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Unprincipled All the Way Down

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Unprincipled All the Way Down

Wilfred U. Codrington III*

Abstract

In 2006, the Supreme Court issued an emergency stay order in Purcell v. Gonzalez. *Sparing in words and inattentive to the realities on the ground, the opinion nevertheless made a reasonable and understandable assertion: prior to issuing relief, courts presiding over elections should take into account any harms that judicial orders might cause, particularly in the lead-up to voting, alongside other considerations unique to elections. The statement was general enough to mollify the masses in the short-term. But over the long haul, it has proven to be a vehicle through which important election decisions might be made in less than principled ways.*

This Paper examines two important dimensions of what Purcell *omitted: how the guidance relates to principles of federalism and equity. In the years since the opinion's issuance, the Supreme Court has elaborated on the* Purcell *principle, suggesting that it binds federal courts alone. Yet state courts have drawn on* Purcell *to justify their own decisions to rule or abstain from ruling in election disputes. In those decisions, furthermore, they have attempted to fit* Purcell *into their states'*

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equitable regimes. There is no uniformity among the states, as one might expect, but one also observes the absence of doctrinal clarity, coherence, and consistency in its application. Based on a survey of state election cases, this Paper, which is part of a larger project devoted to examining the Purcell *principle, contends that the problem of* Purcell *is far more diffuse and potent than one could have predicted.*

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INTRODUCTION

Elections are an essential means to ensuring the legitimacy of government. This is because, when they function properly, elections lead to the selection of officers and bodies that can credibly claim the right and duty to exercise constituted powers. These powers, held in trust, stem from processes that foster—and outcomes that uphold—the values that undergird political and legal authority: equality, inclusion, competition, transparency, representativeness, and accountability, among others. Logically, then, the rules that govern elections help ensure that processes and results are, indeed, valid. As such, those tasked with drafting and enforcing election regulations in the United States must strive for rules that promote—in addition to the aforementioned values—clarity, coherence, stability, and predictability in ways that respect both individual dignity and our collective sense of belonging in a federal system.

In many ways, the Supreme Court's decision in *Purcell v. Gonzalez*[1] upsets these understandings.[2] The notion that

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

2. *See id.* at 2 (declining to issue an injunction which would prevent Arizona's more stringent voter identification procedures from being implemented).

elections matter and that the regulations governing them should be in place in advance of contests is sensible enough to merit compliance. But it is also vague enough to elude any meaningful application. For example, *Purcell* suggests the need for promptness in filing suit in election matters.[3] But what is the relevant timing? Elections occur frequently in the United States—primary elections, special elections, and general elections—and for various levels of public office. They require the imposition of a series of key dates and deadlines beyond Election Day alone, including for registration, submitting applications to declare one's candidacy, showing a sufficient level of support through signatures and donations for public funding, and so many others. What is the relevant status quo? Certainly, *Purcell* must also presume a legal baseline from which judicial decrees might depart, something that might depend on when in the course of the litigation a ruling is made. Yet in a country with various actors and authorities possessing overlapping jurisdiction over elections, there must be some agreement on how to delimit those lanes to arrive at who establishes those important defaults. What is the relationship among these considerations and so many more? And through it all, what is the role of the judiciary in safeguarding the right to vote? The devil is in the details, one might contend, in searching for the answer to these and other questions. But in the case of *Purcell*, the details are quite scant.

Thus, there is a gulf between *Purcell* and the idea of principle. This was exhibited in the initial decision, which employs a false equivalence to *Reynolds v. Sims*[4] and assumes,[5]

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3. *See id.* at 5 (explaining that court orders affecting elections can result in voter confusion and incentive to stay away from the polls when the timing is close to election dates).

4. 377 U.S. 533 (1964).

5. *See Purcell*, 549 U.S. at 4 (per curiam).

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting

without testing, that pandemonium would materialize from the rule change at issue.[6] It persisted as the Supreme Court invoked the *Purcell* principle during the deadly pandemic to prevent courts from issuing orders that might make voting safer and more accessible.[7] And it extended beyond that point into today.[8] Even calling it the "*Purcell* principle"[9] suggests some level of consistency in analysis when it is invoked and attributes a level of honor to the shapeshift notion. When it comes to *Purcell*,

> the free exercise of the franchise."(quoting *Reynolds*, 377 U.S. at 555);

see also Democratic Senatorial Campaign Comm. v. Iowa Sec'y of State, 950 N.W.2d 1, 6 n.5 (Iowa 2020) (quoting the same portion of the *Reynolds* opinion); *In re* Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 454 (Mich. 2007) (same).

6. *See Purcell*, 549 U.S. at 6 (Stevens, J., concurring) (allowing the measure to take effect despite the meager factual "record on which to judge [its] constitutionality[,]" and noting that "the scope of the disenfranchisement that the novel [law] . . . will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements" both "remain largely unresolved"); *see also* Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123, 137 (2021) ("Even if consistently applied, *Purcell* is supported by the untested assumption that implementing election laws on the books always minimizes voter confusion."); Nicholas Stephanopoulos, *Freeing* Purcell *from the Shadows*, TAKE CARE (Sept. 27, 2020), https://perma.cc/55SB-CVS5

> [T]he probability that judicial changes to election regulations close to election day will confuse voters and dissuade some of them from voting [is a relevant factor stressed by *Purcell* itself]. As explained earlier, courts shouldn't assume that this probability is high; they should assess it based on the best available evidence. In this assessment, much will often hinge on the kind of policy that's being challenged.

7. *See* Wilfred U. Codrington III, Purcell *in Pandemic*, 96 N.Y.U. L. REV. 941, 977–78 (2021) [hereinafter Purcell *in Pandemic*] (discussing the impact of the Supreme Court's invocation of *Purcell* during the coronavirus pandemic, including to the detriment of the nation's most vulnerable voters).

8. *See* Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (mem.) (denying a request for injunctive relief, thereby allowing a state to proceed with holding congressional elections using a redistricting plan that a federal judicial panel concluded was in violation of the Voting Rights Act of 1965).

9. *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2017) (explaining that the *Purcell* principle is "the idea that courts should not issue orders which change election rules in the period just before the election").

principle is a phantasm.[10] Principle is, in many cases, simply not there.

As the succeeding discussion reveals, *Purcell* has now percolated down to the states. This, even though its application is binding on federal—not state—courts. Yet the corpus of state election law seemingly possesses a porous quality such that it has allowed *Purcell* to seep in. And from there? Nonuniformity, of course. But also, there is often a lack of clarity, coherence, and consistency in the subsequent equitable analysis and the resulting decision to grant or deny relief. At bottom, then, this Paper argues that what we might think of as election law's *Purcell* problem is, in fact, also a concern for federalism and equity.

Part I of the Paper focuses on the macro concern, which is the tendency of state courts to ignore the distinction that the Supreme Court made between federal and state courts. With courts having disregarded that federalism limitation, Part II shows how they incorporate *Purcell* into the rest of the analysis including where concepts like laches may be at issue and when the relief requested is not an injunction or stay. Part III seeks to bring this together with a call for more research that could propel the legal system to rethink *Purcell* on the understanding that it is likely here to stay.

I. *PURCELL*'S FEDERALISM PRINCIPLE

From its 2006 issuance of the emergency stay order in *Purcell*, the Supreme Court has failed to provide clarity about various important aspects of the eponymous principle.[11] Over time, however, the Justices seem to have offered courts and litigants at least one thing to hang their hats on: the *Purcell* principle—which incorporates precepts of federalism characteristics of election law—binds only federal courts. Yet because of the procedural posture, most notably that definitive

10. *See* Wilfred U. Codrington III, *The Phantasm of Principle*, 111 KY. L.J. 651, 656 (2023) (arguing a lack of principled decision-making by the Supreme Court in election matters).

11. *See* Stephanopoulos, *supra* note 6 ("Despite all this activity, the *Purcell* principle remains remarkably opaque. Precisely because it is a shadow doctrine, appearing only in the Court's shadow docket, its contours have never been clarified.").

Supreme Court rulings that implicate *Purcell* are emergency orders from the shadow docket,[12] the emergence of a federalism constraint merits some explanation and a caveat.

In terms of explanation, *Purcell*'s federalism principle developed over time. Fourteen years separated the original case—which made no distinction between federal and state courts[13]—and the initial Supreme Court decision—which was issued during the 2020 pandemic-era primaries—that inserted

12. Given its relevance to late-stage election disputes, it is unlikely that the *Purcell* principle will appear in merits decisions, perhaps aside from fleeting references or in dicta. But one can expect to see its continued invocation in emergency orders ruling on requests for relief. This is of significant consequence as it suggests that any future refinement of *Purcell* will materialize in non-ideal conditions—under intense time pressures and in a highly charged partisan context—and through the casual insertion of words and other stealth linguistic maneuvers. In fact, this was the case with *Purcell*'s federalism principle. *See infra* note 14 and accompanying text. It should be unsettling that this has become a mode for the development of important legal principles due to, among other reasons, its lack of transparency and tendency to force parties and courts alike to partake in the legal equivalent of reading tea leaves. *See* Steve Vladeck, Purcell *and the Terrible, Horrible, No Good, Very Bad Year*, JOTWELL (Sept. 26, 2022), https://perma.cc/QP3R-J83X (reviewing Codrington's Purcell *in Pandemic*, and highlighting that "*Purcell* was a shadow docket decision—decided on a compressed schedule, with no argument and no advance indication to the parties or anyone else that the Court would treat Arizona's emergency application as an opportunity to fundamentally rewrite judicial procedure in election cases"); *id*. (arguing that *Purcell* Court's "thinly reasoned analysis" not only "dramatically change[s] the nature of judicial review in election cases" in a nonpublic, non-comprehensive manner, but increasingly appears to be employed "in a way that tends to favor Republicans and hurt Democrats"); *cf*. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting)

> Today's ruling illustrates just how far the Court's "shadow-docket" decisions may depart from the usual principles of appellate process . . . . Yet the majority has . . . reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion . . . [T]he majority's decision is emblematic of too much of this Court's shadow-docket decision-making—which every day becomes more unreasoned, inconsistent, and impossible to defend.

