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New York Election Chaos and the 'Purcell' Principle

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With the dust mainly settled in the New York redistricting litigation, let's take a quick look back at how the state Court of Appeals missed the boat in its decision to invalidate congressional and state senate lines this year. See *Harkenrider v. Hochul*, in which a 4-3 majority found an improper partisan gerrymandering and chastised the Independent Redistricting Commission for its missteps in the process. Rather than concentrate on the court's substantive view that the legislatures drew unconstitutional lines (we think they were wrong) or the problems with the redistricting procedures (we think the court overreached on this as well), we focus on the court's problematic remedy.

The court issued its April 21st decision weeks after nominating petitions had been filed and the primary election campaign was already in full swing for a June 28th vote, and yet it ordered new lines to be drawn weeks down the road, obviating the scheduled primary. In so doing, it ignored what U.S. Supreme Court Justice Kavanaugh has called a "bedrock tenet of election law," that courts should not change rules so close to an election. We may not be enamored with this Justice's opinions in general or the many ongoing misapplications of this principle (see, e.g., Prof. Rick Hasen's analysis at https://electionlawblog.org/?p=129174), but in theory the

doctrine makes sense. As Kavanaugh put it, "When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others."

This doctrine is referred to as the *Purcell* principle, named after a voter ID case out of Arizona, and, whatever one's political stripes, its rationale make sense. Neither election administrators nor voters should have to master new rules or figure out who represents them right before an election. Yet, that is the unfortunate fallout of the Court of Appeals decision. The general election may be six months away, but the all-important primary election was on the horizon. Nevertheless, a thin majority of the court upended the election calendar smack in the middle of the primary campaign, disregarding *Purcell*'s proscription against eleventh-hour court interventions. As if to minimize the issue, it referred to *Purcell* in a footnote, saying that this rule prevents only federal courts, not state courts, from such last-minute interference in an election schedule.

The *Purcell* principle has its detractors, including us. First of all, since its creation in 2006 courts have failed to set any markers as to when a rule change is too close to an election. Is it a week? Three months? The courts have not suggested anything near a bright line test. And, second, the doctrine is too often applied even when constitutional rights are at stake, leaving improper districting or other laws in place because to rectify them close to an election would supposedly be a hardship. This approach, of course, underscores the murkiness of what "too close to an election" means, and has led to what can fairly be described as a misapplication of the principle.

One such distortion of *Purcell* was the recent stay of a district court's order that invalidated Alabama's new congressional lines as racially discriminatory. Despite extensive findings, the U.S. Supreme Court decided that the election was too close at hand for new lines to be drawn and required that Alabama use the district lines that the trial court had already found unconstitutional—even though the primary election was more than three months down the road. Justice Kagan, taking issue with the remedy imposed, dissented, observing that the improper lines were drawn in a week, and, therefore, new, constitutional districts could be fashioned quickly as well. Indeed, when Maryland recently had to re-draw its gerrymandered lines, it did so promptly; Alabama had no such chance. Just last week, the U.S. Court of Appeals for the Eleventh Circuit followed suit by issuing yet another misapplication of *Purcell*, staying a district court's ruling that Florida's voting laws were enacted with racial animus on the dubious ground that the district court acted too close to the primary election—although it was *five* months away.

The lesson of the Alabama and Florida cases is that *Purcell* is often invoked long before an actual vote, preventing unconstitutional laws from being remedied even when there is plenty of time to do so. The doctrine, therefore, should be modified. Instead of a court simply saying it's too late to do anything because an election is close at hand, in cases where constitutional rights are at stake, it should order the offending state or city to fix the problem immediately and the

election conducted as scheduled. In other words, *Purcell* should require an expeditious remedy rather than preventing a fix to an unconstitutional scheme. This approach would address Justice Kavanaugh's concerns about "last-minute" judicial intervention while preventing states from relying on unconstitutional laws.

Which brings us back to New York. Assuming the Court of Appeals correctly found the redistricting plan to be an unlawful gerrymander, it should have acknowledged that nominating petitions for the primary had already been processed, and although it rightly refused to simply accept the status quo as Justice Kavanaugh would probably have done, it should have ordered the state legislature to draw new lines forthwith. Somehow, though, the court decided that the legislature had forfeited its authority and ordered a court-appointed academic to decide how 20 million New Yorkers would be represented. But, more to the point, the court failed to impose a short deadline, instead giving the special master several weeks to produce maps, rendering the scheduled June primary untenable. In so doing, the court's decision produced a chaotic election calendar. As such, the court may have avoided a strict misapplication of *Purcell* by refusing to leave unconstitutional lines in place, but failed to respect its rationale by not ordering new lines to be drawn immediately.

Thus, New York now has a June primary for statewide, judicial, and county races, and an August vote for congress and state senate—and, inevitably, a public ever more exasperated with the way elections are conducted. A smart application of the *Purcell* principle by the Court of Appeals would have preserved constitutional rights, saved taxpayer dollars, and not further damaged voters' confidence in our elections.

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