Utah Law Review

Volume 2022 | Number 5 Article 5

11-2022

The Positive and Negative Purcell Principle

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THE POSITIVE AND NEGATIVE *PURCELL* PRINCIPLE

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Abstract

The Purcell *Principle—the idea that courts should think twice about changing the rules before elections to avoid confusing voters—is sorely misunderstood. Despite deriving from a three-page opinion, the* Purcell *Principle has morphed into one of the Supreme Court's most powerful election-law doctrines. By and large, the Court has interpreted the principle as a bright-line rule barring any judicial intervention close to elections and has overwhelmingly used the principle to uphold voting restrictions. That's a problem because the* Purcell *Principle is not a bright-line rule. And it's certainly not one that rubber stamps voting restrictions. To make matters worse, we know little about why the Court wields the principle in this way because it has been developed on the Court's shadow docket. Lower courts are thus left with almost no guidance on when the* Purcell *Principle applies—when is a late change likely to cause confusion, how late is too late, and what considerations could outweigh the principle?*

This Article adds structure to the Purcell *Principle. Election-related court orders can be sorted into two categories: positive and negative. "Positive" orders add voting restrictions, while "negative" orders remove voting restrictions. Each category leads to different types of confusion. Positive orders produce underinclusive voter behavior—think bringing less identification to the polls than necessary—which risks disenfranchisement. Negative orders, on the other hand, lead to overinclusive voter behavior—think bringing more identification than necessary—which tends not to prevent people from voting. That matters because* Purcell*'s text and long-forgotten predecessor cases show that the operative inquiry in a Purcell case is whether a court's order will chill voting. If a late rule change will not confuse voters in a way that stops them from voting,* Purcell *is no reason to halt that change. This Article argues that to safeguard the* Purcell *Principle's integrity, courts ought to adopt a "presumption of no confusion": presume negative orders do not confuse voters in a way that disenfranchises those voters unless evidence suggests otherwise. In doing so, this Article reimagines* Purcell *in the way most consistent with common sense,* Purcell *itself, and* Purcell*'s roots.*

 J.D., Northwestern Pritzker School of Law, 2021; B.A., University of Georgia, 2017. I am sincerely grateful to Professor Michael S. Kang for his feedback and encouragement. Many thanks also to Professor Zachary D. Clopton, Walter Garcia, and Joseph Mantegani.

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INTRODUCTION

In the little-known 2006 case of *Purcell v. Gonzalez*,[1] the Supreme Court established the "*Purcell* Principle": the idea that courts should think twice before changing election rules close to an election.[2] That idea rings true. After all, late changes might confuse voters and keep them away from the polls. But looks can be deceiving. Today, the *Purcell* Principle is one of the Court's most controversial election-law doctrines because it often does the very thing it sought to protect against—prevent people from voting. We need look no further than 2020, when the

[1] 549 U.S. 1 (2006).

[2] *See generally* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016) (coining the term "*Purcell* Principle").

principle threatened to sway the Presidential election, to understand its force.[3] Voters in swing states like Wisconsin and Florida saw the Supreme Court drastically restrict election procedures weeks before the election—all because of the *Purcell* Principle.[4] And after the Court doubled down on its interpretation of the principle in the last two years,[5] *Purcell* is not going away. For better or for worse, the *Purcell* Principle is the skeleton key to future election litigation.

So, what exactly is it? The *Purcell* Principle arises after a litigant moves for an injunction.[6] Typically, voters challenge state voting restrictions, such as voter identification requirements or mail-in ballot deadlines.[7] But because litigation takes a while or because the law itself is changed close to the election, courts often cannot hear a full case on the merits before the election. So, plaintiffs first seek a preliminary injunction to prevent the state from enforcing the law in the upcoming election.[8] When those plaintiffs prevail, courts sometimes need to craft new rules to take the place of the enjoined rules. For example, a court enjoining a voter identification requirement might alternatively allow voters to verify their identity through signature matching.

The *Purcell* Principle tells courts to be careful when considering whether to grant these injunctions because late rule changes might confuse voters and keep them from voting.[9] That message is rhetorically powerful: late changes could of course confuse voters and election officials, leading to people not knowing how, when, or where to vote. If a court changed the locations of polling places just days before the election, for instance, many would not know where to vote. But somewhere along the line, *Purcell*'s message became scrambled. What was once a

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[3] *See* Ariane de Vogue, *The Legal Doctrine that Could Sway the Election*, CNN (Oct. 21, 2020, 8:23 AM), https://www.cnn.com/2020/10/21/politics/purcell-election-supreme-court/index.html [https://perma.cc/YTR5-5QUJ]; Josh Gerstein, *The Murky Legal Concept that Could Swing the Election,* POLITICO (Oct. 5, 2020, 07:58 PM), https://www.politico.com/news/2020/10/05/murky-legal-concept-could-swing-the-election-426604 [https://perma.cc/E3FF-ZYNQ].

[4] *See, e.g.*, Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam) (staying an order that extended Wisconsin's primary election mail-in ballot deadline); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020) (mem.) (refusing to vacate a stay on an order that extended Wisconsin's general election mail-in ballot deadline); Raysor v. DeSantis, 140 S. Ct. 2600 (2020) (refusing to vacate a stay on an order that allowed those with prior felony convictions to vote even if they did not pay all court fees).

[5] *See infra* Part II.C (describing the 2020 election cases).

[6] *See infra* Part I.A (describing the preliminary and permanent injunction contexts in which *Purcell* arises).

[7] *See infra* Part I.A (describing the litigation contexts in which *Purcell* arises).

[8] *See infra* Part I.B (describing *Purcell*).

[9] *See* 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.").

cautionary tale that late judicial intervention *might* cause confusion that *might* disenfranchise voters became a bright-line rule that late intervention *will* cause confusion that *will* disenfranchise voters. As this Article shows, the latter simply isn't true.

What's more, the doctrine has been developed in the dark, so we don't know its contours.[10] *Purcell* Principle cases arise on the "shadow docket," the Court's non-merits docket used for denials of certiorari, summary dispositions, and emergency orders.[11] Unlike cases on the merits docket, shadow docket cases are not fully briefed or orally argued.[12] Worse, orders often contain only the judgment with no explanation or indication of how the Justices voted, leaving us to wonder *why* the Court reached a particular result and *who* voted for it.[13] This is all to say that we know the Supreme Court cautions against late judicial intervention in elections, but the rest is "guess work."[14] We do not know how close to the election an intervention must be to trigger *Purcell*, what types of changes are most dangerous, or if some circumstances justify a late intervention and trump the *Purcell* Principle.[15]

In the 2020 election cycle, the *Purcell* Principle garnered considerable attention because courts determined that some state election rules were unlawful during a

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[10] *See* Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 644 (7th Cir. 2020) (Rovner, J., dissenting) ("[T]he Supreme Court has evinced a pronounced skepticism of judicial intervention in the weeks prior to an election, but has put little meat on the bones of what has become known as the *Purcell* doctrine." (citation omitted)).

[11] *See generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) (coining the term). For proposed reforms to shadow docket procedures, see *infra* Part IV.C.

[12] *See* Baude, *supra* note 11, at 19; Steve Leben, *Getting It Right Isn't Enough: The Appellate Court's Role in Procedural Justice*, 69 U. KAN. L. REV. 13, 42 (2020) ("The shadow docket is the Court's version of motion practice and summary decisions that don't get full briefing or oral argument."). Further unlike merits cases, non-merits cases often have not been reviewed on the merits by courts below, leaving the Supreme Court without the benefit of lower Court opinions.