13. *See* Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, 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 term "federal" as a qualification.[14] The federalism principle became more enshrined in the days immediately before the 2020 general election based on a series of orders ruling on emergency stay requests. The reasoning for the disparate outcomes—the Court's decisions to grant or deny the requests—was sound only if one considered whether a state or federal court was responsible for the rule change.[15] In fact, Chief Justice John Roberts, who cast the pivotal vote in the cases, used the *Democratic National Committee v. Wisconsin State Legislature*[16] case to justify his votes based on this federalism principle[17] and ruled against petitioning parties in the *Moore v. Circosta*[18] case fully aware of an appellate judge's denunciation of the federalism principle.[19]

The federalism principle seems to have been strengthened by Justice Brett Kavanaugh, who, with the death of Justice Ruth Bader Ginsburg and the elevation of Justice Amy Coney

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14. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. 423, 424 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.") (citations omitted). Notwithstanding the cases that the order cited for this proposition, neither made a distinction between federal and state courts. *See* Frank v. Walker, 574 U.S. 929, 929 (2014) (mem.) (granting the application to vacate the order of the U.S. Court of Appeals for the Seventh Circuit); Veasey v. Perry, 574 U.S. 951, 951 (2014) (mem.) (denying motion to vacate the stay entered by the U.S. Court of Appeals for the Fifth Circuit).

15. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020) (mem.) (denying the request for a stay of a decision by the Pennsylvania Supreme Court to include ballots received within three days of Election Day); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (mem.) (declining to vacate an order issued by the U.S. Court of Appeals for the Seventh Circuit staying a federal district judge's extension of the ballot receipt deadline by six days); Moore v. Circosta, 141 S. Ct. 46, 46 (2020) (mem.) (declining to reverse an order by the U.S. Court of Appeals for the Fourth Circuit that sustained a state court's sanctioning of a six-day ballot extension deadline).

16. 141 S. Ct. 28 (2020) (mem.).

17. *See Wis. State Legislature*, 141 S. Ct. at 28 (Roberts, C.J., concurring) ("While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes.").

18. 141 S. Ct. 46 (2020) (mem.).

19. *See* Wise v. Circosta, 978 F.3d 93, 116 (4th Cir. 2020) (Wilkinson, J. and Agee, J., dissenting) ("But there is no principled reason why this rule should not apply against interferences by state courts and agencies.").

Barrett, became the median justice.[20] Notwithstanding his vote to grant a stay in a state court matter less than two years prior[21]—a vote contrary to the federalism principle—Kavanaugh changed his tune in a concurrence that made him the pivotal fifth vote to stay a federal court's order preliminarily enjoining Alabama from enforcing a redistricting plan that was held to violate Section 2 of the Voting Rights Act.[22] In that 2022 opinion, he wrote the *Purcell* principle maintains "(i) that *federal* district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that *federal* appellate courts should stay injunctions when, as here, lower *federal* courts contravene that principle."[23] The opinion proceeded to rationalize *Purcell*'s federalism constraint in nonchalant terms: "It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a *federal* court to swoop in and re-do a state's election laws in the period close to an election."[24]

Importantly, Kavanaugh wrote for himself alone—Roberts disagreed with the stay order—that *Purcell* should govern.[25] For Roberts, however, the federalism concern was, at best, secondary to the merits of the case, which strongly suggested the map was unlawful.[26] The federal court properly exercised

20. *See* Kalvis Golde, *On a New, Conservative Court, Kavanaugh Sits at the Center*, SCOTUSBLOG (May 13, 2021), https://perma.cc/PE7N-3D5T (reporting on Justice Kavanaugh's ostensible ideological position halfway into his first term).

21. *See Boockvar*, 141 S. Ct. at 643 ("Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh would grant the application.").

22. *See* Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (mem.) (Kavanaugh, J., concurring) (agreeing in the grant of applications for stays).

23. *Id.* (Kavanaugh, J., concurring) (emphasis added); *see also id.* at 880 ("This Court has repeatedly stated that *federal* courts ordinarily should not enjoin a state's election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle." (emphasis added)).

24. *Id.* at 881 (Kavanaugh, J., concurring) (emphasis added).

25. *See id.* at 882 (Roberts, C.J., dissenting) ("I respectfully dissent from the stays granted in these cases because, in my view, the District Court properly applied existing law in an extensive opinion with no apparent errors for our correction.").

26. *See id.* at 883 (Roberts, C.J., dissenting) ("I would not grant a stay. As noted, the analysis below seems correct as *Gingles* is presently applied, and in

jurisdiction over the matter and adhered to the law—including what could be gleaned from *Purcell*—and rightfully enjoined an illegal map so that it would not take effect and undermine the rights of Alabama's Black voters.[27] Yet Roberts' prior rulings in the pandemic era suggest that he would agree with Kavanaugh's pert analysis on the federalism constraint generally, despite their divergent understandings of the propriety of a stay in that particular instance.[28]

If the emergence of *Purcell*'s federalism principle demanded an explanation based on dueling orders and, to some extent, reading tea leaves,[29] the caveat regarding the federalism principle can be stated more succinctly: it remains fragile. This assessment stems from two overriding, unresolved issues. The broader issue pertains to the nature of precedent and its relationship to the shadow docket in the context of the federal court structure. The narrower issue relates to this particular Court. As to the former, there is no consensus about the precedential value of the orders. Discussing a subset of shadow docket orders, the Supreme Court has advised that, in general, such decisions might "be taken as rulings on the merits"

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my view the District Court's analysis should therefore control the upcoming election.").

27. To be sure, various facts about *Milligan* made petitioners' request for a stay readily distinguishable from previous ones that prompted the Court to engage with *Purcell*. The election was about nine months out, for example. Even more, applying *Purcell* was novel here because it was the first time the Court invoked it in a redistricting case. Given that it occurred in the wake of apportionment and Alabama gained a congressional seat, there were no status quo state legislative districts. The state was, in other words, working with a legal *tabula rasa*, which belies the applicability of *Purcell*'s anti-confusion rationale.

28. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring)

> I write separately to note that this case presents different issues than [prior applications, namely distinguishing it from those that] implicate[] the authority of state courts to apply their own constitutions to election regulations [from those like] this case [that] involve[] *federal* intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require [different outcomes].

29. *See* Zina Makar, *Per Curiam Signals in the Supreme Court's Shadow Docket*, 98 WASH. L. REV. 427, 439 (2023) ("The bottom line is that when the Court reverses and corrects a lower court, it expects other courts to read the tea leaves or risk future reversals.").

regarding "the specific challenges presented" in "the judgment appealed from," while also "explain[ing] that they do not have the same precedential value . . . as does an opinion of th[e] Court after briefing and oral argument on the merits."[30] The tension in this assertion is reflected in the way that Justices have treated the orders.[31] Scholars have also opined on the question—including with diagnoses[32] and prescriptions[33] as to what the Court should do[34] —but they are split and in the end of course, their understanding is not definitive.

30. Lunding v. N.Y. Tax App. Trib., 522 U.S. 287, 307 (1998) (internal quotation omitted) (citing Wash. v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 477, n.20 (1979)) (explaining the precedential value of summary dismissals).

31. *See, e.g.*, Adam Liptak, *Alito Responds to Critics of the Supreme Court's 'Shadow Docket'*, N.Y. TIMES (Sept. 30, 2021), https://perma.cc/9M8G-6VCY (last updated Oct. 4, 2021) ("Justice Alito said rulings on emergency applications did not create precedents. In April, however, the Supreme Court chastised the federal appeals court in California for failing to follow its earlier rulings on emergency applications concerning restrictions on religious gatherings during the pandemic.").

32. *See, e.g.*, Makar, *supra* note 29, at 436

> [I]t is logical to assume that the more likely the Court is to address a particular area of the law through its orders, the more relevant a particular line of per curiam opinions becomes. But even as their prevalence increases, problems pertaining to a lower court's ability to rely on a particular opinion remain given the fact that the signals arise through a less comprehensive litigation posture than its plenary counterpart.

see also STEVE VLADECK, THE SHADOW DOCKET 21 (2023) ("The absence of legal reasoning . . . also provides no guidance to the parties or anyone else about how they can or should adjust their behavior to comply with the Court's ruling . . . ."); *id.* at 22 ("[N]o one can truly know what the new rule is, or how it does or should apply to other cases.").

33. *See* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 849–64 (2021) (proposing a three-tier framework for the precedential effects of the emergency stay decisions); Mike Fox, *Supreme Court Shadow Docket Leaves Reasoning in the Dark, Professors Say*, UNIV. OF VA. SCH. OF L. NEWS (Sept. 22, 2021), https://perma.cc/3VDT-EYCK ("[Professor Lawrence] Solum [has] argue[d] that shadow docket decisions should only be binding in the shadow docket cases themselves. Cases decided without the benefit of briefing and oral argument should not carry the same precedent as traditional Supreme Court rulings.").

34. With respect to *Purcell* specifically, Rick Hasen suggests that the Court might mitigate some of these and related concerns by "issu[ing] opinions, even months after the fact, explaining its reasoning in the election

The latter, narrower concern has to do with the views of the individual Justices. Notwithstanding the series of cases whose logical conclusions lead to the federalism principle, the Court's full membership has not endorsed the idea that *Purcell* should not operate as a constraint on state courts. As the pandemic orders reflect, some on the Court clearly want *Purcell* to apply to the judiciary broadly—that is, without regard to their being federal or state courts.[35] Furthermore, Justice Amy Coney Barrett has not written on the issue. To be sure, with Roberts and now Kavanaugh in support of *Purcell*'s federalism principle, there are likely five Justices who will invoke it when petitioned for relief in state election matters. But what effect does that have on a Court with a different composition?[36] Lower courts are at a loss about the precedential value of non-merits orders[37] because the Court has engaged in doublespeak on the issue and, eventually, there will be newly appointed members. Collectively, these facts weaken the authority of the "Court's election-law precedents" relying on *Purcell*,[38] making it "far

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cases. Such opinions will increase the Court's legitimacy in deciding controversial election issues and could discipline the Court to apply consistent legal standards to requests for emergency relief." Hasen, *supra* note 9, at 464.

35. *See, e.g.*, Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020) (mem.); Moore v. Circosta, 141 S. Ct. 46, 46 (2020) (mem.).

