AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Voting/Regulating Elections

**Republican Party of Pennsylvania v. Boockvar, \_\_\_ S. Ct. \_\_\_** (2020)

*The Republican Party of Pennsylvania objected to the decision in* Pennsylvania Democratic Party v. Boockvar *(PA, 2020) requiring the state to count all mail-in ballots received three days after election day 2020, as long as those ballots were postmarked on or before election day. The Republican Party asked the Supreme Court of the United States to issue a stay, forbidding Kathy Boockvar, the Secretary of the Commonwealth of Pennsylvania, from implementing that decision until the justices could determine whether the Pennsylvania justices had acted constitutionally. That motion was denied by an equally divided court. A week before the election, The Republican Party asked the Supreme Court of the United States to issue a writ or certiorari or at least expedite consideration of the writ.*

 *The Supreme Court refused to expedite review. The three justices, while recognizing that review could not be done before the election, issued a statement urging the court to decide the question in the immediate future. What are Justice Samuel Alito’s constitutional objections to the actions of the Pennsylvania Supreme Court? Are they constitutionally sound? Although no justice who opposed the previous request for a stay issued an opinion, Chief Justice John Roberts in* Democratic Party Committee v. Wisconsin State Legislature *distinguished claims that federal courts should extend deadlines for mail-in ballots from claims that state courts could extend deadlines for mail-in ballots. The three more liberal justices provided reasons why courts in general could extend ballot deadlines during a pandemic. Who was engaged in lawfare during this episode? Were Republicans attempting to use the pandemic to disfranchise voters? Were Democrats and their judicial supporters attempting to use the pandemic to increase their share of the vote? Were the voting wars prior to the 2020 national elections pure politics or did law play a distinctive role.*

The motion to expedite consideration of the petition for a writ of certiorari is denied.

Justice [BARRETT](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0505709001&originatingDoc=Ie2aca7d4190c11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ie2aca7d4190c11ebbea4f0dc9fb69570) took no part in the consideration or decision of this motion.

Statement of Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ie2aca7d4190c11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ie2aca7d4190c11ebbea4f0dc9fb69570), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ie2aca7d4190c11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ie2aca7d4190c11ebbea4f0dc9fb69570) and Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ie2aca7d4190c11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ie2aca7d4190c11ebbea4f0dc9fb69570) join.

The Court's handling of the important constitutional issue raised by this matter has needlessly created conditions that could lead to serious post-election problems. The Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office. In a law called Act 77, the legislature permitted all voters to cast their ballots by mail but unambiguously required that all mailed ballots be received by 8 p.m. on election day. It also specified that if this provision was declared invalid, much of the rest of Act 77, including its liberalization of mail-in voting, would be void. The legislature subsequently made it clear that, in its judgment, the COVID–19 pandemic did not call for any change in the election-day deadline. In a law enacted in March 2020, the legislature addressed election-related issues caused by the pandemic, but it chose not to amend the deadline for the receipt of mailed ballots.

In the face of Act 77's deadline, the Pennsylvania Supreme Court, by a vote of four to three, decreed that mailed ballots need not be received by election day. Instead, it imposed a different rule: Ballots are to be treated as timely if they are postmarked on or before election day and are received within three days thereafter.  In addition, the court ordered that a ballot with no postmark or an illegible postmark must be regarded as timely if it is received by that same date. The court expressly acknowledged that the statutory provision mandating receipt by election day was unambiguous and that its abrogation of that rule was not based on an interpretation of the statute.  It further conceded that the statutory deadline was constitutional on its face, but it claimed broad power to do what it thought was needed to respond to a “natural disaster,” and it justified its decree as necessary to protect voters’ rights under the Free and Equal Elections Clause of the State Constitution.

A month ago, the Republican Party of Pennsylvania and the Pennsylvania Senate leaders asked this Court to stay the Pennsylvania Supreme Court's decision pending the filing and disposition of a petition for certiorari. They argued that the state court decision violated the previously cited constitutional provisions, as well as the federal statute setting a uniform date for federal elections. Respondent, Democratic Party of Pennsylvania (DPP), agreed that the constitutionality of the State Supreme Court's decision was a matter of national importance and urged us to grant review and to decide the issue before the election. Instead of doing what either party sought, the Court simply denied the stay. Although there were four votes to enter a stay, the application failed by an equally divided vote. Now, in a last ditch attempt to prevent the election in Pennsylvania from being conducted under a cloud, we have been asked to grant a petition for a writ of certiorari, to expedite review, and to decide the constitutional question prior to the election.

It would be highly desirable to issue a ruling on the constitutionality of the State Supreme Court's decision before the election. That question has national importance, and there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution. The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.

For these reasons, the question presented by the Pennsylvania Supreme Court's decision calls out for review by this Court—as both the State Republican and Democratic Parties agreed when the former applied for a stay. But I reluctantly conclude that there is simply not enough time at this late date to decide the question before the election.

That does not mean, however, that the state court decision must escape our review. Although the Court denies the motion to expedite, the petition for certiorari remains before us, and if it is granted, the case can then be decided under a shortened schedule. In addition, the Court's denial of the motion to expedite is not a denial of a request for this Court to order that ballots received after election day be segregated so that if the State Supreme Court's decision is ultimately overturned, a targeted remedy will be available. Petitioner represents that it will apply to this Court to obtain that modest relief and Respondent DPP agrees that such relief is appropriate. Although the Pennsylvania Supreme Court rejected Petitioner's request for that relief, we have been informed by the Pennsylvania Attorney General that the Secretary of the Commonwealth issued guidance today directing county boards of elections to segregate ballots received between 8:00 p.m. on November 3, 2020, and 5:00 p.m. on November 6, 2020. Nothing in the Court's order today precludes Petitioner from applying to this Court for relief if, for some reason, it is not satisfied with the Secretary's guidance.