[13] *See id.* As Justice Ginsburg put it, "[w]hen a stay is denied, it doesn't mean we are in fact unanimous." Mark Sherman, *Supreme Court Justices Silent over Execution Drug Secrecy*, DAILY HAMPSHIRE GAZETTE (Aug. 12, 2014), https://www.gazettenet.com/Archives/2014/08/suplethaldrugs-hg-080414 [https://perma.cc/DJ45-SLQ8].

[14] *See* Richard L. Hasen, *Did the Supreme Court Kill the 'Purcell Principle' for Election Litigation? Maybe, Maybe Not*, ELECTION L. BLOG (Feb. 20, 2016, 1:26 PM), https://electionlawblog.org/?p=80165 [https://perma.cc/R6QG-NCLP].

[15] *See Bostelmann*, 977 F.3d at 644 ("Perhaps we can say . . . that *Purcell* . . . establish[es] a presumption against judicial intervention close in time to an election. But how near? As to what types of changes? Overcome by what showing? These and other questions remain unanswered." (citation omitted)).

pandemic.[16] For example, a district court in Wisconsin extended the mail-in ballot deadline when postal delays meant some voters would not even receive their ballots before the deadline to send them in.[17] But the *Purcell* Principle is not relevant only in a pandemic. In fact, it has had an increasing effect on our elections since 2006 and will continue to do so.[18] Election litigation is on the rise,[19] voting restrictions are becoming increasingly contested partisan issues,[20] and unsubstantiated claims of voter fraud have taken hold.[21] And after a wave of state legislation further restricted voting following the 2020 election, largely on the back of these voter fraud claims, election litigation is unlikely to go away.[22]

Although there has been little scholarship on *Purcell*, the doctrine is increasingly drawing attention from academics as well. One scholar called for the outright abolition of the principle.[23] Others still believe the doctrine can be

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[16] *See* League of Women Voters of Fla., Inc. v. Fla. Sec'y of State, 32 F.4th 1363, 1374 (11th Cir. 2022) (staying an injunction of a new Florida election law); *see also COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://web.mit.edu/healthyelections/www/election-litigation-tracker.html [https://perma.cc/3G55-JY5A] (last visited Feb. 11, 2021) (finding 628 election law cases, in 436 case families, related to the COVID-19 pandemic).

[17] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam) (staying an injunction extending Wisconsin's primary election mail-in ballot deadline); *see also* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28 (2020) (mem.) (refusing to vacate a stay on an injunction extending Wisconsin's general election mail-in ballot deadline).

[18] *See infra* Part II (describing the case law).

[19] RICHARD L. HASEN, EXAMPLES AND EXPLANATIONS: LEGISLATION, STATUTORY INTERPRETATION, AND ELECTION LAW 304 (Erwin Chemerinsky et al. eds., 2014) (showing that election litigation has undergone more than a twofold increase in the post-2000 period compared to the pre-2000 period). This is in part because the Court in *Shelby County v. Holder* struck down Section 5 of the Voting Rights Act's preclearance requirement, which ex-ante prevented states from enacting many of the provisions now being challenged in ex-post litigation. 570 U.S. 529, 547 (2013); *see also* Hasen, *supra* note 2, at 445.

[20] *See* Hasen, *supra* note 2, at 445 (describing the "Voting Wars," in which "Republican state legislatures pass laws which have made it more difficult to register and vote and Democratic state legislatures pass laws which have made it easier to vote.").

[21] *Id.*

[22] *See* BRENNAN CENTER FOR JUSTICE, *Voting Laws Roundup: May 2021,* https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021 [https://perma.cc/8DQL-B9K2] (last visited July 17, 2022) (finding that legislators had introduced at least 389 bills to restrict voting in 48 states for the 2021 legislative sessions, as of May 14, 2021). The Brennan Center also found at least 880 bills to expand access to voting were in circulation during that same time. *Id.* These pieces of legislation will likely lead to an increase in election litigation.

[23] *See* Ruoyun Gao, Note, *Why the* Purcell *Principle Should Be Abolished*, 71 DUKE L.J. 1139, 1145 (2022).

salvaged.[24] Professor Hasen, who first charted this area and coined the term "*Purcell* Principle,"[25] argued that—no matter how the Court is treating it—*Purcell* is not a bright-line rule barring any intervention close to elections but merely one consideration in the factor-balancing analysis courts engage in.[26] More recently, Professor Stephanopoulos proposed greater structure through five factors courts should consider in determining whether judicial intervention is proper.[27] But none have engaged in a full-fledged excavation of the *Purcell* Principle to determine what it should stand for in light of *Purcell* itself, its doctrinal predecessors, and its effect on today's elections. This Article fills that void. The existing scholarship is correct: courts should consider not just *when* an injunction will occur but also *whether* that injunction is likely to cause confusion. This Article builds on that work by providing the first framework for judging whether an injunction in an emergency election case is likely to cause confusion.

This Article proceeds as follows, making two central contributions: one descriptive and one normative. Part I details the contexts in which the *Purcell* Principle arises. It describes the tests courts apply when considering preliminary and permanent injunctions and when reviewing those injunctions on appeal. It then describes the *Purcell v. Gonzalez* opinion itself. Part II examines the case law to identify how the Supreme Court understands the *Purcell* Principle. It zeroes in on what motivates each Justice and the emerging split between the Court's Democratic and Republican appointees. Part III, the Article's main descriptive contribution, first identifies that the Supreme Court engages in an unspoken "step zero" in its *Purcell* analysis—which attempts to identify a status quo of voting procedures and then asks whether the injunction deviated from that status quo. It concludes such an analysis is inconsistent with *Purcell* because it distorts, rather than clarifies, *Purcell*'s key inquiry. Part III next proposes a framework for taxonomizing injunctions in election cases into two categories: positive and negative. Positive orders add restrictions on

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[24] A few more scholars have discussed *Purcell* incident to other issues. *See, e.g.*, Michael T. Morely, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179 (2020); Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065 (2007); David Gans, *The Roberts Court, The Shadow Docket, and the Unraveling of Voting Rights Remedies*, AM. CONST. SOC'Y (2020).

[25] *See generally* Hasen, *supra* note 2.

[26] *Id.; see also* Samuel D. Gilleran, Comment, Purcell v. Gonzales*, Principle and Problem—Native American Voting Rights in the 2018 North Dakota Elections*, 55 WAKE FOREST L. REV. 445, 449–454 (2020) (pointing out that the Court has not defined how close to an election is too close to intervene or how *Purcell* interacts with the injunctive relief factors).

[27] *See generally* Nicholas Stephanopoulos, *Freeing* Purcell *from the Shadows*, TAKE CARE BLOG (Sept. 27, 2020), https://takecareblog.com/blog/freeing-purcell-from-the-shadows [https://perma.cc/2CC4-AB86] (proposing that courts consider "(1) when a court's remedy will cause little voter confusion; (2) when a court's remedy will cause little administrator error; (3) when, if a court fails to intercede, significant disenfranchisement will ensue; (4) when plaintiffs have diligently pursued their claim; and (5) when an election is further rather than closer based on Congress's judgments about election proximity").

voting, while negative orders remove restrictions. It concludes that, unlike negative orders, positive orders tend to produce confusion that results in disenfranchisement. Lastly, Part IV, the Article's normative contribution, argues that a "presumption of no confusion" ought to accompany negative orders: reviewing courts should presume that confusion is unlikely unless evidence suggests otherwise. This Part then defends the presumption by showing that it aligns with *Purcell*'s text and long-forgotten predecessor cases, both of which show that the operative inquiry is not simply whether voters will be confused but whether they will be confused in a way that results in disenfranchisement—a finding that calls into question much of the Court's *Purcell* jurisprudence. Part IV concludes by discussing the normative benefits of the proposal.