36. The precedential weight of these orders seems even more precarious in light of recent *merits* decisions that raise questions about the durability of precedent. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) (overruling *Roe v. Wade* and *Planned Parenthood of Se. Pa. v. Casey*, thereby reversing a half-century of precedent); *cf*. Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 732 (2024) ("[T]he *Dobbs* Court's focus on democratic deliberation may have signaled its willingness to bypass conventional stare decisis analysis altogether if it views a precedent as so contentious and divisive that the underlying question should be decided through the political process, rather than through judicial resolution.").

37. *See* Makar, *supra* note 29, at 441–42

> But today, the narrative being conveyed by the Court is one of discord, divisiveness, and strong disagreement in both procedure and substance. The signals being sent to lower courts and litigants now lack even the most basic appearance of unanimity and, therefore, raise questions regarding the weight of authority that such opinions should carry.

38. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (mem.) (Kavanaugh, J., concurring); *see also* Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. 423, 425 ("The Court would prefer not to [intervene], but when a lower

from certain that this [federalism] limitation will remain in effect over the long term."[39]

This federalism principle also makes sense—certainly as much sense as anything else about *Purcell*. While the structure and organization of the federal judiciary would logically lead the Supreme Court to exercise its equity jurisdiction over Article III courts, that reasoning is less applicable for state courts. This is unquestionably the case where there is no federal question at issue. But it also holds in election law matters where challenges might suggest concurrent state and federal jurisdiction. Indeed, "[t]hroughout much of the twentieth century, the Supreme Court adopted limits on judicial power while relying on concepts like . . . federalism,"[40] (and more specifically, "Our Federalism"[41]) that offers strong "public policy [reasons] against federal court interference with state court proceedings"[42] and "restraining equity jurisdiction within narrow limits . . . [to] avoid a duplication of legal proceedings . . . ."[43] This development can also be understood outside of the criminal context and as applying to election law. A basic reason relies on federalism's overarching desire to foster "comity,"[44] a principle that has been invoked to referee disputes arising between courts presiding over election litigation and "exercising concurrent jurisdiction over the same subject matter."[45] Indeed, the Court has found that "federalism and comity dictate" that "abstention [is] necessary" when an election challenge "raises difficult questions of state law bearing on important matters of state policy," and when the legal "issue in the federal action will be mooted or presented in a different posture following conclusion

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." (emphasis added)).

39. Codrington, Purcell *in Pandemic*, *supra* note 7, at 979.

40. Fred O. Smith Jr., *Abstaining Equitably*, 97 NOTRE DAME L. REV. 2095, 2104 (2022) (discussing core features of *Younger* abstention that balance national interests in minimizing federal rights violations with state interests in making governance and policy decisions within their own borders).

41. Younger v. Harris, 401 U.S. 37, 44 (1971).

42. *Id.* at 43.

43. *Id.* at 44.

44. *Id.*

45. Growe v. Emison, 507 U.S. 25, 32 (1993).

of the state-court case."[46] If doctrine is to accord with comity and exhibit "a proper respect for state functions,"[47] then perhaps, "[e]quity should not be understood as a single, freestanding body of principles that federal courts must apply regardless of whether a case arises under federal or state law."[48] It would, instead, acknowledge that states also have long-standing equitable regimes that their courts can draw on, where applicable, to ensure adequate relief in the lead-up to elections.

Yet another reason, a policy reason, provides support for the federalism principle: deferring to state courts, particularly in time crunches before elections, may result in more ideal decision-making. This is because the judges will have greater familiarity with state election law and a better appreciation of how it might interact with the unique local conditions. To this end, it is reasonable for a general rule to be based on the assumption that, in these situations, there is a level of competence and insight that state courts could bring that a federal court (and certainly more distant federal appeals court) might not.[49] Prior decisions thus complement wise policy, both undergirded by principles of federalism, against interposing the *Purcell* principle in a way that would disrupt a working relationship among state and federal courts.

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46. *Id.*

47. *Younger*, 401 U.S. at 44.

48. Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 220 (2018).

49. The existence of a statute that limits federal courts from enjoining state action might also support this position. *See* 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."). To be sure, the rationale for The Act of March 2, 1793—the precursor to the Anti-Injunction Act—is uncertain because there was no recorded debate. John Daniel Reaves & David S. Golden, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 GA. L. REV. 294, 294–95 (1971). But if it was meant "to prevent unhampered intrusions by the new federal courts into the then well-established state court domain, in that context 'new' might imply a lack of situational knowledge, while 'well-established' suggests familiarity." Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 719 (1977); *see also Younger*, 401 U.S. at 43 (discussing these statutes as a manifestation of the "desire to permit state courts to try state cases free from interference by federal courts").

In theory, then, federalism offers some meaningful constraints on *Purcell*. Even as this increasingly important component of the Court's modern election jurisprudence directs "*federal* courts ordinarily [] not [to] enjoin a state's election laws in the period close to an election," and empowers appellate courts to "stay . . . lower *federal* court injunctions that contravene that principle,"[50] it still leaves *state* courts free to award what they adjudge to be appropriate relief notwithstanding the electoral calendar. Nor is this inconsequential. Given the sheer amount of state election litigation, the federalism principle has the potential to prevent the more incoherent aspects of *Purcell* from taking root in—and corrupting—state election jurisprudence.[51] Yet, there is an unfortunate misalignment between theory and practice such that the federalism constraint is not meeting its full potential. As it happens, on several occasions, state judiciaries have proven inclined to disregard *Purcell*'s federalism principle. Indeed, courts have invoked *Purcell* as if it were binding authority, a misreading of relevant doctrine that has led them to sidestep more difficult questions that might otherwise reveal a regulation to be illegal and subject to non-enforcement.

For example, in October 2020, the Supreme Court of Maine affirmed a lower court's decision to deny an injunction request made by an organization and group of voters who sought to have the Secretary of State count absentee ballots received ten days after the statutory deadline and, more broadly, provide voters with an opportunity to cure ballots errors. In *Alliance for Retired*

50. Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (mem.) (Kavanaugh, J., concurring) (emphasis added).

51. Miriam Seifter & Adam Sopko, *Standing for Elections in State Courts*, 2024 U. ILL. L. REV. (forthcoming 2024) (manuscript at 4) [hereinafter *Standing for Elections in State Courts*] ("But the majority of recent election litigation has taken place in state court."); Miriam Seifter & Adam Sopko, *State Courts Are Fielding Sky-High Numbers of Lawsuits Ahead of the Midterms—Including Challenges to Voting Restrictions and to How Elections are Run*," THE CONVERSATION (Oct. 26, 2022), https://perma.cc/HA5H-HN6A

> But in state courts, rather than decreasing, preelection lawsuits have increased . . . . Of greatest interest, we see a continuation or increase in conflict over "electoral mechanics"—lawsuits challenging the who, what, where and how of voting, even when there is no novel virus throwing an unforeseen wrench in those mechanics. We emphasize that these numbers are provisional as of mid-October, and they are only estimates—and likely undercounts.

Americans v. Secretary of State,[52] the court cited *Purcell*, "find[ing] it instructive" that the Supreme Court stayed a Wisconsin federal court's injunction with the admonition that it "has repeatedly emphasized that lower *federal* courts should not ordinarily alter the election rules on the eve of an election."[53] Despite *Purcell*'s federalism principle spelled out clearly in the cited opinion, the Maine Supreme Court failed to acknowledge it, making no effort to distinguish itself as a state court and, thus, not bound by the decision.[54] Notable still is the fact that the opinion was issued over a dissent that offered an alternative approach that the Supreme Court of Pennsylvania had recently taken, highlighting that the U.S. Supreme Court had declined to stay that court's order.[55] Even as the majority in *Alliance for Retired Americans* explicitly sought to disclaim that it was unwittingly lockstepping its constitutional analysis with federal constitutional doctrine—thereby addressing one important federalism consideration—it showed no similar appreciation of the federalism implications of its decision to invoke *Purcell*.[56]

In *Abdus-Sabur v. Evans*,[57] a state court declined to order a pair of local election officials to acknowledge two candidates as being qualified for the ballot and, instead, dismissed the suit by asserting that it was obligated to do so on *Purcell* grounds.[58] While the opinion emphasized the risk of voter confusion in the election, citing *Purcell*, it made no mention of *Purcell*'s legal authority over the court in light of its federalism principle. However, the omission is understandable given the cases that

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52. 240 A.3d. 45, 52 (2020).

53. *Id.* at 52 (emphasis added) (citing Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020)).

54. *Id.*

55. *Id.* at 61 (citing Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020) (mem.)). Importantly, *Boockvar* would soon prove to be a pivotal decision in establishing *Purcell*'s federalism limitation. *See* Republican Party of Pa. v. Boockvar, 141 S. Ct. 643, 643 (2020) (mem.).

56. *Alliance for Retired Ams.*, 240 A.3d. at 54. The dissent suggested that the majority was, in fact, lockstepping its interpretation of the state constitution. *Id.* at 57 (Jabar, J., dissenting) ("I respectfully dissent because I believe that we should be looking to the Maine Constitution and not the Federal Constitution to protect the constitutional rights of Maine citizens.").

57. No. NNH-CV-23-6135336-S, 2023 WL 5697658 (Conn. Super. Ct. Aug. 29, 2023).

58. *Id.* at *3–4.

the court cited for support—three state court opinions that referenced *Purcell* in dicta, two of which were in footnotes, and none of which acknowledged the federalism principle.[59] To be sure, the court had good justification for its decision given the primary election calendar: the parties filed suit one week before absentee ballots were available,[60] the initial court hearing was scheduled for one day after the date of their availability, and the election was three weeks away. Stated differently, the dispute was undoubtedly taking place during a critical election window. Yet the court's declaration that it "must invoke the *Purcell* principle"[61] subtly reflects the state judiciary as having implicitly, and arguably inadvertently, adopted the principle intended to bind federal courts.

The Supreme Court of Tennessee presided over an appeal in *Moore v. Lee*,[62] a case in which a group of voters challenged the Senate redistricting plan as violating the Tennessee Constitution.[63] Parties in that case alleged that the map contravened Article II's mandate that senate districts in a singular county be numbered consecutively and, accordingly, requested that the measure be enjoined.[64] Siding with the voters, the trial court temporarily enjoined the plan, rendering it inoperative for the next election, and directed the legislature to enact a new map expeditiously lest it impose its own.[65] The state supreme court vacated the order, asserting that the lower court's ruling was erroneous because it did not sufficiently account for the potential harm that the injunction would have on election officials and the public.[66] The majority invoked "the *Purcell* principle" and, like the Maine court, it cited the Supreme

59. *Id.* at *2–3.

