to elect" on Election Day. Based on a detailed examination of these provisions' texts, legislative histories, and histories of judicial application, this Article explains that federal Election Day laws empower states to postpone or extend federal elections when serious emergencies preclude them from being conducted or concluded on Election Day itself.*

*A court may also postpone or extend a federal election when necessary to prevent constitutional or statutory violations. The Supreme Court has emphasized that courts should generally avoid granting such relief at the last minute, although major unexpected emergencies may sometimes render it necessary. A court may not order an election postponement or extension, however, unless other, less extensive changes to the rules governing the electoral process would be insufficient to remedy the underlying constitutional or statutory violation. And courts may be especially reluctant to grant such relief in states that*

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*provide extensive opportunities for early and absentee voting before Election Day. In the hierarchy of electoral remedies, a postponement or extension is a severe, disfavored remedy—particularly in the unique context of presidential elections—that should be employed only in the rare, extreme case where alternatives would be completely ineffective.*

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### *I. Introduction*

Federal law requires states to hold both presidential<sup>1</sup> and congressional<sup>2</sup> elections on “the Tuesday next after the first

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1. 3 U.S.C. § 1 (2018) (requiring each state to appoint its presidential electors on the specified day “in every fourth year” following each presidential election).

2. See 2 U.S.C. § 7 (2018) (requiring each state to elect representatives to Congress on the specified day “in every even numbered year”). This law does not expressly mention U.S. Senators because, at the time it was adopted, Senators were still directly appointed by legislatures rather than elected by popular vote. Compare U.S. CONST. art. I, § 3, cl. 1 (providing that U.S. Senators shall be “chosen by the Legislature” of each state), with U.S. CONST. amend. XVII, § 1 (providing for popular election of Senators). Congress enacted a separate statute in 1914 to require states to hold U.S. Senate elections at the same time as U.S. House elections. See 2 U.S.C. § 1 (2018)

Monday in November.”<sup>3</sup> It further specifies that states may hold such elections at a later date when there is a “failure to elect”<sup>4</sup> or a “fail[ure] to make a choice”<sup>5</sup> on this statutorily established Election Day. This Article contends that these provisions empower states to postpone or extend federal elections when an unexpected emergency prevents them from conducting or concluding those elections on Election Day. It relies on a detailed examination of these statutes’ texts, legislative histories, and histories of judicial application. While previous pieces have briefly touched on these federal election postponement provisions,<sup>6</sup> this is the first academic article to explore them in detail.<sup>7</sup>

Part II explains the background of the various statutes establishing a federal Election Day, focusing in particular on their “failure to elect” provisions. It explains that Congress adopted those exceptions for two main reasons. First, some states required candidates to receive an absolute majority of votes to prevail, requiring runoff elections to be held after

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(requiring states to elect U.S. Senators “[a]t the regular election” at which a U.S. Representative “is regularly by law to be chosen” which “next precede[s]” the expiration of a Senator’s term); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1171 (9th Cir. 2001) (noting that, after the Seventeenth Amendment was ratified, “Congress provided that [Senators] should be elected at the same time as Representatives were elected”).

3. *Foster v. Love*, 522 U.S. 67, 69–70 (1997) (explaining that federal law “mandates holding all elections for Congress and the Presidency on a single day throughout the Union”).

4. 2 U.S.C. § 8(a) (2018).

5. 3 U.S.C. § 2 (2018).

6. See, e.g., Lynne H. Rambo, *The Lawyers’ Role in Selecting the President: A Complete Legal History of the 2000 Election*, 8 TEX. WESLEYAN L. REV. 105, 140–42 (2002) (arguing that the legislative history of the presidential Election Day statute does not “address situations where a dispute arises merely over which candidate has garnered a majority of the votes”); see also Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 586–89 (2018) (summarizing judicial interpretations of Election Day statutes); Richard D. Friedman, *Trying to Make Peace with Bush v. Gore*, 29 FLA. ST. U. L. REV. 811, 816–17 (2001) (arguing that 3 U.S.C. § 2 does not allow state legislatures to step in to directly appoint electors whenever “an election is so close or difficult to call”).

7. The Congressional Research Service provided an overview of the applicable statutes in JACK MASKELL, CONG. RSCH. SERV., RL32623, POSTPONEMENT AND RESCHEDULING OF ELECTIONS TO FEDERAL OFFICE (2014).

Election Day. Second, several Members of Congress were concerned about the possibility that extreme weather or other such impediments could preclude substantial numbers of voters from participating on Election Day.

Part III explores how courts have interpreted and applied the federal Election Day statutes. It goes on to explain that the Supreme Court's recent ruling in *Republican National Committee v. Democratic National Committee*<sup>8</sup> bars federal courts from postponing or extending an election unless election *modifications*—changes to, or suspension of, other rules governing the electoral process—would be insufficient to ameliorate a constitutional or statutory violation.<sup>9</sup> Courts also may be reluctant to conclude that the Constitution requires postponement or extension of a voting period due to unexpected problems on Election Day when the state has afforded voters ample opportunity to participate in absentee or early voting.

Part IV briefly concludes. It reiterates that, although federal law requires states to hold federal elections on Election Day, it also grants them the flexibility to postpone their elections when required by natural disasters or other such emergencies.

## II. Creation of the Federal Election Day

The U.S. Constitution grants state legislatures the authority to determine the “Times, Places, and Manner of holding Elections for Senators and Representatives,” but allows Congress to “make or alter such Regulations.”<sup>10</sup> In contrast, state legislatures may determine the “Manner” in which presidential electors are appointed,<sup>11</sup> while Congress may

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8. 140 S. Ct. 1205 (2020).

9. *Id.* at 1207–08.

10. U.S. CONST. art. I, § 4, cl. 1.

11. *Id.* art. II, § 1, cl. 2. Despite the textual differences between the constitutional provisions granting Congress power over congressional and presidential elections, the Supreme Court has construed them *in pari materia*. See Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 109 (2017). Once a state decides to appoint presidential electors based on the statewide popular vote, Congress' power to regulate that election is just as broad as its authority over congressional elections. *Id.*

“determine the Time of chusing the Electors.”<sup>12</sup> It took Congress nearly seventy years to establish a single, uniform Election Day for all regular federal elections.<sup>13</sup> It worked piecemeal, beginning with an Election Day for presidential elections in 1845;<sup>14</sup> applying it to U.S. House races in 1872 (though the law did not take effect until 1876);<sup>15</sup> and then extending it again, to U.S. Senate races, in 1914,<sup>16</sup> following the Seventeenth Amendment’s ratification. Although these statutes designate a default date for federal elections, they provide legislatures with the flexibility to postpone such elections when natural disasters or other election emergencies prevent people from voting.

#### *A. Election Day and Failures to Elect in Presidential Elections*

##### *1. Presidential Elections and the First Congress*

The legislative history of the federal Election Day statute for presidential electors demonstrates that Congress specifically intended to allow legislatures to hold such elections at a later date when necessary to respond to unexpected emergencies and natural disasters. Congress first regulated the timing of presidential elections in 1792.<sup>17</sup> Rather than specifying a particular day on which electors were to be chosen, the law required states to appoint electors at some point within the thirty-four days preceding the first Wednesday in December of each presidential election year.<sup>18</sup> The Act also required electors to meet within their respective states to cast their electoral votes on that first Wednesday in December.<sup>19</sup> Congress would

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12. U.S. CONST. art. II, § 1, cl. 4.

13. See *Foster v. Love*, 522 U.S. 67, 69–70 (1997) (discussing the various statutes that Congress enacted to require states to hold all federal elections on the same day).

14. Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (codified as amended at 3 U.S.C. §§ 1–2 (2018)).

15. Act of Feb. 2, 1872, ch. 11, §§ 3–4, 17 Stat. 28, 28–29 (codified as amended at 2 U.S.C. §§ 7–8 (2018)).

16. Act of June 4, 1914, ch. 103, 38 Stat. 384 (codified as amended at 2 U.S.C. § 1 (2018)).

17. Act of Mar. 1, 1792, ch. 8, § 1, 1 Stat. 239. This was the eighth law that Congress enacted. *Id.*

18. *Id.*

19. *Id.* § 2, 1 Stat. at 239–40.

then convene, on the second Wednesday in February, to count the electoral votes and determine the president and vice president.<sup>20</sup> Some representatives thought the voting period under the bill should have been even longer.<sup>21</sup> Others objected that the voting period was too long. They argued that electors should be chosen as close as possible to the day on which they cast their electoral votes, to reduce the likelihood that they would be manipulated or corrupted.<sup>22</sup>

States that appointed their presidential electors based on statewide popular votes held their presidential elections on different days within this thirty-six-day window. The existence of different election days allowed people to illegally vote in multiple states in the same presidential election. In the 1840s, political parties engaged in widespread “pipelaying”: bringing people who had already voted in one state to other states with later elections to vote again.<sup>23</sup> Senator Charles Atherton of New Hampshire explained: “It was well known . . . that frauds had been practiced in elections—that men had been transferred from one part of the Union to another, in order to vote; and that system . . . of pipe-laying, had been carried into pretty general, and in some instances, into pretty extensive operation.”<sup>24</sup> The

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20. *Id.* § 5, 1 Stat. at 240.

21. *See* 2 ANNALS OF CONG. 278 (1791) (statement of Rep. Sedgwick) (arguing that the bill should “give the people a longer time to give in their votes for Electors”).

22. *See id.* (statement of Rep. White) (“If it had been possible, he could have wished that the Electors should meet and give their votes on the very day of their being chosen . . . .”); *id.* at 279 (statement of Rep. Dayton) (“[H]e thought fourteen days would be a more proper time; it was the design of the Constitution, thought it was not expressed, that the President should not know the characters to whom he was indebted for his election.”).

