

5-19-2020

## **A Narrowly-Tailored, Technical Disenfranchisement: Risking Death to Vote Amidst a Viral Pandemic**

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## GGU Law Review Blog



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### A Narrowly-Tailored, Technical Disenfranchisement: Risking Death to Vote Amidst a Viral Pandemic



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In what has been referred to as a **tragedy for American democracy** and **one of the most egregious examples of voter suppression in history**, a United States Supreme Court ruling on April 6<sup>th</sup> made it harder for citizens of Wisconsin to cast their votes amidst the **coronavirus pandemic**. Wisconsin state law requires all ballots to be received by election officials by April 7<sup>th</sup> at 8pm in order for them to be counted. Though **more than a dozen other states** have chosen to postpone their

primary elections due to the coronavirus, the state of Wisconsin decided to continue without any delay. Wisconsin's governor, Tony Evers, made an attempt at delaying in-person voting by handing down an **Order** which suspended voting on April 7<sup>th</sup> until June 9<sup>th</sup>, "unless the Legislature passes and the Governor approves a different date for in-person voting." But, Evers' Order was **struck down** by Wisconsin's Republican-controlled state Supreme Court and the election date was unchanged. Wisconsin voters, Democratic state and national parties, and community organizations filed suit against the Wisconsin Elections Commission, requesting the rigid election rules be changed to prioritize the health and safety of voters amidst the coronavirus outbreak. In an attempt to adjust Wisconsin's spring

election to the COVID-19 pandemic, a federal district court granted voters a **five-day extension to submit absentee ballots** for the state's spring primary election. The lower court order allowed absentee ballots to be counted **so long as they arrived at the designated polling place by April 13<sup>th</sup>**. Republicans appealed this decision, arguing that ballots should be postmarked by April 7<sup>th</sup>, and the United States Supreme Court agreed. In **Republican National Committee v. Democratic National Committee**, the Supreme Court issued a stay of the lower court's order, requiring no changes be made to the requirement that ballots be postmarked by April 7<sup>th</sup>.



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As a result of the Coronavirus, most poll workers in Wisconsin refused to work during this election. Though Governor Evers called in the National Guard to compensate for the lack of poll workers, the effects of the pandemic on the election were nevertheless both great and detrimental. For example, in Milwaukee, **only five poll locations were open on election day** compared to the normal 180 polling locations. Additionally, where the state typically receives fewer than 250,000 absentee ballot requests, due to the coronavirus, this year **the state received 1.2 million absentee ballot requests**. State officials were not equipped to handle this volume of requests, and as a result many voters were not expected to receive their ballot **until after election day**. Therefore, those voters were unequivocally disenfranchised by the Supreme Court's opinion in *Republican*. What materialized after election day on April 7<sup>th</sup> was perhaps at least one adverse outcome the opinion created, that was not anticipated: voters who *did* receive their absentee ballot and successfully mailed it in on time could also be disenfranchised by the ruling. Because the post office either **did not place a postmark on some of those ballots** or because the postmark did not have a date, it is uncertain whether their ballots will be counted. *Republican* indicates the answer is likely that they were not counted.

## Republicans versus Democrats

The *Republican* majority relied on their opinion in *Purcell v. Gonzalez*, which held that when an election is nearing, courts should not engage in decisions that impact a state's election procedures. This is because, "Court orders affecting elections...can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." The not so subtle irony of the majority's logic is that *Purcell* also makes an argument against the majority's stay of the lower court's order. Justice Ginsburg writing for the dissent cites *Purcell* in pointing out that the majority's "upending" of Wisconsin's election process a day before the April 7<sup>th</sup> deadline, "is sure to confound election officials and voters." Justice Ginsburg also questioned the majority's framing of the issue before them as a "narrow, technical question" calling that characterization outright "wrong." Rather, Justice Ginsburg asserts, the question of the case is "whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic." The **Supreme Court voted on Republican remotely**, without ever meeting in-person, effectively sharing in the privilege of voting from home while denying this same privilege to Wisconsin **voters**. Indeed, **all oral arguments for the high court for the months of March and April** have been postponed.

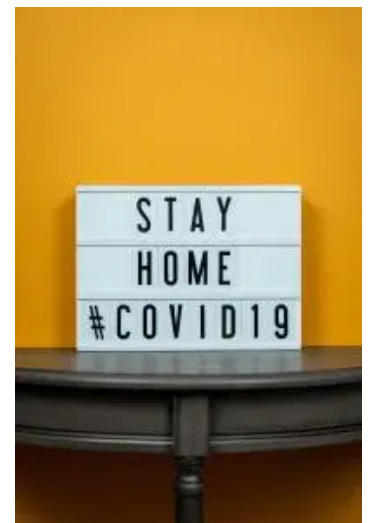


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## The Supreme Court as an Apolitical Entity

In September of last year, Justice Roberts suggested that the Supreme Court is apolitical. He **lamented public perception** that the Court has increasingly become politicized and that Supreme Court justices' decisions are informed by their partisan affiliations. Justice Roberts stated that the Court does not function according to politics, and that their rulings "do not suggest otherwise."



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It is difficult to view the Supreme Court's decision as something existing outside the arena of politics, especially in an opinion where the opposing parties are Republicans and Democrats, and when the justices **voted along ideological lines**: Justice Kavanaugh, Justice Roberts, Justice Alito, Justice Gorsuch, and Justice Thomas comprised the majority opinion, while Justice Ginsburg, Justice Breyer, Justice Sotomayor and Justice Kagan dissented. Writing for the majority, Justice Kavanaugh seemed to implicitly address the possible perception that this opinion is political in nature, stating, "The Court's decision on the narrow question before the Court should not be viewed as

expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID-19 are appropriate." The majority said that this point "cannot be stressed enough." This disclaimer seemed to function as a means of distancing the majority from the **politics inherent in Wisconsin's election process** amidst – and resulting from – the coronavirus. Indeed, this was the only time the majority mentioned the virus by any name in its opinion.

That it is possible to read *Republican* without context, without considering the coronavirus, as though it was made during any time other than a pandemic is fantastical. The real-world effect of this opinion is that it imposed a life or death dilemma for Wisconsin constituents, a double-edged sword of sorts: exercise the right to vote but literally risk your life in doing so, or alternatively, stay home to avoid the risk of death to yourself and others, yet forfeit your vote entirely. This scenario was a win for the Republican National Committee, and made possible by the Court's Republican justices.

## Wisconsin's Spring Election as a Health Indicator of Democracy

Despite the dilemma the Supreme Court forced on Wisconsin voters, many voters took the risk of in-person voting, and in a surprise to both parties, progressive Jill Karofsky unseated conservative incumbent Daniel Kelly for a seat on the Wisconsin Supreme Court. This result was referred to by some in the media as a "**win for democracy**," and a "**political feel-good moment**." This sentiment is tempting: it is inspiring that voters literally risked their lives to vote while it was **sought to be suppressed**. But nothing should feel good about the results of an election in which voters braved a deadly virus in the process of exercising a constitutional right; this is not a win for democracy, but certainly a tragedy. The effects of the coronavirus on Americans has shone a bright light on many of the **failures of our society** and vis-à-vis *Republican*, this light extends to American democracy. That a healthy democracy would force its citizens to jeopardize their life in order to enjoy in its benefits is paradoxical at best, and a failure at worst.

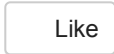
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