60. To be clear, the candidates could not be said to be at fault. They filed the suit the day after the local election officials alerted their campaigns that they would not appear on the ballot. *Id.* at *1. Thus, the election officials' motion did not include a laches defense. *See infra* Part II for a discussion of the relationship between *Purcell* and equitable principles like laches.

61. *Abdus-Sabur*, 2023 WL 5697658, at *4.

62. 644 S.W.3d 59 (Tenn. 2022).

63. *Id.* at 60–61. While the state house districts were also challenged in the trial court, they were not at issue in the appeal. *Id.* at 61 n.1.

64. *Id.* at 61.

65. *Id.* at 62–63.

66. *Id.* at 64.

Court case "'emphasiz[ing] that lower *federal* courts should ordinarily not alter the election rules on the eve of an election.'"[67] The opinion then proceeded with an analysis based on what *federal* courts in Georgia and New York had previously done.[68] To be sure, the majority also cited a state court ruling, explaining that, in the past, the state supreme court had "shown restraint when asked to enjoin . . . constitutionally suspect reapportionment plans,"[69] including by reversing a summary judgment ruling when "there remained disputed questions of material fact."[70] Through it all, though, it elided or ignored the federalism principle, which is particularly noteworthy in light of the dissent that was filed. The dissenting opinion stated expressly that, as a legal matter, *Purcell* posed no barrier because "*we are not a lower federal court*," but a "[s]tate court[] . . . of last resort [with] a vital role to play in protecting the right to vote and the structural guarantees of a constitutional democracy," before canvasing rulings from other *state* courts, specifically in redistricting cases, to re-emphasize *Purcell*'s federalism principle.[71]

This is not to say that courts have invariably failed to acknowledge *Purcell*'s federalism principle. Some have recognized it, even explicitly. In *McCormick for U.S. Senate v. Chapman*,[72] for instance, litigants challenged the validity of absentee and mail ballots in the Republican primary for U.S. Senate where voters neglected to handwrite the date on the exterior ballot envelope but the ballots were nevertheless received on time.[73] The Commonwealth Court of Pennsylvania granted a motion for a preliminary injunction that obligated the county boards to count the ballots at issue—segregating them,

67. *See id.* at 65 (emphasis added) (quoting Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020)).

68. *See id.* at 65 ("Federal courts have applied the *Purcell* principle in declining to preliminarily enjoin redistricting plans.").

69. *Id.* at 66.

70. *Id.*

71. *See id.* at 71 (emphasis added) (citing decisions from Ohio and Florida to show that "Supreme Courts in other states have also struck down redistricting plans exercising original jurisdiction during election years").

72. No. 286, 2022 WL 2900112 (Pa. Commw. Ct. June 2, 2022).

73. *See id.* at *2 ("Petitioners assert that Pennsylvania's dating provisions for absentee and mail-in ballots are unenforceable under both state and federal law.").

yet conducting two vote tallies—while the challenge proceeded to the merits. That court expressly declined to apply *Purcell*, which it noted was "a prohibition against *federal* courts weighing in on state election rules," and granted the requested relief because not doing so would "effectively disenfranchis[e]" voters, an "irreparable harm that cannot be compensated by damages" and "great injury . . . contrary to the public's interest."[74]

Much the same in *Harkenrider v. Hochul,*[75] a case asking whether in drawing the legislative map, state lawmakers circumvented the independent redistricting process and engaged in impermissible gerrymandering in violation of the New York Constitution.[76] The majority and dissent disagreed on the issues broadly, including aspects regarding both the substance of the redistricting question and the remedy. As to the latter, the state invoked *Purcell*, "arguing no remedy should be ordered for the 2022 election cycle because the election process for this year is already underway."[77] The court rejected the suggestion outright, dismissing the idea that the voting should proceed under "the unconstitutional maps" and that it should "defer[] any remedy for a future election."[78] Then, citing Justice Kavanaugh's concurrence denying a stay request in *Moore v. Harper*,[79] the majority opinion spelled out why "the state respondents' reliance on the federal *Purcell* principle is misplaced" as a result of its federalism principle.[80] "The *Purcell* doctrine cautions *federal* courts against interfering with state election laws when an election is imminent[,]" it explained, "and does not limit state judicial authority where, as here, a state

74. *Id.* at *15 (emphasis added).

75. 197 N.E.3d 437 (N.Y. 2022).

76. *Id.* at 443 ("Petitioners also asserted that the congressional map is unconstitutionally gerrymandered in favor of the majority party because it both 'packed' minority-party voters into a select few districts and 'cracked' other pockets of those voters across multiple districts, thereby diluting the competitiveness of those districts.").

77. *Id.* at 454.

78. *Id.*

79. 142 S. Ct. 1089 (2022) (mem.).

80. *Harkenrider*, 197 N.E.3d at 454, n.16; *see also Harper*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring) ("[T]his Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election.").

court must intervene to remedy violations of the State Constitution."[81]

As one might expect in a system of judicial federalism, state courts have taken different approaches when faced with late-breaking requests for relief in election litigation. When it comes to *Purcell*, the best decisions are those that begin (and perhaps end) with an acknowledgment that the principle is not binding on the court. Yet, in repeated instances, state courts have invoked *Purcell* in ways that might suggest otherwise, even when the federalism principle is pointed out in the course of the proceedings.[82] What follows from this macro failure is a decidedly mixed jurisprudence among state courts, some of which, as the next Section reveals, integrate *Purcell* in ways that are confusing, doctrinally incoherent, and otherwise ill-considered.

II. *PURCELL*'S [IN]EQUITABLE PRINCIPLES

Given state courts' disregard of the Supreme Court's federalism limitation, the *Purcell* principle now appears in state election jurisprudence, often framed—wrongly—as if it is inherently binding authority. In these places, as a consequence, the analysis for equitable relief requests made in the course of litigation will, at some point in advance of an election, make room for *Purcell*'s admonition of caution. But how should *Purcell* fit into these inquiries? And, more importantly, how does it?

The answer to the former, a normative question, has nuances that make it difficult to do complete justice in the immediate discussion. In general, however, *Purcell* should be taken as a holistic consideration that accounts for the shifting imperatives of democracy in the context of the dynamic

81. *Harkenrider*, 197 N.E.3d at 454, n.16 (citation omitted).

82. *Compare, e.g.*, League of United Latin Am. Citizens v. Pate, 950 N.W.2d 204, 215–16 (Iowa 2020) (declining, "on the eve of this election[,] to invalidate the legislature's statute providing additional election safeguards," particularly given that "[t]he United States Supreme Court has repeatedly warned that courts 'should ordinarily not alter the election rules on the eve of an election'"), *with id.* at 231 (Oxley, J, dissenting) (rejecting "the majority's position that we should not change election rules this close to the election" and questioning whether "the *Purcell* principles . . . even apply to state courts addressing challenges to their state's election laws under their own constitutions").

electoral, legal, and political environments at the backdrop of each case.[83] As for the latter question, perhaps unsurprisingly, its answer varies. Court opinions show some judges situating it logically in the analysis, and others exhibiting confusion about *Purcell*'s relationship to principles of equity. Below highlights a bit of uniformity that has emerged, whereby courts assume that *Purcell* is a consideration in their decisions, not an absolute bar to relief. From there, however, they reveal an unevenness in how courts think about *Purcell* in relation to notions like laches and requests for mandamus.

In federal litigation, "the *Purcell* principle . . . has come to stand for an increasingly categorical rule that election laws cannot be changed close to an election, thus imposing severe time constraints on when voting rights lawyering can occur."[84] Notwithstanding the Supreme Court's pronouncement that "lower federal courts should ordinarily not alter the election rules on the eve of an election,"[85] and Justice Elena Kagan's clarification that they "articulated not a rule but a caution[,]"[86] the Court's decisions in even the most extraordinary of conditions "suggest[s] that *Purcell* constitutes a categorical ban on [federal] judicial intervention on the eve of an election."[87] As far as state courts go, however, there is some good news on this point: they have tended to reject the absolutist manner in which

83. *See* Hasen, *supra* note 9, at 429, 441 (asserting "that the *Purcell* principle should properly be understood not as a stand-alone rule but instead as" raising "special concerns in election cases should [] count[] toward the public interest factor in the" equitably analysis, without "disregarding the other traditional factors for granting or denying preliminary relief"); Stephanopoulos, *supra* note 6 (proposing "a multifactor standard," whose "central theme . . . is that courts should examine a series of factors when contemplating action close to election day, all of which are relevant and none of which is dispositive[,]" and they "shouldn't hesitate to step in if their remedies won't baffle voters, won't lead administrators to make mistakes, will prevent disenfranchisement, and couldn't feasibly have been imposed sooner").

84. Zhang, *supra* note 6, at 136; *see also* Codrington, Purcell *in Pandemic*, *supra* note 7, at 977 (noting that under the Supreme Court's treatment of it, *Purcell* "seems to operate as a near categorical bar to judicial intervention").

85. Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. 423, 424 (2020).

86. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 42 (2020) (mem.) (Kagan, J, dissenting) (quoting Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 644 (7th Cir. 2020) (Rovner, J., dissenting)).

87. Codrington, Purcell *in Pandemic*, *supra* note 7, at 970.

the Supreme Court has implemented *Purcell* in practice and, instead, embrace its stated theory to weigh the election's proximity. In other words, the state court approach to *Purcell* has generally been "to apply, not depart from, the usual rules of equity" in the case, accounting for "all relevant factors, not just the calendar[,]" understanding that "[r]emediable incursions on the right to vote can occur in September or October as well as in April or May."[88]

The Tennessee case *Moore v. Lee* is, again, illustrative.[89] In their appeal of a decision granting an injunction, defendants elected to not contest the findings on two prongs of the test for that measure of equitable relief—the likelihood of merits success and the risk that plaintiffs would suffer irreparable harm.[90] Instead, they challenged only the lower court's assessment of the harm the injunction posed to them and the public interest in the outcome.[91] Defendants argued that the considerations relevant to each prong weighed against the injunction and, as such, the lower court erred.[92] The majority agreed.[93] Invoking *Purcell* and citing evidence in the record—affidavits from election officials in particular—it argued that the injunction would have too great an impact with key election dates nearing.[94] It would, for example, require a series of deadline extensions, undermine information in correspondence already sent to the voters, and create the potential for non-compliance with federal law.[95] The court, thus, vacated the injunction, ruling that these considerations suggest that an injunction would put a "burden on election officials" and "impose[] a significant delay on the election process," harming

88. *Wis. State Legislature*, 141 S. Ct. at 42 (Kagan, J, dissenting).

