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ARTICLE

EQUITABLE BALANCING IN THE PURCELL FRAMEWORK

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ABSTRACT

According to the Voting Rights Act, states must not racially discriminate when they draw legislative districts. Federal trial courts frequently issue preliminary injunctions to prevent states from drawing districts at the eleventh hour to shield themselves from anti-discrimination laws.

In 2006, the Supreme Court held that federal courts should generally not issue preliminary injunctions against state election laws "in the period close to an election." Justice Kavanaugh reaffirmed this theory in 2022, and some lower courts have begun to use the test he proposed. Lower courts have struggled to apply this principle consistently, and they disagree about what it means. All the while, states are allowed to conduct elections governed by illegal statutes, leading to the disenfranchisement of marginalized people.

This Article argues that, aside from being unworkable, this Supreme Court precedent is also wrong as a matter of law. This Article proposes a new test, based on an originalist interpretation of the law, that would

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allow lower courts greater flexibility to check unlawful and discriminatory state action.

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INTRODUCTION

In 2004, Arizona voters approved a law that implemented a strict voter ID requirement.[1] Proposition 200 "required proof of citizenship upon registering to vote and presentation of certain forms of identification to cast an in-person ballot on Election Day."[2] Voting rights groups challenged the proposition in May 2006—two years after it was approved, but mere months before the next election.[3] In *Purcell v. Gonzalez*, the plaintiffs moved to preliminarily enjoin the law so that it would not be in force during the 2006 midterm elections, and the district court summarily denied the motion.[4] On appeal, the Ninth Circuit summarily granted an injunction pending appeal, in essence reversing the

1. *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 437 (2016); Press Release, ACLU, Federal Court Halts Arizona's Harmful Voter ID Law (Oct. 5, 2006, 12:00 AM), https://www.aclu.org/press-releases/federal-court-halts-arizonas-harmful-voter-id-law [https://perma.cc/98DJ-NLRX] (describing the impact of the Arizona voter ID law on voters).

2. Hasen, *supra* note 1; *see* Arizona Taxpayer and Citizen Protection Act, 2004 Ariz. Ballot Proposition 200 (codified as Ariz. Rev. Stat. Ann. § 16-121.01 (2023)).

3. Hasen, *supra* note 1; Press Release, ACLU, *supra* note 1.

4. Purcell v. Gonzalez, 549 U.S. 1, 2–3 (2006) (per curiam).

district court's decision below.[5] In a *per curiam* opinion, issued just days before the 2006 elections, the Supreme Court vacated the Ninth Circuit's order.[6]

The grounds on which the Supreme Court vacated are not entirely clear. The Court held that it vacated because the Ninth Circuit used an erroneous standard of review.[7] However, the Court also castigated the Ninth Circuit for its failure to account for "considerations specific to election cases."[8] Were these latter grounds dicta, or did they constitute a separate holding? In the years since *Purcell*, courts from the district level to the Supreme Court have struggled to answer this question.[9] For example, in February 2022, voting rights groups again petitioned a federal court for relief against a state's election laws.[10] After the 2020 Census, Alabama's legislature redrew its Congressional districts.[11] Several plaintiffs sued Alabama, alleging that the proposed redistricting plan was racially gerrymandered in violation of the Voting Rights Act.[12] A three-judge panel in the Northern District of Alabama—comprised of two judges appointed by Donald Trump and one appointed by Bill Clinton—granted a preliminary injunction prohibiting the state of Alabama from using the challenged redistricting plan to conduct its elections.[13] The panel ordered the state legislature to redraw the legislative districts within fourteen days or the court would

5. *Id.* at 3; *see* Press Release, ACLU, *supra* note 1 ("This court ruling means that thousands of eligible voters who would have been turned away from the polls because of this misguided and unnecessary law will now be able to exercise their fundamental right to vote . . . .").

6. *Purcell*, 549 U.S. at 6.

7. *Id.* at 5. ("It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error.").

8. *Id.* at 4.

9. *See infra* notes 121–36 and accompanying text.

10. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022).

11. Singleton v. Merrill, 582 F. Supp. 3d 924, 938 (N.D. Ala. 2022); Amy Howe, *In 5-4 Vote, Justices Reinstate Alabama Voting Map Despite Lower Court's Ruling That It Dilutes Black Votes*, SCOTUSBLOG (FEB. 7, 2022, 8:43 PM), https://www.scotusblog.com/2022/02/in-5-4-vote-justices-reinstate-alabama-voting-map-despite-lower-courts-ruling-that-it-dilutes-black-votes/ [https://perma.cc/W762-BBCM].

12. *Singleton*, 582 F. Supp. 3d at 935.

13. *Id.*; *see* Howe, *supra* note 11.

appoint an expert to make the requisite changes.[14] The court analyzed the case thoroughly, devoting eighty-seven pages to legal analysis and seventy-one pages to its findings of fact and law.[15]

The defendants requested a stay of the injunction directly from the Supreme Court.[16] What the district court created in 225 pages, the Supreme Court summarily halted in one sentence with no stated reasoning—the same fault classified as an "error" in *Purcell*.[17] Justice Kagan noticed this incongruity and wrote a blistering twelve-page dissent in which she observed that the trial court considered a "massive" factual record and did not think that the question of "whether the plaintiffs were 'substantially likely to prevail on the merits of their Section Two claim [was] a close one.'"[18] Justice Kavanaugh disagreed on two grounds: "(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."[19] In support of his reasoning, Justice Kavanaugh cited *Purcell*.[20] Yet neither *Purcell* nor Justice Kavanaugh ever explained what "ordinarily" or "close to an election" meant.[21] Lower courts have complained about this lack of guidance ever since *Purcell*,[22] but the Supreme Court has not revisited the issue.[23] In the years since it was handed down, *Purcell* has become so ubiquitous in

14. *Singleton*, 582 F. Supp. 3d at 936–37.

15. *See id.*

16. *See* Merrill v. Milligan, 142 S. Ct. 879, 879 (2022).

17. *See id.* ("The district court's January 24, 2022 preliminary injunctions in No. 2:21–cv–1530 and No. 2:21–cv–1536 are stayed pending further order of the Court."); Purcell v. Gonzalez, 549 U.S. 1, 5 (2006).

18. *Merrill*, 142 S. Ct. at 883, 886 (Kagan, J., dissenting from grant of application for stays).

19. *Id.* at 879 (Kavanaugh, J., concurring in grant of application for stays).

20. *Id.*

21. *See infra* notes 109–23 and accompanying text.

22. *See, e.g.*, Veasey v. Perry, 769 F.3d 890, 897 (5th Cir. 2014) (Costa, J., concurring) ("[T]he only constant principle that can be discerned from the Supreme Court's recent decisions in this area is that its concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis.").

23. *See generally* Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 644 (7th Cir. 2020) (Rovner, J., dissenting) (discussing the Court's "hands-off approach").

the world of election law that Professor Richard L. Hasen famously coined the phrase "the *Purcell* principle" to refer to the idea that federal courts must not enjoin state election law when an election is close at hand.[24]

The stakes of *Purcell* litigation are high. If a test allows for too few preliminary injunctions, then countless people will be disenfranchised, including a disproportionate number of already disadvantaged voters.[25] If a test allows for too many preliminary injunctions, then federal courts will interfere in a matter constitutionally committed to the states,[26] violating principles of federalism. Federal court interference also decreases public trust in the judiciary by opening judges up to criticism that they are ruling according to personal politics instead of the law. This Article proposes that to thread this needle, a test like *Purcell* needs to achieve two main goals: (1) flexibility to adapt to the specific circumstances of each voting rights case and (2) clarity for lower courts to promote uniform application of federal law. Scholars of election law generally agree that *Purcell* fails to do either of these things.[27]

While scholars and judges alike have proposed alternative tests, no test achieves both goals. This Article argues the proper test is one that has stood the test of time: equitable balancing. Traditionally, courts of equity were extremely flexible, and

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24. *See* Hasen, *supra* note 1, at 437–38. *See generally* Josh Gerstein, *The Murky Legal Concept That Could Swing the Election*, POLITICO (Oct. 5, 2020, 7:58 PM), https://www.politico.com/news/2020/10/05/murky-legal-concept-could-swing-the-election-426604 [https://perma.cc/8NGG-WYXT] ("'It's being brought up in just about every case right now as we are getting closer to the election,' said Rick Hasen, a University of California at Irvine law professor who coined the term 'Purcell principle' in a 2016 law review article. 'But it's not a hard-and-fast-rule, and it's not well developed.'").

25. *See, e.g.*, Davin Rosborough & Tish Gotell Faulks, *Voting Rights Are Center Stage This Supreme Court Term*, ACLU (Oct. 4, 2022), https://www.aclu.org/news/voting-rights/voting-rights-are-center-stage-this-supreme-court-term [https://perma.cc/7MS9-3S5Q] (discussing *Merrill*, the Alabama case concerning Section 2 of the Voting Rights Act).

26. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

27. *See, e.g.*, Hasen, *supra* note 1, at 428; Ruoyun Gao, Note, *Why the* Purcell *Principle Should Be Abolished*, 71 DUKE L.J. 1139, 1146 (2022); Comment, *Article III — Equitable Relief — Election Administration* — Republican National Committee v. Democratic National Committee, 134 HARV. L. REV. 450, 450–51 (2020).

judges used this flexibility to rule justly in as many cases as possible.[28] Still, the Supreme Court today can use traditional equitable tools, like presumptions and burden-shifting, to ensure that this discretion is used appropriately and in a generally uniform manner. Equitable balancing avoids the rigidity of a test without losing the benefits of the uniform administration of justice. Importantly, the injunction is an equitable remedy, and the Supreme Court has held that federal courts are required by law to adhere to traditional principles of equity when they issue equitable relief.[29] This Article argues that a return to equitable balancing is not just legally right—it will also lead to the fairest results.

This Article analyzes the *Purcell* test and the *Merrill* opinions and compares them to equitable balancing. Part I discusses what courts of equity would have traditionally considered when analyzing preliminary injunctions to understand the basis for equitable balancing. Part II discusses the tests that modern federal courts use for preliminary injunctions to understand the context in which *Purcell* exists. Part III discusses the *Purcell* principle and compares it to modern equity jurisprudence, including the test Justice Kavanaugh proposed in *Merrill*. Part IV defines equitable balancing and explain its benefits as compared to the existing framework. Finally, Part V discusses possible drawbacks of equitable balancing and alternative scholarly proposals, ultimately concluding that equitable balancing is the best solution.

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28. *See* Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 524 (2010).

29. Grupo Mexicano de Desarrollo v. All. Bond Fund, 527 U.S. 308, 318–19 (1999) ("The substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction." (quoting CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE 31 (2d ed. 1995))); Atlas Life Ins. Co. v. W. I. S., Inc., 306 U.S. 563, 568 (1939) ("The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." (citing Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1869) (appealing to the "received principles of equity" as the proper test for equitable jurisdiction))).

I. TRADITIONAL PRINCIPLES OF EQUITY AND PRELIMINARY INJUNCTIONS

Though equity has changed significantly from its inception in Renaissance England, the principles that guide it have not.[30] While some might argue that equity could not traditionally address political issues, the locus of sovereignty in the United States makes the analysis different. The Crown had sovereign immunity against suits in equity that it did not want to subject itself to.[31] However, both courts of law and courts of equity would grant relief against the Crown's officers if they exercised their authority incorrectly.[32] Because the sovereign in the United States is the people, through the instrument of the Constitution, courts of equity would not be barred from granting relief against lawmakers, since they are subordinate to the American sovereign.[33] Courts of equity also traditionally understood that if a person had a right, that right entitled her to a remedy to vindicate it.[34] Election law challenges usually appeal to rights, such as those granted in the Voting Rights Act, so courts of equity have a separate, sufficient ground for granting relief.[35]

Two minor concerns must be addressed: state immunity from suit and equity's refusal to address political questions. First, the Eleventh Amendment guarantees state immunity from suit.[36] This is easily dispatched: by ratifying the Constitution (or joining the Union after its passage), each state consented to relinquish its sovereignty to the extent that the federal Constitution

30. *See Grupo Mexicano*, 527 U.S. at 318–19.

31. *See* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1788 (2022).

32. *See* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 STAN. L. REV. 1269, 1281 (2020). The United States Supreme Court later adopted this distinction. *See id.* at 1283–84.

33. *See* JOHN J. PATRICK, UNDERSTANDING DEMOCRACY: A HIP POCKET GUIDE 73–74 (2006); R.G. Hall Jr., *Federal Jurisdiction – The Sovereign Immunity Doctrine – Actions Against Federal Officials – Equitable Relief and Mandamus*, 33 N.C. L. REV. 276, 278 (1955).