23. CONG. GLOBE, 28th Cong., 1st Sess. 350 (1844) (statement of Rep. Duncan) (discussing the “pipelaying of 1840[,] and . . . the importation of voters from one State to another, and from one county to another”); *see, e.g.*, GERARD T. KOEPEL, WATER FOR GOTHAM: A HISTORY 259 (2001); 1 BENJAMIN PERLEY POORE, PERLEY’S REMINISCENCES OF SIXTY YEARS IN THE NATIONAL METROPOLIS 241–42 (Hubbard Bros. ed., 1886); 1 MICHAEL BURLINGAME, ABRAHAM LINCOLN: A LIFE 670 (2009); *see also* Rambo, *supra* note 6, at 141 (discussing congressional concerns over pipe-laying).

24. CONG. GLOBE, 28th Cong., 1st Sess. 679 (1844) (statement of Sen. Atherton). Senator William Allen of Ohio added:

absence of voter registration requirements made such double voting even easier.<sup>25</sup>

## 2. *The Presidential Election Day Act*

Due to widespread fraud in the presidential election of 1840, Representative Alexander Duncan introduced a bill in the House to establish a uniform Election Day for all presidential and House elections.<sup>26</sup> The bill would have required states to choose representatives and presidential electors on the first Tuesday in November, starting in 1844.<sup>27</sup> When special elections for president and vice president were necessary, they would also be held on the first Tuesday in November.<sup>28</sup> Section 4 provided that special elections to fill House vacancies that occurred due to “the failure of the people to elect at a regularly scheduled election,” resignation, death, or declination, or that arose “in any other manner than a failure to hold the regular stated election” at the time specified in the bill, could be held “at the times . . . directed” by state law.<sup>29</sup>

The House referred the bill to the Committee on Elections.<sup>30</sup> The committee removed all of the bill’s references to congressional elections and reported an amended version that

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[T]hat there were frauds almost without number committed on the ballot-box in [Ohio] in 1840, was a fact which no solitary citizen within the limits of the State was now prepared to deny. There were frauds committed by the transfer of voters from the adjoining States to the State of Ohio—a fact which was proved before the Senate of the State at the next session of the legislative body after the election—proved beyond doubt, in the contests between Senators upon that floor . . . .

*Id.* (statement of Sen. Allen).

25. See JOSEPH P. HARRIS, REGISTRATION OF VOTERS IN THE UNITED STATES 65 (1929) (explaining that few states outside of New England had voter registration laws prior to 1860).

26. CONG. GLOBE, 28th Cong., 1st Sess. 167 (1844) (statement of Rep. Duncan); H.R. 80, 28th Cong. § 1 (as introduced in House, Jan. 19, 1844).

27. H.R. 80, 28th Cong. § 2 (as introduced in the House, Jan. 19, 1844).

28. *Id.*

29. *Id.* § 4.

30. CONG. GLOBE, 28th Cong., 1st Sess. 167 (1844).



set a date only for presidential elections.<sup>31</sup> It also changed Election Day from the first Tuesday in November to the “Tuesday next after the first Monday of November.”<sup>32</sup> Throughout the floor debates, numerous representatives emphasized that the bill’s purpose was to prevent election fraud by eliminating the opportunity for people to vote in multiple states.<sup>33</sup> The House passed the bill as amended.<sup>34</sup> The Senate debated whether the bill should take effect before the impending

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31. H.R. 80, 28th Cong. (as reported by the H. Comm. on Elections, Feb. 17, 1844); *see* CONG. GLOBE, 28th Cong., 1st Sess. 295 (1844); *id.* at 350 (statement of Rep. Elmer) (explaining that the committee narrowed the bill to apply only to presidential elections).

32. H.R. 80, 28th Cong. (1844) (as reported by the H. Comm. on Elections).

33. *See, e.g.*, CONG. GLOBE, 28th Cong., 1st Sess. 601 (1844) (statement of Rep. Hamlin) (explaining that the bill would “prevent—frauds which had heretofore been perpetrated upon the elections”); CONG. GLOBE, 28th Cong., 2d Sess. 28 (1844) (statement of Rep. Rhett) (recognizing that the bill was intended “to prevent the flagitious frauds from the transfer of votes from one State to another”); *id.* at 29 (statement of Rep. Haralson) (explaining that “a majority of the House were for passing some bill that would guard against these election frauds that had been so loudly complained of”); *id.* (statement of Rep. Rathbun) (“The object of this bill was to guard against frauds in the elections of President and Vice President, by declaring that they shall all be held on the same day.”); *see also* CONG. GLOBE, 28th Cong., 1st Sess. 349 (1844) (statement of Rep. Duncan) (discussing cases of fraud in congressional elections); *id.* at 680 (statement of Sen. Buchanan) (“The prevailing impression every where [sic], was that great frauds had been practi[c]ed in the presidential election of 1840, for want of such a provision as that now proposed.”); CONG. GLOBE, 28th Cong., 2d Sess. 29 (statement of Rep. Payne) (recognizing that congressional elections involve the same risk of fraud as presidential elections); *supra* note 23 and accompanying text.

34. CONG. GLOBE, 28th Cong., 1st Sess. 602 (1844) (recording vote of 141 yeas to 34 nays).

presidential election of 1844,<sup>35</sup> and ultimately tabled the measure.<sup>36</sup>

The following December, during Congress' next session, Representative Duncan re-introduced the bill in the House.<sup>37</sup> It applied only to presidential elections, and would have set Election Day for presidential electors as the first Tuesday in November.<sup>38</sup> The House referred the bill to the Committee of the Whole.<sup>39</sup> Representative Elmer proposed an amendment in the nature of a substitute to change Election Day to the Tuesday following the first Monday in November.<sup>40</sup> His amendment would also empower state legislatures to "direct[] the appointment of electors on any subsequent day in the same year" to replace any electors who could not fulfill their duties due to "sickness or any other cause."<sup>41</sup>

As written, Elmer's proposed amendment appeared to allow states to conduct a special election (or directly appoint electors) after the statutorily designated Election Day to fill vacancies

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35. Compare *id.* at 680 (statement of Sen. Clayton) (arguing that the bill should not apply to the upcoming presidential election to give state legislatures an opportunity to amend their state laws to comply with it), and *id.* (statement of Sen. Dayton) (agreeing with Clayton), with *id.* at 679 (statement of Sen. Atherton) (arguing that the bill should take effect before the 1844 presidential election to prevent fraud and bolster public confidence in the election's legitimacy), and *id.* (statement of Sen. Allen) (arguing that delaying the bill's implementation would "defeat the bill entirely"). See H.R. 80, 28th Cong. (1844) (as reported by S. Comm. on the Judiciary) (specifying that the statute did not enter into effect until after the 1844 elections and was inapplicable to states in which the legislature directly appointed presidential electors).

36. See CONG. GLOBE, 28th Cong., 1st Sess. 680 (1844) (recording vote of 26 yeas and 25 nays on the motion to table).

37. CONG. GLOBE, 28th Cong., 2nd Sess. 8–9 (1844).

38. *Id.* at 14; H.R. 432, 28th Cong. (1844) (as introduced in House and referred to Comm. of the Whole House on the State of the Union); see CONG. GLOBE, 28th Cong., 2d Sess. 9 (1844) (statement of Rep. Duncan) (explaining that his previous proposal would have applied to both presidential and House elections, but this bill applied only to presidential elections). Duncan explained that the legislature in a state such as South Carolina, which still directly appointed presidential electors, could comply with the bill by convening on Election Day to appoint them. *Id.* at 14 (statement of Rep. Duncan).

39. CONG. GLOBE, 28th Cong., 2d Sess. 10 (1844).

40. *Id.* at 14 (statement of Rep. Elmer).

41. *Id.*

that arose when electors who had already been appointed could not perform their duties.<sup>42</sup> Elmer suggested, however, that he intended the amendment to sweep even more broadly. He explained, “[I]nasmuch as some casualty might defeat some of the elections,” the amendment “provided further that each State legislature might supply the electors, the choice of which had been prevented by such casualty.”<sup>43</sup>

Representative John Hale of New Hampshire then commented that the bill was “deficient” because it was based on the assumption “that the choice of electors would always be perfected in one day.”<sup>44</sup> It lacked provisions “for an election, if the people should fail to elect on the day designated.”<sup>45</sup> Hale explained that New Hampshire required a candidate to receive a majority of votes cast in the election to win the office of presidential elector, and the leading candidate might fail to receive the requisite majority on Election Day.<sup>46</sup> He asked that the bill be amended to address such contingencies.<sup>47</sup> Elmer replied that his proposed amendment already addressed Hale’s concerns.<sup>48</sup>

Representative Samuel Chilton, however, echoed Hale’s objections. He explained that the bill required all states to hold their presidential elections “on the same day, and that no votes cast after that day should be received.”<sup>49</sup> He argued that “some provision” should “be made to meet the condition of things existing in Virginia. They voted in that State *viva voce*, and it frequently happened that all the votes were not polled in one day.”<sup>50</sup> Chilton then expressly warned that natural disasters or extreme weather could interfere with an election. He explained,

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42. *Id.*

43. *Id.*

44. *Id.* (statement of Rep. Hale).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 15 (statement of Rep. Elmer) (declaring that Hale’s amendment “was unnecessary, for his [Elmer’s] amendment embraced that ground with sufficient breadth”).

49. *Id.* (statement of Rep. Chilton).