89. 644 S.W.3d 59 (Tenn. 2022).

90. *Id.* at 62, 64.

91. *Id.*

92. *See id.* at 62 ("The Defendants also filed an Emergency Motion to Stay Pending Extraordinary Appeal pursuant to Rule 7 of the Tennessee Rules of Appellate Procedure, requesting that the injunction be stayed pending appeal and seeking expedited review.").

93. *See id.* at 64.

94. *See id.* at 65 ("The affidavits submitted by the Defendants detail harm to the election process well beyond the obligations to comply with federal law, as detailed above.").

95. *See id.* (acknowledging the risks posed by extending the deadline).

the defendants, and that the "uncertainty and confusion that will result from a change in the Senate plan at this stage in the election process" would not be in the public interest.[96] These harms outweighed any injury that the plaintiffs would suffer, which merely consisted of having to vote in a senate district that was improperly numbered.

Whereas the Tennessee Supreme Court relied on *Purcell* to stay an injunction in *Moore v. Lee*, in *Norelli v. Secretary of State*,[97] the Supreme Court of New Hampshire cited it but, on consideration, ruled that it did not weigh against compliance with its previously issued order for a new congressional map that adhered to the one person, one vote principle from *Reynolds v. Sims*.[98] The court rejected the state's argument that the *Purcell* principle should prevent the implementation of a new map at that point, saying that such a ruling would suggest that "judicial non-intervention . . . is more important than protecting the voters' fundamental rights."[99] While the court did take into account *Purcell*'s call "for clear guidance" in advance of the election, it understood that call to support a timely resolution of the matter in a way that also accords with the Constitution. This was reflected in both the procedural posture and the relief awarded. The court revealed its sensitivity to the election calendar from the outset when it "assumed jurisdiction over the case" earlier than normal and "to the exclusion of the superior court," a decision it made "because the case is one in which 'the parties desire, and the public need requires, a speedy determination of the important issues in controversy.'"[100] And when it declined to permit the election to proceed under the unlawful plan despite the upcoming candidate filing deadline, the court said that it would sanction any lawful plan that the legislature adopted, but would otherwise impose its own plan before that critical date.[101] What the opinion reveals, then, is a court that sincerely considered the election's proximity, and

96. *Id.* at 65.
97. 292 A.3d 458 (N.H. 2022).
98. *Id.* at 471.
99. *Id.* at 468.
100. *Id.* at 461 (citation omitted).
101. *Id.* at 471.

because it proceeded in ways that would mitigate the major concerns, that court could issue its order in the normal course.

The judicial opinions show that state courts generally do, as Kagan suggested, "'*weigh*' whether an injunction of an election rule should issue" by "*balanc*[*ing*] the 'harms attendant upon issuance or nonissuance of an injunction,' together with 'considerations specific to election cases.'"[102] While this suggests their "preference for status quo election laws" does not "rise to unconditional fealty,"[103]—as Emily Zhang also fears is occurring in the federal judiciary—courts vary on "*how much* weight judges [] give to the election's proximity."[104] Further still, there is the variation in "*how*" *else* they see *Purcell*'s "considerations fit[ing] into the analysis for equitable relief,"[105] namely for mandamus requests, and how it should interact with other equitable principles, like laches. Indeed, state courts have drawn on the *Purcell* principle when these notions were also at issue, with some exhibiting a better understanding than others as to how, given the openness and nuances of *Purcell*, it might best fit into the analysis in accord with logic and furtherance of doctrinal coherence.

As to the latter notion, laches, the principle has been raised as an affirmative defense to oppose relief, thus allowing courts to address how it relates to *Purcell*. Again, courts have not taken a uniform approach. But some courts have misapprehended the relationship between the two in ways that, if parroted by later courts, could have an impact on future cases.

In one case, for example, the Maryland Court of Appeals falsely contended that "[t]he *Purcell* Court . . . addressed the issue of the applicability of laches on an election."[106] The *Purcell*

102. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 41 (2020) (mem.) (Kagan, J, dissenting) (emphasis added) (quoting Purcell v. Gonzalez, 549 U.S. 1, 4 (2006)).

103. Zhang, *supra* note 6, at 138; *see also* Codrington, Purcell *in Pandemic*, *supra* note 7, at 970.

104. Codrington, Purcell *in Pandemic*, *supra* note 7, at 976 (emphasis added). To be sure, there is variation in the quality and quantity of these courts' *Purcell* analyses, with some dedicating more attention to the concerns than others. *Compare, e.g.*, Democratic Senatorial Campaign Comm. v. Iowa Sec'y of State, 950 N.W.2d 1, 9 (Iowa 2020) (Appel, J., concurring), *with* Holmes v. Moore, 876 S.E.2d 903, 904 (N.C. 2022) (Newby, J., dissenting).

105. Codrington, Purcell *in Pandemic*, *supra* note 7, at 976.

106. Liddy v. Lamone, 919 A.2d 1276, 1287 (Md. 2007).

Court did no such thing. The Maryland court's suggestion exposes either a misreading of the facts of the case or a gross conflation of *Purcell* and laches (or, perhaps, both). A more flagrant example of a court conflating these principles—or at least eliding their differences—came in concurrence to a pair of Michigan Supreme Court decisions. The writings make clear that the concurring justices understand that "timing matters, especially when a lawsuit contests election procedures and seeks emergency relief just days before an election,"[107] but not much beyond that. Indeed, quoting the Sixth Circuit, the opinions disclaimed the existence of a "compelling" or "powerful reason" for intervening in the dispute over an election manual's guidance on challenges to voter eligibility, "whether it be 'laches, the *Purcell* principle, or common sense . . . .'"[108] The short analysis that followed the assertion failed to disentangle what considerations are relevant to each of these inquiries, thus providing no indication that its authors understood the connection between the two principles. In fact, one might read the opinion as suggesting the two are interchangeable or even the same.

But they are not the same. *Purcell*, though ill-defined, suggests that courts should consider timing and other matters specific to election litigation, which may ultimately result in maintaining the status quo even if they might not in other circumstances. It calls for courts to specifically consider whether, as a prudential matter, this may be the best course of action in the lead-up to contests as a means of minimizing confusion and related public disorder that could decrease electoral legitimacy.[109] Timing is also a point of focus for laches,

107. DeVisser v. Sec'y of State & Dir. of the Bureau of Elections, 981 N.W.2d 30, 33 (Mich. 2022) (Welch, J., concurring); *see also* O'Halloran v. Sec'y of State & Dir. of the Bureau of Elections, 981 N.W.2d 149, 151 (Mich. 2022) (mem.) (Bernstein, J., concurring) ("To say [a delay] would not be disruptive is to ignore reality and basic human behavior.").

108. *DeVisser*, 981 N.W.2d at 35 (Welch, J., concurring) (quoting Crookston v. Johnston, 841 F.3d 396, 398 (6th Cir. 2016)).

109. In an important observation, Emily Zhang notes that *Purcell*, "[e]ven if consistently applied, . . . is supported by the untested assumption that implementing election laws on the books always minimizes voter confusion[,]" yet "[t]here are reasons to believe that the consequences of voter confusion flowing from changes that make voting harder and easier are not symmetrical." Zhang, *supra* note 6, at 137.

which "operates as a bar in a court of equity."[110] The application of that broader equitable doctrine, however, is neither limited to election matters nor primarily concerned with a regulation's impact on the public. The underlying rationale for laches is an interest in the potential for unfairness because the "neglect to assert [a] right or claim [], taken together with lapse of time and other circumstances[,] [may] caus[e] prejudice to an adverse party."[111] Thus, to some extent, the principles employ the same tactic, as each "discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process."[112] But their reasons for disfavoring late-stage judicial rulings in litigation serve different objectives. The time crunch that fits into *Purcell*'s analysis stems from the tendency that, "[a]s an election draws closer," the "risk" that court orders will disrupt fair and orderly administration "will increase."[113] Laches, on the other hand, seeks to avoid penalizing litigants to any range of disputes because their opponents were remiss in their performance "for an unreasonable and unexplained length of time under circumstances permitting diligence," and thus failed to "do in law, [what] should have been done."[114]

This is not to say that the principles are wholly unrelated or that they cannot work in alignment. They are connected, most notably, by their concern with timing as described above. And they can work alongside each other. "The parties' diligence is . . . relevant," Rick Hasen explains, highlighting the challengers' delay in seeking relief in *Purcell v. Gonzalez*.[115] Nick Stephanopoulos also agrees that "it matters whether plaintiffs diligently developed their claim or, conversely, dallied when they should have hurried."[116] Inordinate delay, moreover, where challenges are not lodged "until an election [is] imminent" is probably of even greater consequence when a regulation has been "on the books for years and its burdens were constant over

110. *Laches*, BLACK'S LAW DICTIONARY (6th ed. 1990).

111. *Id.*

112. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31 (2020) (mem.) (Kavanaugh, J., concurring).

113. Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam).