34. *See* Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1764 (2017).

35. *See id.*

36. U.S. CONST. amend. XI.

countermands it.[37] Article I, Section 4 of the Constitution grants state legislatures the power to dictate how Congressional elections within their states are conducted.[38] However, it abrogates that sovereignty by allowing Congress to "at any time by Law make or alter such Regulations,"[39] which Congress did when it passed the Voting Rights Act.[40] Furthermore, the Constitution secures certain rights—including the right to equal protection under the law[41]—and it would be thoroughly unjust if equitable relief was unavailable to vindicate the enjoyment of these rights. Citizens would have no means of securing their own rights if federal or state governments decided to abrogate them. In this way, election law questions are not *purely* political questions in the sense that they are solely a matter of a difference of opinion; rather, they may also touch upon well-established Constitutional rights. A court of equity could therefore grant injunctive relief in election law cases according to the ancient principles of equity, because "equity will not suffer a wrong without a remedy."[42]

It is important to understand the traditional purpose of preliminary injunctions to understand how courts of equity traditionally evaluated them. Justice Story, author of the first major

37. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1495 (2019) ("The States, in ratifying the Constitution, . . . surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts."); *see* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 4 (1988) (citing *Ex parte* Young, 209 U.S. 123 (1908) (holding state officials could be sued in federal court for acts that violate the Constitution)).

38. U.S. CONST. art I, § 4, cl. 1.

39. *Id.*

40. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–10314 (formerly designated as 42 U.S.C. §§ 1971, 1973 to 1973bb-1)).

41. U.S. CONST. amend. XIV, §1.

42. JOHN NORTON POMEROY, POMEROY'S EQUITY JURISPRUDENCE § 423 (3d ed. 1905); *see* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 29 (2d ed. 1948) ("[T]he maxim does operate when there is presented to a court of equity a claim to protection against a wrong which is of a nature similar to that which has been recognized and protected . . . . [T]he absence of precedent for the particular relief sought is no bar to action."); *see, e.g.*, Ashby v. White, (1703) 92 Eng. Rep. 126, 134, 136–37 (Q.B.) (Holt, C.J., dissenting) ("[P]laintiff had a right to vote, and that in consequence thereof the law gives him a remedy, if he is obstructed; and this action is the proper remedy. . . . It is a vain thing to imagine, there should be right without a remedy . . . if a statute gives a right, the common law will give remedy to maintain it; and where-ever there is injury, it imports a damage . . . .").

American equity treatise, states that interlocutory injunctions are intended "to preserve [the status quo] until the hearing or further order," and unlike permanent injunctions, are merely provisional and do not create a right.[43] Justice Story further stresses that the grant of a preliminary injunction does not guarantee victory on the merits, but merely expresses the opinion of the court that "there is a substantial question to be tried" and that a case has been made to preserve the status quo.[44] In Justice Story's opinion, "[i]t is enough if [the plaintiff] can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such question can be disposed of."[45]

Meagher, Gummow, and Lehane's Equity, a modern Australian equity treatise, further states that interlocutory injunctions are necessary because "there is often a possibility that, without an interlocutory injunction, the right which the plaintiff seeks to vindicate might be destroyed, or substantially impaired, between the issue of the initiating process and final determination of the proceedings."[46] If there are "countervailing disadvantages" to preserving the status quo, a court may choose not to grant a preliminary injunction.[47] However, "[t]he truth of the matter is that no real principles can be laid down."[48] Still, courts have consistently considered several factors when evaluating preliminary injunctions: the construction of a *prima facie* case

43. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 367–68 (A.E. Randall ed., 3d ed. 1920) (quoting WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS *9–10 (3d ed. 1889)).

44. *Id.*; KERR, *supra* note 43, at *10.

45. STORY, *supra* note 43, at 368.

46. J.D. HEYDON, M.J. LEEMING & P.G. TURNER, MEAGHER, GUMMOW, AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES § 21-340 (5th ed. 2015). This treatise uses the term "interlocutory injunction" rather than "preliminary injunction," and other, earlier treatises will use those terms and "injunction *pendente lite*" interchangeably. For the sake of simplicity, this Article will use only the term "preliminary injunction."

47. *Id.* § 21-345. The authors mention, as examples of grounds for denying preliminary injunctions, the plaintiff having unclean hands and the defendant's case being strong prima facie. *Id.*

48. *Id.*

and whether the plaintiff has presented a "serious question,"[49] the adequacy of damages, the possibility of alternate remedies, the availability of a defense of laches, the strength of the defense, the effect the undertakings that the defendant has offered would have on the problem, and the balance of conveniences and hardships.[50]

The equity treatise also relays a preliminary injunction test created by Lord Diplock in the English House of Lords in 1975: (1) a plaintiff never *needs* to make a prima facie case; (2) a plaintiff does need to prove that there is a serious question to be tried, but this will fail only "in rare cases"; (3) the question of adequacy of damages must be addressed both as to the plaintiff and to the defendant;[51] and (4) if damages would be inadequate, "the balance of convenience should be examined."[52] Lord Diplock wrote that a court should almost never consider the strength of a case when determining whether to grant a preliminary injunction.[53] Although this does not explicitly align with other sources, the gap between Lord Diplock's conception of the prima facie case and earlier sources is small. Diplock argues that preliminary injunctions should be granted or denied based almost exclusively on the balance of hardships, including whether the non-prevailing party in the matter of the injunction could be adequately compensated monetarily for the period the

49. *Id.* §§ 21-350, 21-355. The treatise notes that there is some disagreement among the authorities as to what, precisely, these two considerations demand from the plaintiff. *Id.* § 21-350 ("Nearly every judge who has attempted to define [prima facie case] has done so in somewhat different terms."); *Id.* § 21-355 (regarding the "serious question" doctrine, "[a]t what level must the plaintiff demonstrate a prima facie case? On this there is a great diversity of opinion"). It seems, however, that it would be fair to say that a plaintiff must prove no less than that she has alleged facts which, if uncontroverted, would entitle her to permanent injunctive relief. *See id.*

50. *Id.* § 21-375.

51. *Id.* § 21-355.

52. *Id.* (citing Am. Cyanamid Co. v. Ethicon Ltd., [1975] UHKL 1, [1975] AC 396, 396 (appeal taken from UK)).

53. Am. Cyanamid Co. v. Ethicon Ltd., [1975] UHKL 1, [1975] AC 396, 397, 409 (appeal taken from UK) (holding that considering the relative strength of the parties' cases "should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party" because "[t]he court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case").

injunction is active should they later prevail on the merits.[54] This accords with many traditional equity treatises.[55] Lord Diplock later added that, in a case where the preliminary injunction would effectively decide the case, the court must give plaintiff's ultimate chances of success "as precise consideration as possible."[56] These sources reveal that that courts of equity preferred to lay down guideposts rather than set firm "tests" with required elements.

II. THE CURRENT STATE OF AMERICAN INJUNCTION LAW

The Supreme Court, however, opted to establish tests instead of following the traditional approach. There are two major Supreme Court precedents governing preliminary injunctions: *Winter v. NRDC*[57] and *Nken v. Holder*.[58] In *Winter v. NRDC*, the Supreme Court established a test for preliminary injunctions.[59]

54. *Id.* ("The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies . . . .").

55. *See, e.g.*, 2 CHARLES FISK BEACH, COMMENTARIES ON THE LAW OF INJUNCTIONS § 781 (Albany, H. B. Parsons 1895) ("[T]here being no charge that the defendant is insolvent, and irreparable damage not being probable, . . . an interlocutory injunction is properly denied."); JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 11 (Chicago, Callaghan &. Co. 1879) ("But where the danger threatened is of a nature that can not [sic] easily be remedied in case of a refusal of relief . . . an interlocutory injunction should be allowed . . . ."); 2 HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS § 781 (Albany, Matthew Bender & Co. 1909) ("And it also decided that it should appear, to authorize the granting of a preliminary injunction, that irreparable damages will be sustained if it is not granted."); 1 THOMAS CARL SPELLING, A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 21 (Boston, Little, Brown & Co., 2d ed. 1901) ("As a preliminary injunction is, in its operation, somewhat like judgment and execution before trial, it is only to be resorted to from a pressing necessity, to avoid injurious consequences which cannot be repaired under any standard of compensation.").

56. HEYDON ET AL., *supra* note 46, § 21-355 (citing NWL Ltd. v. Woods [1979] 3 All ER 614, 625–26 (UK)). Though the authors do not mention this, Diplock wrote that when the factors are evenly balanced, "it is a counsel of prudence to take such measures as are calculated to preserve the status quo." *See* Am. Cyanamid Co. v. Ethicon Ltd. [1975] UKHL 1, 5 [1975] AC 396, 408 (UK). Diplock illustrates by saying that if an injunction would prevent the defendant from doing something he had not previously done, then the only harm to him would be a temporary delay in beginning this new course of action. *Id.* However, if the injunction would interrupt something that the defendant had been doing for a while, the harm to him would be much greater. *Id.*

57. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008).

58. Nken v. Holder, 556 U.S. 418 (2009).

59. *Winter*, 555 U.S. at 20.

The Court held that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[60]

The factors of this test comport largely with the traditional principles laid out above, with a few exceptions. The first prong is stronger than Justice Story's "fair question" and Lord Diplock's "serious question."[61] This test requires a likelihood of success on the merits rather than merely submitting a valid pleading.[62] However, *Meagher, Gummow, and Lehane* write that both are common strains of reasoning in preliminary injunction jurisprudence, so this concern is not fatal to the *Winter* test's fidelity to equity.[63] The test also does not mention traditional equitable concerns, like clean hands and laches, that are integral to equity writ large.[64] However, the Supreme Court has

60. *Id.* The Supreme Court called this a "traditional test." *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390 (2006). This is wrong because equity did not have tests per se; rather, courts of equity would grant relief when they believed the totality of the circumstances warranted it. *See infra* Part III; John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U. L. REV. 59, 64 (1961) ("Relief in equity was not viewed as a matter of right but was deemed as subject to the discretion of the court."); MCCLINTOCK, *supra* note 42, § 23 ("[R]elief in chancery was not obtainable as a matter of strict right, but was granted in the [form of] discretion of the chancellor."). However, this equitable discretion was not completely subject to the whims of the chancellor but was constrained by principles set forth by prior chancellors. *See* Garvey, *supra*, at 64 (referring to discretion as "[n]ot a personal discretion of the individual judge . . . but a judicial discretion—one based upon the principles which had activated the Chancellors of the past"); MCCLINTOCK, *supra* note 42, § 23 (saying that discretion was "not as unfettered as Selden [a famous critic of equity] thought"). Equity is not inherently violated when chancellors look to past practice, and indeed, some scholars have noted that the factors in *Winter* align with tradition. *See* Bethany M. Bates, Note, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1522–23 (2011) (citing CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995 & Supp. 2011)).

61. *See supra* Part I.

62. *Winter*, 555 U.S. at 20. In fact, prior to *Winter*, some circuits allowed for the use of Diplock's "serious question" test rather than *Winter*'s "likelihood of success" test. *See* Bates, *supra* note 60, at 1523.

63. HEYDON ET AL., *supra* note 46, § 21-370 ("The former [line of authority] lays down that proof by a plaintiff of an 'arguable case' is sufficient. The latter requires proof of a 'probability' of success.").

64. *See* 1 POMEROY, *supra* note 42, § 418 ("The principle [that equity aids the vigilant] thus used as a practical rule controlling and restricting the award of reliefs is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief , and to prevent

considered laches in preliminary injunction cases since *Winter*,[65] suggesting courts may still consider equitable defenses. The second prong is unusual when compared to other Supreme Court precedent. Although the test for irreparable injury looks similar to "adequate remedy at law,"[66] the Supreme Court explicitly differentiated irreparable injury and inadequate remedy at law in *eBay v. MercExchange*, a case decided two years prior to *Winter*.[67] It is not clear what the Supreme Court meant to do when it separated the two concepts.[68] Nor is it clear that the separation has had any practical effect.[69] However, the Supreme

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the enforcement of stale demands of all kinds, wholly independent of any statutory periods of limitation. It is invoked for this purpose in suits for injunction . . . ."); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 61 (1st ed. 1836) ("They are, also, deemed to have the same consequences; so that one party . . . shall not derive benefit by his laches, or neglect, and the other party . . . shall not suffer thereby."); STORY, *supra* note 43, § 64a ("Equity always discountenances laches."); MCCLINTOCK, *supra* note 42, § 28 ("[E]quity does not impute laches to a party for delay alone, but only for a delay which is unreasonable under the circumstances and which has resulted in harm to the other party.").