50. *Id.*

[I]n a State circumstanced as Virginia was—mountainous and intersected by large streams of water—at times of high water, and of inclement weather, voters were frequently prevented from attending the polls in one day, not only in the presidential elections, which had induced the legislature to authorize the *continuance of the elections when . . . any considerable number of voters had been prevented from coming to the polls*. The case had happened, and would happen again, when all the votes could not be polled. It could not surely be the design of any gentleman, by this bill, that those who were entitled to vote . . . should be deprived of this privilege.<sup>51</sup>

He asked Duncan to “so shape the bill as to obviate any difficulty of this kind.”<sup>52</sup>

In response, Duncan proposed a substitute version of his bill. The substitute required states to appoint presidential electors on the first Tuesday after the first Monday in November.<sup>53</sup> It also authorized states to enact laws to fill any vacancies that existed when the Electoral College convened.<sup>54</sup> Moreover, the substitute specified, “[W]hen any State shall have held an election for the purpose of choosing electors and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day, in such manner as the State shall, by law, provide.”<sup>55</sup> This language was broad enough to address both Representative Hale’s concern that runoff elections might be required,<sup>56</sup> as well as Representative Chilton’s objection that natural disasters, extreme weather, or other unexpected contingencies may prevent a state from completing its election at the specified time.<sup>57</sup> Based on Duncan’s proposal, Representative Elmer withdrew his amendment.<sup>58</sup> The Committee of the Whole approved Duncan’s

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51. *Id.* (emphasis added).

52. *Id.*

53. *Id.* at 21 (statement of Rep. Duncan).

54. *Id.*

55. *Id.*

56. *See supra* notes 44–47 and accompanying text.

57. *See supra* notes 49–52 and accompanying text.

58. CONG. GLOBE, 28th Cong., 2d Sess. 21 (1844) (statement of Rep. Elmer) (noting that his proposed amendment “was substantially the same” as Duncan’s substitute).

proposed substitute without debate<sup>59</sup> and then voted to report it to the House.<sup>60</sup>

While the bill was on the House floor, Representative Dromgoole proposed an amendment in the nature of the substitute.<sup>61</sup> Like Duncan's substitute, Dromgoole's amendment also established the first Tuesday following the first Monday in November as Election Day.<sup>62</sup> It gave states greater discretion, however, to hold their presidential elections on alternate days. The amendment provided, "[N]othing in this act shall be construed to prevent the legislatures of the several States from providing for the appointment of electors on some other subsequent day, in case the electors, or any of them, in any State, shall not be chosen at the time herein determined . . . ."<sup>63</sup> Finally, it allowed states to fill any vacancies that existed when the electors gathered to cast their electoral votes.<sup>64</sup>

Representative Hannibal Hamlin of Illinois, Chairman of the House Committee on Elections, commented that Duncan's amended bill and Dromgoole's proposed amendment appeared similar to each other.<sup>65</sup> The "real, substantial difference between them" was that Duncan's measure expressly required states to attempt to hold a vote on the specified day, while Dromgoole's alternative granted states that did not wish to hold elections on that day broader discretion to do so at a later time.<sup>66</sup> Several representatives complained that Dromgoole's proposal gave states too much "latitude" to "defeat the objectives of the bill."<sup>67</sup> The House voted to adopt Duncan's version of the legislation.<sup>68</sup> The Senate passed the bill with a technical correction,<sup>69</sup> which

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59. *Id.*

60. *Id.* at 23.

61. *Id.* at 28 (statement of Rep. Dromgoole).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* (statement of Rep. Hamlin).

66. *Id.*

67. *Id.* at 30 (statement of Rep. Elmer); *see id.* (statement of Rep. Bidlack); *id.* (statement of Rep. Rhett).

68. *Id.* at 31, 35.

69. *Id.* at 62 (statement of Sen. Berrien) (noting that the Senate Judiciary Committee reported the bill with an amendment); *id.* at 143 (statement of Sen.

the House promptly approved.<sup>70</sup> The measure passed into law when the president signed it on January 23, 1845.<sup>71</sup>

### 3. *The 1872 Presidential Election*

During Reconstruction, in 1872—the same year in which it established a uniform Election Day for House elections<sup>72</sup>—Congress passed two laws modifying the timing requirements solely for that year’s presidential election. The first measure permitted states to hold that year’s presidential election over a period of several days, so long as that period started on the federally designated Election Day.<sup>73</sup> Several representatives explained that the bill was necessary to “secure to the people a full and fair election.”<sup>74</sup> Several states, particularly Texas, held their polls open for multiple days for state and congressional elections because there was only a single polling place in each county, and it was “an impossibility for the voters all to get together on one day.”<sup>75</sup> The bill did not provoke much debate in Congress.

The second measure allowed Louisiana to hold its presidential election in 1872 a day earlier, on the first Monday in November.<sup>76</sup> After the Civil War, in 1868, Louisiana adopted a new constitution. Due to a scrivener’s error, the new constitution required elections for state offices to be held on the first Monday in November.<sup>77</sup> And the legislature had

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Berrien) (explaining that the amendment corrected an inadvertent error in the House bill); *id.* (enacting amended bill).

70. *Id.* at 149.

71. Act of Jan. 23, 1845, ch. 1, 5 Stat. 721.

72. *See infra* Part II.B.

73. Act of May 23, 1872, ch. 198, 17 Stat. 157.

74. *E.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 3408 (1872) (statement of Rep. Bingham).

75. *Id.* (statement of Rep. Eldredge); *see id.* (statement of Rep. Giddings) (“An election held in one day in the State of Texas under the present State law would be simply a farce.”); *id.* (statement of Rep. Beck) (“To compel six thousand voters to vote at one ballot-box in one day is, as this House must know, an impossibility.”).

76. Act of June 1, 1872, ch. 253, 17 Stat. 195.

77. CONG. GLOBE, 42d Cong., 2d Sess. 3101 (1871) (statement of Sen. Kellogg); *id.* at 3174 (statement of Sen. Morton) (noting that there had been

subsequently enacted a statute requiring congressional elections to be held simultaneously with state elections.<sup>78</sup>

As the 1872 elections approached, the state faced the prospect of having different elections on consecutive days: state and congressional elections on Monday, pursuant to the state constitution and state law, followed by the presidential election on Tuesday, as required by federal law.<sup>79</sup> The state did not have time to amend its constitution prior to November to move its congressional and state elections to the next day.<sup>80</sup> The bill's supporters explained that moving back the presidential election to be held at the same time as the other races would allow the state to avoid the expense of separate elections<sup>81</sup> and reduce the burden on voters.<sup>82</sup> One Senator emphasized, "This bill only makes the change for one year, and after that [Louisiana] must change [its] state constitution."<sup>83</sup>

Senator Oliver Morton of Indiana triggered controversy by pointing out that, if Congress rescheduled the presidential election in Louisiana to be held simultaneously with the state's congressional elections, it would be protected by the Reconstruction Era laws that Congress had enacted to regulate and prevent racial discrimination in congressional elections.<sup>84</sup> Opponents pointed out that the Constitution grants Congress authority to regulate the "Manner" of only congressional, and

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"a mistake in engrossing the [Louisiana] constitution"); *see id.* at 72 (statement of Sen. Sheldon); *id.* (statement of Rep. Bingham); *id.* at 3407 (statement of Rep. Bingham); *id.* at 3174 (statement of Sen. Carpenter); *id.* at 3177 (statement of Sen. Kellogg).

78. *Id.* at 3101 (statement of Sen. Kellogg).

79. *Id.* at 3100–01.

80. *Id.* at 72 (statement of Rep. Sheldon); *id.* at 3101 (statement of Sen. Kellogg); *id.* at 3174 (statement of Sen. Carpenter).

81. *Id.* at 72 (statement of Rep. Sheldon).

82. *Id.* at 3174 (statement of Sen. Carpenter); *see id.* at 3174–75 (statement of Sen. Morton) ("[M]any poor people who have to travel some distance will perhaps be unable to attend both elections."); *id.* at 3177 (statement of Sen. Kellogg); *id.* at 3279 (statement of Sen. Carpenter).

83. *Id.* at 3174 (statement of Sen. Carpenter); *see id.* at 3177 (statement of Sen. Kellogg).

84. *Id.* at 3175 (statement of Sen. Morton); *see id.* at 3280 (statement of Sen. Morton).

not presidential, elections.<sup>85</sup> They argued that Congress should therefore not seek to regulate the latter “indirectly” by requiring both elections to be held at the same time.<sup>86</sup>

Some Senators also warned that the bill could facilitate voter fraud by “colonizing voters”: people who vote multiple times in different states that hold their federal elections on different days.<sup>87</sup> In addition, opponents claimed that, because the Constitution requires Congress to establish a single, uniform “Time”<sup>88</sup> at which all states must hold their presidential elections, Congress may not carve out exceptions for certain states.<sup>89</sup> The debate ultimately degenerated into a fight over the violence that plagued elections in southern states and alleged abuses by federal troops. The Senate ultimately passed the bill<sup>90</sup> and the President signed it into law.<sup>91</sup> It does not appear that Congress has made any other *ad hoc* exceptions to its timing requirements for presidential elections.

#### 4. Postponing Presidential Elections

The 1845 Presidential Election Day Act<sup>92</sup> is now codified as 3 U.S.C. §§ 1–2. Section 1 requires each state, every four years, to appoint presidential electors “on the Tuesday next after the first Monday in November.”<sup>93</sup> Section 2 adds that, when a state “has held an election for the purpose of choosing electors,” but

85. Compare U.S. CONST. art. I, § 4, cl. 1 (granting Congress authority to regulate the time, place, and manner of congressional elections), *with id.* art. II, § 1, cl. 4 (granting Congress authority to regulate only the time of presidential elections).

