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How Many Votes is Too Few?

REBECCA GREEN*

The 1918 influenza pandemic is believed to have depressed turnout in the midterm elections that year by around ten percent when compared to the previous midterm election. Few cast doubt on the 1918 election's legitimacy at the time—even though that ten percent [represented](#) around 3,000,000 votes. As one [commenter](#) put it, “If just a fraction of the drop in turnout from 1914 to 1918 was due to the presence of the flu, then the disease was responsible for hundreds of thousands of people not voting.”

As the country gears up for November's election, the specter of election disruption again looms large. Disruptions—pandemic flare ups, security issues, weather events—may significantly depress turnout. If this happens, how few votes is too few for an election result to be considered [legitimate](#)? How is a court likely to evaluate depressed turnout in the context of available post-election remedies?

First, a parade of potential horrors. What if a superstorm [hits](#) days before November 3rd? What if, due to massive [poll worker](#) shortages, a state shuts a significant number of polling locations, preventing [thousands](#) from casting ballots? What if a foreign cyberattack cripples a state's power grid on the morning of Election Day? Under numerous [scenarios](#), unexpected events could make it impossible for a large number of voters to cast ballots in November.

As Michael Morley studiously [documents](#) in his article on election emergencies, the vast majority of state statutes lack clear language addressing election disruptions nor do many state [emergency statutes](#) clearly delegate power or provide specific guidance to state officials to manage disruptions that threaten turnout. The events of the past six months have served as a much-needed wake up call to state officials who have been working [diligently](#) to address new realities of running elections during emergencies. Still, the likelihood that state responses to emergencies that impact elections—the current pandemic and/or others—will fail a significant number of voters remains. Professor Stephen Huefner has looked [carefully](#) at remedies available for failed elections.

This short post examines the contours of a potential numerical trigger: how many votes does it take for an election to credibly capture the will of the people? How has this question played into courts' analyses of when to order election remedies?

In the United States, turnout is chronically low. Many U.S. primary elections are [lucky](#) to pass the twenty-percent mark. During presidential election years, a [greater](#) number of voters cast ballots. But even when the will to vote is

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strong, circumstances prevent some portion of voters in every election from casting ballots, whether it is car trouble, the inability to get off [work](#) on Election Day, or a myriad other reasons.

When eligible voters are unable to cast ballots—even when the burden prevents a potentially outcome-determinative number of voters from voting—courts typically [treat](#) what they deem “ordinary burdens” as insufficient to warrant relief.

But we are not living in ordinary times. Since the coronavirus outbreak, courts have begun to take extraordinary measures to protect the right to vote. As Rick Pildes [convincingly](#) argues, the coronavirus pandemic appears to be emboldening [lower](#) federal courts to force states to take steps to take voter-protective measures. (So far, the Supreme Court does not seem quite as [willing](#).)

These federal decisions have focused on the extent to which states must accommodate voters because of extraordinary circumstances *before* Election Day (for example, making [absentee voting](#) more widely available). But if measures before Election Day, whether by courts or state officials, fail to safeguard access for a significant number of voters in November, at what point (if ever) does an election become illegitimate? Should the question hinge on how many voters are impacted? If so, how many must that number be?

Can we agree that if *all* voters are prevented from casting ballots an election is illegitimate? In [State v. Marcotte](#), a Maine Supreme Judicial Court decision from 1952, state officials rescheduled an election day after a massive snowstorm hit. In rejecting a challenge to the outcome of that rescheduled election, the court noted that, “[t]here was a storm of such unusual proportions and such unexpected violence that it might well be considered that there was no election due to ‘an act of God.’” In that instance, no votes were cast (the city had 21,252 registered voters).

Marcotte therefore supplies precedent for the idea that if no voters can vote, an election should not stand. That seems right. But what if *some* voters are able to cast valid ballots? How many is enough?

New York has an answer to this question on the books. A New York [statute](#) provides that if less than twenty-five percent of registered voters in a city, town or village cast ballots “as the direct consequence of a fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack, or other disaster,” a county or state board of elections may authorize “an additional day of election” in that jurisdiction (which must be completed within twenty days of the original election and voting must be in person).

New York’s legislature passed this law in the wake of a devastating [blackout](#) in 1977 when the Northeast power grid went dark for twenty-five hours. New York City bore the brunt of the disruption with [widespread](#) looting and subway failures. The event led the New York legislature to enact its unique statutory fix in case catastrophe should prevent a significant number of voters from casting ballots.

We might be able to agree that a result when one hundred percent of registered voters are unable to cast ballots is illegitimate; we might even agree that, as in New York, if fewer than twenty-five percent of registered voters cast ballots an election should be extended or rescheduled. But what if a disruption stops say forty percent of voters from casting ballots? Should a post-election remedy be available?