65. *See, e.g.*, Benisek v. Lamone, 138 S. Ct 1942, 1944 (2018) ("First, a party requesting a preliminary injunction must generally show reasonable diligence.").

66. *See* POMEROY, *supra* note 42, § 424 ("The right existing at the law, and the remedy being one which the law gives, the remedy as administered by the law must be inadequate, incomplete, or uncertain."); *see also* STORY, *supra* note 43, § 76 ("The concurrent jurisdiction, then, of equity, has its true origin in one of two sources; either the courts of law, although they had general jurisdiction in the matter, could not give adequate, specific, and perfect relief; or, under the actual circumstances of the case, they could not give any relief at all."). Both Story and Pomeroy specifically tie this rule of equity to equity's concurrent jurisdiction, which means that it applies to injunctions. *See id.* § 861 (identifying injunctions as belonging to equity's concurrent jurisdiction).

67. eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

68. Most scholars of equity, including Professor Bray, believe that the concepts of "inadequate remedy at law" and "irreparable injury" are merely different ways of looking at the same idea. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1026–27 (2015).

69. *See id*. at 1027.

> This doctrine is the very one that Laycock had argued was dead, in the sense of 'add[ing] nothing to the other grounds of decision in cases where [they are] invoked.' To be clear, these formulations had never disappeared from what courts said was required before an injunction would issue. Rather, Laycock's argument was that the irreparable injury rule and the idea of legal remedies being inadequate should be discarded and already were in effect irrelevant.

Id. (citations omitted).

Court did in fact separate the two factors,[70] and only one of the two appears in the *Winter* test.[71]

The Supreme Court usually receives *Purcell* cases when an injunction has already been granted and the defendant has requested a stay pending final judgment, as was the case in *Merrill*.[72] In *Nken v. Holder*, the Supreme Court held that the "traditional" four-factor test for issuing an appellate stay is as follows:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[73]

These factors are very similar to the *Winter* factors, as the *Nken* court acknowledged.[74] In this test, the party requesting a stay must show: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay."[75] "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent."[76] However, the Court has also held that it "may not vacate a stay entered by a court of appeals unless that court clearly and 'demonstrably' erred in its application of 'accepted standards.'"[77] There is

70. *See eBay*, 547 U.S. at 391.

71. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

72. *See* Merrill v. Milligan, 142 S. Ct. 879, 879–80 (2022) (Kavanaugh, J., concurring in the grant of stays).

73. Nken v. Holder, 556 U.S. 418, 425–26 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

74. *Id.* at 434 (citing *Winter*, 555 U.S. at 7, 24) ("There is substantial overlap between these [factors] and the factors governing preliminary injunctions.").

75. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010); *see also Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in the grant of stays).

76. *Hollingsworth*, 558 U.S. at 190.

77. Frank v. Walker, 574 U.S. 929, 929 (2014) (citing Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 571 U.S. 1061, 1065 (2013) (Scalia, J., concurring in denial of

evidence to suggest that *Purcell* is intended to supersede the standard test for stays.[78]

Because preliminary injunctions occur in early stages of litigation, *Purcell* cases are generally heard in an emergency posture, including on the Supreme Court's emergency docket.[79] Even at the Supreme Court level, these cases do not proceed to decisions on the merits at the time and are decided quickly.[80] These decisions frequently do not contain much reasoning and are not the product of briefing and argument, unlike the preliminary injunction below.[81] Equity traditionally gave the trial court great discretion in meting out injunctions—perhaps even too much—but the traditional test clearly prefers greater oversight and accountability. But choosing this path requires more guidance from the appellate courts, and *Purcell* is not up to the task.

III. ANALYSIS OF THE *PURCELL* PRINCIPLE

Purcell is an utter failure as a guide to lower courts, as it is not clear what framework the case espouses. *Purcell* could be a standalone test.[82] It could be a preliminary bar to relief, after

application to vacate stay) (quoting W. Airlines, Inc. v. Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers))).

78. *See Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in the grant of stays) (citing Purcell v. Gonzalez, 549 U.S. 1 (2006)). *Purcell* does not explicitly mention a test for stays.

79. *See, e.g.*, Moore v. Harper, 142 S. Ct. 1089, 1089 (2022); *Merrill*, 142 S. Ct. at 879; Republican Party v. Degraffenreid, 141 S. Ct. 732, 732 (2021).

80. *See, e.g.*, Doe v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief) ("Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—except made without full briefing and argument."); Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1348–49 (Mem.) (2022) (Kagan, J., dissenting) ("By nonetheless granting relief, the Court goes astray. It provides a stay pending appeal, and thus signals its view of the merits. . . . That renders the Court's emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—and do so on a short fuse without benefit of full briefing and oral argument.").

81. *See Am. Rivers*, 142 S. Ct. at 1349 (Mem.) (Kagan, J., dissenting); *see also Doe*, 142 S. Ct. at 18 (Barrett, J., concurring).

82. *See* Veasey v. Perry, 574 U.S. 951, 951–52 (2014) (Ginsburg, J., dissenting) (describing the lower court's analysis as solely *Purcell*-focused).

which courts should apply *Winter*.[83] It could be a factor in the balance of equities.[84] Or it could be a factor in the public interest.[85] It could even be just another name for laches.[86] It also is not clear whether *Purcell* is an absolute bar to relief[87] or merely a factor to be weighed.[88] It is also unclear how close to an election it must be for *Purcell* to apply.[89] The Supreme Court has not clarified, and lower courts continue to struggle without a bright-line rule to follow.[90] Still, this does not render the concerns *Purcell* raises invalid.

Without *Purcell*, courts would presumably use the *Winter* test in election law cases. However, under a typical set of *Purcell* facts—that is, a change in electoral law around an election that disparately impacts marginalized groups—the *Winter* test becomes very difficult to apply. The first prong may be relatively straightforward, since a likelihood of success on the merits is no more difficult to determine than in any other case. Similarly, the second prong will almost certainly be satisfied in any such case—damages cannot adequately compensate someone who is

83. *See id.* at 952. (criticizing the lower court for failing to apply *Nken*); *supra* note 81 and accompanying text (stating the *Nken* "factors are very similar to the *Winter* factors, as the *Nken* court acknowledged").

84. *See* Hasen, *supra* note 1, at 456–57.

85. *See* Wilfred U. Codrington, III, Purcell *in Pandemic*, 96 N.Y.U. L. REV. 941, 962–63 (2021).

86. Gao, *supra* note 27, at 1151.

87. *See Veasey*, 574 U.S. at 951 (Ginsburg, J., dissenting) (describing the lower court's interpretation of *Purcell* as an absolute bar); *see also* Harry B. Dodsworth, *The Positive and Negative* Purcell *Principle*, 2022 UTAH L. REV. 1081, 1096–97 (2022) (discussing the different interpretations of the *Purcell* Principle amongst the Supreme Court's liberal and conservative Justices).

88. *See* Rose v. Sec'y, State of Ga., No. 22-12593, 2022 U.S. App. LEXIS 22581, at *4 (11th Cir. August 12, 2022) (per curiam) (saying that *Purcell* could be "overcome").

89. *Compare* Thompson v. Dewine, 959 F.3d 804, 807, 813 (6th Cir. 2020) (five and a half months is too close to an election), *with* Frank v. Walker, 769 F.3d 494, 496–97 (7th Cir. 2014) (three months is not too close to an election). *Compare* Short v. Brown, 893 F.3d 671, 680 (9th Cir. 2018) (five months is too close to an election), *and* Feldman v. Ariz. Sec'y of State's Off., 840 F.3d 1057, 1086 (9th Cir. 2016) (two weeks is too close to an election), *with* Feldman v. Ariz. Sec'y of State's Off., 843 F.3d 366, 368 (9th Cir. 2016) (one week is not too close to an election); Dodsworth, *supra* note 87, at 1096–97.

90. *The Purcell Principle: How Close Is Too Close to an Election?*, DEMOCRACY DOCKET (May 20, 2022), https://www.democracydocket.com/analysis/the-purcell-principle-how-close-is-too-close-to-an-election/ [https://perma.cc/XAQ6-TGUP].

deprived of the right to vote.[91] However, the third and fourth prongs are difficult to discern. Although plaintiff's constitutional right to vote is important in the balance of the equities, the state defendant has the constitutional right to set the time, place, and manner of its own elections.[92] If the plaintiff's challenge ultimately fails, the state will be deprived of its own constitutional right.[93] Judges can easily view a citizen plaintiff as weaker than the government and hence more deserving of the court's help. While this may be true, a court that enjoins a state law is acting anti-democratically. In *Merrill*, for example, the people of Alabama elected representatives to make laws, which includes the function of creating electoral maps.[94] If the plaintiff's claim is not meritorious, but the state is enjoined from using the maps nonetheless, then the people of Alabama were denied their right to self-government through their elected representatives.[95] This is a serious concern that should not be discarded lightly.

The Supreme Court has acknowledged the difficulty in determining whether to grant injunctions when a constitutional right is at risk for both parties. In *Times-Picayune Publishing Corp. v. Schulingkamp*, Justice Powell wrote that the competing constitutional rights to freedom of the press and a fair trial made the question of irreparable harm difficult to analyze:

> The question of the possibility of irreparable harm is particularly troublesome in this case. It presents a fundamental confrontation between the competing values of free press and fair trial, with significant public and private interests balanced on both sides. If the order is

91. The Voting Rights Act provides a private right of action for those who feel that they have been "aggrieved" by a violation thereof. 52 U.S.C. § 20510(b). However, this private right of action allows for plaintiffs to seek either declaratory or injunctive relief (and not damages), which somewhat muddles the question of the adequacy of a remedy at law if an injunction *is* the remedy at law. *See id.* § (b)(2). However, this issue is tangential to the main point here, so I will proceed as though challenges to state election laws will satisfy the second prong as a matter of course.

92. U.S. CONST. art I, § 4, cl. 1.

93. *See id.*

94. *See* Merrill v. Milligan, 142 S. Ct. 879, 888 (2022) (Roberts, C.J., dissenting).

95. *See id.*

> not stayed, the press is subjected to substantial prior restraint with respect to a case of widespread concern in the community. If, on the other hand, the order is stayed and the press fails to act with scrupulous responsibility, the defendants' constitutional right to a fair trial may be seriously endangered.[96]

Justice Powell ultimately granted the stay, in part based on one of the grounds mentioned by *Meagher, Gummow, and Lehane*—the strength of the defense.[97]

The public interest question is also difficult to judge. It may be even more difficult to evaluate than the balance of equities, because when considering the public's interest, the court must send its view farther afield and must consider third party interests,[98] which is difficult in the limited-discovery framework required by the emergency posture. The concerns that the Court raised in *Purcell* (i.e., "voter confusion and consequent incentive to remain away from the polls") add further confusion.[99] When courts apply the *Winter* framework to a *Purcell* fact pattern, they are likely to end up with a deadlock on the third and fourth prongs.[100] If a court wanted to reach the same result as *Purcell* within the *Winter* framework, it would need to find that the balance of equities and the public interest do not favor granting an injunction, because the injunction would lead to an increased probability of confusing voters (and hence discouraging them from voting). But this approach could just as easily result in the opposite result à la *Purcell*, depending on the proclivities of the judge.

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96. Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301, 1305–06 (1974) (Powell, J., in chambers).

97. *Id.* at 1308 (citing the "absence of any showing of an imminent threat to fair trial" as part of the reason to grant the stay); *see* HEYDON ET AL., *supra* note 46, §§ 21-340, 21-345.

98. *See generally* M. Devon Moore, Note, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939 (2019) (identifying "three aspects of a case that consistently implicate the direction and magnitude of this factor: the identity of the parties, the underlying cause of action, and the scope of injunctive relief"). Moore writes that there is considerable disagreement regarding what precisely goes into the public interest factor. *See id.* at 945–50.

99. *See* Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006).

100. *Compare id.* at 2–5, *with* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

These issues would still be present if the court were to reach a decision for a plaintiff on the merits and issue a permanent injunction. Yet it simply cannot be that no court could issue an injunction to prevent a *proven* violation of rights, because that would violate the traditional principle that "equity will not suffer a wrong without a remedy."[101] What if there were a 99% probability that the defendant's conduct violated the plaintiff's rights? What about 99.9%? Resolving all possible doubt in favor of the defendant is incommensurate with the traditional practice of courts of equity, and *Purcell* weakens itself by doing so.