86. CONG. GLOBE, 42d Cong., 2d Sess. 3175 (1871) (statement of Sen. Trumbull); *id.* at 3278–79 (statement of Sen. Bayard); *id.* at 3283 (statement of Sen. Saulsbury).

87. *Id.* at 3101 (statement of Sen. Trumbull); *see id.* at 3277 (statement of Sen. Casserly).

88. U.S. CONST. art. II, § 1, cl. 4.

89. CONG. GLOBE, 42d Cong., 2d Sess. 3101 (1872) (statement of Sen. Trumbull); *see id.* at 3278 (statement of Sen. Bayard) (arguing that the Constitution requires the time for choosing electors to be “the same throughout the United States”); *id.* at 3282 (statement of Sen. Hill).

90. *Id.* at 3287.

91. *Id.* at 4145.

92. Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (codified as amended at 3 U.S.C. §§ 1–2 (2018)).

93. 3 U.S.C. § 1 (2018).



“has failed to make a choice on the day prescribed by law,” it may appoint electors “on a subsequent day” specified by state law.<sup>94</sup> Section 2 traces back to the amendment that Representative Duncan proposed<sup>95</sup> to address concerns that states would be unable to complete their elections on Election Day itself, either due to the need for runoffs<sup>96</sup> or because of natural disasters or other such emergencies.<sup>97</sup> If an election emergency makes voting impracticable or impossible on the day of a presidential election, federal law allows states to postpone the election to a future date to ensure that eligible voters have a constitutionally sufficient opportunity to vote. Thus, 3 U.S.C. § 2 does more than simply authorize runoff elections.<sup>98</sup>

States’ ability to postpone presidential elections is constrained by other constitutional and statutory provisions, however. After an election is held, most states take several weeks to canvass results, hold recounts if necessary, and resolve election contests. Any such post-election procedures must be completed fairly quickly to meet a series of federal deadlines. The first such deadline is optional. Federal law grants “safe harbor” status to electors from states that resolve any disputes concerning their electors’ appointments by mid-December.<sup>99</sup> Congress will treat as “conclusive” a “final determination of any controversy or contest concerning the appointment” of a state’s electors that the state makes at least six days before the Electoral College convenes to cast electoral votes.<sup>100</sup>

The Constitution requires electors throughout the nation to meet within their respective states on the same day to cast their electoral votes.<sup>101</sup> Federal law specifies this date as “the first

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94. *Id.* § 2.

95. *See supra* notes 53–55 and accompanying text.

96. *See supra* notes 44–47 and accompanying text; *see also* Rambo, *supra* note 6, at 140–42.

97. *See supra* notes 49–52 and accompanying text.

98. *Cf.* Rambo, *supra* note 6, at 140–42; Friedman, *supra* note 6, at 816–17.

99. *See* 3 U.S.C. § 5 (2018).

100. *Id.*; *see* Bush v. Gore, 531 U.S. 98, 110 (2000) (*per curiam*) (holding that the Florida state legislature intended to take advantage of the federal safe harbor). The safe harbor applies only if the controversy is resolved pursuant to state laws enacted prior to Election Day. 3 U.S.C. § 5 (2018).

101. U.S. CONST. art. II, § 1, cl. 4; *id.* amend. XII.

Monday after the second Wednesday in December.”<sup>102</sup> If one state’s electors cast their electoral votes at a later date—particularly if other states’ electors cast their votes at the proper time—both statutory and constitutional questions as to the validity of those votes would arise.

Federal law further requires the chambers of Congress to meet in joint session on the sixth day of January to count the electoral votes.<sup>103</sup> Procedurally, it appears that Congress is unable to reconvene in joint session at a later date to count any additional electoral votes cast after the initial tally is complete.<sup>104</sup> The ultimate constitutional deadline, of course, is January 20, when the President’s term expires, regardless of whether a successor has been determined.<sup>105</sup> If Congress has not named a new president and vice president by that date, a vacancy exists and the speaker of the house serves as acting president until the election is resolved.<sup>106</sup> Thus, only a narrow window exists within which states may postpone presidential elections without bumping up against federal statutory and constitutional deadlines.

One potential obstacle to allowing a state to postpone or extend its presidential election is the notion that the Constitution requires Congress to set a single, uniform time for all states to appoint their electors. In *Fladell v. Elections Canvassing Commission of Florida*,<sup>107</sup> the plaintiffs asked a Florida trial court to order a re-vote in Palm Beach County in the 2000 presidential election to remedy confusion arising from

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102. 3 U.S.C. § 7 (2018).

103. *Id.* § 15; see U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII.

104. See 3 U.S.C. § 16 (2018) (stating that the joint session “shall not be dissolved until the count of electoral votes shall be completed and the result declared”); see also U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII; 3 U.S.C. § 15 (specifying procedure for counting electoral votes).

105. U.S. CONST. amend. XX, § 1.

106. See U.S. CONST. amend. XX, § 3 (granting Congress power to determine who shall serve as acting president when neither a new president nor vice president “shall have qualified” by the end of the previous president’s term); 3 U.S.C. § 19(a)(1) (2018) (providing that the speaker shall serve as acting president if neither a president-elect nor vice president-elect qualifies).

107. Nos. CL 00-10965 AB, CL 00-10970 AB, CL 00-10988 AB, CL 00-10992 AB, CL 00-11000 AB, 2000 Fla. Cir. LEXIS 768 (Fla. Cir. Ct. Nov. 20, 2000).

the county's use of the "butterfly" ballot design.<sup>108</sup> The court noted that a re-vote had never been held in a presidential election.<sup>109</sup> It went on to erroneously assert that the Constitution requires all states to appoint their presidential electors on the same day.<sup>110</sup>

To the contrary, Article II of the Constitution states, "The Congress may determine the time of choosing the electors, and the day on which they shall give their vote; which day shall be the same throughout the United States."<sup>111</sup> This provision grants Congress flexibility about "the time of choosing the electors."<sup>112</sup> For example, Congress may choose to establish a uniform Election Day. Conversely, Congress may grant states broad latitude to decide for themselves when to select their presidential electors. As discussed earlier, the nation's first presidential election law allowed states to appoint electors at any time they wished within a thirty-four-day period.<sup>113</sup>

Article II goes on to grant Congress the power to specify "the day on which [electors] shall give their votes."<sup>114</sup> It continues, "[W]hich day shall be the same throughout the United States."<sup>115</sup> Only "the day" on which electors cast their votes must be uniform, not the days on which states choose those electors. The Framers expressly distinguished between "the time" of choosing electors and "the day" on which they must cast their electoral votes, specifying only that such "day" must "be the same" throughout the nation.<sup>116</sup>

Moreover, although federal law establishes a uniform federal Election Day for presidential electors,<sup>117</sup> it expressly

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108. *Id.* at \*1–2.

109. *Id.* at \*5–6.

110. *Id.* at \*6, \*12, \*19–20 ("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[s] that Presidential 'electors' be elected on the same day throughout the United States.").

111. U.S. CONST. art. II, § 1, cl. 4.

112. *Id.*

113. *See supra* Part II.A.1.

114. U.S. CONST. art. II, § 1, cl. 4.

115. *Id.* (emphasis added).

116. *Id.*

117. 3 U.S.C. § 1 (2018).

allows states to hold elections on subsequent days if there is a “failure to elect” on the designated day.<sup>118</sup> And that “failure to elect” provision was added in part specifically due to the possibility of election emergencies like extreme weather and natural disasters.<sup>119</sup> The *Fladell* Court, however, stated that 3 U.S.C. § 2 does not allow states that are prevented from holding a presidential election on Election Day to do so at a later date.<sup>120</sup> Rather, the court declared, “Congress clearly intended a procedure other than a second election in the event the electors were not elected on the date prescribed by law.”<sup>121</sup> But the court did not point to anything in the statute’s text or legislative history evidencing any such “clear[] inten[t].”<sup>122</sup>

The court pointed out that a candidate in a do-over election might be prejudiced if the Election Day results from other jurisdictions have already been publicly announced.<sup>123</sup> But the court failed to balance such harm against the specter of disenfranchising voters and casting the overall legitimacy of a presidential election into doubt. Of course, practical circumstances often may preclude a re-vote given both the statutory deadlines for electoral votes to be cast and counted, as well as the constitutional end of the president’s term.<sup>124</sup> Nevertheless, neither the Constitution nor federal law categorically prohibits re-votes in presidential elections, particularly in response to extreme election emergencies.

The *Fladell* Court overlooked a different argument in support of its conclusion, however. The Article I Elections Clause allows state legislatures and Congress to determine the “Times” of congressional elections.<sup>125</sup> The Article II Presidential Electors Clause, in contrast, allows Congress to determine the “Time of chusing the Electors.”<sup>126</sup> One could argue that this difference in language is significant. While congressional

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118. *Id.* § 2.

119. *See supra* notes 49–55 and accompanying text.

120. *Fladell*, 2000 Fla. Cir. LEXIS 768, at \*20.

121. *Id.* (emphasis omitted).

122. *Id.*

123. *Id.* at \*16–17.

124. *See supra* notes 99–106 and accompanying text.

125. U.S. CONST. art. I, § 4, cl. 1.

126. *Id.* art. II, § 1, cl. 4.

elections may occur at different “Times” in the several states, Congress must establish a single “Time” at which states must choose their presidential electors.<sup>127</sup>

The significance of that minor variation in language seems to be overwhelmed, however, by the difference between Article II’s treatment of the “Time” for choosing electors and the “day” on which they must cast their electoral votes.<sup>128</sup> Only the latter must be “the same throughout the United States.”<sup>129</sup> Thus, especially in light of the First Congress’ decision to authorize a thirty-four-day period for appointing presidential electors,<sup>130</sup> the Constitution likely permits a state to hold—or a court to order—a re-vote in a presidential election, subject to timing constraints arising from the Electoral College. Given the severe practical impediments to unexpectedly holding a new election on short notice, such relief would be appropriate only in the most extreme circumstances.