I. WHAT IS THE *PURCELL* PRINCIPLE?

In *Purcell v. Gonzalez*, the Supreme Court overturned a Ninth Circuit injunction that had prevented Arizona from enforcing a set of strict voter identification laws.[28] The Supreme Court did so because the Ninth Circuit overlooked whether its own order—which came close to the election—would cause voter confusion and, as a result, keep voters away from the polls.[29] On one level, the *Purcell* Principle is thus fairly simple: it advises courts to think twice before enjoining a state law on the eve of the election because doing so might disrupt the election. But on another, the *Purcell* Principle is rooted in a specific rationale that should limit its application to certain circumstances. To understand why *Purcell* is misunderstood and misapplied, we must first look at its roots. Section A reviews the basic mechanics of injunctions, including the standards that courts use to evaluate preliminary injunctions and where the *Purcell* Principle fits into those standards. Section B then provides an overview of *Purcell v. Gonzales* itself.

A. Injunction Mechanics

The *Purcell* Principle typically arises in the context of injunctions. Plaintiffs in election cases often ask courts for a preliminary injunction—a remedy that enjoins a party from engaging in certain behavior until the case is finally decided on the merits.[30] For example, a court might enjoin a state from enforcing its voter identification laws until the court has a chance to decide on the merits whether those laws are unconstitutional. When a trial court considers that motion, the *Purcell* Principle comes into play, and a court must then ask itself if an injunction would run

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[28] 549 U.S. 1, 6 (2006).

[29] *Id.* at 4–5.

[30] *See* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2947 (3d ed. 2022 Update) ("[A] preliminary injunction is an injunction that is issued to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits. Thus, the court may issue a preliminary injunction, even though plaintiff's right to permanent relief still is uncertain.").

afoul of *Purcell*. The principle also applies to reviewing courts. When an appellate court reviews a trial court's ruling on a motion for an injunction, it has three options: stay (i.e., suspend) the district court's injunction, refuse to stay the district court's injunction, or issue its own injunction (if the trial court denied the motion for an injunction).[31] In making this choice, an appellate court must ask itself if the district court's order ran afoul of *Purcell* or if its own order would undermine *Purcell*.

To determine whether to grant a motion for a preliminary injunction or a stay, federal courts employ a balancing test. And while the test for considering a preliminary injunction is slightly different from the test for considering a stay, courts consider the same four factors in some form or another: (1) the likelihood of success on the merits, (2) the likelihood of irreparable injury if the injunction is not granted, (3) the balance of hardships to the parties, and (4) the interest of the public at-large.[32] When ruling on a motion for a permanent injunction, courts also consider these factors, minus the likelihood of success on the merits factor.[33] Somewhere within this balancing test—most likely in the fourth, "public interest" factor—courts consider the *Purcell* Principle.[34] But at least two Supreme Court Justices think that *Purcell* alters the factors. Those Justices believe that *Purcell* requires a plaintiff to show that the merits are "entirely clearcut" in her favor, that she would suffer irreparable harm without the injunction, that she has not "unduly delayed" the lawsuit, and that the changes she requests are "feasible" before the election.[35]

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[31] *See* Portia Pedro, *Stays*, 106 CALIF. L. REV. 869, 883–84 (2018).

[32] *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Similarly, the Supreme Court may vacate an appellate court stay when (1) the case "could and very likely would be reviewed here upon final disposition in the court of appeals," (2) "the rights of the parties . . . may be seriously and irreparably injured by the stay," and (3) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." Coleman v. Paccar Inc., 424 U.S. 1301, 1304 (1976).

[33] *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("[A] plaintiff seeking a permanent injunction must . . . demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."). Although the Court listed four factors, the standard is still functionally the same as the preliminary injunction standard, excepting likelihood of success on the merits. Courts typically consider the adequacy of remedies at law as part of the irreparable harm factor, but some courts, like the Court in *eBay*, prefer to list the two parts of that factor separately.

[34] *See* Gao, *supra* note 23, at 1148–52.

[35] Merrill v. Milligan, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (stating that *Purcell* can be overcome when: "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship").

That said, exactly *how* courts apply the factors is a "nearly law-free zone."[36] Some courts require that each factor independently meet a certain threshold, others allow stronger factors to make up for weaker factors, and others still weigh certain factors more than others or leave factors out of the analysis altogether.[37] Even within those broad categories, courts diverge in their approaches.[38] So while there are nominally clear standards, in practice, the law of preliminary injunctions and stays is the Wild West.

B. Purcell v. Gonzalez

The *Purcell* Principle derives from *Purcell v. Gonzalez*, a 2006 case heard on the Court's shadow docket.[39] The case arose out of Arizona's Proposition 200, a popular referendum measure passed in 2004 that sought to prevent voter fraud by requiring proof of citizenship to register to vote and personal identification to physically vote.[40] In May 2006, residents of Arizona challenged these requirements, seeking a preliminary injunction in district court.[41] The district court denied that request, but it did not do so until September 2006—just two months before the midterm election—without issuing any findings of fact or law.[42] On appeal, the Ninth Circuit reversed without explanation, temporarily enjoining Arizona's enforcement of the voter identification requirement.[43] The district court eventually entered findings of fact and law supporting its decision, but not until October 12, 2006, after the Ninth Circuit's decision.[44] The Supreme Court then granted certiorari to review the Ninth Circuit's decision.[45]

In a three-page per curiam opinion, the Supreme Court vacated the Ninth Circuit's injunction, putting Proposition 200's restrictions back into effect before

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[36] *See* Pedro, *supra* note 31, at 892.

[37] *Id.* at 892–96.

[38] *Id.*

[39] 549 U.S. 1 (2006). The principle has a deeper history, though, which is discussed in Part IV.B.

[40] *Id.* at 2.

[41] *Id*. at 3.

[42] *Id.* at 3–4.

[43] *Id.* The plaintiffs originally appealed the district court's denial of a preliminary injunction, but after the Ninth Circuit set a briefing schedule that concluded two weeks after the election, the plaintiffs sought an injunction pending appeal from the Ninth Circuit, which is what the Ninth Circuit granted. *Id.*

[44] *Id.* ("[The District Court] concluded that 'plaintiffs have shown a possibility of success on the merits of some of their arguments but the Court cannot say that at this stage they have shown a strong likelihood.' The District Court then found the balance of harms and the public interest counseled in favor of denying the injunction." (citations omitted)).

[45] Strangely, the Court construed the plaintiffs' motion to stay the Ninth Circuit's injunction as a petition for certiorari, an incredibly rare occurrence. *See* Hasen, *supra* note 2; *see also* Orin Kerr, *Supreme Court Allows Voter ID Law*, VOLOKH CONSPIRACY (Oct. 20, 2006, 5:05 PM) (referring to the move as a judicial "lightning bolt"), https://volokh.com/posts/1161378321.shtml [https://perma.cc/3DCB-QCNQ].

the election.[46] The opinion began by acknowledging that, on the one hand, Arizona has a compelling interest in preserving the integrity of its elections by avoiding the appearance of voter fraud.[47] But on the other, there is a possibility that "qualified voters might be turned away from the polls," so the district court should give "careful consideration" to the plaintiff's claims.[48] The opinion then explained how courts should do so:

> Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.[49]

And at the end of the opinion, the Court summarized its holding in the following way: "In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals."[50]

These few lines gave rise to the *Purcell* Principle. In plain English, the Court told us that lower courts should "weigh" whether to issue an injunction in emergency election cases by considering the typical preliminary injunction factors as well as "considerations specific to election cases."[51] Those election-specific considerations include (i) whether an injunction will result in "voter confusion and consequent incentive to remain away from the polls" and (ii) whether the order provides "clear guidance" to state election officials.[52] The Court also made two more brief points. It admonished the Ninth Circuit for failing to explain its decision, even though the

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[46] *Purcell*, 549 U.S. at 5.