Judges are not without traditional equitable tools to address these concerns. One possible solution would be to lean heavily on the equitable defenses of unclean hands and laches. The unclean hands doctrine states that any party who has behaved inequitably in the dispute that has led to the case at bar must not be granted equitable relief.[102] Similarly, laches is the equitable defense of unreasonable delay that states if a plaintiff unreasonably delays asserting her rights in court, she cannot receive equitable relief.[103] Normally, these considerations only run against the plaintiff, but a judge may be justified in considering unreasonable delay on the part of the defendant in changing election law excessively close to an election.[104]

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101. *See* POMEROY, *supra* note 42 and accompanying text. The Supreme Court acknowledged this principle by reversing a district court denial of a *permanent* injunction in June of a midterm election year, a mere five months before the election. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 409–10 (2006). This decision was closer to an election than the decision in *Merrill*, which was decided in February of a midterm election year. *See* Merrill v. Milligan, 142 S. Ct. 879, 879 (2022).

102. *See* POMEROY, *supra* note 42, § 397 ("[W]henever a party, who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him . . . ."); STORY, *supra* note 64, § 59 ("[T]he Court will never assist a wrong doer, in effectuating his wrongful and illegal purpose.").

103. *See supra* note 64 and accompanying text.

104. *See* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1056 (2021) (discussing one of the traditional issues of law as being "the problem of opportunism, in which an actor takes unforeseen advantage of a rule that works under normal circumstances" and equity's ability to address such "constructive frauds"). The Supreme Court has held that the maxim "he who seeks equity must do equity"—a maxim traditionally associated with the doctrine of unclean hands—applies to the defendant. *See* Brown v. Lake Superior Iron Co., 134 U.S. 530, 535 (1890). Some federal courts have also considered late changes to long-standing election law to be inequitable behavior. *See* Feldman v. Ariz. Sec'y. of State's Off., 843 F.3d 366, 369 (9th Cir. 2016).

Another possible approach is that proposed by Lord Diplock. He anticipated the possibility that a preliminary injunction could functionally decide a case (as seems to be the motivating worry behind *Purcell*).[105] His solution was not to refuse to issue an injunction, but rather to give the plaintiff's chances of success "as precise consideration as possible."[106] Under this test, the fact that the *Merrill* district court devoted forty-one pages to analyzing the plaintiff's likelihood of success could be considered a relevant factor in the Supreme Court's stay analysis.[107] This view has some implicit support from at least three sitting justices.[108]

There remains one final issue with the *Purcell* principle that must be addressed. The *Purcell* principle hardens equity into a lawlike mold, which early courts of equity would never have done.[109] Because the *Purcell* principle prohibits relief against an election law once a certain time threshold has passed, [110] opportunistic legislatures may decide to forestall the passage of new election laws to trigger *Purcell*. Imagine a scenario where a state legislature passes a law drawing its legislative districts in July of an election year. In August, a local newspaper reveals that the House majority leader, in an email dated January 4, told the representatives in his party that "we're delaying the vote on

105. *See supra* notes 51–56 and accompanying text.

106. *See supra* note 56 and accompanying text.

107. *See* Singleton v. Merrill, 582 F. Supp. 3d 924, 959–1000 (N.D. Ala. 2022).

108. *See* Merrill v. Milligan, 142 S. Ct 879, 883–85 (2022) (Kagan, J., dissenting from grant of application for stays) (joined by Justices Breyer and Sotomayor). Justice Thomas takes the opposite approach, arguing that it is inherently illegitimate to preliminarily enjoin election laws—not just because to do so would be disruptive, but because it would be wrong *per se* to enjoin state election laws before final judgment. *See* Perry v. Perez, 565 U.S. 388, 399 (2012) (Thomas, J., concurring) ("Although Texas' new plans are being challenged . . . they have not yet been found to violate any law. Accordingly, Texas' duly enacted redistricting plans should govern the upcoming elections.").

109. *See* Smith, *supra* note 104, at 1096–97 ("As a few voices in the wilderness have noted, the hyperformalism of such an approach [referring to the codification of the equitable doctrines surrounding a good-faith purchaser for value] would have shocked earlier generations of lawyers and judges.").

110. Justice Kavanaugh argues that this is not how *Purcell* is "best understood," but he acknowledges that "[s]ome of this Court's opinions, including *Purcell* itself, could be read to imply" a hard-and-fast rule. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in the grant of stays).

redistricting because we know that no matter what we do, somebody will sue us, and these bleeding-heart judges are bound to side with them." This would *clearly* be inequitable behavior on the part of the legislature, intended solely to circumvent its duties under the Constitution, avoid judicial review, and put the rights of citizens at risk. Under the *Purcell* principle, courts would be powerless to stop such behavior.

Purcell has issues even apart from its failure to be equitable. The Supreme Court has two jobs when it sits in equity: (1) do equity in the case at bar in its role as the ultimate "chancellor" of the federal court system, and (2) declare what the law is in its role as an appellate court.[111] The *Purcell* principle fails to do both. The Supreme Court has not applied *Purcell* consistently across all cases—something that many observers have noticed.[112] Lower courts are confused by *Purcell*, because the circuits cannot agree among themselves—or even within themselves—on which cases ought to be dismissed under *Purcell*.[113] Circuits have even interpreted *Purcell* as merely a consideration in the balance of hardships test.[114] Some lower-court opinions have argued that *Purcell* mandates an absolute ban when an election is too close, while others argue that it simply tells courts to exercise caution.[115] If the Supreme Court hoped to simplify matters with *Purcell*, it failed. To make matters worse, the Supreme Court generally receives *Purcell* cases on the emergency docket.[116] The Court rarely explains emergency docket

111. *See supra* Part I.

112. *See* Hasen, *supra* note 1, at 429; Gao, *supra* note 27; Republican Party v. Degraffenreid, 141 S. Ct. 732, 734 (Thomas, J., dissenting from denial of certiorari).

113. *See supra* note 89 and accompanying text.

114. *See, e.g.*, Ariz. Democratic Party v. Hobbs, 976 F.3d 1081, 1086–87 (9th Cir. 2020) (considering the *Purcell* principle as one facet of the necessary balancing test).

115. *Compare* Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 641 (7th Cir. 2020) ("For many years the Supreme Court has insisted that federal courts not change electoral rules close to an election date."), *with Feldman*, 840 F.3d at 1067 (saying that *Purcell* "*often* counsel[s] restraint" (emphasis added)), *and* People First of Ala. v. Sec'y. of State for Ala., 815 Fed. App'x. 505, 514 (Rosenbaum and Pryor, JJ., concurring) (11th Cir. 2020) ("*Purcell* is not a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists.").

116. Because *Purcell* cases necessarily involve preliminary injunctions, any case in which *Purcell* may be invoked must come to the Supreme Court as an interlocutory appeal (and hence

decisions,[117] and the Supreme Court therefore has had little opportunity to clarify *Purcell*'s doctrinal holding.[118] The only signals the Supreme Court gives lower courts come in the form of the characteristics of the *Purcell* cases themselves or the non-controlling opinions of individual justices.[119] The Supreme Court created a test that is both bad equity and bad guidance to lower courts, and it has very little opportunity to clarify this area of doctrine, because it does not receive these cases in a posture that would allow it to consider the doctrine with ample time and after full briefing.

A. *Justice Kavanaugh's Test*

In *Merrill*, Justice Kavanaugh agreed that *Purcell*'s holding was unclear and that the strongest reading was untenable.[120] He proposed an alternative test, which was better than *Purcell*, but still fatally flawed. Justice Kavanaugh's test specifically addresses undue hardship and laches—both fatal weaknesses in *Purcell*.[121] Still, the prima facie prong that Justice Kavanaugh designed was seriously flawed. Further, his undue-hardship

not on the merits). *See, e.g.*, Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) (explaining that motions for preliminary injunctions are necessarily decided and appealed before reaching the merits of a case). Non-merits decisions are heard on the Court's emergency docket. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3, 15–16 (2015).

117. *See* Baude, *supra* note 116, at 3–4; *e.g.*, Merrill v. Milligan, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of application for stays) (providing an explanation for *Purcell* because of the varying interpretations of the case that arose after the case was decided).

118. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of application for stays).

119. In addition to the *Merrill* concurrence and dissent already mentioned, *see, e.g.*, Veasey v. Perry, 574 U.S. 951 (2014) (Ginsburg, J., dissenting); Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 22–47 (2013) (Thomas, J. dissenting).

120. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of application for stays). Even though Justice Kavanaugh wrote this opinion for himself alone, lower courts have begun to apply it. *See, e.g.*, Democratic Cong. Campaign Comm. v. Kozinski, 614 F. Supp. 3d 20, 59 (S.D.N.Y. 2022) (quoting Justice Kavanaugh's understanding of the *Purcell* principle in his concurrence in Merrill); Goldman v. Youngkin, No. 3:22CV769, 2023 U.S. Dist. LEXIS 11422, at *11–12 (E.D. Va. Jan. 23, 2023) (applying Justice Kavanaugh's test in his *Merrill* concurrence); Balt. Cnty. Branch of the NAACP v. Balt. Cnty., No. 21-cv-03232, 2022 U.S. Dist. LEXIS 39265, at *38 n.8 (D. Md. Feb. 22, 2022) (discussing Justice Kavanaugh's *Merrill* concurrence).

121. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of application for stays).

prong does not consider interests on both sides—only the defense—which is misaligned with traditional practice.[122]

The Supreme Court itself is not certain whether *Purcell* is a blanket ban on late-breaking injunctions or merely a counsel of caution.[123] Justice Kavanaugh acknowledges that *Purcell* "could be read to imply that the [*Purcell*] principle is absolute and that a district court may *never* enjoin a State's election laws in the period close to an election."[124] However, he argues that the "best" reading of *Purcell* is neither as a counsel of caution nor a total bar to injunctive relief, but as a heightened standard reflecting the defendant state's "extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures."[125] Justice Kavanaugh proposes the following test for a plaintiff wishing to overcome *Purcell*: (1) the merits of the case must be "entirely clearcut" in the plaintiff's favor; (2) the plaintiff must show that she would suffer irreparable harm without the injunction; (3) the plaintiff must survive a laches claim; and (4) the requested injunctive relief must be "at least feasible" to implement before the injunction without "significant cost, confusion, or hardship."[126] This proposal hews much closer to traditional principles of equity than did the previous reading of *Purcell*. It turns the *Purcell* principle into a rebuttable presumption, of which equity has traditionally made great use.[127]

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122. *See id.* at 881–82 (opining whether the relief requested by plaintiffs is "feasible without significant cost, confusion, or hardship" without consideration of whether "plaintiff would suffer irreparable harm absent the injunction," as originally presented in Justice Kavanaugh's test).

123. *Compare* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."), *with Veasey*, 574 U.S. at 952 (Ginsburg, J., dissenting) ("*Purcell* held only that courts must take careful account of considerations specific to election cases, . . . not that election cases are exempt from traditional stay standards.").

124. *Merrill*, 142 S. Ct at 881 (Kavanaugh, J., concurring in grant of application for stays).

125. *Id.*

126. *Id.*

127. *See, e.g.*, Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 219–30 (discussing equity's traditional use of presumptions).

There are a few differences between Kavanaugh's test and the *Winter* test. The first prong no longer requires that a plaintiff be *likely* to succeed on the merits, but rather that the merits are "entirely clearcut" in the plaintiff's favor.[128] It is unclear what "entirely clearcut" means, and lower courts could reasonably ascribe different meanings to it. A lower court could interpret it in a Diplockian mode and give "as precise consideration as possible."[129] This method would retain the normal standard of certainty, but based on findings that are as thorough as possible given the posture. However, "entirely clearcut" could also mean that the evidence must not just support the plaintiff's claim, but that the support must be overwhelming.

Justice Kavanaugh seemed to prefer the latter interpretation. He wrote the district court failed to find the evidence was "entirely clearcut" in favor of the plaintiff because the law governing the merits was unclear, and in any case the underlying merits appeared to be close.[130] If the underlying merits being "close" causes the first prong to fail, then Justice Kavanaugh cannot have intended Lord Diplock's test to govern. It is also unclear why *Merrill* is *not* "entirely clearcut" on the merits—the

128. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of application for stays).

129. *See supra* note 56 and accompanying text.