### *B. Election Day and Failures to Elect in U.S. House Elections*

Congress did not establish a uniform Election Day for House elections until nearly three decades later, after the Civil War. At the time, states held their congressional elections in different months throughout the year.<sup>131</sup> The measure was enacted as part of the House reapportionment bill following the Census of 1870.<sup>132</sup>

As originally introduced in the House, the reapportionment bill left the timing of congressional elections up to the states.<sup>133</sup> At several points during the debate, Representative Butler

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127. See CONG. GLOBE, 42d Cong., 2d Sess. 3101 (1872) (statement of Sen. Trumbull); *id.* at 3278 (statement of Sen. Bayard).

128. U.S. CONST. art. II, § 1, cl. 4.

129. *Id.*

130. See *supra* Part II.A.1.

131. CONG. GLOBE, 42d Cong., 2d Sess. 138 (1871) (statement of Rep. Farnsworth) (“Several of the States have divers [sic] times for the election of their members of Congress. Some elect in September; others hold their elections in October. Pennsylvania, Ohio, and Indiana hold their elections in October, while other States have their elections at other seasons of the year.”); *id.* at 112 (statement of Rep. Butler); *id.* at 117 (statement of Rep. Dawes).

132. Act of Feb. 2, 1872, ch. 11, §§ 3–4, 17 Stat. 28, 28–29.

133. See CONG. GLOBE, 42d Cong., 2d Sess. 32–33 (1871) (statement of Rep. Farnsworth).

proposed an amendment to require all states to hold their House elections on the same day. Butler first introduced the measure as an amendment<sup>134</sup> to a more substantial amendment that Representative Farnsworth had offered to the apportionment bill.<sup>135</sup> Butler explained that he sought “to provide a uniform time of electing Representatives in Congress, beginning with the elections to the Forty-Fourth Congress” in 1874.<sup>136</sup>

Butler was primarily concerned about stopping voter fraud—specifically, “colonization and repeating among the large central states” which held their congressional elections at different times.<sup>137</sup> He also suggested that, if Congress required congressional elections to be held on the same day as presidential elections, states could amend their constitutions to hold elections for state offices at the same time, as well, to minimize the inconvenience for voters.<sup>138</sup> The House accepted Butler’s proposal with little debate,<sup>139</sup> but the underlying Farnsworth amendment to which it was appended failed.<sup>140</sup>

Butler then raised his idea for a second time, this time as an amendment to the underlying apportionment bill itself.<sup>141</sup> He pointed out that it would not enter into effect until the 1874 election cycle.<sup>142</sup> The House then passed a series of further amendments to his proposal to exempt several states from complying for even longer, until 1876.<sup>143</sup> Several

134. *Id.* at 112 (statement of Rep. Butler); *see id.* at 35 (statement of Rep. Butler) (submitting slightly different version of amendment to be printed, stating “[T]he election of all Representatives in Congress shall be held on the first Tuesday after the first Monday of November of each alternate year, except in cases of special elections ordered to fill a vacancy”).

135. *Id.* at 33 (statement of Rep. Farnsworth).

136. *Id.* at 112 (statement of Rep. Butler).

137. *Id.*

138. *Id.*

139. *Id.* at 113.

140. *Id.* at 115.

141. *Id.* (statement of Rep. Butler) (“I only desire to say that this amendment was offered to the substitute which has been lost, and I now want to apply it to the original bill.”).

142. *Id.* at 115–16.

143. *Id.* at 137 (statement of Rep. Stevenson) (moving successfully to delay the requirements for Maine and Indiana); *id.* at 137–38 (statement of Rep. Randall) (adding Pennsylvania and Ohio); *id.* at 138 (statement of Rep. Kellogg) (adding Connecticut, Iowa, and Vermont).

Representatives argued that their states would have to amend their state constitutions to change the date for congressional elections, and the process would take several years.<sup>144</sup> The House ultimately rejected Butler's proposal as amended.<sup>145</sup>

Butler introduced his amendment yet again<sup>146</sup> when the Committee of the Whole took up Representative Mercur's proposed substitute to the apportionment bill.<sup>147</sup> Again, Butler's amendment would have established the "Tuesday next after the first Monday in November" as Election Day for representatives, starting with the 1874 elections.<sup>148</sup> It specified that this requirement would be inapplicable to Maine and Indiana until 1876.<sup>149</sup> Unlike the previous iterations, however, this amendment further stated that if, "upon trial, there shall be a failure to elect a Representative" in any state or district "upon the day hereby fixed and established for such election," or a vacancy occurs for any reason, "an election shall be held to fill any vacancy . . . at such time and in such manner as is or may be provided by law for filling vacancies in the State or Territory . . . ."<sup>150</sup>

Butler reiterated that this amendment was "substantially like the one which I first offered."<sup>151</sup> He did not specifically discuss the new proviso he added. Rather, he cautioned that, if Congress did not establish an Election Day for House races, "it will be in the power of each State to fix upon a different day, and we may have a canvass going on all over the Union at different times."<sup>152</sup> He also argued that states with earlier elections would have an "undue advantage" over later states, because their results would influence later voters.<sup>153</sup> He concluded by arguing that a state's voters should not have to travel to the polls

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144. *Id.* at 137 (statement of Rep. Stevenson); *id.* (statement of Rep. Randall); *id.* at 138 (statement of Rep. Kellogg).

145. *Id.* at 140.

146. *Id.* at 141 (statement of Rep. Butler).

147. *Id.* at 140.

148. *Id.* at 141 (statement of Rep. Butler).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

multiple times to vote for different offices.<sup>154</sup> The House again rejected Butler's proposal.<sup>155</sup>

Finally, Representative Killinger introduced a variation of Butler's proposal as an amendment to Representative Mercur's proposed substitute. It was identical to Butler's previous submission—including the provisions concerning failures to elect and vacancies—except it would not take effect in any state until the 1876 elections.<sup>156</sup> The Committee of the Whole approved the amendment without debate by a vote of 107 to 32,<sup>157</sup> and it was included in the reapportionment bill that the House ultimately passed.<sup>158</sup>

On the Senate side, the bill was referred to the Senate Judiciary Committee.<sup>159</sup> The Committee reported the bill the following month with amendments.<sup>160</sup> Senator Allen G. Thurman of Ohio explained the need to establish a uniform Election Day, stating:

Whenever you provide that elections shall take place upon the same day, you do interpose a not inconsiderable check to frauds in elections, to double voting, to the transmission of voters from one

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154. *See id.* (arguing it was “wrong” to require “that once in four years” a state's voters “shall be put to the trouble of having a double election. On every election day the poor laboring man who goes to the polls to vote loses his day's work, to say nothing of the expenses which fall on the politicians . . .”).

155. *Id.*

156. *Id.* (statement of Rep. Killinger) (“The object of that amendment is to put off a uniform day of election for two years longer than by the amendment of [Butler]. It is his amendment in other respects, omitting the exception in favor of Indiana and Maine.”).

157. *Id.* at 142. Later, Representative Ambler proposed a modification so that the Election Day requirement would apply to the 43rd Congress, but it was defeated. *Id.* at 144.

158. The Committee of the Whole approved Mercur's substitute for the original bill, to which Killinger's Election Day provisions had been added, and reported it to the House. *Id.* at 144–45. The House subsequently passed the bill. *Id.* at 146.

159. *Id.* at 157.

160. *Id.* at 520 (statement of Sen. Trumbull). The Judiciary Committee recommended modifying the bill so that the House Election Day requirements would take effect in 1872 rather than 1876. *Id.* at 676. The Senate rejected that amendment, however. *Id.* The Senate decided to delay implementation until 1876 to give states time to amend their state constitutions to reschedule elections for state offices to be held on the new congressional Election Day, rather than conducting separate elections within a few weeks of each other. *Id.* (statement of Sen. Hamlin); *id.* (statement of Sen. Sherman).



State to another, and you do allow the people to vote for their Representatives undisturbed by considerations which they ought not to take at all into account.<sup>161</sup>

Among other things, the Judiciary Committee recommended adding a provision stating that, in the 1872 election cycle, states which held their polls open for multiple days for state elections had to keep them open “for the same length of time” for congressional elections, as well.<sup>162</sup> Senator Trumbull explained that several states, including Texas, held their elections over multiple days.<sup>163</sup> Voters in those states were required to travel to their county seats to cast their ballots.<sup>164</sup> “[I]t would be impracticable” to require all voters throughout each county to vote at the same place on a single day.<sup>165</sup>

Trumbull nevertheless objected to the committee’s amendment, explaining that voting over several days was “a very bad arrangement.”<sup>166</sup> Moreover, since the House Election Day requirement would not take effect until 1876, states had enough time to amend their voting provisions so that elections could reasonably occur within a single day.<sup>167</sup> One of the Senators from Texas agreed with this reasoning,<sup>168</sup> and the Senate rejected the amendment.<sup>169</sup> As discussed above,<sup>170</sup> only a

161. *Id.* at 618 (statement of Sen. Thurman).

162. *Id.* at 676. This proposal was a corollary of the committee’s recommendation that the Election Day provisions take effect in 1872. *See supra* note 160 and accompanying text.