[47] *Id.* at 4 ("Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."). Many scholars today would, however, reject that notion. *See, e.g.*, Stephen Ansolabehere & Nathaniel Persily, Essay, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1759 (2008) (finding that feelings of disenfranchisement are not correlated with voter identification laws); Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 32, 35–36 (2007) (explaining that turnout is in fact depressed *because of* voter identification requirements and that African American confidence in the electoral system is depressed *because of* voter identification requirements, and questioning whether it is appropriate to balancing feelings of disenfranchisement against actual disenfranchisement).

[48] *Purcell*, 549 U.S. at 4.

[49] *Id.* at 4–5.

[50] *Id.* at 5.

[51] *Id.* at 4.

[52] *Id.* at 4–5.

district court had itself failed to enter any findings. And it suggested that the Ninth Circuit might have considered the fact that the losing party would seek en banc review, something that would consume even more time, but that this consideration should not control.[53]

It is clear that the Court relied on two general justifications for its holding that courts should think twice before changing election procedures close to an election. But many other things are unclear. The Ninth Circuit's failure to explain its injunction no doubt did some of the work in the decision, but as Professor Hasen points out, it is unclear how much work.[54] Nor is it clear how much the possibility of en banc review mattered.[55] We also do not know whether *Purcell* is a bright-line rule. It seems fairly clear—at least to some courts and scholars—that it is not a bright-line rule but part of the injunctive relief balancing analysis.[56] The fact that courts must "weigh" election considerations with the traditional injunction considerations necessarily implies that the *Purcell* principle is not controlling.[57] And within the injunctive balancing analysis, the *Purcell* Principle logically fits within the public interest prong.[58] But this is not so clear to a majority of the Court, who—without explanation—appear to treat it as a bright-line rule.[59]

In sum, *Purcell* struck down a Ninth Circuit injunction because it did not properly weigh the special considerations that arise when an election is near. But, to this day, many questions about *Purcell* remain. And rather than shed light on *Purcell*'s meaning, later cases cast doubt on the little that was clear in *Purcell*.

II. THE *PURCELL* PRINCIPLE AFTER *PURCELL*

The Court initially applied *Purcell* sparingly, but since the 2014 midterms, the principle has garnered significant attention from the Court. This section reviews notable emergency election cases at the Supreme Court since 2006 in which *Purcell* appeared to play a large part. Orders on the shadow docket, however, often lack accompanying opinions, so we do not always know with certainty whether the *Purcell* Principle drove the result in a particular case.

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[53] *Id.* at 5.

[54] *See* Hasen, *supra* note 2.

[55] *Purcell*, 549 U.S. at 5.

[56] *See, e.g.*, Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 645 (7th Cir. 2020) (Rovner, J., dissenting) (noting that courts must "carefully evaluate emergent circumstances that threaten to interfere with the right to vote and conscientiously evaluate all of the factors that bear on the propriety of judicial intervention to address those circumstances, including in particular the possibility of voter confusion."); Hasen, *supra* note 2, at 437–44.

[57] *See* Stephanopoulos, *supra* note 27 ("[T]o weigh a factor is to take it into account . . . *not* to make it dispositive in all cases . . . ."); *see also* Hasen, *supra* note 2, at 437–44 (concluding the same).

[58] Hasen, *supra* note 2, at 429 ("[T]he Purcell principle should properly be understood not as a stand-alone rule but instead as relevant to one of the factors (the public interest) the Court usually considers.").

[59] *See infra* Part II.C.

Section A discusses cases arising before the 2014 midterms, Section B discusses cases arising between 2016 and 2018, and Section C discusses cases arising before the 2020 election.

A. The Beginnings of the Doctrine: 2014 Midterms

The Supreme Court first applied the *Purcell* Principle in the run-up to the 2014 midterm election.[60] Around a month before the election, the Court issued four orders without explanation.

First was *Veasey v. Perry*.[61] There, the Court allowed Texas's voter identification restrictions to stand. It did so by refusing to vacate a Fifth Circuit stay on a district court order that had enjoined the restrictions.[62] The majority did not issue an opinion, but Justices Ginsburg, Sotomayor, and Kagan noted their dissent.[63] The dissent first criticized the Fifth Circuit for treating *Purcell* as a bright-line rule rather than applying the four stay factors.[64] It then criticized the majority, arguing that *Purcell* does not prevent the Court from vacating the stay in this case because no confusion would result from its doing so.[65] That was because the state could merely reinstate the procedures it used for ten years, including in the last five general elections.[66] By contrast, the rule that the district court struck down had only been used for three "low-participation" statewide elections, so there was "little risk" that doing away with it would disrupt the election.[67] The dissent also pointed out that the state had almost an entire year since the case began to prepare for the possibility of the district court's injunction and any confusion that would result from it.[68] The dissent, unlike the majority, thus understood *Purcell* as one factor in the analysis, not as a total prohibition on judicial intervention.[69]

In *Frank v. Walker*,[70] the Court took a different approach. The district court enjoined Wisconsin's voter identification requirements, and the Seventh Circuit stayed that order—but this time, the Court vacated the Seventh Circuit's stay, allowing the district court's injunction to stand.[71] The majority again did not write

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[60] It is also from these cases that Richard L. Hasen first developed the *Purcell* Principle. *See* Hasen, *supra* note 2.

[61] 135 S. Ct. 9 (2014) (mem.).

[62] *Id.* at 9–10.

[63] *Id.* at 10–12 (Ginsburg, J., dissenting).

[64] *Id.* at 10 (citing Purcell v. Gonzalez, 549 U.S. 1, 4 (2006)).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* ("*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." (citations omitted)).

[70] 135 S. Ct. 7 (2014) (mem.).

[71] *Id.* The Supreme Court later denied certiorari when the full case came back up on the merits. *See* Frank v. Walker, 135 S. Ct. 1551 (2015) (mem.).

an opinion, but Judge Williams's dissent at the Seventh Circuit offers some clues as to what the majority might have been thinking.[72] It argued that *Purcell* counsels against the last-minute stay because the district court order at issue had been in place for nearly five months.[73] Accordingly, that order was the status quo that Wisconsin voters had come to rely on, and the Seventh Circuit's stay—which came so close to the election that absentee voting was already underway—disrupted that status quo.[74] Judge Williams also believed that plaintiffs had a strong likelihood of success on the merits, as the law potentially disenfranchised ten percent of registered, not just eligible, voters in Wisconsin.[75] And the state would not suffer irreparable harm from the injunction because it could not point to a single instance of voter fraud in its elections that this law would have prevented.[76] At the Supreme Court, Justices Alito, Scalia, and Thomas dissented.[77] While the dissent acknowledged that there was a "colorable basis" for the majority's decision because of the "proximity of the upcoming . . . election," it ultimately believed that the Seventh Circuit's decision could not be overturned because it did not "demonstrably" err in issuing a stay.[78]

In *North Carolina v. League of Women Voters of North Carolina*,[79] the Court once again allowed restrictions on voting to stand. The district court refused to enjoin a North Carolina law that eliminated same-day voter registration and the counting of votes cast at the wrong precinct, but the Fourth Circuit remanded the case to the district court with instructions to enter a preliminary injunction.[80] The Supreme Court, however, vacated that Fourth Circuit order, which allowed the restrictions to stand; Justices Ginsburg, joined by Justice Sotomayor, dissented on grounds that she would not displace the Fourth Circuit's "record-based reasoned judgment" that the law violated the Voting Rights Act.[81]

Lastly, in *Husted v. Ohio NAACP*,[82] the Court allowed Ohio to shorten its early voting period from thirty-five days to twenty-eight days, and allowed the state to eliminate its "Golden Week," a week in which voters could register and vote in the same transaction.[83] The district court enjoined the state, but the Supreme Court

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[72] *See* Frank v. Walker, 769 F.3d 494 (7th Cir. 2014) (Williams, J., dissenting).