130. *Merrill*, 142 S. Ct. at 881–82 (Kavanaugh, J., concurring in grant of application for stays). Justice Kavanaugh's point about the lack of clarity in the Voting Rights Act is especially vexing because it ignores the traditional test of concurrent jurisdiction—the lack of adequate remedy at law. *See* Ver Brycke v. Ver Brycke, 843 A.2d 758, 773–75 (Md. 2004) (citing Pomeroy's treatise on equitable jurisdiction). A lack of clarity in the law cannot end an equitable inquiry, because if the law is unclear, the plaintiff would not have an adequate remedy at law, which is itself a requisite for an equitable remedy. *See id.* One could argue that injunctions are even *more* important in such cases because they could give states more time to plan for an adverse ruling. The plaintiffs in *Purcell* cases usually request a statutory injunction, as is explicitly allowed in the Voting Rights Act, but this is a foreseeable consequence of establishing a legal right to an equitable remedy—what happens when the law is insufficient? Is a statutory injunction treated identically to an injunction granted due to an inadequate remedy at law? Scholars disagree on this point. *Compare* Michael T. Morley, *The Federal Equity Power*, 58 B.C. L. REV. 217, 221–22 (2018) ("When a federal law provides for an equitable remedy such as an injunction, a court may presume Congress intended to implicitly incorporate and rely upon traditional equitable principles as a matter of statutory interpretation, in the absence of express language to the contrary in the law's text or legislative history."), *with* Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 488 (2010) ("[T]he premise for applying equitable balancing in statutory cases—that equitable balancing is a longstanding factor for deciding whether to issue injunctions—is simply untrue.").

underlying law being unclear cannot justly have any bearing on whether an injunction is warranted.[131] In a solo concurrence written for an emergency docket case, it is not incumbent upon Justice Kavanaugh to be perfectly precise. Still, the question arises: What more would a lower court judge need to do to satisfy Justice Kavanaugh's test? If an opinion with more than a thousand pages of briefing and findings of law based on a "massive factual record"[132] isn't enough, then what is?

Justice Kavanaugh's test also eschews *Winter's* balance-of-equities and public-interest prongs in favor of laches and undue hardship. The balance-of-equities and undue-hardship tests are very similar, if not entirely the same,[133] so what prompted the change? It is interesting that Justice Kavanaugh excised the public-interest prong in favor of laches. This raises two questions: (1) what is the effect of the removal of the public-interest prong, and (2) what should we make of an explicit mention of laches? American courts have long considered the public interest relevant to injunctions,[134] but it is a dangerous tool to use.[135] Many judges tend to allow their policy preferences to color their public interest analyses.[136] The judges are not necessarily venal or avaricious, and they almost certainly *do* "care two straws for . . . axioms or deductions."[137] Nonetheless, different judges have

131. *See* Purcell v. Gonzales, 549 U.S. 1, 4–5 (2006); *Ver Brycke*, 843 A.2d at 772–75.

132. *See Merrill*, 142 S. Ct. at 883 (Kagan, J., dissenting from grant of application for stays).

133. *See* Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in* Boomer v. Atlantic Cement*)*, 4 J. TORT L. 1, 3 (2012) ("The doctrine is commonly called 'undue hardship,' 'balancing the equities,' 'balancing the hardships,' or occasionally, 'balancing of conveniences.'").

134. *See* Bray, *supra* note 68, at 1025–26 (listing historical tests for injunctions).

135. *See* Goldstein, *supra* note 28, at 489 ("Balancing the equities in . . . cases arising out of competing federal policies allows, if not requires, that judges pick which federal policy they consider most important, a task that is inconsistent with separation-of-powers principles.").

136. *See id.*; Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2037–38 (2020) ("Although it may sound heartless to disregard the public interest, this assessment is highly subjective and perhaps the factor most likely to invite a judge to play a purely political role.").

137. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460, 465 (1897).

always had different standards,[138] and the same is true today.[139] Many observers have criticized forum shopping in federal contexts, and not just for election law.[140] Although equity in antiquity—and equity throughout the early United States—had only one chancellor per jurisdiction, equity of today does not.[141] The Supreme Court, as the ultimate federal court of equity, must therefore give lower courts a uniform standard. It is not enough for the Supreme Court to articulate *accurate* factors when creating an equitable test; those factors also need to be *helpful*. The public-interest prong is very difficult to determine in *Purcell* cases, and it might best be thought of as a part of the balance of equities.[142] Some judges might be more likely to think the legislature's needs are in the public interest and some more likely to think the plaintiffs' needs are, and it would be better to get rid of a factor that forces judges to make their biases an explicit part of the analysis.[143] Removing the public interest prong would not prohibit judges from considering it in the balance of equities. Rather, it focuses their analyses on the specific issues before the court, which will streamline the handling of *Purcell* cases.

Justice Kavanaugh's test suffers a fatal flaw in that it considers only those hardships imposed on the defendant. Justice Kavanaugh did not consider, as courts of equity historically did, the possible harm to plaintiffs if a preliminary injunction were

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138. JOHN SELDEN, *Equity*, *in* THE TABLE-TALK OF JOHN SELDEN 43, 43–44 (London, J.M. Dent & Co., 3d ed. 1898) (1689).

139. *See* David W. Lannetti, *The "Test" – Or Lack Thereof – for Issuance of Virginia Temporary Injunctions: The Current Uncertainty and a Recommended Approach Based on Federal Preliminary Injunction Law*, 50 U. RICH. L. REV. 273, 280–81 (2015).

140. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 445 (2017); Ryan Kirk, *A National Court for National Relief: Centralizing Requests for Nationwide Injunctions in the D.C. Circuit*, 88 TENN. L. REV. 515, 532 (2021); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 42 (2019); Matthew Eriksen, Note, *Who, What, and Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 337–38 (2018). Even members of the bench have taken note of this issue. *See, e.g.*, Feds for Med. Freedom v. Biden, 63 F.4th 366, 413 (5th Cir. 2023) (Higginson, J., dissenting from denial of stay).

141. *See* Bray, *supra* note 140, at 420–21; *Judicial Officers*, DEL. CTS. JUD. BRANCH, https://courts.delaware.gov/chancery/judges.aspx [https://perma.cc/B9MK-KBDQ].

142. *See supra* notes 98–100 and accompanying text.

143. *See supra* notes 134–36 and accompanying text.

not granted.[144] The test instead focuses entirely on the defendant's needs.[145] The "irreparable injury" requirement does not address this factor, as irreparable harm traditionally refers not to the seriousness of the harm, but rather the inability of money damages to redress the harm.[146] Courts often treat the *Winter* factors as a "sliding scale," wherein a stronger showing for one factor lessens the burden necessary on the remaining factors.[147] However, by preventing courts from considering harms to the plaintiff, Justice Kavanaugh removes a major vector for nuance that would allow lower courts to consider highly relevant factors such as the number of citizens affected or the cost to the defendant in money or time.[148]

Even worse, Justice Kavanaugh implies that a lack of clarity in the underlying substantive law is sufficient grounds for the denial of relief.[149] This is a dubious claim for two reasons. First, the underlying law may not actually be unclear—Justice Roberts and Justice Kagan both wrote that the district court correctly applied the law.[150] Second, Justice Kavanaugh implies that no preliminary injunctions may be granted when the law is unclear until the Supreme Court clarifies the underlying substantive law.[151] This is completely untethered to the traditional understanding of equity. Equity traditionally could provide

144. *See* Merrill v. Milligan, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of application for stays).

145. *See id*.

146. *See* Sampson v. Murray, 415 U.S. 61, 90 (1974) ("The key word in this consideration is *irreparable*. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." (quoting Va. Petrol. Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958))).

147. Bates, *supra* note 60, at 1522–23.

148. *See, e.g.*, Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *8 (5th Cir. Feb. 17, 2022) ("A plaintiff is entitled to a preliminary injunction if she shows: . . . (3) the threatened injury to the movant outweighs the threatened harm to the party sought to be enjoined").

149. *Merrill*, 142 S. Ct. at 881–82 (Kavanaugh, J., concurring in grant of application for stays) ("As to the merits, . . . the Court's case law in this area is notoriously unclear and confusing.").

150. *See id*. at 882–83 (Roberts, C.J., dissenting from grant of application for stays) (Kagan, J., dissenting from grant of application for stays).

151. *See id.* at 881 (Kavanaugh, J., concurring in grant of application for stays).

relief when there was no adequate remedy at law.[152] If the underlying law is unclear, one could easily imagine that that would mean that there would be no adequate remedy at law. If the lower court were affirmatively *wrong* on the law, that would be one thing, but Justice Kavanaugh does not argue that is what happened. If Justice Kavanaugh means that the Supreme Court should clarify the governing standard such that the challenged injunction would no longer be a valid application of the law, then he has a stronger argument. Justice Roberts points out that the proper way to resolve such a question is not through the emergency docket, but by waiting to resolve the underlying question on the merits and to allow the law as it is currently stated to govern the present elections.[153] Justice Roberts has the stronger claim, as supported by Justice Kagan, who grants there may be good reason to update the legal standard, but that any such update must come "only after full briefing and argument—not based on the scanty review this Court gives matters on its shadow docket."[154]

There is no better way to illustrate why Justice Kavanaugh's approach is foolish than to look at the *Allen* merits decision.[155] The Court ultimately chose, in a 5–4 decision, to stick to existing precedent—in other words, the Court didn't clarify the law at all.[156] The four dissenters from the shadow docket decision again voted that the law was clear and that the district court applied it properly.[157] Justice Kavanaugh was the only justice who voted to stay the injunction at first, who subsequently voted that no changes in the law were necessary.[158] His votes in

152. *See supra* Part I; *Equity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/equity [https://perma.cc/TBY5-8JBG] (Dec. 2022).

153. *See Merrill*, 142 S. Ct. at 883 (Roberts, C.J., dissenting from grant of application for stays).

154. *Id.* (Kagan, J., dissenting from grant of application for stays).

155. *See* Allen v. Milligan, 599 U.S. 1 (2023).

156. *See id.*

157. *See id.* at 19, 36–42 (saying the underlying precedent has been applied "in one . . . case after another" and that the Court will "stay[] the course"); *Merrill*, 142 S. Ct. at 882–83.

158. *See Allen*, 599 U.S. at 42–45 (Kavanaugh, J., concurring in all but Part III-B-1) (majority consisting of Roberts, C.J., Kagan, Jackson, and Kavanaugh, JJ.); *Merrill*, 142 S. Ct. at 879

Merrill show why a law's lack of clarity is not a good reason to stay an injunction. He decided, based on "scanty" emergency docket review, that the law was unclear.[159] After full briefing and argument, he clearly changed his mind.[160] Nonetheless, because of his vote, Alabama had to change its electoral maps *again* even closer to the election than before, incurring (one would assume) greater costs to the electorate.[161]

IV. EQUITABLE BALANCING

Winter is insufficient to address *Purcell*'s concerns. Though Justice Kavanaugh has proposed a better test than *Purcell*, it still falls short. The Court has struggled to apply *Purcell* consistently, which reveals that the *Purcell* framework is untenable.[162] The observation that the *Purcell* principle is bad is not novel.[163] It also is not enough to say that *Purcell* is a poor decision, because courts still need to know what to do in election law cases. What should replace *Purcell*? Professor Hasen suggests the Court should simply apply the tests it laid out in *Winter* and *Nken* alongside the concerns addressed in *Purcell*'s public-interest prong.[164] Another writer goes further, arguing that *Purcell* contributed nothing novel to the *Winter* test and should therefore be overruled.[165] Equitable balancing—the correct path—lies somewhere in between.

The *prima facie* case prong should be Lord Diplock's test—the court must give the evidence "as precise consideration as possible," but at the normal standard of proof. This allows plaintiffs greater access to preliminary relief and clarifies the governing standard to avoid inconsistent application across courts. Courts

(Kavanaugh, J., concurring in grant of application for stays) (Chief Justice Roberts and Justices Kagan, Breyer, and Sotomayor dissented from the grant of applications for stays).

159. *See Merrill*, 142 S. Ct. at 883 (Kavanaugh, J., concurring in grant of application for stays).

160. *See Allen*, 599 U.S. at 28–33.

161. *See id.* at 28–29.

162. *See supra* notes 128–35 and accompanying text.

163. *See* Hasen, *supra* note 1, at 428; Gao, *supra* note 27, at 1140.

164. *See* Hasen, *supra* note 1, at 429.

165. *See* Gao, *supra* note 27, at 1173–74.

should also consider issues of timing and delay—albeit those created by both the plaintiff and the defendant. If the plaintiff delays suit until shortly before an election, as in *Purcell*, this test would still allow courts to deny an injunction. It also allows courts to consider inequitable behavior on the part of the legislature. Equity courts have considered that enjoining a longstanding practice is more disruptive than enjoining a new practice.[166] Allowing courts to continue to draw this distinction will better address *Purcell*'s "voter confusion" concerns.

Most importantly, courts must be allowed to use sliding scales. *Purcell*'s "too close" factor was not applied consistently, because what constitutes being "too close" is context dependent. The trial court in *Merrill* reasonably considered that Alabama showed it could draw new maps quickly, for example.[167] The actual burden that a preliminary injunction would cause varies from state to state and situation to situation, and courts must be allowed the flexibility to acknowledge these differences.