163. CONG. GLOBE, 42d Cong., 2d Sess. 676 (1871) (statement of Sen. Trumbull).

164. *Id.*; *see id.* at 677 (statement of Sen. Thurman) (“There are some States in which, by the laws, the election is held for several days, and all the electors in a county vote at the same place.”).

165. *Id.* at 676 (statement of Sen. Trumbull); *see id.* at 677 (statement of Sen. Thurman) (“State law provides that the election may be kept open for three or four days, so that all the voters may be entitled to vote.”).

166. *Id.* at 676 (statement of Sen. Trumbull).

167. *Id.* (“There is no provision confining the election of members of Congress to a single day until 1876, and there will be time enough for these States to conform their legislation to the law, which will take effect in 1876.”).

168. *Id.* at 677 (“I have consulted one of the Senators from Texas, and he thinks there is no necessity now for the proviso, inasmuch as the certain day fixed for the election does not take effect until 1876.”).

169. *Id.*

170. *See supra* notes 73–75 and accompanying text.

few months later, in May 1872, Congress would approve a related measure, allowing states to hold their polls open for multiple days for the 1872 presidential election.<sup>171</sup>

During the Senate debates, Senator Thurman offered the only express reference to the bill's "failure to elect" provision. He claimed that, in states which use plurality-based voting, "no such thing as a failure to elect can occur unless there should be a tie," and state law usually requires ties to be resolved by lot.<sup>172</sup> He added that a failure to elect could occur only in the few states which require candidates to receive a majority of the votes cast to win.<sup>173</sup>

The Senate passed the bill, with some unrelated amendments, by a vote of forty-nine to seven.<sup>174</sup> The House agreed to the amendments,<sup>175</sup> and the reapportionment act—including its provisions establishing an Election Day for House elections—became law.<sup>176</sup>

### *C. Election Day and Failures to Elect in U.S. Senate Elections*

Shortly after the Civil War—before the adoption of the Seventeenth Amendment—Congress enacted a law governing the time and manner in which state legislatures were required to elect U.S. Senators.<sup>177</sup> The statute required the legislature elected immediately prior to the expiration of a senator's term to elect the senator's successor "on the second Tuesday" after its "meeting and organization."<sup>178</sup>

171. Act of May 23, 1872, ch. 198, 17 Stat. 157.

172. CONG. GLOBE, 42d Cong., 2d Sess. 677 (1872) (statement of Sen. Thurman).

173. *Id.* ("[T]here can be no failure to elect except in those States in which a majority of all the votes is necessary to elect a member, and they are very few in number. Then there is no probability of there being a failure to elect so as to make this section necessary in many cases . . .").

174. *Id.* at 679.

175. *Id.* at 713 (agreeing to the Senate's amendments). The Senate passed a joint resolution to correct a minor scrivener's error in the bill, *id.* at 755, and the House concurred, *id.* at 777.

176. Act of Feb. 2, 1872, ch. 11, §§ 3–4, 17 Stat. 28, 28–29.

177. Act of Jul. 25, 1866, ch. 245, 14 Stat. 243, 243–44.

178. *Id.* § 1, 14 Stat. at 243. The statute also required a legislature to fill any vacancy that arose while it was in session, using the specified process, "on

Voting was to occur in a two-step process. First, the legislature's chambers were required to meet separately, and their respective members voted for candidates *viva voce*.<sup>179</sup> If the same candidate received a majority of the votes cast in each chamber, that person was elected.<sup>180</sup> If the election was not resolved at that stage, then the chambers were required to meet together in joint session and again vote *viva voce*.<sup>181</sup> A candidate had to receive a majority of all votes cast in the joint session to be elected.<sup>182</sup> If the legislature failed to elect a candidate at this second stage, it was required to meet daily at noon in joint session and complete at least one round of voting until a candidate was elected.<sup>183</sup> The law was intended to avoid election contests over the legality of senators' elections,<sup>184</sup> and reduce the likelihood of states being unrepresented in the Senate because the chambers of their legislatures could not agree on a candidate.<sup>185</sup>

The Seventeenth Amendment, ratified in April 1913,<sup>186</sup> stripped legislatures of their power to appoint senators and provided for popular elections instead.<sup>187</sup> The following year,

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the second Tuesday" after learning of the vacancy. *Id.* § 2, 14 Stat. at 243–44. Similarly, when a vacancy arose while the legislature was in recess, it was required to elect a new senator using the statutory process "on the second Tuesday after the commencement and organization of its session." *Id.* § 2, 14 Stat. at 244.

179. *Id.* § 1, 14 Stat. at 243.

180. *Id.*

181. *Id.*

182. *Id.* The act specified that "a majority of all the members elected to both houses" constituted a quorum for the joint session. *Id.*

183. *Id.*

184. See CONG. GLOBE, 39th Cong., 1st Sess. 3732 (1866) (statement of Sen. Johnson); see also *id.* at 3723 (statement of Sen. Clark); see, e.g., 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, § 877, at 73–75 (1907) (explaining that the 1865 election contest over the New Jersey legislature's attempted election of John P. Stockton to the U.S. Senate centered around whether a joint session of the legislature had power to adopt a rule allowing a candidate to win with only a plurality vote).

185. CONG. GLOBE, 39th Cong., 1st Sess. 3727–28 (1866) (statement of Sen. Trumbull).

186. WILLIAM JENNINGS BRYAN, U.S. SEC'Y OF STATE, NOTIFICATION OF RATIFICATION OF THE SEVENTEENTH AMENDMENT (1913), <https://perma.cc/Z69E-Q34Q> (PDF).

187. U.S. CONST. amend. XVII, § 1.

prior to the first general election for the Senate, Congress passed a law to regulate the timing of Senate elections and provide default rules for states that failed to adopt their own laws.<sup>188</sup> Section 1 of the statute required states to elect a U.S. Senator “at the regular election . . . next preceding the expiration” of a senator’s term, “at which . . . a Representative to Congress is regularly by law to be chosen.”<sup>189</sup>

Section 2 directed states that lacked laws for U.S. Senate elections to instead apply their laws governing nominations and elections for members-at-large of the U.S. House of Representatives.<sup>190</sup> States that also lacked laws for at-large House races would instead apply their statutes governing elections for statewide executive and administrative offices.<sup>191</sup> Section 2 concluded by specifying that, in all states, a plurality of votes would be sufficient to elect a senator.<sup>192</sup> Section 2’s

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188. Act of June 4, 1914, ch. 103, 38 Stat. 384.

189. *Id.* § 1, 38 Stat. at 384; see 51 CONG. REC. 1334 (1913) (statement of Sen. Walsh) (explaining that § 1 “provides for the time of holding the election” by directing states to hold Senate elections simultaneously with “the general election . . . at which . . . Members of Congress will be voted for”); *id.* at 3333 (statement of Sen. Sutherland) (explaining that the bill “fixed a uniform date for the election of Representatives in Congress”); *id.* at 8461 (statement of Rep. Rucker) (explaining that the act “will fix the time of election the same as the time when the election of Representatives in Congress is held”).

190. Act of June 4, 1914, § 2, 38 Stat. at 384; see 51 CONG. REC. 8461 (1914) (statement of Rep. Knowland) (describing the bill as “a temporary method of conducting the nomination and election of United States Senators in those States whose legislatures have not convened since the ratification of the constitutional amendment providing that Senators should hereafter be chosen by the people of the several States”).

191. Act of June 4, 1914, § 2, 38 Stat. at 384.

192. *Id.*

provisions were intended as purely interim measures;<sup>193</sup> they automatically expired after three years.<sup>194</sup>

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193. See, e.g., 51 CONG. REC. 509 (1913) (statement of Sen. Sutherland) (“The whole purpose of this measure is temporary. It is to tide over this difficulty . . .”); *id.* at 514 (statement of Sen. Poindexter) (declaring that he had intended the bill to serve as a “temporary expedient”); *id.* at 1335 (statement of Sen. Sutherland) (“This is only temporary, Mr. President. It is to tide over the period which will intervene between now and the time when the various legislatures can meet in regular session and adopt laws in reference to this matter.”); *id.* at 8458 (statement of Rep. Henry) (“This bill provides for the election of United States Senators only until various States can pass laws on the subject. It is a temporary expedient, to serve only until the legislatures convene in regular order and take action.”).

194. Act of June 4, 1914, § 3, 38 Stat. at 384. The chambers disagreed on whether the whole law should be temporary. As originally enacted by the Senate, the bill did not contain a sunset clause. The House, however, adopted an amendment introduced by Representative Rucker providing that the entire bill would automatically expire after three years. 51 CONG. REC. 8467 (1914); see *id.* at 8460 (statement of Rep. Rucker) (explaining that he intended to introduce an amendment “to avoid any possible confusion” as to the law’s permanency). The Senate would not agree to the amendment, however, and insisted on a conference. *Id.* at 8548.

The conference committee recommended acceding to Rucker’s amendment. *Id.* at 9214. Senator Walsh explained that the Senate conferees “decided to acquiesce” to the House’s amendment “for the purpose of expediting the passage of the act.” *Id.* (statement of Sen. Walsh). Additionally, the Senate conferees “believ[ed] that the act will have subserved its purpose within the time mentioned, anyway.” *Id.* Senator Sutherland, however, opposed the amendment. He explained, “[S]ection 1 of this bill is clearly permanent in its character. . . . We have a provision in the law with reference to the election of Members of the House of Representatives which fixes a uniform time for the holding of elections, and of course there ought to be a law of the United States fixing a uniform time for the election of Senators . . .” *Id.* (statement of Sen. Sutherland). Sutherland suggested a compromise amendment providing that only § 2—which established rules for U.S. Senate elections in states that lacked laws to govern them—would expire after three years. *Id.* at 9214–15. The Senate voted to recommit the bill to a second conference. *Id.* at 9215.