[73] *Id.* at 499, 501. The Seventh Circuit's stay came on September 26, 2014, while the district court's injunction came much earlier, on April 29, 2014. *Id.* at 494–95 (per curiam). Professor Hasen similarly theorized that this case came out differently to *Veasey* because, unlike in *Veasey*, the voter identification law here had not previously been in place for an election. *See* Hasen, *supra* note 14.

[74] *Id.* at 498–501 (Williams, J., dissenting) (discussing the status quo).

[75] *Id.* at 498.

[76] *Id.* at 500–01.

[77] Frank v. Walker, 135 S. Ct. 7 (2014) (Alito, J., dissenting).

[78] *Id.* at 7.

[79] 135 S. Ct. 6 (2014) (mem.).

[80] League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 230, 248 (4th Cir. 2014).

[81] *League of Women Voters of N.C.*, 135 S. Ct. at 6–7 (Ginsburg, J., dissenting).

[82] 135 S. Ct. 42 (2014) (mem.).

[83] *Cf.* Ohio State Conf. of NAACP v. Husted, 43 F. Supp. 3d 808, 812 (S.D. Ohio 2014).

stayed the district court's order, allowing Ohio's cutback to stand.[84] Justices Ginsburg, Sotomayor, Kagan, and Breyer dissented, again without explanation.[85]

After *Purcell*'s first big outing, the results were inconsistent. The Court upheld voting restrictions in three out of four cases, upheld circuit courts in two out of the three cases heard by a circuit court, and agreed with the district court in two out of four cases. In one case, all four liberals dissented; in another, Justice Breyer did not join the dissent; in still another, both Justice Breyer and Justice Kagan did not join the dissent.[86] In the one case in which conservative Justices dissented, Justices Roberts and Kennedy did not join, despite seemingly voting with their conservative colleagues in every other case. This trend of inconsistency continued in subsequent years.

B. The Calm Before the Storm: 2016 to 2018

The Court decided only two emergency election cases that implicated *Purcell* in 2016—both without explanation. In *North Carolina v. North Carolina State Conference of NAACP*,[87] the Court refused to vacate a Fourth Circuit decision that enjoined North Carolina restrictions, including voter identification requirements, changes to early voting, and a pre-registration provision.[88] Justices Roberts, Kennedy, and Alito would have granted the stay excepting the pre-registration provision, which allowed sixteen- and seventeen-year-olds to register to vote when applying for driver's licenses, while Justice Thomas would have granted the stay in its entirety.[89] In another North Carolina case, *McCrory v. Harris*, the Court refused to stay a district court order requiring the state to redraw its congressional districts in just two weeks and in a way that did not amount to a racial gerrymander under

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[84] The case was appealed directly from the district court to the Supreme Court, so there was no circuit court decision. *Ohio State Conf. of NAACP*, 135 S. Ct. at 42.

[85] *Id.* The Justices only noted that they would have denied the application for stay and did not offer a written explanation of their dissent.

[86] This Article refers to Justices Sotomayor, Ginsburg, Kagan, and Breyer as the "liberal Justices" and to Justices Thomas, Kavanaugh, Alito, and Gorsuch as the "conservative Justices." *See* Oriana Gonzalez & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS, https://www.axios.com/supreme-court-Justices-ideology-52ed3cad-fcff-4467-a336-8bec2e6e36d4.html [https://perma.cc/3QWG-UKLA] (last visited July 5, 2022); *see also* Andrew D. Martin, & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 146 (2002) (calculating ideology scores for each justice).

[87] 137 S. Ct. 27 (2016) (mem.).

[88] *Id.*; N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 217 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 27 (2016) ("Preregistration permitted 16- and 17-year-olds, . . . to identify themselves and indicate their intent to vote. . . . This allowed County Boards of Elections to verify eligibility and automatically register eligible citizens once they reached eighteen.").

[89] *N.C. State Conf. of NAACP*, 137 S. Ct. at 28.

the Equal Protection Clause.[90] The Court's order came after absentee voting started and featured no noted dissents.[91] Some questioned whether this case—which allowed a district court to intervene in a major way close to an election—marked the end of the *Purcell* Principle.[92]

In 2018, however, the Court confirmed that the *Purcell* Principle was alive and well. First, in *Brakebill v. Jaeger*, the Court allowed North Dakota to require voter identification with a residential street address.[93] North Dakota has a large Native American population, and many Native Americans lack a residential address because they live on reservations or in rural areas.[94] A survey submitted to the district court found that 19% of otherwise eligible Native American voters in North Dakota lacked qualifying identification under the law, as compared with 11.6% of non-native eligible voters.[95] Accordingly, the district court enjoined the state law, finding it unconstitutionally burdened the right to vote, and required the state to accept identification with a residential address *or* a mailing address.[96] The Eighth Circuit stayed the district court's order, and the Supreme Court refused to vacate the Eighth Circuit's stay, leaving the restriction in place. Justices Ginsburg and Kagan dissented. They argued that because the district court injunction was in place for the primary election and because the Secretary of State's website listed the identification requirements based on the order, the order *became* the status quo, and the Eighth Circuit disrupted that status quo by vacating the injunction.[97] The dissent acknowledged that if the Court were to overturn the Eighth Circuit's stay, then the Court's *own* order would also disrupt the status quo.[98] But it argued the confusion

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[90] McCrory v. Harris, 136 S. Ct. 1001 (2016) (mem.). A few hours before the Supreme Court's order, North Carolina did, however, notify the Court that it had created a new redistricting plan. *See* Hasen, *supra* note 14.

[91] *McCroy*, 136 S.Ct. at 1001; Hasen, *supra* note 14. Recall that, under the shadow docket's obscure procedures, some Justices could have disagreed with the outcome but failed to note their disagreement. *See supra* notes 10–15 and accompanying text.

[92] *See, e.g.*, Hasen, *supra* note 14 (positing reasons for the Court's seeming change of heart).

[93] 139 S. Ct. 10 (2018) (mem.).

[94] *See* Matt Vasilogambros, *For Some Native Americans, No Home Address Might Mean No Voting*, PEW CHARITABLE TRUSTS (Oct. 4, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/04/for-some-native-americans-no-home-address-might-mean-no-voting [https://perma.cc/KNC2-EKD8].

[95] Brakebill v. Jaeger, No. 1:16-CV-008, 2018 WL 1612190, at *2 (D.N.D. Apr. 3, 2018) ("The difference is statistically significant at the 99 percent level, the most rigorous level of social science testing."), *vacated and remanded*, 932 F.3d 671 (8th Cir. 2019).

[96] *Brakebill*, 2018 WL at *7.

[97] *Brakebill*, 139 S. Ct. at 10 (2018) (Ginsburg, J., dissenting) ("The risk of voter confusion appears severe here because the injunction against requiring residential-address identification was in force during the primary election and because the Secretary of State's website announced for months the ID requirements as they existed under that injunction. Reasonable voters may well assume that the IDs allowing them to vote in the primary election would remain valid in the general election.").