First, the prima facie case prong must be relaxed to Lord Diplock's standard. The plaintiff should only need to show her complaint is not "frivolous or vexatious."[168] Justice Kavanaugh's test, as opposed to the *Winter* standard, acknowledges that different circumstances may require the plaintiff to make a higher or lower showing at the pleadings stage.[169] Increasing the bar for the prima facie case is risky, however. The biggest risk stems from the court's inability to assess the relative strength of the parties' cases at the preliminary injunction stage, and any such decision would be based on incomplete evidence.[170] Courts should treat the prima facie case as a threshold matter and only deny relief at this stage if the plaintiff's complaint is legally insufficient. Trial courts should conduct

166. *See, e.g.*, Oakland Trib., Inc. v. Chron. Publ'g Co., 762 F.2d 1374, 1377 (9th Cir. 1985).

167. Singleton v. Merrill, 582 F. Supp. 3d 924, 1034 (N.D. Ala. 2022).

168. *See, e.g.*, Am. Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 (HL) 407 (appeal taken from Eng.).

169. *See supra* Section III.A.

170. *See Am. Cyanamid*, AC 396 at 406–07.

whatever preliminary discovery they deem necessary to rule fairly on the preliminary injunction. If the court finds, after discovery, that it no longer thinks the plaintiff's case entitles her to relief under the law, then it may decline to issue an injunction.

The next major issues are timing and delay. There are two temporal elements in *Purcell* cases: the proximity of the lawsuit to the next election and the proximity of the filing of the suit to the passage of the law.[171] The doctrine of laches addresses the latter concern. Laches may be pled in one of two circumstances: either the plaintiff's delay prejudiced the defendant,[172] or the delay implies waiver, release, or affirmation.[173] Pomeroy writes that gross negligence by the plaintiff, excessive delay, prejudicial delay, implied acquiescence, and inadequate justification for the delay are all sufficient grounds for laches.[174] Courts must remember the plaintiff's constitutional rights are at stake in *Purcell* cases,[175] and "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'"[176] However, courts should grant a defense of laches for *prejudicial* delay. Time is of the essence in election law cases.[177] In preliminary injunction cases, simple delay "can . . . be fatal."[178] *Meagher, Gummow, and Lehane* explains the importance of laches by asking: "[w]hy should a court grant urgent relief when the

171. *See* Goldman v. Youngkin, No. 3:22CV789 (RCY), 2023 U.S. Dist. LEXIS 11422, at *18 (E.D. Va. Jan. 23, 2023); Merrill v. Milligan, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring).

172. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in the grant of stays) (writing that a plaintiff must establish that she "has not unduly delayed bringing the complaint to court").

173. *See* HEYDON ET AL.,, *supra* note 46, § 38-015, at 1086; *see also* STORY, *supra* note 43, § 529, at 224–25.

174. JOHN NORTON POMEROY, JR., A TREATISE ON EQUITABLE REMEDIES SUPPLEMENTARY TO POMEROY'S EQUITY JURISPRUDENCE § 814, at 1446–47 (1905).

175. *See* Thornburg v. Gingles, 478 U.S. 30, 97 (1986) (O'Conner, J., concurring) (stating that Fourteenth Amendment rights are implicated in Voting Rights Act cases).

176. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937)).

177. *See* Purcell v. Gonzalez, 549 U.S. 1, 5–6 (2006) ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.").

178. HEYDON ET AL., *supra* note 46, § 21–375, at 768.

plaintiff's tardiness in applying for it casts doubt on the reality of the alleged injury?"[179] This question squarely applies the equitable maxim that "equity aids the vigilant, not those who slumber on their rights."[180]

The Supreme Court has written that injunctions of election law run the risk of causing confusion and suppressing voter turnout and that "[a]s an election draws closer, that risk will increase."[181] Clearly, any delay at all in bringing suit would prejudice the state's interest in preventing these harms. The length of delay that should be considered excessive will depend on the circumstances, but in many cases, it will not be clear. For example, the *Merrill* plaintiffs sued eleven days after the redistricting data from the 2020 Census was released and before Alabama adopted its new redistricting plan.[182] Did the plaintiffs jump the gun, or were they simply being vigilant? Courts should balance plaintiffs' need to wait for a case to be ripe to sue with the state's need to have election policies in place in enough time to keep voters informed. Courts should also consider the amount of time remaining before the election at the time the offending law was passed—a month's delay after the passage of the law might be less harmful two years before an election as opposed to three months before the election. From a planner's standpoint, strict application of laches will encourage plaintiffs to act promptly and ensure that courts have as much time as possible to consider their cases. Courts should be flexible when they look to laches, and they should freely request factual showings from plaintiffs justifying why they did not sue immediately, just as courts may require defendants to justify why they waited so long to pass a law.

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179. *Id.*

180. *See* POMEROY, *supra* note 42, § VIII, at 695.

181. *Purcell*, 549 U.S at 4–5.

182. *See* Singleton v. Merrill, 582 F. Supp. 3d 924, 938–39 (N.D. Ala. 2022) ("On September 27, 2021, after the results of the 2020 census were released, the *Singleton* plaintiffs filed a complaint against Secretary Merrill."); Press Release, U.S. Census Bureau, Census Bureau Delivers 2020 Census Redistricting Data in Easier-to-Use Format (Sept. 16, 2021), https://www.census.gov/newsroom/press-releases/2021/2020-census-redistricting-data-easier-to-use-format.html [https://perma.cc/2Z5K-6DED].

In a similar vein, lower courts often interpret *Purcell* as prohibiting injunctions only when the election is "too close."[183] But lower courts do not agree,[184] and the Supreme Court has not clarified the issue.[185] It would be inequitable to create an absolute bar to relief in all situations based purely on election proximity. The lower court in *Milligan* agreed, adopting the plaintiff's argument that applying *Purcell* in the case at bar "would essentially be ruling that 'the redistricting process is above the law.'"[186] Justice Kavanaugh implicitly acknowledges this concern in his *Merrill* concurrence.[187] However, if courts agree that there must be some possibility of relief, how should courts determine when it is appropriate? Justice Kavanaugh's test facially addresses this concern, but it would functionally deny preliminary relief in virtually all redistricting cases.[188] Equity

183. *See, e.g.*, *Singleton*, 582 F. Supp. 3d at 1027–28 (holding that elections must be "imminent" to trigger *Purcell* and that an election is not imminent two months before it).

184. *Compare id., with* Favors v. Cuomo, 881 F. Supp. 2d 356, 371 (E.D.N.Y 2012) (holding that "[i]t is best for candidates and voters to know significantly in advance" of the period for soliciting petitions for nomination who is allowed to run in each district, and that four weeks was insufficient time). The *Singleton* court specifically considered and rejected the *Favors* line of reasoning, even though Alabama's qualifying deadline was a mere four days after the opinion was issued. *See Singleton*, 582 F. Supp. 3d at 935, 1028 (establishing that the deadline in question was January 28).

185. The Court will generally just repeat the *Purcell* principle without elaborating further. *See*, *e.g.*, *Purcell*, 549 U.S. at 5–6 (holding that an election may "proceed without an injunction" because of the "inadequate time to resolve the factual disputes"); Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of application for stays) (stating "state and local election officials need substantial time to plan for elections"; thus, injunctions are inappropriate "in the period close to an election"); Andino v. Middleton, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in the grant of application for stay) ("[F]ederal courts ordinarily should not alter state election rules in the period close to an election."); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam) ("[L]ower federal courts should ordinarily not alter the election rules on the eve of an election.").

186. *Singleton*, 582 F. Supp. 3d at 1028. The district court relays a pithy statement of the issue from closing arguments: "It can't always be too late or too soon." *Id.*

187. *See Merrill*, 142 S. Ct. at 881 ("[T]he *Purcell* principle is probably best understood as a sensible refinement . . . a principle that is not absolute but instead simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures.").

188. Justice Kavanaugh argued that the changes must be possible without incurring "significant cost, confusion, or hardship." *Id.* at 881–82. He did not acknowledge the district court's analysis of the feasibility and good faith of the state legislature in bringing about a situation where redistricting would incur significant cost. *See, e.g.*, *Singleton*, 582 F. Supp. 3d 924 at 1027–29.

considers issues of time in several different fields—aside from laches, courts of equity consider issues of time in cases of appreciation damages.[189] For example, in *In re Estate of Rothko*, a trustee violated his fiduciary duty by selling several paintings that he was obliged to hold.[190] The New York Court of Appeals affirmed a judgment holding the trustee liable for the fair market value of the paintings at the time of judgment.[191] The Court justified the grant of appreciation damages on the grounds that "if there is a duty to retain and the trustee sells there is no policy reason to protect the trustee; he has not simply acted imprudently, he has violated an integral condition of the trust."[192] In this way, courts of equity will consider the passage of time to the defendant's detriment when she has violated a fundamental condition of power, granted for the benefit of another.

Purcell cases present a similar situation. State legislatures have been granted power on behalf of the people, and one could argue that they have affirmative duties to safeguard the rights of their citizens.[193] The Constitution imposes an affirmative duty on states to refrain from interfering with the rights of citizens to be able to vote.[194] The trial court in *Merrill* reasoned similarly when it found the Alabama legislature knew that it may have a duty under the Voting Rights Act, had an opportunity to address it without incurring significant costs, and nonetheless failed to do so:

> Put simply, Defendants have been on notice for a long while that, depending on how any given Section Two

189. *See, e.g.*, *In re* Estate of Rothko, 372 N.E.2d 291, 298 (N.Y. 1977).

190. *Id.* at 297–98. *In re Estate of Rothko* is a seminal case on equitable appreciation damages in the field of trusts. *See, e.g.*, Charles Bryan Baron, *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Involving Trust Property?*, 72 ST. JOHN'S L. REV. 43, 48–50 (1998) (discussing details of the self-dealing in *Rothko* that led to appreciation); *see also* John R. Morken & Ilene S. Cooper, *Usurpation of Trust Opportunities and Self-Dealing*, 83 N.Y. STATE BAR ASS'N J., 34, 38 (2011).

191. *Rothko*, 372 N.E.2d at 298, 300.

192. *Id.* at 297.

193. *See, e.g.*, U.S. CONST. amend. XIV, § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," which resembles fiduciary language).

194. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 80 (1986).

> challenge played out, they could be required to conduct the 2022 congressional elections on the basis of a map that includes two majority-Black districts or districts in which Black voters otherwise have an opportunity to elect a representative of their choice. And the Legislature already has demonstrated just how quickly it can prepare a map.[195]

The incentives the *Merrill* court's rationale creates are appealing. If legislatures know that election law may require them to draw new maps and that they cannot hide behind *Purcell*, they could draft a redistricting map to be used in the alternative.[196] Equity should not shield inequitable behavior, and willful or negligent refusal to mitigate potential harm qualifies as just that kind of behavior.[197] Certainly, it suggests at least another factor to consider in Justice Kavanaugh's proposed "significant cost" prong. Still, it would be unwise to make this factor dispositive because it still may cause undue "voter confusion and consequent incentive to remain away from the polls."[198] If it were simply the defendant's rights at risk if an injunction were granted, we could be less concerned. Voter confusion implicates the rights of voters, as well as the state. Therefore, the middle way is to make the defendant's burden contingent on the amount of time remaining before the election: the more time remaining, the lower the burden—with the lowest possible burden of proof being that established by the *Winter* test. However, the plaintiff may attempt to establish that the legislature knew or should have known that its proposed law would draw a

195. Singleton v. Merrill, 582 F. Supp. 3d. 924, 1029 (N.D. Ala. 2022). The court also noted several factors alleviating prejudice to the Alabama state legislature's interests: "[T]he Legislature enacted the Plan in a matter of days last fall; . . . the Legislature already has access to an experienced cartographer; and the Legislature has not just one or two, but at least eleven illustrative remedial plans to consult, one of which pairs no incumbents." *Id.* at 937, 1034.

196. *See id.* at 1032–38.

197. This framing is imprecise, but I use it for clarity's sake. Courts of equity would not consider themselves to be doing *anything* (e.g., shielding) to the defendant. Rather, they would focus on whether the plaintiff deserves equitable relief. A more precise framing would say that inequitable behavior on the part of the defendant should weigh in the plaintiff's favor in the balance of the equities.

198. *See* Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006).

Voting Rights Act challenge. If successful, the defendant would then have the burden to prove that it would be impossible to implement the requested changes without substantial detriment to the election process.