The conference committee endorsed Sutherland’s compromise. Section 1, requiring states to hold Senate elections simultaneously with House elections, would remain permanent law. Section 2, providing default interim rules for Senate elections in states that lacked laws to govern them, would expire after three years. Both chambers agreed to the compromise. *Id.* at 9466 (noting the House’s agreement to the change); *id.* at 9435 (noting the Senate’s agreement).

Due to this sunset provision, Section 1 is the only provision of the act that remains in effect.<sup>195</sup> Currently codified as 2 U.S.C. § 1, it provides:

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof . . . .<sup>196</sup>

Rather than directly specifying the day on which states must hold U.S. Senate elections, this provision instead directs states to hold them at the same time as House elections. Thus, although Congress never enacted a “failure to elect” provision specifically for Senate races, the statute authorizing states to postpone or extend House races due to natural disasters or other unexpected emergencies would apply.<sup>197</sup> Under that statute, states may also hold special elections to fill vacancies that arise during a senator’s term on an alternate date set by the legislature, as well.<sup>198</sup>

With this 1914 law, Congress completed the seventy-year project of creating a single Election Day that presumptively applies to all federal elections. The “failure to elect” provisions within this statutory scheme<sup>199</sup> grant states sufficient

195. One early federal district court explained:

The provision that the federal statute should cease to be operative as soon as state legislation on the subject was enacted, the provision that the act should expire by its own limitation at the end of three years from the date of its approval, together with the title of the act, show plainly that it was intended to meet a temporary exigency . . . .

United States v. O’Toole, 236 F. 993, 996 (S.D. W. Va. 1916).

196. 2 U.S.C. § 1 (2018).

197. *Id.* § 8; *supra* Part II.B; *see also* 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 [S]ection 8 applies equally to Senators and Representatives.”), *aff’d per curiam*, 992 F.2d 1548 (11th Cir. 1993).

198. *See* Judge v. Quinn, 623 F. Supp. 2d 933, 935 (N.D. Ill. 2009) (noting that 2 U.S.C. § 8(a) applies to special Senate elections, even though the statute discusses only House elections), *aff’d on other grounds*, 612 F.3d 537 (7th Cir. 2010), *modified*, 387 F. App’x 629 (7th Cir. 2010).

199. 2 U.S.C. § 8 (2018); 3 U.S.C. § 2.

flexibility, however, to postpone or extend federal elections when necessary to respond to election emergencies.

### III. Enforcing Election Day

Federal law currently requires all regularly scheduled federal elections—Presidential,<sup>200</sup> Senate,<sup>201</sup> and House<sup>202</sup>—to be held on the Tuesday after the first Monday in November of election years. Federal courts, however, have never “isolat[ed] precisely what acts a State must cause to be done on federal election day (and not before it) to satisfy” these requirements.<sup>203</sup> In *Foster v. Love*,<sup>204</sup> the Supreme Court explained that, at a minimum, these provisions require some “act in law or in fact to take place on the date chosen by Congress.”<sup>205</sup> A state may not “conclud[e]” a “contested selection of candidates . . . before the federal election day.”<sup>206</sup>

Numerous circuits, applying *Foster*, have held that these statutes do not prohibit early voting in federal elections.<sup>207</sup> So long as a state holds an “authentic general election” on Election

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200. 3 U.S.C. § 1 (2018).

201. 2 U.S.C. § 1 (2018).

202. *Id.* § 7.

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

204. 522 U.S. 67.

205. *Id.* at 72.

206. *Id.*; *see also id.* at 72 n.4 (reiterating that 2 U.S.C. § 7 prohibits an election from being “consummated” before Election Day).

207. *See Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001) (holding that the Election Day statutes allow states to hold early voting, so long as “substantial official action” still occurs on “the congressionally prescribed day, and considerable voting continues to take place on election day”); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001) (stating that the federal Election Day statutes allow states to hold early voting, noting that, “[a]lthough voting takes place, perhaps most voting, prior to election day, the election is not ‘consummated’ before election day because voting still takes place on that day”); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775–76 (5th Cir. 2000) (holding that early voting is legal under the Election Day statutes because the polls are still open on Election Day “and most voters cast their ballots on that day. No election results are released until the votes are tabulated on federal election day.”). *But see In re Opinion of Justices*, 80 N.H. 595, 606 (1921) (“If the election is to be held on a certain day, the implication is that the vote must be cast on that day.”).

Day, it may allow voting to occur beforehand, as well.<sup>208</sup> Moreover, states may also conduct post-election activities well after Election Day, including ballot counting,<sup>209</sup> election contests<sup>210</sup> and run-offs.<sup>211</sup>

The “failure to elect” provisions of the federal Election Day laws allow states to extend or postpone federal elections when necessary to respond to unexpected election emergencies that make it dangerous or impossible to vote on Election Day throughout a substantial part of a congressional district or state.<sup>212</sup> A three-judge panel of the U.S. District Court for the

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208. *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 830 (N.D. Ga. 1993), *aff’d per curiam*, 992 F.2d 1548 (11th Cir. 1993); *see Millsaps*, 259 F.3d at 547 (upholding early voting statutes because they “do not create a regime of combined action meant to make a final selection on any day other than federal election day”); *Keisling*, 259 F.3d at 1175 (holding that a violation of the Election Day statutes occurs only where “no act of officials or voters [is] left to be done on federal election day”); *Bomer*, 199 F.3d at 776 (“[T]he plain language of the statute does not require all voting to occur on federal election day. . . . Allowing some voters to cast votes before election day does not contravene the federal election statutes because the final selection is not made before the federal election day.”).

209. *See Harris v. Fla. Elections Canvassing Comm’n*, 122 F. Supp. 2d 1317, 1324–25 (N.D. Fla. 2000) (holding that states may count votes and allow earlier-mailed votes to be received by election officials after Election Day).

210. *See Franken v. Pawlenty*, 762 N.W.2d 558, 570 (Minn. 2009) (*per curiam*).

211. *Public Citizen, Inc.*, 813 F. Supp. at 830 (holding that a state may hold a U.S. Senate runoff after federal Election Day, because the state neither “reschedule[d] the earlier general election” nor “negate[d] that election’s outcome”); *see also Love v. Foster*, 100 F.3d 413, 414 (5th Cir. 1996) (*per curiam*) (denying petition for rehearing and rehearing en banc) (stating that a state may hold an “open primary on Federal Election Day and provide for a runoff election between November and January when the elected member of Congress takes office”), *aff’d*, 522 U.S. 67 (1997); *Baber v. Dunlap*, 376 F. Supp. 3d 125, 142 (D. Me. 2018) (“Nor is it unconstitutional for an election to be determined in more than one round, provided that the official election takes place on federal election day.”).

212. *See Public Citizen*, 813 F. Supp. at 831 (explaining that the “failure to elect” provisions “permit states to prescribe different times for elections when they experience a legitimate failure to elect due to exigent circumstances after making an honest attempt to do so”); *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 [2 U.S.C. § 7] would prevent a state from rescheduling its congressional elections under such circumstances.”), *aff’d*, 459 U.S. 1166 (1983).



District of Columbia, in an opinion summarily affirmed by the U.S. Supreme Court, declared, “[W]here exigent circumstances arising prior to or on the date established by [a federal Election Day law] preclude holding an election on that date, a state may postpone the election until the earliest practicable date.”<sup>213</sup>

Federal courts have also occasionally noted that the 1872 Act’s “failure to elect” provisions allow them to extend or postpone congressional elections where necessary to prevent constitutional or statutory violations.<sup>214</sup> The same reasoning would apply to 3 U.S.C. § 2 and presidential elections although, as discussed earlier, other constitutional and statutory constraints relating to the Electoral College greatly limit the length of any such delay.<sup>215</sup> Other courts, in contrast, emphasizing the federal Election Day requirements, have been far less willing to issue injunctions that might delay elections, even when certain aspects of the electoral system may be unconstitutional.<sup>216</sup>

In *Purcell v. Gonzalez*,<sup>217</sup> the Supreme Court held that courts generally should exercise their equitable discretion to avoid issuing injunctions that change the rules of an upcoming election. In addition to the usual “harms attendant upon issuance or nonissuance of an injunction,” a court must consider several issues specific to elections.<sup>218</sup> “Court orders affecting elections, especially conflicting orders, can . . . result in voter confusion and [create a] consequent incentive to remain away

213. *Busbee*, 549 F. Supp. at 525.

214. *See, e.g., id.* at 523–25 (holding that, where a state violated the preclearance requirements of § 5 of the Voting Rights Act, 2 U.S.C. § 8 authorizes a federal court to order the state to postpone its congressional election); *see also* *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 569–70 (E.D. Va. 2016) (three-judge court) (Payne, J., dissenting) (explaining that, where a state engaged in racial gerrymandering, 2 U.S.C. § 8 grants federal courts “power to postpone the general elections for the affected districts”).

215. *See supra* notes 99–106 and accompanying text.

216. *See, e.g., Kostick v. Nago*, 878 F. Supp. 2d 1124, 1147 (D. Haw. 2012) (“[A] federal court preliminary injunction that has the net effect of interrupting the election would be ill advised.”); *Wright v. Cripps*, 292 F. Supp. 294, 297, 300 (D. Del. 1968) (three-judge court) (determining that the state’s failure to permit write-in voting was unconstitutional, but construing the federal Election Day statutes as prohibiting the court from delaying the election to give the state time to obtain new voting equipment).

217. 549 U.S. 1 (2006) (per curiam).