[98] *Id.*

from leaving the Eighth Circuit's order in place would be far worse.[99] This is because if the Supreme Court were to reinstate the district court order, which broadened the types of acceptable identifications, the worst that could result from any confusion is a voter showing up at the polls with more detailed identification than necessary.[100] The Eighth Circuit's order, by contrast, narrowed the list of acceptable identifications, so it might cause voters to turn up at the polls to discover that their previously valid identification is now invalid.[101]

Second, in *Michigan State A. Philip Randolph Institute v. Johnson*,[102] the Court refused to vacate a Sixth Circuit stay. The Court's order, which contained no opinion, had the effect of upholding a Michigan statute that eliminated its "straight ticket" voting procedure—a procedure that allowed voters to select a party's entire slate of candidates by checking one box.[103] Justices Ginsburg and Sotomayor noted that they would have vacated the stay but did not provide an opinion explaining why.[104]

C. The Storm: 2020

In part because of the COVID-19 pandemic, 2020 featured a flurry of emergency election cases in the Supreme Court. The conservative majority doubled down on its treatment of *Purcell* as a potentially absolute bar to judicial intervention, and consequently, most holdings resulted in the reinstatement of voting restrictions. What made 2020 stand out, however, was the way in which the Court did so. Perhaps attuned to mounting criticism or the high-stakes nature of election litigation in the 2020 election cycle, the Justices broke from the norm and explained their reasoning at length in several cases.[105] These opinions shed the most light to date on the *Purcell* Principle. They also evidence a growing rift between the conservative and liberal Justices: the conservative Justices interpret *Purcell* as a bright-line bar on judicial intervention close to an election, or something close to it, and the liberal Justices

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[99] *Id.*

[100] *Id.* at 10–11 ("[T]he confusion arising from vacating the stay would at most lead to voters securing an additional form of ID.").

[101] *Id.* at 11.

[102] 139 S. Ct. 50 (2018) (mem.).

[103] The district court found that, among other things, the elimination of straight ticket voting would disproportionately lead to longer lines for African Americans and deter African Americans from voting. *See* Mich. State A. Philip Randolph Inst. v. Johnson, 326 F. Supp. 3d 532, 555–78 (E.D. Mich. 2018).

[104] *Johnson*, 139 S. Ct. 50.

[105] In *Democratic National Committee v. Wisconsin State Legislature*, for instance, Justice Roberts wrote separately to explain why his vote was not inconsistent with his votes in previous cases. 141 S. Ct. 28 (2020) (mem.). *See also* @steven_vladeck, TWITTER (Oct. 26, 2020, 6:45 PM), https://twitter.com/steve_vladeck/status/1320874207560011783?s=20 [https://perma.cc/6XGC-2N7Z] ("Perhaps mindful of the mounting criticism of such 'shadow docket' rulings without any reasoning, six of the eight Justices . . . signed onto opinions setting out their reasons for refusing to lift the Seventh Circuit's stay.").

interpret *Purcell* as an invitation to inquire into whether such intervention will cause confusion in the case at hand.

In *Republican National Committee v. Democratic National Committee* (*RNC v. DNC*), a per curiam majority stayed a district court order that had extended the Wisconsin primary mail-in ballot deadline.[106] State law required mail-in ballots to be postmarked and received by election day, April 7, 2020 but the district court ruled that ballots must still be counted as long as they were received by April 13, 2020.[107] It did so because the state received an influx of mail-in ballot requests during the COVID-19 pandemic and could not distribute ballots in time.[108] Even voters who requested their ballots by the proper deadline would be unable to return their ballots on time—which, according to the district court, rendered the April 7 deadline an unconstitutional burden on the right to vote.[109] The Supreme Court, seemingly applying *Purcell* as a bright-line rule, held that "[b]y changing the election rules so close to the election date . . . the District Court contravened this Court's precedents and erred by ordering such relief."[110] The dissent, however, stressed that tens of thousands of voters—who followed all of the state's rules—would be disenfranchised if the district court could not alter the rules in these unusual times.[111] As to *Purcell*, the dissent suggested that the district court order, *not* the state law, was the status quo that the Court should protect. In its eyes, it was illogical for the majority to uphold a stay on the district court order on the grounds that the order would create confusion because of its proximity to the election when the majority's order changed the rules one day before the election.[112]

Next, in *Andino v. Middleton*, the Court reinstated South Carolina's witness signature requirement.[113] A district court enjoined South Carolina from requiring that mail-in ballots be signed by a witness, finding the requirement was an

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[106] 140 S. Ct. 1205 (2020) (per curiam).

[107] *Id.* at 1206–07.

[108] Democratic Nat'l Comm. v. Bostelmann, 451 F.Supp.3d 952, 976 (W.D. Wisc. 2020).

[109] *Democratic Nat'l Comm.* 140 S. Ct. at 1209 (Ginsburg, J., dissenting).

[110] *Id.* at 1207 (per curiam). In addition, the district court enjoined the release of election results until April 13, 2020 in case the results affected still ongoing voting. According to the majority, the fact that the district court needed to issue a subsequent injunction to avoid voter confusion caused by its first injunction "further underscore[d] the wisdom of the *Purcell* principle[.]" *Id.*

[111] *Id.* at 1209 (Ginsburg, J., dissenting).

[112] *Id.* at 1210–11 ("[T]he Court's order cites *Purcell*, apparently skeptical of the District Court's intervention shortly before an election. Nevermind that the District Court was reacting to a grave, rapidly developing public health crisis. If proximity to the election counseled hesitation when the District Court acted several days ago, this Court's intervention today—even closer to the election—is all the more inappropriate."). The majority responded that it would "prefer not to" intervene so late but maintained that "when a lower court intervenes and alters the election rules so close to the election date, [the Court's] precedents indicate that [the] Court . . . should correct that error." *Id.* at 1207 (per curiam).

[113] 141 S. Ct. 9 (2020) (mem.) (exempting ballots already sent and received within two days of the Supreme Court's order).

unconstitutional burden on the right to vote because it required voters to risk contracting COVID-19.[114] The Supreme Court stayed the order but exempted ballots already sent before the stay and received within two days of it.[115] Justices Thomas, Gorsuch, and Alito noted that they would have stayed the order in full.[116] Justice Kavanaugh wrote separately to emphasize that it is the job of the state legislature, not the court, to make election rules.[117] He also cited *Purcell*, seeming to understand it as a bright-line time bar, as he simply noted that the district court ran afoul of the principle by acting close to an election.[118] Curiously, he wrote that he concurred for "two alternative and independent reasons,"[119] which, taken literally, would suggest that the majority did not share his views on the *Purcell* Principle. But this is likely just a formalism, as he has used this language elsewhere when he agrees with other opinions.[120] None of the liberal Justices noted their dissent. While it is clear from their previous opinions that they disagree with Justice Kavanaugh's characterization and application of the *Purcell* Principle, it is possible that they believed other factors outweighed *Purcell*.[121]

There were four separate opinions in *Democratic National Committee v. Wisconsin State Legislature* (*DNC v. Wisconsin*),[122] a case with similar facts to *RNC v. DNC* but implicating the general election. Once again, the Court prevented the district court from extending the absentee ballot deadline.[123] First, Chief Justice Roberts wrote to clarify why his vote to strike down the extension here was not inconsistent with his vote to uphold a similar extension in two recent Pennsylvania cases.[124] According to Chief Justice Roberts, the Pennsylvania cases were distinguishable because they involved a state court applying its own constitution, while here, a federal court intruded on the state lawmaking process.[125]

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[114] Middleton v. Andino, 488 F. Supp. 3d 261, 296 (D.S.C. Sept. 18, 2020).

[115] *Andino*, 141 S. Ct. at 9–10.

[116] *Id.*

[117] *Id.* at 10 (Kavanaugh, J., concurring)

[118] *Id.* ("[T]his Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election. By enjoining South Carolina's witness requirement shortly before the election, the District Court defied that principle and this Court's precedents." (citations omitted)).