Post-judgment relief is the final issue to address. The Supreme Court wavers between a *de novo* standard, where the appellate court puts itself in the trial court's shoes for the purposes of evaluating the original prayer for injunction,[199] and a deferential standard, where the enjoined party must itself satisfy a test nearly identical to the preliminary injunction test in order to receive a stay.[200] Which test should be used depends on whether a stay is some new form of relief, logically required by the creation of appellate courts of equity,[201] or simply an injunction in and of itself, enjoining a lower court from enforcing its own injunction.[202] If a stay is indeed a form of an injunction, traditional principles of equity would *require* the appellant to meet the latter standard.[203] Courts in the United Kingdom sometimes use of an abuse-of-discretion standard, unless the trial court has made an error at law.[204]

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199. *See, e.g.*, Trump v. Int'l Refugee Assistance Project, 582 U.S. 571, 580–82 (2017) (granting a stay due to perceived deficiencies in the district court's equitable analysis).

200. *See, e.g.*, Nken v. Holder, 556 U.S. 418, 433–34 (2009) (citations omitted) (quotation marks omitted) (a stay is an "exercise of judicial discretion" that follows a four-part test that has "substantial overlap" with the factors governing preliminary injunctions); Hilton v. Braunskill, 481 U.S. 770, 776 (1987) ("[T]he factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.").

201. *See Nken*, 556 U.S. at 428.

202. *See id.* at 441–42 (Alito, J., dissenting). For further discussion of confusion surrounding the nature of stays and the Supreme Court's muddled application thereof, see Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1944–45 (2022).

203. Some Justices have implied that appellate courts must give some deference to the lower court's findings. *See* Veasey v. Perry, 574 U.S. 951, 951–52 (2014) (Ginsburg, J., dissenting) (stating in a parenthetical that the "Court of Appeals [in *Purcell v. Gonzalez*] erred in failing to accord deference to 'the ruling and findings of the District Court'"); Merrill v. Milligan, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting) (reasoning that the District Court's analysis was a correct application of existing law). However, McClintock writes that American courts around the turn of the century accorded no deference to findings of fact or law on appeal. *See* MCCLINTOCK, *supra* note 42, § 19, at 40.

204. *See* Am. Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 (HL) 409 (appeal taken from Eng.) (stating of an injunction granted by a trial court judge that "an appellate court should be hesitant

A *de novo* standard is simply untenable, however, because it is necessarily worse by the *Purcell* standard. The *Purcell* court held that "[c]ourt 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.*"[205] If appellate courts stay lower-court injunctions every time their own equitable analyses differ, they will issue "conflicting orders" that "result in voter confusion" closer to the election than the lower court.[206] This is not to say that the appellate courts should strictly apply *Purcell* against themselves, as a litigant once argued before the Supreme Court.[207] The Court rightly wrote that it "defies common sense" to allow lower courts to contravene an established test without fear of reversal.[208] Appellate courts should merely acknowledge that the lower court's interference has already occurred, meaning any reversal would carry increased costs.

Another issue arises in *Purcell* cases: the standard of review. It is a well-established principle of appellate jurisprudence that lower courts are to be accorded substantial deference on issues of fact but no deference on issues of law. Cases in equity are discretionary and have historically been accorded great deference on appeal.[209] However, in cases where the Voting Rights Act is implicated, the grounds for granting an injunction come from the law, suggesting that the bifurcation between fact and law may come back into play. The Supreme Court has not

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to overrule his exercise of his discretion, unless they are satisfied that he has gone wrong in law").

205. Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (emphasis added).

206. *Id.*; *see also Merrill*, 142 S. Ct. at 888 (Kagan, J., dissenting) (referring to "[t]he only delay" in the judicial proceedings being the appeal, which "came 'at the request' of the State").

207. *See* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 31 (2020).

208. *Id.*

209. *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496 (2001) ("[W]hen district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise."); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citation omitted) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). *Contra* MCCLINTOCK, *supra* note 42, § 19, at 40 ("[T]he question presented is not whether error was committed by the lower court, but whether the decree rendered was that which should have been rendered in the light of the entire case as disclosed by the record.").

issued an opinion on an emergency-docket *Purcell* case clarifying this issue, so it remains uncertain what the Court's stance may be. Concurrences from individual justices make precious little mention of findings below, if indeed they are mentioned at all.[210]

Justice Kavanaugh's concurrence in *Merrill* illustrates the difficulty in disambiguating fact from law. He writes that "[t]he district court ordered that Alabama's congressional districts be completely redrawn within a few short weeks" as a way of illustrating the harm done by the injunction, and goes on to say that "in any event, the plaintiffs have not established that the changes are feasible without significant cost, confusion, or hardship" without further elaboration.[211] He does not acknowledge the lower court's finding that Alabama would not need to redraw anything, since it had already passed an electoral map that would have complied with the requested relief.[212] Justice Kavanaugh further says that "the underlying merits appear to be close," flatly ignoring the district court's contrary finding.[213] These cases come to appellate courts in a posture not designed for briefing on the merits—all the more reason that appellate courts should not allow themselves to second-guess factual findings in *Purcell* cases.[214] Rather, courts should simply adhere to their established stay analysis as articulated in *Nken*: the defendant would have to prove:

> (1) [that] the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) [that] the applicant will be irreparably injured absent a stay; (3) [that] the stay [would not] substantially injure the other parties interested in the

210. *See, e.g.*, Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) (agreeing with grant of applications for stays).

211. *Id.* at 879, 881–82.

212. *See* Singleton v. Merrill, 582 F. Supp. 3d 924, 1028–29 (N.D. Ala. 2022).

213. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see id.* at 1026.

214. *See Merrill*, 142 S. Ct. at 883 (Kagan, J., dissenting).

> proceeding; and (4) [that a stay lies in] the public interest.[215]

Appellate courts should also consider that they are reviewing lower court judgments at a time closer to the election even than the lower courts themselves were, and they should raise their standard for granting a stay accordingly. This would prohibit courts from creating further harm by substituting their own judgment for that of the court below when the lower court was not clearly wrong.

Aside from comporting with traditional rules of equity, as the law requires,[216] there are other, practical benefits to this approach. First, consider *Purcell*'s "voter confusion" concern. [217] Though made about court orders, it stands to reason that late-breaking legislation would engender similar concerns, especially if it changes a long-standing election procedure. The Ninth Circuit made such an observation in *Feldman v. Arizona Secretary of State's Office*.[218] In distinguishing *Purcell* from the case at bar, the court wrote that "[e]very other election cycle" had allowed what the challenged law banned, and a preliminary injunction prevented the law from "disrupt[ing]" the election.[219] With this, the Ninth Circuit showed that not all injunctions are equally disruptive. Diplock's preliminary injunction test shows that the most critical aspect of a preliminary injunction analysis is the balance of hardships, and anything that prevents courts from considering key factors in that analysis prevents equity from being done properly.[220] Equitable balancing

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215. Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

216. *See* Grupo Mexicano De Desarrollo v. All. Bond Fund, 527 U.S. 308, 318–19 (1999).

217. Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.").

218. *See* Feldman v. Ariz. Sec'y. of State's Off., 843 F.3d 366, 370 (9th Cir. 2016).

219. *Id.* at 369. The idea that some changes should be treated differently under the law has some support. For example, courts evidently do treat restrictive changes to long-standing election law differently than they do permissive changes, in a process that Professor Muller calls "the Democracy Ratchet." *See* Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 452 (2019).

220. *See* Am. Cyanamid Co. v. Ethicon Ltd. [1975] AC 396 (HL) 399, 402–04.

removes those barriers and allows courts the flexibility to achieve equity.

Second, equitable balancing addresses the concern, expressed by several dissents, that the Court does not give enough weight to thorough findings of fact the trial courts develop.[221] Justice Kavanaugh attempts to rebut this idea by pointing out that if thorough work by a trial court was all that was necessary for an injunction to be valid, the Court would almost never be able to step in.[222] While at least one early treatise agrees that equitable decrees do not receive deference on appeal,[223] there are a few reasons the Court's current approach is invalid. To start, intervening precedent requires the Supreme Court to give deferential review to decisions made by courts properly sitting in equity.[224] Additionally, most *Purcell* stays are decided without any explanation whatsoever,[225] and although the Court is under no obligation to explain itself on the emergency docket, doing so would be useful for lower courts to understand how they are being evaluated on appeal.

Yet another benefit of equitable balancing is that it restores discretion to the equitable process. *Purcell* does not allow lower courts much discretion at all.[226] One of the most basic tenets of equity jurisprudence is that equitable relief is discretionary.[227]

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221. *See, e.g.*, Merrill v. Milligan, 142 S. Ct. 879, 883 (2022); Veasey v. Perry, 574 U.S. 951, 951 (2014).

222. *Merrill*, 142 S. Ct. at 882 (Kavanaugh, J., concurring).

223. *See* MCCLINTOCK, *supra* note 42, § 19.

224. *See supra* note 209 and accompanying text.

225. *See, e.g.*, Moore v. Harper, 142 S. Ct. 1089, 1089 (2022) (denying stay application where applicants were asking the Court to require a change in election districts in North Carolina); *Merrill*, 142 S. Ct. at 879 (granting stay application regarding Alabama's election districts); Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 28 (2020) (denying application to vacate stay regarding Wisconsin law requiring absentee voters to return ballots by election day).

226. Although the Supreme Court held that the Ninth Circuit committed reversible error by failing to "give deference to the discretion of the District Court," appellate courts have not always given lower-court rulings deference. Purcell v. Gonzalez, 549 U.S. 1, 5 (2006); *see, e.g.*, League of Women Voters of Fla., Inc. v. Fla. Sec'y of State, 32 F.4th 1363, 1370–71 (2022); Feldman v. Ariz. Sec'y of State's Off., 843 F.3d 366, 369–70 (9th Cir. 2016).

227. *See, e.g.*, John J. Higson, *CIVIL PROCEDURE—Federal Court Jurisdiction Over Interpleader Actions: A Virtual Unflagging Obligation or Inherently Discretional? The Third Circuit Opts for the Discretionary Approach*, 41 VILL. L. REV. 1137, 1167 n.133 (1996) (discussing Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)).

There is no *right* to equitable relief; the chancellor awards it when, in her view, the plaintiff has shown that it is warranted.[228] The Court should accord equitable decisions by lower courts a greater degree of deference for two main reasons. First, because the trial court is simply better equipped to weigh the credibility of witness testimony, which frequently factors into *Purcell* cases, especially when assessing the burden that an injunction would place on a state's legislature and voters.[229] Second, trial courts likely have a greater degree of understanding of local issues that might counsel for or against issuing an injunction. For example, if the state legislature has a history of passing late-breaking changes to election law or has exhibited animus toward certain protected classes in the past, a local court might have a better sense of how much weight to give those factors. Because lower courts are often not allowed this level of discretion under *Purcell*, judicial efficiency has decreased, and the Court has therefore interfered in far more election cases than it otherwise would have.[230] Worst of all, the Court interferes from a posture that does not allow it to decide after "serious and sustained consideration" because it would be "impossible to [do so] 'on a short fuse without benefit of full briefing and oral argument.'"[231] The emergency docket is not well-suited to handle questions of such difficulty and importance, and equitable balancing would decrease its relevance.

Third, and perhaps most compelling, is that the proposed test provides courts with a stronger standard and hence prevents them from making *ad hoc* rulings that conflict with each other. As Professor Hasen and others have observed, judges cannot seem to agree: (1) how much time before an election constitutes

228. *See* MCCLINTOCK, *supra* note 42, § 21.

229. *See, e.g.*, Singleton v. Merrill, 582 F. Supp. 3d 924, 935–36 (N.D. Ala. 2022) ("The court has had the benefit of a seven-day preliminary injunction hearing that . . . included live testimony from seventeen witnesses.").

230. *See e.g.*, Merrill v. Milligan, 142 S. Ct. 879, 888–89 (2022) (Kagan, J., dissenting) ("Today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument.").

231. *Id.* at 887 (Kagan, J., dissenting) (quoting Doe v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring)) (arguing in denial of application for injunctive relief).

an insufficient amount according to *Purcell*,[232] (2) whether the standard of review should be different if the court is asked to grant a stay as opposed to if it is asked to vacate one,[233] and (3) whether *Purcell* is a categorical ban on injunctions once the "too close" line has been crossed or just a warning to be parsimonious in such cases.[234] With such uncertainty, even the most capable judges would struggle to rule consistently. Further, the lack of clarity in this politically charged area of the law opens courts to criticism that they are ruling based on politics and not law.[235] Equitable balancing would allow courts to issue or deny injunctions in the brief time they have. It would also provide a robust metric by which courts can rule more consistently, lower courts can understand appellate decisions, and observers can feel reassured that courts are ruling based on the law.

V. COSTS AND POTENTIAL OBJECTIONS

The changes proposed in this Article are not radical departures from general preliminary injunction law, but they do represent a real change from the Supreme Court's current position on election law injunctions.[236] Unfortunately, equitable balancing entails certain costs. For example, lowering the bar to obtain injunctions would probably increase the volume of election law litigation. However, most changes to election law already result in litigation, so the actual increase in volume would be minimal.[237] Courts could also create guardrails, like rebuttable presumptions or burden shifting, to dissuade frivolous litigation without making meritorious suits impossible.