The Wisconsin Supreme Court in [McNally v. Tollander](#) thought yes. In that case, a ballot shortage prevented forty percent of the electorate from voting in a referendum. Because the election did not involve a candidate for office, Wisconsin's contest statute was not available to challenge the result. Not to be deterred, the Wisconsin Supreme Court voided the election holding that the deprivation of the right to vote violated Wisconsin's constitution. Quoting an [earlier case](#), the Wisconsin Supreme Court held that the

right of a qualified elector to cast a ballot . . . which shall be free and equal, is one of the most important of the rights guaranteed to him by the [state] constitution. If citizens are deprived of that right, which lies at the very basis of our democracy, we will soon cease to be a democracy.

Forty percent of voters unable to cast ballots was too much for the Wisconsin Supreme Court. But other courts have been less open to overturning the results of an election due to disruption on this basis. In the early 1960s, for example, the town of Springville, Nebraska held a vote on a school bond issue. In the days leading up to the election, a blizzard left much of the area snowbound (even though election day itself was reportedly mild and sunny). While we do not know the exact number, the Nebraska Supreme Court [acknowledged](#) that a "substantial number of electors who were wholly or partially isolated by drifts could not get out to vote." Nevertheless, the justices refused to invalidate the election, holding that, "in the absence of fraud, the courts will not ordinarily consider the effect of votes not actually cast at an election."

In *Jenkins v. Williamson-Butler*, a 2004 [case](#) involving a local election in New Orleans, a candidate sought a new election after substantial irregularities affected an estimated twenty to twenty-five percent of voters. According to Louisiana's [contest statute](#), a remedy is available if "the number of qualified voters who were denied the right to vote by the election officials was sufficient to change the result in the election, if they had been allowed to vote."

In that election, one-third of the city's voting machines arrived late to polling locations preventing voters from casting ballots. Then-Secretary of State Fox McKeithen [proclaimed](#) that the "election was the biggest fiasco in New Orleans election history." On the basis of this extraordinary circumstance, the appeals court affirmed the trial court's decision to void the election and hold a new one.

But note an interesting feature of this statutory remedy: a significant number of voters need not be impacted. Louisiana's statute keys the question to the

number of voters impacted being *outcome determinative*. Depending on how close the election, that number could be quite small. If a candidate wins by three votes and the number of foiled voters is five, presumably the contest would hinge on whether those five voters were wrongly excluded from the count. If a post-election remedy is sought through a contest statute like Louisiana's, disenfranchisement therefore need not be widespread for the result of an election to be successfully contested.

Not all courts perk up when an outcome-determinative number of voters are prevented from casting ballots. In 1920, the Idaho Supreme Court in [Harper v. Dotson](#) refused to count fifteen ballots dispositive to the outcome of a probate judge election. The day before the November 5 election, at the height of the 1918 flu pandemic with quarantine orders in place, a group of faculty and students quarantining at their school petitioned the local elections board to establish an emergency polling place there. The local elections board granted the last-minute petition and fifteen students and faculty cast ballots. The election for probate judge came down to four votes. The loser filed a contest challenging inclusion of those fifteen ballots.

The Idaho Supreme Court tossed the ballots as contrary to state law, which expressly prohibited the elections board from establishing new polling locations later than July preceding an election. In that case, the ravages of the pandemic did not sway the Idaho Supreme Court to bend state law. Why? Notice and fairness issues proved critical to the court's opinion. The special treatment local officials gave these fifteen voters were not afforded to all voters likewise stuck in quarantine. Had the accommodation been uniformly available further in advance of the election, the outcome may well have been different. After all, the court did cite a South Dakota Supreme Court recommendation that courts decide election cases with "leaning towards liberality."

As this review reveals, the choice often comes down to whether or not to bend the law to accommodate voters disenfranchised by circumstances. The resolutions courts arrive upon are often fact-specific and deeply intertwined with decision makers' perception of the degree of burden voters faced and the fairness issues implicated. In the end, state statutory and constitutional rules do not typically provide bright line rules to help courts navigate when enough voters have been excluded for an election remedy to become necessary.

What about federal law? Does it provide answers? One potential source of reference is the Voting Rights Act (VRA) through its [erstwhile](#) Section 4 preclearance formula. To determine which states had egregious enough histories of voting discrimination, the VRA's original coverage formula targeted, among other things, states in which fewer than [fifty percent](#) of the voting age population actually voted in the presidential election of November 1964. That, according to the designers of the Voting Rights Act, signified evidence of an election undemocratic enough to warrant federal oversight. This fifty percent threshold marks the closest federal statutory law comes to setting a floor for low participation rates to constitute a problematic election.