[119] *Id.*

[120] *See, e.g.*, Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 30, 32 (2020) (Kavanaugh, J., concurring) (concurring "[f]or three alternative and independent reasons," despite the fact that one of those reasons was the independent state legislature doctrine, something Justice Gorsuch also stated in his concurrence, which Justice Kavanaugh joined).

[121] For example, the liberal Justices might have believed that the injunction had a weak likelihood of success on the merits. *See supra* Part I.A.

[122] *Democratic Nat'l Comm.*, 141 S. Ct. 28 (2020) (mem.).

[123] *Id.* at 28 (refusing to vacate a Seventh Circuit stay of the order).

[124] *See generally* Republican Party of Pa. v. Boockvar 141 S. Ct. 1 (2020); Scarnati v. Boockvar, 141 S. Ct. 644 (2020) (mem.).

[125] *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (2020) (Roberts, C.J., concurring).

Second, Justice Gorsuch, joined by Justice Kavanaugh, seemed to endorse a version of the controversial "independent state legislature" doctrine.[126] The doctrine argues that because the Constitution vests state legislatures with the power to regulate federal elections, state courts cannot restrict the authority of state legislatures to craft election procedures, even by enforcing the state constitution.[127] The Court rejected the doctrine in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, but only by a 5–4 vote, so it may soon be subject to reexamination.[128]

Third, Justice Kavanaugh wrote that the Court should not intervene at this late hour.[129] Rather than treating the *Purcell* Principle as one consideration in the decision or an invitation to inquire into whether the order will create confusion, Justice Kavanaugh suggested that he interprets the principle as a bright-line bar to judicial interference. According to him, "[t]he Court's precedents recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled."[130] Nowhere in his opinion did Justice Kavanaugh analyze whether the district court's order *would* cause confusion. Instead, it was enough that the district court altered the rules "too close" to the election.[131]

Fourth, in dissent, Justice Kagan challenged the premises underlying the two previous ideas. In response to the independent state legislature doctrine, she argued that while the state may possess the power to make election rules, such a delegation does not remove from the judiciary the power to determine whether those rules are constitutional or not.[132] In response to Justice Kavanaugh, she explained that "fixating on time alone" is a "misunderstanding of *Purcell*'s message."[133] The proper

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[126] *Id.* at 29 (Gorsuch, J., concurring) ("The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear the primary responsibility for setting election rules."). The Seventh Circuit did so, too. *See* Democratic Nat'l Comm. v. Bostelmann, 977 F. 3d 639, 642 (7th Cir. 2020) ("[T]he design of electoral procedures is a legislative task.").

[127] *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8–9 (2020).

[128] 576 U.S. 787, 816–19 (2015). *See also* Morley, *supra* note 127, at 10–11. Justice Thomas has also endorsed the doctrine. *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732–38 (2021) (Thomas, J., dissenting). The Court is set to hear arguments on the doctrine, likely in fall of 2022. *See* Amy Howe, *Justices Will Hear Case that Tests Power of State Legislatures to Set Rules for Federal Elections*, SCOTUSBLOG (June 30, 2022, 12:47 PM), https://www.scotusblog.com/2022/06/justices-will-hear-case-that-tests-power-of-state-legislatures-to-set-rules-for-federal-elections/ [https://perma.cc/2C5S-GSWG].

[129] *See Democratic Nat'l Comm.*, 141 S.Ct at 30–32 (Kavanaugh, J., concurring).

[130] *Id.* at 31.

[131] *Id.* at 34 ("In sum, the District Court's injunction was unwarranted for three alternative and independent reasons," one of which was that "[t]he District Court changed the state election laws too close to the election.").

[132] *Id.* at 43 (Kagan, J., dissenting) ("[Some have] argued that the design of electoral procedures is a solely legislative task. But that is not so when those procedures infringe the constitutionally enshrined right to vote." (citations and internal quotation marks omitted)).

[133] *Id.* at 41 (Kagan, J., dissenting).

inquiry considers all relevant factors—including whether the order will confuse voters—not merely whether the order will come close to the election.[134] For support, Justice Kagan pointed back to the text of *Purcell*, which explained that a court should "weigh" whether to issue an injunction by balancing "the harms attendant upon issuance or noninssuance of an injunction," with "considerations specific to election cases," including voter confusion.[135] As Judge Rover said in dissent below, these words "articulated not a rule but a caution . . . ."[136] Otherwise, *Purcell* would place a "moratorium on the Constitution as the cold weather approaches."[137] Indeed, Justice Kagan and the liberal Justices believe that *when* last-minute changes confuse voters, courts should think twice before intervention. But they also believe that "not every such change poses that danger" and that courts "must also take account of other matters," not just the calendar, in deciding whether to issue an injunction.[138] In this case, Justice Kagan argued, the district court's order was unlikely to confuse voters because a voter who was unaware of the district court's late extension of the deadline would, at worst, mail in their ballot earlier than necessary.[139]

Next, in *Merrill v. People First of Alabama*, the Court stayed a district court order that aimed to make it easier for high-risk individuals to vote during the COVID-19 pandemic.[140] The district court's order enjoined the Alabama Secretary of State's ban on curbside voting, holding that the ban violated the Americans with Disabilities Act because it forced disabled voters, who are disproportionately more susceptible to the virus, to vote in person.[141] On appeal, the Eleventh Circuit upheld the injunction.[142] Without an opinion, the Supreme Court's conservative majority reinstated that ban. Justices Sotomayor, Breyer, and Kagan dissented.[143] They emphasized that the injunction would not create voter confusion because it did not require all counties to adopt curbside voting but instead gave counties the option to do so.[144] Although the majority did not author an opinion, one of two responses can be inferred. First, it might believe that, despite the fact the election administrators had a choice of whether to adopt curbside voting, voter confusion would still result.

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[134] *Id.* at 41–42 ("At its core, *Purcell* tells courts to apply, not depart from, the usual rules of equity.").

[135] Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006).

[136] Democratic Nat'l Comm. v. Bostelmann, 977 F. 3d 639, 644 (2020) (Rovner, J., dissenting).

[137] *Democratic Nat'l Comm.*, 141 S. Ct. at 42 (2020) (Kagan, J., dissenting).

[138] *Id.*

[139] *Id.*

[140] 141 S. Ct. 25 (2020) (mem.).

[141] The district court also held that the ban infringed on the plaintiffs' right to vote but the Supreme Court did not address this issue. The majority did not write an opinion and the dissent chose not to because it believed the injunction was appropriate under the Americans with Disabilities Act. *Id* at 26 n.1.

[142] People First of Ala. v. Sec'y of State for Ala., 2020 WL 6074333, at *1 (11th Cir. Oct. 13, 2020) (granting a motion for stay as to the witness and photo identification requirements but denying as to the curbside voting ban).

[143] *Merrill*, 141 S. Ct. at 26 (Sotomayor, J., dissenting).

[144] *Id.* at 27.

This would be strange, given that election administrators are presumably better positioned than the Court to predict voter confusion on the ground. Or second, it might understand the *Purcell* Principle to be a bright-line rule barring judicial intervention close to an election, no matter how likely the order is to confuse voters and election administrators.