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232. *See* Gao, *supra* note 27, at 1144.

233. *See* Hasen, *supra* note 1, at 429–33.

234. *Compare Merrill*, 142 S. Ct. at 881 (arguing that it is unclear whether *Purcell* is a categorical ban), *with* Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 30–31 (2020) (implying that *Purcell* is functionally a categorical ban).

235. *See, e.g.*, Hasen, *supra* note 1, at 457 (arguing that the "conservative" Supreme Court in 2014 "has displayed routine skepticism and hostility toward race-based claims" and implying that the Court may have allowed its views on the merits to influence a rigid application of *Purcell*).

236. *See supra* Parts II, IV (providing an overview of the current state of American injunction law and equitable balancing).

237. *See* Muller, *supra* note 219, at 499.

Another possible solution to the *Purcell* problem involves using the *Winter* standard but allowing *Purcell* as an affirmative defense. Though this solution is reasonable, it still does not provide courts with the flexibility that they need (e.g., sliding scales and a lower *prima facie* case burden) because it uses a rigid four-part test instead.[238] It also places the focus almost exclusively on issues of fact, which would overcorrect from *Purcell* and likely increase forum shopping.[239]

There is another potential solution: get rid of *Purcell* and use *Winter* alone.[240] One author touts this solution for its increased predictability,[241] but this is its greatest flaw. If equity becomes too predictable, it can no longer effectively do justice, because canny actors will simply plan around it like they do with the law.[242] *Purcell*'s great weakness is that it is unclear, but that is a problem of execution, not of conception—that is, the concerns *Purcell* raises are legitimate even if *Purcell* itself does not work. It is possible to address these concerns in a better, clearer way that still allows courts to have needed flexibility, and equitable balancing does just that.

The proposal explicated within this Article increases election law litigation. It is difficult to imagine *more* litigation, since most changes to state election laws already result in litigation,[243] but this proposal does not mitigate the issue. Even if it is impossible or impractical to reduce the number of lawsuits, a rule change could still serve the good of judicial economy if it were to decrease the time judges spent on each case.

One way to combat increased litigation could be something close to Justice Kavanaugh's test: a rebuttable presumption that courts should not enjoin election laws near an election. The key

238. *See supra* Part II.

239. *See generally* Cass, *supra* note 161, at 30, 42 (emphasizing how, for example, allowing district court judges to issue nationwide injunctions incentivizes forum shopping).

240. *See* Gao, *supra* note 27, at 1154.

241. *See id.* at 1160–62.

242. *Cf.* Cass, *supra* note 161, at 45–46 (arguing that predictability is "essential to law's legitimacy" as it "assures that laws apply the same way to everyone and that the laws are applied the same way").

243. *See* Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561, 562 (2021).

difference is that this approach would focus on undue hardship rather than Justice Kavanaugh's heightened standard of proof. The plaintiff would be required to prove that a preliminary injunction would not be overly prejudicial to the running of the state's elections given the amount of time remaining until the next one. The major benefit to this approach is that it is less rigid than *Purcell* but clearer than standard equitable balancing. It allows plaintiffs a path to relief while narrowing the appellate focus to the actual harm that *Purcell* sought to avoid.[244] Because it is a fact-intensive inquiry, it makes it harder for appellate courts to reverse.[245] This would limit their ability to second-guess the factfinder and would speed up the litigation process. A major drawback, however, is the trial court may end up with too much power, which would increase forum shopping and splits between and within circuits. There are over 670 district-level judges in the federal judiciary,[246] and a rule allowing each of them substantial deference might exacerbate the problem of judicial economy. The Supreme Court generally prefers to have a uniform interpretation of federal law across all jurisdictions,[247] and reviewing only on an "abuse of discretion" standard would make it much harder to do so.[248] That Voting Rights Act cases are heard before a three-judge panel in each district court alleviates this concern, but it does not solve it.[249]

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244. *See* Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006).

245. *See, e.g.*, Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) ("This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.").

246. *Introduction to the Federal Court System*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/federal-courts [https://perma.cc/YWA3-NN9F].

247. *See, e.g.*, Robinson v. Dep't of Educ., 140 S. Ct. 1440, 1442 (2020) (Thomas, J., dissenting) (reasoning that certiorari should have been granted to remedy the circuit split); CNH Indus. N.V. v. Reese, 138 S. Ct. 761, 765 (2018) (resolving conflict between Sixth Circuit's interpretation and Supreme Court precedent).

248. *See* Adam Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 27–28, 27 n.155 (2020).

249. *See* 52 U.S.C. § 10101(g); *see also* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 89–90, 89 n.69 (1996) (explaining that the drafters of the Voting Rights Act may have designed the three-judge panels to review cases brought under the act to encourage eventual review by the Supreme Court).

Another possible solution would use the *Winter* standard but allow defendants to access the heightened *Purcell* standard as an affirmative defense. This test would emphasize the equitable defense of undue hardship.[250] Traditionally, undue hardship allows the defendant to defeat a claim in equity on the grounds that granting the requested relief would place an inequitable burden upon the defendant.[251] A major benefit of this approach is that a defendant who has intentionally behaved inequitably will be denied the benefit of an undue-hardship defense, which is one of the major deficiencies of *Purcell*.[252] This approach still comports with traditional principles of equity and is also similar to the modern approach.[253] Because an explicit constitutional right is implicated on both sides of the equation, the balance of hardships will necessarily turn on questions of inconvenience, cost, and confusion. In *Purcell* cases, the defendant is likely to have better access to information regarding these factors than the plaintiff does.[254] Placing the burden of proof on the defendant makes it more likely that relevant information comes before the court in a timely manner—an especially important consideration in eleventh-hour election law cases. Shifting the burden to the defendant would not mean that the presumption is in favor of issuing an injunction. The plaintiff still bears the burden of convincing the court that equity otherwise demands that the injunction be issued.[255] This approach would simply acknowledge the reality that the plaintiff in election law cases is rarely well-positioned to prove where the balance of hardships falls, and equity would not be done if defendants were able to avoid it by dragging their feet.

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250. For a discussion of the undue hardship defense, *see* Laycock, *supra* note 133, at 3.

251. *See id.* at 1 ("[I]f the injunction would impose hardship greatly disproportionate to the benefit to plaintiff then the injunction may be denied and plaintiff remitted to a compensatory remedy, usually damages.").

252. *Id.* at 3–4 (citing Whitlock v. Hilander Foods, 720 N.E.2d 302 (Ill. App. Ct. 1999)).

253. *See id.* at 3 (conflating "undue hardship" and "balance of equities" as essentially the same concept).

254. Defendants in these types of cases are states themselves, vested with the power to dictate how elections are conducted. U.S. CONST. art. I, § 4, cl. 1.

255. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

A final possible alternative would be to jettison *Purcell* entirely, returning instead to the *Winter* standard.[256] One author argues that *Purcell* is too ambiguous and that *Purcell* considerations would be addressed in the balance of the equities.[257] This author also argues that a return to the *Winter* standard would provide clearer guidance to courts and would avoid arbitrary outcomes.[258] However, this criticism is misconceived for two reasons. First, what courts are doing in *Purcell* cases is *equity*. Equity is meant to correct, not to provide guidance.[259] McClintock writes that equity originated as "the king's prerogative of grace to administer justice between his subjects."[260] Equity is a meta-law, and one of its most important functions is the ability to punish opportunistic behavior taken to exploit an otherwise reasonable rule.[261] If equity becomes too predictable, it can no longer serve this function. This is one of *Purcell*'s great failings.[262] And the *Winter* standard has its own weaknesses; for example, it does not mention equitable considerations like the strength of the defense or laches.[263] Though one author concludes that *Purcell* cases should be returned to equity, she argues that the flexibility of *Winter* is not a concern.[264] She argues that the flexibility of *Winter* will not be arbitrary because courts will "consider and weigh *each* equitable factor."[265] She is right, but what she has described is equitable balancing, which is inherently hard to predict. While it is true that *Purcell* expresses a concern for "clear guidance" being given to the states,[266] the courts should not allow that factor to outweigh equity's need for flexibility.

256. *See* Gao, *supra* note 27, at 1160–70.
257. *Id.* at 1154–65 (discussing the reasons that *Purcell* is unworkable).
258. *Id.* at 1169–70.
259. *See* Smith, *supra* note 104, at 1056.
260. MCCLINTOCK, *supra* note 42, § 22.
261. *See* Smith, *supra* note 104, at 1056.
262. *See supra* Part III.
263. *See supra* Part II.
264. *See* Gao, *supra* note 27, at 1169–70.
265. *Id.*
266. Purcell v. Gonzalez, 549 U.S. 1, 5 (2006).

Ironically, though *Purcell* is concerned about providing clear guidance, it has caused more confusion than before.[267] Its critics are right to criticize *Purcell* for its inefficiency, but there may be something in *Purcell* worth preserving. The Supreme Court has two roles when it hears an appeal in equity: it must do equity as the highest chancellor in the land, but it must also provide guidance to the lower chancellors for the sake of judicial economy. These two goals are in tension; the more guidance the Court gives, the less flexibility it has.[268] Though decreased flexibility is unfortunate, it is a necessary evil. The Supreme Court cannot exercise its power over every single election law case without forcing significant costs in both money and time onto the litigants. The Court, for the sake of judicial economy, must give up some flexibility to maintain an orderly justice system.[269] Simply because *Purcell* was poorly executed does not mean it was entirely wrong. Therefore, *Purcell* should survive not in its current strong form, but rather in an advisory form as a guide to lower courts.

CONCLUSION

Election laws present one of the most difficult situations that a court of equity could ever have to address. The right to vote is fundamental to democracy, and various jurisdictions within the United States have long and sordid histories of attempting to abrogate this right.[270] Yet it is also fundamental that states

267. *See* Gao, *supra* note 27, at 1165–66.

268. *See* Brooks M. Chupp, Note, *"A Sword in the Bed": Bringing an End to the Fusion of Law and Equity*, 98 NOTRE DAME L. REV. 465, 486 (2022). In the colonial era and the early days of the United States, most states had only one court of equity for the entire jurisdiction, preventing the need for signposting. *Id.* at 473–75 nn.47–48.

269. David A. Super, *Against Flexibility*, 96 CORNELL L. REV., 1375, 1411–12 (2011). Professors Gergen, Golden, and Smith argue that equity does not need to choose between the two and could instead use a system of rebuttable presumptions and safety valves. This would allow equity to maintain its flexibility while still allowing it to signal important factors for equitable consideration. *See* Gergen et al., *supra* note 145, at 242–43, 249.

270. *See, e.g.*, Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 95–96 (2009) (describing "Bloody Sunday," which took place in Selma, Alabama after peaceful protest for voting rights was met with police brutality).

have sovereignty within certain spheres, including election law.[271] It is a delicate situation that calls for delicate handling. Courts of equity are uniquely positioned to address such cases, drawing on centuries of accumulated wisdom dating back to well before the founding of the nation.

Congress intentionally directed election law litigation to equity.[272] But in *Purcell*, the Supreme Court choked off equity in election cases by creating a complete bar to relief whenever elections were too close.[273] This created a situation in which people were denied their constitutional rights because it was "always . . . too late or too soon" to sue.[274] The *Purcell* principle is so unworkable that even the Supreme Court has not been able to apply it consistently.[275]

It would be impossible to lay down a rule that avoids injury in every single case. But then, that is the beauty of equity—it uses standards and guideposts to grant relief *ex aequo et bono* in each case according to its specific circumstances.[276] By ignoring the traditional principles of equity in favor of a fearful rule that elevates judicial restraint above all else, the Supreme Court has denied litigants the chance to vindicate their rights. A far better standard would be one that empowers lower courts to decide according to the facts of each case, providing guidance on critical factors that are likely to arise, and creating a system in which lower courts may feel comfortable granting relief when they feel that it is warranted.

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271. *See* U.S. CONST. art. I, § 4, cl. 1.

272. *See* 52 U.S.C. § 20510(a)–(b).

273. *See* Purcell v. Gonzalez, 549 U.S. 1, 5–6 (2006).

274. Singleton v. Merrill, 582 F. Supp. 3d 924, 1028 (N.D. Ala. 2022).

275. *See* Hasen, *supra* note 1, at 427–28.

276. *See* STORY, *supra* note 51, at 1–2. "*[E]x aequo et bono* holds that adjudicators should decide disputes according to that which is 'fair' and in 'good conscience.'" Leon Trakman, Ex Aequo et Bono: *Demystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621, 621 (2008).