What about the U.S. Constitution? Might it provide greater protection than state law when disruption prevents voters from casting ballots?

In *Shannon v. Jacobowitz*, David Jacobowitz appeared to beat his opponent, incumbent Matthew Shannon, by twenty-five votes in a local election for Town Supervisor in New York. After the election, officials discovered that a voting machine had malfunctioned. While 295 voters had used the machine in the election, only 156 votes had registered; it appeared 139 voters had been disenfranchised through no fault of their own. Investigators later determined that at least sixty-nine of those voters intended to cast ballots for Shannon.

Voters filed a § 1983 claim in federal court seeking declaratory and injunctive relief. Voters claimed that the Board of Elections violated the due process clause by depriving them of their right to have their votes counted. After the district court granted injunctive relief, the Second Circuit reversed, citing an Eleventh Circuit [opinion](#) for the principle that only in extraordinary circumstances will a challenge to a state or local election rise to the level of a constitutional deprivation. Ultimately, the Second Circuit overturned the district court's injunctive relief. It found dispositive that government officials had not engaged in intentional, willful misconduct.

This holding signals a potential weakness in applying a due process frame to election disruptions. Typically due process claims [require](#) state action: the state must act to deprive people of constitutional rights. But the root of election disruptions may be external forces beyond the state's control. Plaintiffs are left making a difficult argument: that the state's *inaction* in the face of dire election circumstances constitutes a due process violation.

Former Department of Justice attorney and Loyola election law professor [Justin Levitt](#) suggests that perhaps courts should distinguish state election inaction in the due process analysis for a simple reason: the government is *responsible* for elections. If a natural disaster decimates a state's abortion facilities, a government failure to provide funds to rebuild is not a due process violation. In that instance, the government is one step removed; it is not the abortion provider. In the case of elections, the government is the responsible actor. This unique feature of elections should impact the due process assessment.

This distinction may explain why some federal courts have [ruled](#) that "fundamental unfairness" in elections may violate the due process clause of the U.S. constitution. In *Bennett v. Yoshina*, a case involving contested ballots already cast, the Ninth Circuit noted that, "[s]everal appellate courts, including our own, have held that an election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair." In *Griffin v. Burns*, the First Circuit held that "if the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated."

But, in the context of an election disruption that prevents voters from casting ballots, attempting to judge the boundaries of "patent and fundamental

unfairness” puts us back at square one: how many voters must be thwarted (and by what means) for an election to be deemed patently and fundamentally unfair?

The Fourteenth Amendment’s [equal protection clause](#) or Voting Rights Act claims may be levied to challenge an election outcome featuring depressed turnout born unequally by minority voters. As we have witnessed already, pandemic-related disruptions [magnify](#) racial inequality in voting. The equal protection and VRA analysis may not help discern an exact number of minority voters who must have been prevented from casting ballots, but if that number is significant and is borne unequally, if the circumstances are sufficiently extraordinary, and if the state with adequate notice failed to act, such claims should be strong.

So how many voters is too few? Whether the question is resolved through a state statute, a state constitution, or even a federal constitutional claim, U.S. law (other than in New York state and states with contest statutes similar to Louisiana’s) provides no exact figure for a low turnout election to be considered a failure.

It is hard not to look at the [cascade](#) of problems that have already unfolded during the presidential primary season and wonder what we are in for in November.

If pandemic-related disruptions plague the general election, one view is that states are already on notice that problems are likely. If states fail to protect voter access with known risks looming, courts should draw inferences against states and in favor of voters if a significant number of voters are in fact prevented from casting ballots because of coronavirus-related disruptions.

Another view is that voters are likewise on notice (at least with respect to disruptions related to the current pandemic). Courts might expect voters to exercise extra vigilance and foresight. The Supreme Court’s [favorable](#) view towards Wisconsin primary voters who requested absentee ballots sufficiently early portends this perspective.

We cannot know what disruptions, if any, are to come. But neither does it appear that courts can rely on a mystical threshold to determine when an election has accurately captured the people’s will.

What is clear is that state officials and legislatures must exercise every effort—comporting with legal and financial constraints—to ensure eligible voters can cast ballots in November. After Election Day, if a significant number of voters were in fact unable to cast ballots, courts should act to the greatest extent applicable law allows to protect the right to vote. To repeat the words of the Wisconsin Supreme Court in [McNally](#), “if citizens are deprived of that right, which lies at the very basis of our democracy, we will soon cease to be a democracy.”