114. BLACK'S LAW DICTIONARY, *supra* note 110.

115. Hasen, *supra* note 9, at 444.

116. Stephanopoulos, *supra* note 6.

time."[117] The long-standing nature of a challenged regulation suggests that a rule change in the lead-up to the election may be more likely to increase confusion because voters and administrators will have to alter what has become the default behavior over time. Thus, a court faced with such a scenario is probably more justified in invoking *Purcell* to deny a rule change. It might also be defensible for that same court to find that laches is applicable because the delay somehow proves to the opponent's detriment, causing harm that might have been mitigated if the claim were prosecuted earlier.[118] But the rationale for *Purcell* may be applicable even when a claim could not reasonably have been brought earlier, whereas laches would be inapt if, for example, the measure at issue was enacted in close proximity to the election. In other words, *Purcell* might reasonably apply when "pre-election litigation is both inevitable and unattributable to any tardiness on plaintiffs' part," while laches demands some measure of fault and injury to the adversary.[119] Its application turns on the existence of "dilatory action"[120] and any attendant consequences of the failure to "act with the required promptness," such that it "may bar the action for extraordinary relief in an election-related matter."[121]

From what one can gather from the terse opinion, an appeals court in North Carolina seemed to grasp the distinction. In a suit challenging the use of certain voting machines as violative of the North Carolina Constitution, it ruled that both *Purcell* and laches would prevent the issuance of an

117. *Id.*

118. Courts should also consider any facts suggesting that the party invoking laches has contributed to the delay. *In re* Khanoyan, 637 S.W.3d 762, 764 n.2 (Tex. 2022) ("[A] party that thinks that an opponent is engendering delay to make a case impossible for the courts to resolve may need to seek anticipatory relief, or at least make a clear record of doing everything practicable to not contribute to the delay.").

119. Stephanopoulos, *supra* note 6.

120. *See* State *ex rel.* Residents' Initiative Voting All. v. Cuyahoga Cnty. Bd. of Elections, 841 N.E.2d 753, 754 (Ohio 2005) ("We have consistently required relators in election cases to act with the utmost diligence." (quoting Blankenship v. Blackwell, 817 N.E.2d 382, 386 (Ohio 2004)).

121. *Id.* (quoting Ohio *ex rel.* Miller v. Cuyahoga Bd. of Elections, 817 N.E.2d 1, 4 (Ohio 2004)).

injunction.[122] Considering "the feasibility of requiring . . . counties to switch to entirely new voting systems before . . . early voting" in just two months, the court cited the *Purcell* principle as "counsel[ing] against issuing an injunction so close to an election."[123] The court explained some of the challenges that counties would face if it enjoined them from using the contested machines, agreeing with defendants that attending to this in a short period would "not [be] merely impractical, but impossible."[124] Compelling election officials to switch machines would pose a "considerable risk that" they "would be unable to perform their duties" and "cause confusion about the particulars of how voting would take place[,]" perhaps even "disenfranchising many voters."[125] Separately, the court said that laches would also prevent it from granting the relief requested.[126] This was because the delay in bringing suit harmed the counties at issue, as they purchased additional machines during the interim period.[127] "Granting the injunction now," the court said, "would injure Defendants by requiring them to devote substantial resources to switch to a different voting system, which may be impossible to implement in time for the election."[128] Similarly, while neither laches nor *Purcell* ended up being dispositive in the case, the Connecticut Supreme Court seemed to apprehend the distinction in an appeal that implicated the two principles.[129] That court engaged in an analysis of the former, which was raised as an affirmative defense.[130] And while it clearly disregarded *Purcell*'s federalism

122. State v. N.C. State Bd. of Elections, No. 20-CVS-5035, 2020 N.C. Super. Ct. LEXIS 112, at *11 (2020) (holding that *Purcell* and laches would prevent issuance of an injunction).

123. *Id.*

124. *Id.*

125. *Id.* at *11–12.

126. *Id.* at *13.

127. *Id.*

128. *Id.*

129. *See* Fay v. Merrill, 256 A.3d 622, 636–38 (Conn. 2021) (recognizing the distinction between laches and *Purcell*).

130. *See id.* The court nevertheless explained the procedural reasons for not sustaining that defense. *Id.* at 637 ("Given the intensely factual nature of the laches defense and the lack of necessary factual development on the trial court record, we decline to consider the defendant's laches claim for the first

principle,[131] its discussion in dicta suggested that *Purcell* might have also applied due to the timing of the election.[132]

If inherent in deciding requests for equitable relief is whether a court order would even be adequate to address the harm, then it is reasonable (and probably essential) for a court to envision the structure and terms of a potential injunction. To this end, the appropriateness of any remedy (and its scope) should take into account factual matters related to both laches and *Purcell*—yet the distinctions in their underlying rationales may figure into the court's analysis in different ways. The court might be capable of fashioning relief in ways that would mitigate any burdens that late-staged litigation forced opponents to bear, even if delays were preventable, thereby making some remedy appropriate. It might also be able to structure its order in a way that decreases the likelihood of confusion to the public and election administrators—which may or may not relate to any burdens that preventable delay poses to opponents—such that *Purcell* need not be a bar to relief.[133] Or perhaps the court, limited by institutional constraints or external factors, may find that any relief that it could mandate would be insufficient to account for the time pressures that led to prejudice, public confusion, or both and, therefore, it decides against issuing an order for an equitable remedy.[134] Whether

time on appeal as an alternative ground on which to affirm the judgment of the trial court.").

131. *See id.* at 23 n.21 (noting that the enforcement of the "judgment that could have been rendered in the plaintiffs' favor . . . would have raised significant practical issues for consideration by a trial court in the first instance" and "presumably would implicate" *Purcell*); *id.* ("The *Purcell* principle remains applicable in the context of COVID-19."). Regarding the federalism principle, it is telling that the court cites federal court cases only in discussing *Purcell*'s applicability.

132. *See id.* (citing COVID-19 cases that grappled with time issues related to post-marked ballots).

133. *See, e.g.*, Moore v. Lee, 644 S.W.3d 59, 69 (Tenn. 2022) (Lee, J., dissenting) (arguing that the lower court properly assessed the facts and context, "*rejected* the plaintiffs' proposed . . . deadline extension" and instead, "ordered a short extension of the qualifying deadline," showing due consideration for "the harm to the plaintiffs . . . and the injury to the defendants, and . . . the constitutional defect to be remedied").

134. *See, e.g.*, *id.* at 65 (majority opinion) (giving credence to the affidavits in the record, which "describe the uncertainty and confusion that will result

and the extent to which any of these scenarios describes the court's position, however, would be an important part of the equitable analysis. And a decision that elides the differences between laches and *Purcell* may afford undue consideration to the facts that are relevant to one or the other—perhaps in abuse of discretion—but at a minimum, miscommunicating the basis for its ultimate decision to the parties and the public.

Consider, also, matters in which parties request relief in the form of a writ of mandamus. Though technically "classed as a legal remedy"[135]—i.e., not an equitable one—whether "the exercise of a sound judicial discretion" calls for the grant of this "extraordinary"[136] writ in any particular case "is largely controlled by equitable principles."[137] State courts have presided over election litigation in which parties have requested writs of mandamus, including where timing was an acute factor.[138] And

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from a change in the Senate plan at this stage in the election process, *regardless of when the new candidate filing deadline is set*" (emphasis added)); *In re* Khanoyan, 637 S.W.3d 762, 766 (Tex. 2022) (asserting that "no amount of expedited briefing or judicial expediency at this point can change the fact that the primary election . . . is already in its early stages" and, thus, denying the writ of mandamus because "even with utmost judicial speed, any relief that we theoretically could provide here would necessarily disrupt the ongoing election process" and "bring dire consequences").

135. Duncan Townsite Co. v. Lane, 245 U.S. 308, 312 (1917).

136. *Id.* at 311.

137. *Id.* at 312; *see In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 138 (Tex. 2004) (noting that mandamus, "an extraordinary remedy," is neither "issued as a matter of right, but at the discretion of the court" nor "an equitable remedy, [though] its issuance is largely controlled by equitable principles" (internal quotation marks and citation omitted)); Ohio *ex rel.* Albright v. Haber, 139 Ohio St. 551, 551 (Ohio 1942) (holding that "the issuance of the extraordinary writ of mandamus" was "within the sound discretion of the court" and "one seeking the writ must show a clear legal right thereto" while also explaining that "while mandamus is considered a legal remedy, equitable principles often govern its issuance").

138. *See, e.g.*, *In re* Khanoyan, 637 S.W.3d at 769 (denying a request for relief related to the drawing of county commission districts in light of "[t]he timing and other circumstances of this mandamus petition"); *In re* Hotze, 627 S.W.3d 642, 650 (Tex. 2020) (denying a petition to require early voting rules be enforced in accord with the state election code as opposed to a gubernatorial decree with modifications to account for COVID when the election was already underway and parties delayed in bringing the request); Duenas v. Guam Election Comm'n, 2008 Guam 1 ¶ 53 (2008) (denying a request for a writ of mandamus, with three days remaining for the election, which would order the removal of an initiative question from the ballot or invalidate the results because of the election commission's biased analysis of the measure).

while *Purcell* was a consideration in several of them, one case, *State ex rel. Demora v. Larose*,[139] highlights pointedly how it factors into the analysis to decide the appropriateness of issuing a writ of mandamus, the requested relief.[140]

The dispute in *State ex rel. Demora v. Larose* pertained to filing deadlines.[141] Litigants disagreed about the legal effect of a series of state supreme court orders invalidating redistricting plans—as well as a federal court order delaying the primary election—specifically whether they also had an impact on the submission deadline for statements of candidacy and nominating petitions.[142] Two sets of litigants petitioned the Ohio Supreme Court for a writ of mandamus to compel county election boards to accept their candidacy filings, which were submitted after the date, and to include their names on the ballot.[143] The court ultimately granted the request for one set of parties, despite the Secretary of State's contention that the *Purcell* principle would bar such relief given the election's proximity.[144] It ruled that "*Purcell*'s application to this case is questionable, at best" because the principle "forbids injunctive relief in certain election cases" and the court had "never applied *Purcell* to preclude the issuance of a writ of mandamus."[145] For its part, the dissent characterized the majority's reasoning for not adhering to *Purcell* as "almost laughable," highlighting its

139. 217 N.E.3d 715 (Ohio 2022).

140. *Id.* at 727 ("But contrary to that characterization, not granting a writ to the intervening relators is appropriate, because they have not established that Secretary LaRose has a clear legal duty to undertake either of the actions that they ask this court to order."). In another case, *Bryan v. Fawkes*, the court considered very similar issues which might shed light on the discussion. 61 V.I. 416, 468 (V.I. 2014) (observing the fact that the party had not "sought injunctive relief" requesting the removal of a candidate's name from the ballot meant that "*Purcell* and its progeny—all of which involve an analysis of the four factors courts consider in issuing an injunction—are not relevant to this appeal"). Notably, however, there was no request for mandamus in that case.

141. *Ex rel. Demora*, 217 N.E.3d at 718–20.

142. *Id.* at 718.

143. *Id.* at 717.