218. *Id.* at 4.

from the polls. As an election draws closer, that risk will increase.”<sup>219</sup> Professor Rick Hasen has dubbed this the *Purcell* principle: “[C]ourts should not issue orders which change election rules in the period just before the election” to avoid “voter confusion and problems for those administering elections.”<sup>220</sup> The *Purcell* principle generally prevents courts from issuing orders to enjoin, postpone, or extend an election that is only months or weeks away, even to prevent a constitutional or statutory violation. This is especially true where the plaintiffs could have brought their lawsuit or sought a preliminary injunction earlier, to avoid the need for last-minute changes.<sup>221</sup>

In *Republican National Committee v. Democratic National Committee (RNC v. DNC)*, the Supreme Court cited the *Purcell* principle as part of its rationale for overturning an injunction that the Seventh Circuit had approved to modify the deadline for absentee voting in the 2020 Wisconsin presidential primary due to COVID-19.<sup>222</sup> Wisconsin law specified that absentee ballots were not valid unless election officials received them by Election Day, which was on April 6.<sup>223</sup> Less than a week before Election Day, a federal district court ordered election officials to accept any absentee ballots that they received by April 13, regardless of when voters mailed them.<sup>224</sup> The Seventh Circuit

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219. *Id.* at 4–5.

220. Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).

221. *See* Morley, *supra* note 6, at 595–97 (discussing the timing challenges of election litigation).

222. 140 S. Ct. 1205, 1207 (2020) (per curiam) (“This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.” (citing *Purcell*, 549 U.S. 1)); *see id.* (“[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.”).

223. WIS. STAT. § 6.87(6) (2020).

224. *See* Democratic Nat’l Comm. (“DNC”) v. Bostelmann, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 62053 (W.D. Wis. Apr. 3, 2020), *stay granted in part and denied in part*, Nos. 20-1538 & 20-1546, 2020 U.S. App. LEXIS 25831 (7th Cir. Apr. 3, 2020), *stay granted per curiam sub nom.*, Republican Nat’l Comm. (“RNC”) v. DNC, 140 S. Ct. 1205 (2020).

refused to stay that order,<sup>225</sup> but the Supreme Court reversed.<sup>226</sup> Invoking the *Purcell* principle, the Court stated, “By changing the election rules so close to the election date . . . the District Court contravened this Court’s precedents and erred by ordering such relief.”<sup>227</sup>

The Court erred in applying the *Purcell* principle in litigation arising from an unexpected election emergency.<sup>228</sup> By their very nature, eleventh hour election emergencies such as natural disasters, terrorist attacks, extreme weather, and other calamities unexpectedly disrupt the electoral process. They can trigger a need for last-minute adjustments in order to preserve the right to vote, protect public safety, and facilitate election administration. Courts frequently are called upon to grant emergency relief in response to such crises that unexpectedly burden the constitutional right to vote.<sup>229</sup> Applying the *Purcell* principle in such cases would virtually disqualify courts from protecting constitutional rights during emergencies. The *Purcell* principle should be inapplicable when a potential claim arises from an unexpected major emergency that does not occur until an election is impending or in progress.

More broadly, however, *RNC v. DNC* established a useful remedial hierarchy for election emergency cases. Though it did not expressly frame its ruling in constitutional terms, the Court in effect distinguished between judicially mandated changes to the “Times” of elections and changes to the “Manner” in which they are conducted.<sup>230</sup> *Election postponements*—changes to the “Times” of elections by rescheduling Election Day or otherwise extending the period for casting votes—are much more serious remedies than *election modifications*—changes to the “Manner” in which elections are conducted by suspending or modifying

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225. *DNC v. Bostelmann*, Nos. 20-1538 & 20-1546, 2020 U.S. App. LEXIS 25831 (7th Cir. Apr. 3, 2020), *stay granted per curiam sub nom.*, *RNC v. DNC*, 140 S. Ct. 1205 (2020).

226. *RNC v. DNC*, 140 S. Ct. 1205 (2020) (per curiam).

227. *Id.* at 1207.

228. See Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, ELECTION L.J. (forthcoming 2020) (manuscript at 30–34), <https://perma.cc/6W45-L78L> (PDF).

229. Morley, *supra* note 6, at 603–09.

230. U.S. CONST. art. I, § 4, cl. 1; *accord id.* art. II, § 1, cl. 2, 4.

some of the rules governing the conduct of voting.<sup>231</sup> A postponement, in the Court's view, "fundamentally alters the nature of the election."<sup>232</sup> *RNC v. DNC* held that it was inappropriate for a court to order an election postponement by allowing voters to cast and submit, or election officials to receive, absentee ballots after the statutory deadline, without demonstrating that modifications to other rules governing the electoral process were insufficient to alleviate any constitutional concerns.<sup>233</sup> Indeed, while the Court invalidated the postponement, it expressly emphasized that it was not addressing "whether other reforms or modifications in election procedures in light of COVID-19 are appropriate."<sup>234</sup>

Thus, election postponements are a very "unusual" remedy, and permissible only in the rare circumstances where modifications would be insufficient.<sup>235</sup> For example, the 9/11 terrorist attacks occurred during the New York State primaries. They present a paradigmatic example of how an emergency can require an election postponement because, under the circumstances, no lesser form of relief would have made it practicable or safe for the election to proceed.<sup>236</sup> Before a court may postpone a federal election under the "failure to elect" provisions in federal law, it must first assess whether election modifications would be sufficient to address the emergency. And, as discussed above, in the absence of a true, unexpected, last-minute emergency, the *Purcell* principle would generally prohibit a court from granting either an election modification or a postponement in the weeks or days immediately before an election.

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231. See Morley, *supra* note 6, at 615–16 (distinguishing among election modifications, postponements, and cancellations, and arguing that modifications are the preferred remedy for responding to election emergencies).

232. *RNC*, 140 S. Ct. at 1207; *accord id.* at 1208.

233. *Id.* at 1207–08 (allowing other election modifications ordered by the district court to remain in place, while overturning the lower court's election postponement).

234. *Id.* at 1208.

235. *Id.* at 1207; see Morley, *supra* note 6, at 615–16.

236. See Morley, *supra* note 6, at 553 n.28 (citing *Primary Elections Are Cancelled*, N.Y. L.J., Sept. 12, 2001, at 3).

Even when an emergency occurs, courts may determine that an extension or postponement is unnecessary if voters have had ample opportunity to cast absentee votes by mail and vote in person during early voting. The majority of states have no-excuse absentee voting, allowing any voter to request and submit their absentee ballots by mail.<sup>237</sup> And nearly all states allow at least some form of in-person early voting, with early voting periods lasting as long as forty-five days.<sup>238</sup> Over the week or two before Election Day, sixteen states establish voting centers throughout each county at which any county resident may cast a ballot, to make early voting even easier.<sup>239</sup>

Some courts have held that such opportunities to vote are an inadequate substitute for the chance to vote in person on Election Day itself.<sup>240</sup> But as Election Day evolves into a lengthy election period, courts may place greater weight on whether voters have had a reasonable opportunity to cast a ballot, rather than whether they were able to cast it specifically on Election Day. With reforms like no-excuse absentee voting and early voting in vote centers substantially extending the time for voting, courts may conclude that the decision to wait to vote on Election Day itself is a personal preference rather than a constitutionally protected right, and that voters who delay assume the risk that unexpected emergencies may preclude them from being able to cast a ballot. Thus, by providing potentially expansive additional opportunities to vote, no-excuse absentee voting and early voting may reduce the perceived need to extend polling place hours,<sup>241</sup> or to extend or postpone elections, due to unexpected emergencies.

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237. *VOVP: Table 1: States with No-Excuse Absentee Voting*, NAT'L CONF. OF STATE LEGISLATURES (May 1, 2020), <https://perma.cc/9S8M-7UYS>.

238. *State Laws Governing Early Voting*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 2, 2019), <https://perma.cc/NU9Q-RDE3>.

239. *Vote Centers*, NAT'L CONF. OF STATE LEGISLATURES, <https://perma.cc/7DWA-FWH3>.

240. *See, e.g.*, *Curling v. Raffensperger*, 403 F. Supp. 3d 1311, 1342 (N.D. Ga. 2019); *Ohio State Conf. of the NAACP v. Husted*, 43 F. Supp. 3d 808, 843 (S.D. Ohio 2014), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *stay granted*, 573 U.S. 988 (2014), *vacated as moot*, No. 14-3877, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014).

241. *Cf. Morley, supra* note 6, at 603–09.

*IV. Conclusion*

Over the course of nearly seventy years, Congress established a uniform Election Day to combat election fraud by preventing double voting, reduce burdens on voters, and prevent results from states with early elections from influencing voters in other jurisdictions. These statutes grant states flexibility to extend or postpone their federal elections to later dates when serious unexpected emergencies make it impossible, impracticable, or unsafe to hold those elections as scheduled.<sup>242</sup> Such an election postponement is an “unusual,” strong remedy, however.<sup>243</sup> Under the Supreme Court’s recent ruling in *RNC v. DNC*, a court may not order such a postponement unless other, lesser types of modifications would be insufficient to alleviate any constitutional concerns.<sup>244</sup> And as Election Day develops into an election period, in which voters have extensive opportunities to vote both by mail through no-excuse absentee voting, and in person at regional vote centers during early voting periods, courts may conclude that the Constitution does not require extensions or postponements when unexpected emergencies interfere with the conduct of voting on Election Day itself.

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242. 2 U.S.C. § 8 (2018); 3 U.S.C. § 2; *see* 2 U.S.C. § 1.

243. *RNC v. DNC*, 140 S. Ct. 1205, 1207–08 (2020) (per curiam).

244. *Id.*; Morley, *supra* note 6, at 615–16.