144. *See id.* at 718, 725 (granting the writ of mandamus for the original relators).

145. *Id.* at 725.

failure to meaningfully differentiate its application to requests for injunctions and writs of mandamus.[146]

Indeed, there is good reason to distinguish mandamus from injunction because the two remedies are, well, distinct. The most obvious difference is the legal standard for showing when each is appropriate. Parties requesting a writ of mandamus must demonstrate that they have a clear legal right to the relief, that opposing parties have a clear legal duty to take the requested course of action, and that there is no adequate legal remedy available.[147] A preliminary injunction, on the other hand, is appropriate upon a parties' showing a substantial likelihood that: they will prevail on the merits dispute, they will suffer irreparable injury if the relief is not awarded, outside parties will not be unjustifiably harmed by its grant, and issuing the relief is in the public interest.[148] In certain cases, it could make a difference that "an injunction can be used to either prevent action or compel it, [while] mandamus can only be used to compel action."[149] But as a general matter, as the dissent in *State ex rel. Demora v. Larose* observed, the similarities between

146. *Id.* at 745 (DeWine, J., concurring in part and dissenting in part) ("Purcell precludes injunctive relief, not mandamus relief. But of course, it never bothers to tell us why that distinction matters."). Importantly, one concurring opinion is framed as if *Purcell* were binding, ignoring the federalism limitation, while the other at least suggests the court might have leeway to decide. *Compare id.* at 737 (Fischer, J., concurring in part and dissenting in part) ("[T]o evaluate this issue, we *must* look at the principle set forth in *Purcell v. Gonzalez* . . . which acknowledges that courts ordinarily should not alter state election laws in the period close to an election . . . ." (emphasis added)), *with id.* at 744 (DeWine, J., concurring in part and dissenting in part) ("The important thing for our purposes is not whether *Purcell* formally binds this court, but whether its rationale informs the present situation. Undoubtedly, it does.").

147. *See* State *ex rel.* Root v. Indus. Comm'n of Ohio, 2017-Ohio-512, at ¶ 1–2 (Ohio Ct. App. Feb. 14, 2017) (explaining the requirements of the writ of mandamus); *see In re* Khanoyan, 637 S.W.3d 762, 767 (Tex. 2022) (denying mandamus relief, particularly "on the paltry factual record" that was partly "disputed," where litigants were unable to demonstrate "that the Texas Constitution imposes an absolute duty" and, thus, show "a clear violation of ministerial duties imposed by law" because the case raised a novel constitutional question in Texas).

148. *See* Procter & Gamble Co. v. Stoneham, 474 N.E.2d 268, 273 (Ohio Ct. App. 2000) (explaining the requirements of a preliminary injunction).

149. Derek T. Muller, *Election Subversion and the Writ of Mandamus*, 65 WM. & MARY L. REV. 327, 366 (2023).

a writ of mandamus and an injunction are obvious and, perhaps, sufficient enough such that "in the election context the two remedies function alike."[150]

Thus, while it is reasonable to contrast a writ of mandamus and an injunction, it seems unwarranted for a court weighing a petition for mandamus to categorically disclaim *Purcell*'s applicability. Undoubtedly, the requirement that a petitioner seeking mandamus show that a right or duty is clearly established is different from the injunction standard that demands the showing of a likelihood of success on the merits.[151] But the fact that the former imposes a higher burden on petitioners would suggest only a baseline that *Purcell* might apply in fewer instances where mandamus is requested.[152]

Fewer, however, does not mean never. Moreover, a moving party might establish a right, duty, or likelihood of success according to either test yet—because its motivating force is avoiding insurmountable voter confusion and other circumstances that could adversely impact the administrability of elections—the facts of the case might nevertheless make *Purcell*'s rationale apt such that a court should withhold the requested relief. Indeed, there may be a clearly established right or duty, or the chances of success on the merits may be virtually 100 percent, but when taken into consideration, the right or duty may be relatively minor compared to the public impact of the court order.[153] (Of course, the injunction standard includes a factor that accounts for the public interest. And, importantly, a "court may decline to issue mandamus in its discretion," if it deems aspects of the dispute to be "unique" and "would needlessly involve the judiciary," or if the "public interest" would

150. 217 N.E.3d 715, 745 (Ohio 2022).

151. *See* Audrey Davis, *A Return to the Traditional Use of the Writ of Mandamus*, 24 LEWIS & CLARK L. REV. 1527, 1533 (2020) (mentioning the clearly established legal right requirement for a writ of mandamus); *id.* at 1538 (contrasting the purpose of an injunction from a writ of mandamus).

152. *See* Muller, *supra* note 149, at 373 ("A clear legal duty, for instance, suggests a stronger case for the plaintiff than a mere 'likelihood' of success, and it is a reason to counsel against staying the judgment.").

153. *See Procter & Gamble*, 747 N.E.2d at 273–75 (discussing the elements that must be met for a party that is requesting a preliminary injunction).

be "adversely affected.")[154] Conversely, the right or duty at issue in the case may be so important as to outweigh any negative consequences of an order, thus calling for its issuance. Whether a writ of mandamus or an injunction is appropriate in a given election dispute, then, is highly dependent on the circumstances.

While the majority in *State ex rel. Demora v. Larose* was wrong to suggest that *Purcell* would not apply simply because the case involved a request for mandamus—and not an injunction—it is harder to evaluate the outcome of the decision overall. Whether the court arrived at the correct result is difficult to know because, as the dissent noted, "it never bother[ed] to tell us why that distinction matters."[155] Instead, it merely set out the requirements for the grant of mandamus without more.[156] But writs of mandamus and injunctions are

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154. *See* Muller, *supra* note 149, at 342; *see, e.g.*, *ex rel. Demora*, 217 N.E.3d at 738 (Fischer, J., concurring in part and dissenting in part) ("Even if mandamus were appropriate, the *Purcell* principle weighs against issuing a writ, because this case will have far more negative than positive outcomes across all of Ohio.").

155. *See ex rel. Demora*, 217 N.E.3d at 745.

156. The other point of contention regarding *Purcell* was whether the majority or dissent framed the "status quo" more accurately. *Compare id.* at 725–26

> Even if the *Purcell* principle were to play a role in our analysis of mandamus actions, it would not warrant the denial of a writ of mandamus [because] the applicability of *Purcell* depends on whether the original relators are attempting to alter or restore the status quo, i.e., the established "rules of the road." Here, rather than altering election rules . . . the original relators seek the secretary of state's adherence to the statutory deadlines. In this circumstance, the *Purcell* principle should not bar a court from requiring the subject of the law here—the secretary of state—to do his duty and follow the law. (internal citations omitted),

with id. at 745 (DeWine, J., concurring in part and dissenting in part)

> The majority flippantly asserts that its interjection into election affairs preserves, rather than erodes, the status quo. But that's simply untrue. Adding new candidates to the ballot at the last minute obviously changes the status quo. Before today, primary ballots were finalized, proofed, and in the case of overseas servicepersons, actually mailed out. Today's order disrupts that progress, forcing election officials to try to figure out how to unwind and redo what they have already accomplished. For the majority to claim that its order altering the chief election officer's

both "'extraordinary remed[ies]' that 'direct[] the conduct of a party,' with a court's 'full coercive powers,'"[157] as the dissent noted, and "[t]he factors courts consider for both remedies align," with each "contain[ing] a 'discretion[ary]' component 'based upon all the facts and circumstances in the individual case.'"[158] The overlap between them might render their differences functionally meaningless, or they may not. To this end, the dissent was right to call for more from the majority but, perhaps, it was premature to presume that the court was making *faux* distinctions or perpetuating some legal contrivance.

The cases show that, once courts dispense with *Purcell*'s federalism, there is little consistency in how they proceed with their analysis for equitable relief. They tend to take the election, its proximity, and related circumstances into account as a factor—not a reason to end the inquiry abruptly and deny the request—but that weight varies. Under the hopeful view, the variation is closely tied to the actual circumstances of the case, while the cynical view might see that weight (and thus the ultimate resolution) tethered to either the courts' steadfast, predetermined positions on the issue one way or the other or, even worse, the likely political impact of the outcomes. Some courts then elide important distinctions between *Purcell* (which encourages a healthy skepticism about last-minute rule changes because of their potentially negative impact) and laches (a doctrine "based upon the maxim that equity aids the vigilant and not those who slumber on their rights")[159]—even to the extent that one basically shrugged off the difference.[160] But such glib treatment that either understates or overstates their distinctions necessarily alters the analysis and, potentially, the

implementation of the election laws 'restore[s] the status quo' is nonsensical.

157. *Id.* at 745 (DeWine, J., concurring in part and dissenting in part) (citations omitted).

158. *Id.* (DeWine, J., concurring in part and dissenting in part) (citations omitted).

159. BLACK'S LAW DICTIONARY, *supra* note 110.

160. *See* DeVisser v. Sec'y of State & Dir. of the Bureau of Elections, 981 N.W.2d 30, 35 (Mich. 2022) (Welch, J., concurring) (articulating how laches is being applied to election matters); O'Halloran v. Sec'y of State & Dir. of the Bureau of Elections, 981 N.W.2d 149, 154 (Mich. 2022) (Welch, J., concurring) (same).

outcome. And there also seems to be confusion about how *Purcell* should be considered when the request is neither an injunction nor a stay, but a writ of mandamus.

The Supreme Court may be, in part, to blame for this. Its *Purcell* opinions "offered no guidance as to how its considerations fit into the analysis for equitable relief."[161] But state judiciaries are also unique for having faced novel questions not posed to the Court, which may implicate a broader swath of equitable principles. Yet, if their failure to grapple properly with laches and writs of mandamus is a microcosm of their approaches to these inquiries—the metaphorical tip of the iceberg—it suggests that there are countless ways that courts can misapply *Purcell* based on erroneous understandings of it and other principles in their legal and equitable regimes. The picture that emerges is one in which *Purcell* permeates state election law and interacts with related doctrines in ways that may or may not be rational but, in either case, could be consequential for the immediate dispute and, because of our precedent-based system, later ones as well.

CONCLUSION

To conclude, consider an opinion from *Democratic Senatorial Campaign Committee v. Pate*.[162] The case pertained to a dispute over the mailing of prepopulated absentee ballot applications to registered voters in three Iowa counties.[163] Some local election officials had prefilled the applications, contrary to the Secretary of State's directive, with individual voter information so that the voter only needed to sign and return the application.[164] An opinion concurring in the judgment to vacate the statewide stay order, thus sustaining the enforcement of the secretary's decree, was particularly notable.[165] The judge "regard[ed] this as a close case that require[d] further explanation,"[166] which read in part:

161. *See* Codrington, Purcell *in Pandemic*, *supra* note 7, at 976.
162. 950 N.W.2d 1 (Iowa 2020).
163. *Id.* at 3.
164. *Id.*
165. *See id.* at 9–21 (Appel, J., specially concurring).
166. *Id.* at 9 (Appel, J., specially concurring).

> *Purcell*, of course, is infused with federalism concerns, arising from the notion that *federal* courts should show a degree of caution before they intervene in state-created election procedures that could bollix up the management of an election by state officials. There is, of course, no federalism consideration in this case.
>
> Further, as was noted by Justice Ginsburg, *Purcell* merely held that courts 'must take careful account of considerations specific to election cases, *not that election cases are exempt from traditional stay standards*.' *Purcell* should not overshadow the fact that pre-election litigation is better than post-election litigation. *Purcell* plainly should *not be regarded as a per se bar or even a deterrent to necessary litigation, but only a reminder* that a reviewing court should be attentive to the potential of voter confusion and the burdens that may be imposed on election administrators in considering equitable relief in voting rights cases. As noted by Justice Ginsburg, the other traditional factors for equitable relief remain in play . . . .
>
> While attention to practical impacts is important, however, a reviewing court must be attentive to vindicating the rights of voters who seek to cast absentee ballots free from unnecessarily burdensome regulation. In this case, . . . [i]t does not seem that affirming the district court order would substantially increase the burdens on election administrators.[167]

Among all of the opinions reviewed, this concurrence may offer the best, i.e. most coherent, discussion of *Purcell*'s role in state election matters. The opinion acknowledges that *Purcell* does not constitute binding authority but may offer persuasive reasoning. It understands that *Purcell* is not a trump card that can be played to prevent judicial decision making in the ordinary course of litigation, because, as Justice Kagan wrote, "there is not a moratorium on the Constitution as the cold weather approaches."[168] Instead, the principle should be integrated into the equitable analysis, as an important factor to be taken under advisement in light of the election calendar and other facts and

167. *Id.* at 15 (Appel, J., specially concurring) (emphasis added) (internal citations omitted).

168. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 42 (2020) (mem.) (Kagan, J., dissenting); *see also* Bush v. Gore, 531 U.S. 98, 108 (2000) (per curiam) ("The press of time does not diminish the constitutional concern.").

circumstances surrounding the contest. And the opinion suggests that courts should evaluate the evidence available to predict the consequences of altering the status quo—and, ostensibly, attempt to mitigate them—not presume as a default that issuing an order will result in confusion or any other parade of "horribles" that could undermine electoral legitimacy.[169]

Importantly, this should not be read to suggest either agreement or disagreement with the merits of the decision or, in fact, any of the opinions highlighted in this Paper. While some may have been entirely correct and others completely incorrect, in all likelihood few if any could be described in terms of either extreme. Instead, each probably falls somewhere on the spectrum between right and wrong for each part of the analysis, including those parts that implicate the *Purcell* principle. The above reference to the Iowa Supreme Court case should be taken as an endorsement of the justice's behavior more broadly. The excerpt from the concurrence showcases a jurist thinking critically about important aspects of the case—reviewing its key facts, engaging with the relevant law, and grappling with the very real consequences that a ruling could have on the parties to the dispute and the public. It reflects an understanding of how elections fit into our system of federalism and the limits of law, as well as an awareness of the importance of the judicial station. The opinion offers a model for how to act like judges—and not mere automatons—who might actually believe that the right to vote "is preservative of other basic civil and political rights."[170] Yet when *Purcell* is at play, this model behavior may be more of an outlier rather than the norm.

To be sure, the cited are just some in the entire universe of state courts that have cited the *Purcell* principle.[171] And behind

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169. *See Wis. State Legislature*, 141 S. Ct. at 42 (Kagan, J., dissenting)

> Last-minute changes to election processes may baffle and discourage voters; and when that is likely, a court has strong reason to stay its hand. But not every such change poses that danger. And a court must also take account of other matters—among them, the presence of extraordinary circumstances (like a pandemic), the clarity of a constitutional injury, and the extent of voter disenfranchisement threatened.

170. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964).

171. The cases included are among those from the sixty-nine returned from searches for "Purcell v. Gonzalez" in the LexisNexis state court database, and

every opinion are untold facts, assumptions, and dynamics—there is more at play than what comes through in the words themselves. But law develops from legal argumentation, relying heavily on court decisions (among other sources) that claim their authority, in part, on how closely they relate to—or differ from—earlier cases invoking the same principles. Yet sometimes what results from the process is not the beacon of clarity. *Abdus-Sabur v. Evans* is pretty much a case study on this point.[172] And, in fact, so is *Purcell*. It has truly taken on a life of its own, justifying more scholarship on the principle.[173] By devoting greater attention to it, scholars might inspire courts and other actors to do more to put "meat on *Purcell*'s bones"[174] and take deliberate steps leading to its "reconsideration or recalibration."[175] Indeed, scholarship on *Purcell* should be

ten, which overlap with the sixty-nine, from a search for "Purcell principle." The same searches in Westlaw return fifty-four and ten cases, respectively, each of which is captured in the LexisNexis tranche of cases. Those highlighted in this Paper represent cases in which the court engages with *Purcell* in more than a fleeting or superficial way and where it is not cited for some anodyne statement. *See, e.g.*, Trump v. Evers, No. 2020AP1971-OA, 2020 Wisc. LEXIS 191, at *12 (Wis. Dec. 3., 2020) (Bradley, J., dissenting) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."); Stewart v. Advanced Gaming Techs., Inc., 723 N.W.2d 65, 76 (Neb. 2006) (citing Justice John Paul Stevens's concurring opinion for the proposition discouraging "speculation in [a] case involving constitutional challenge[s] to existing election law"). In drafting this footnote, it seems like an ideal opportunity to reiterate my thanks to Ben Vanden Heuvel, my dedicated research assistant, for his work and insights as he read through these cases alongside me.

172. *See generally* No. NNH-CV-23-6135336-S, 2023 WL 5697658 (Conn. Super. Ct. Aug. 29, 2023).

173. *See* Codrington, *The Phantasm of Principle*, *supra* note 10, at 662 (calling *Purcell* "election law's poster child for what then-Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic'" and calling for "more sustained scholarly criticism that someday results in Purcell's logic 'be[ing] counteracted by the tendency to confine itself within the limits of its history'" (citation omitted)).

174. *See* Stephanopoulos, *supra* note 6.

175. *See* Zhang, *supra* note 6, at 138 ("And if the application of the *Purcell* principle requires the maintenance of status quo election laws even under the most extreme conditions, that clearly suggests that the principle is (over)ripe for reconsideration or recalibration.").

understood as part of a dynamic legal reform process that could lead to thoughtful ways to rein it in.[176]

As time passes, it becomes increasingly difficult to dispute the claim that *Purcell* is a "bedrock tenet of election law."[177] Even if the statement is descriptively accurate, normatively, it does not appear to be a positive development. Incorporating an unremarkable,[178] undertheorized,[179] and highly malleable doctrine to govern an area of law whose only consistent feature is its ability to inflame partisanship seems to be unwise.[180] For better or for worse, courts have an important role to play in elections. So, when faced with legal questions, whether novel or settled, they should generally answer them and provide an appropriate remedy. A major problem with *Purcell*, then, is its power to disrupt these norms by establishing a bias for the status quo.[181] Each time a court permits a law to take effect simply because an election is near, and particularly when the law is later deemed unlawful—whether because it is discriminatory, overly burdensome, or otherwise impairs the right to vote—it frustrates democratic ideals.[182] Sometimes the impact is very consequential, and sometimes less so. But in either case, a decision to abstain from addressing a legal

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176. *See generally* Hasen, *supra* note 9 (arguing that *Purcell* should be reconceptualized to guard against its potential misuse, including as a stand-alone principle).

177. *See* Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (mem.) (Kavanaugh, J., concurring).

178. *See* Codrington, Purcell *in Pandemic*, *supra* note 7, at 984 ("Indeed, much of what the case might claim as its chief virtues is rather unremarkable because the principles it promulgates are either reasonably well-established or commonsensical."); *see also* State *ex rel.* Demora v. Larose, 217 N.E.3d 715, 745 (Ohio 2022) (DeWine, J., concurring in part and dissenting in part) (referring to the "teaching of the *Purcell* principle" as "unremarkable").

179. *See* Hasen, *supra* note 9, at 440 ("The *Purcell* decision is both overdetermined and undertheorized.").

180. *In re* Khanoyan, 637 S.W.3d 762, 765 (Tex. 2022) ("Expedition and precision in requesting relief help ensure that courts can never be converted, willingly or otherwise, into a partisan tool for one side or the other. Those requirements reduce the incentives for partisan adversaries to lie in wait with lawsuits that create chaos.").

181. *See* Zhang, *supra* note 6, at 138 ("*Purcell* evinces not merely a status quo bias towards existing election laws but a legitimation of them.").

182. *Id.* ("While there may be pragmatic reasons to follow the election laws we have always had, there is nothing inherently righteous about those laws.").

challenge that affects the basic terms of an election whittles away at the commitment to a fair, just, and equal democracy. The concern might have been confined to federal courts, however, as this Paper notes, state courts have taken to ignoring that important federalism principle. Often, "[s]tate courts may be the best (and only) fora available to hear election-related lawsuits[,]"[183] yet how those courts will apply *Purcell* in any particular case is pretty much anyone's guess. In other words, with this "bedrock tenet of election law"[184] increasingly nestling itself into state election litigation, we should brace ourselves for its potential to be applied reflexively and uncritically, resulting in a jurisprudence that exhibits a lack of principle all the way down.[185]

183. Seifter & Sopko, *Standing for Elections in State Courts*, *supra* note 51.

184. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring).

185. *Contra* Heather Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010) (using "the term 'federalism-all-the-way-down' to describe the institutional arrangements that our constitutional account too often misses—where minorities rule without sovereignty").