Lastly, in *Raysor v. DeSantis*,[145] the Court allowed Florida's felony voting restrictions to stand. In 2018, Florida voters approved an amendment that allowed those with felony convictions to vote once they completed "all terms" of their sentence.[146] In 2019, however, the state legislature passed a law defining "all terms" of a sentence to include the payment of all court fees, not just the completion of a sentence.[147] In October 2019, a district court preliminarily enjoined enforcement of the statute, and the Eleventh Circuit affirmed ("*Jones I*").[148] The district court then ruled on the plaintiffs' motion for a permanent injunction. On May 24, 2020, it permanently enjoined enforcement of the law, holding that the scheme violates the Fifth Amendment, the Twenty-Fourth Amendment, and the Fourteenth Amendment.[149] Just nineteen days before the voter-registration deadline, and without explanation, the Eleventh Circuit stayed the injunction until it could consider the full appeal ("*Jones II*").[150] The plaintiffs asked the Supreme Court to vacate the stay in time for the August primary, but the Court, also without an opinion, refused to do so.[151] Justice Sotomayor, joined by Justices Ginsburg and Kagan, dissented with an opinion—one that repeatedly emphasized *Purcell*.[152]

To the dissent, the irreparable harm was clear: more than a million voters would be disenfranchised.[153] As to *Purcell*, the Eleventh Circuit "created the very 'confusion' and voter chill that *Purcell* counsels courts to avoid" because its stay upended the status quo that stood for nearly a year while the preliminary injunction from *Jones I* was in place.[154] The dissent also objected to the Eleventh Circuit's failure to vacate *Jones I* (the case in which it affirmed the district court's preliminary injunction) when it stayed the order in *Jones II*. Because of *Jones I*, the dissent reasoned, tens of thousands of voters with prior felony convictions no doubt registered to vote after the decision.[155] But the Eleventh Circuit failed to vacate *Jones I*, so those voters remained on the voter rolls.[156] Now, after *Jones II* (renamed *Raysor v. DeSantis* on appeal at the Supreme Court), those who registered relying on *Jones I* would not be notified of their ineligibility or of the criminal liability they risked

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[145] 140 S. Ct. 2600 (2020) (mem.).
[146] *Id.* at 2600 (Sotomayor, J., dissenting).
[147] *Id.*
[148] *Id.*
[149] *Id.* at 2600–01.
[150] *Id.* at 2602.
[151] *Id.* at 2600.
[152] *Id.* at 2600–03.
[153] *Id.* at 2602.
[154] *Id.* at 2603.
[155] *Id.*
[156] *Id.*

should they vote.[157] And the dissent did not stop there. In a striking rebuke, the liberal Justices showed their frustration with the conservative Justices' handling of the *Purcell* doctrine:

> This Court's inaction continues a trend of condoning disfranchisement. Ironically, this Court has wielded *Purcell* as a reason to forbid courts to make voting safer during a pandemic, overriding two federal courts because any safety-related changes supposedly came too close to election day. Now, faced with an appellate court stay that disrupts a legal status quo and risks immense disfranchisement—a situation that Purcell sought to avoid—the Court balks.[158]

D. The Aftermath: 2022

After a brief period of dormancy, *Purcell* again cropped up in 2022. So far, the Supreme Court has twice applied *Purcell* to a relatively unfamiliar context: redistricting.

Merrill v. Milligan[159] signaled that significant changes to *Purcell* are afoot. Without an opinion, the majority stayed a decision by a three-judge court that had ruled Alabama's congressional map unconstitutional.[160] Justice Kavanaugh, joined by Justice Alito, wrote separately and made two points. First, the concurrence expressed the novel view that *Purcell* modifies the preliminary injunction factors in a way that makes it harder for plaintiffs to obtain injunctions. To Justice Kavanaugh, the *Purcell* Principle can be overcome when: "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship."[161] Second, the concurrence emphasized that *Purcell* kicks in sooner in gerrymandering cases; here, seven weeks away from the start of absentee voting was sufficiently "close" for *Purcell* to apply because redrawing congressional districts would create "chaos."[162] Not only would redrawing the map take time, the concurrence explained, but candidates would not know which districts to file in, incumbents would not know whether they would be running against other incumbents, and voters would not know who their choices would be.[163]

The dissent did not address the concurrence's attempt at retooling the injunction factors. Instead, Justice Kagan—joined by Justices Breyer and Sotomayor—simply

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[157] *Id.*

[158] *Id.* at 2603 (citations omitted). The second court the dissent is referring to is the district court in *RNC v. DNC*.

[159] 142 S. Ct. 879 (2022).

[160] *Id.* at 879.

[161] *Id.* at 881 (Kavanaugh, J., concurring).

[162] *Id.* at 879–80.

[163] *Id.* at 880.

disagreed that the case came close enough to an election for *Purcell* to apply.[164] Justice Kagan emphasized that the election was not mere weeks away: the primary was four months away, the general election was nine months away, and the state had the authority to delay the start of absentee voting.[165] And, Justice Kagan added, the plaintiffs brought their lawsuit within hours or days of Alabama's new map coming into effect, the district court expedited the proceedings, and the only delay came because of the state.[166] Because the Court had before denied stays of districting orders this far out from an election—including in *McCrory v. Harris*—the dissent saw no reason to do otherwise here.[167]

In contrast, the Court next refused to block orders that required Republican-controlled state legislatures to use new maps. In *Moore v. Harper*,[168] the plaintiffs asked the Court to reinstate the state legislature's map after the North Carolina Supreme Court invalidated it and required that the state use a map created by court-appointed experts.[169] Without explanation, the Court refused to stay the order.[170] This time, the majority was seemingly comprised of the dissenting Justices in *Merrill*, Justice Barrett, Justice Roberts, and Justice Kavanaugh. Again, Justice Kavanaugh wrote separately to emphasize that, like *Merrill*, this case came too close to an election for the Court to intervene.[171] But he did not explain why the state court's order—which put in place a new map a little over a week before candidates had to file for the primary and just over a month before absentee ballots were set to go out—would not create the "chaos" he warned of in *Merrill*.[172]

Both cases suggest that the redistricting context can expand the *Purcell* Principle's reach. Redrawing congressional maps threatens to create confusion earlier in the election cycle than other changes. For example, changes to voter identification, mail-in voting, or ballot drop boxes all risk causing confusion at the time of voting. But redistricting does not just affect voters at the time of voting; it also affects how well a candidate can campaign to voters in the lead-up to an election.[173] Redistricting cases may therefore justify invoking the *Purcell* Principle further away from elections. This, coupled with the view that *Purcell* should apply any time an election is sufficiently close, could create a principle that is far more intrusive than the one the Court envisaged in *Purcell*.

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[164] *Id.* at 888–89 (Kagan, J., dissenting).
[165] *Id.* at 888.
[166] *Id.*
[167] *Id.*
[168] 142 S. Ct. 1089 (2022) (mem.).
[169] *See id.* at 1090–91 (Alito, J., dissenting).
[170] *Id.* at 1089 (mem.).
[171] *Id.* (Kavanaugh, J., concurring).
[172] Merrill v. Milligan, 142 S. Ct. 879, 879–80 (2022) (Kavanaugh, J., concurring).
[173] *See, e.g.*, *id.* at 879.

In sum, the Court's *Purcell* jurisprudence is at a crossroads. One group of Justices understands *Purcell* as a bright-line-timing rule—or something close to it. The other group of Justices considers *Purcell* in light of a host of factors that seek to identify whether the harms *Purcell* counsels against are present in the case at hand.

III. THE STATUS QUO AND THE POSITIVE-NEGATIVE DISTINCTION

This Part identifies two features of the case law that have yet to be recognized by scholars: (i) the "status quo" and (ii) the distinction between "positive" and "negative" orders. First, the Court appears to begin its inquiry by identifying a "status quo"—an existing set of election procedures. The Justices, however, do not agree on a baseline by which to measure the status quo. Second, there are two main types of order in a *Purcell* case, which this Article taxonomizes as "positive" and "negative." Without saying so explicitly, the conservative and liberal Justices appear to disagree on whether negative orders can ever trigger the *Purcell* Principle. Both issues are undertheorized in the literature and undeveloped by courts. Accordingly, this Part offers a descriptive contribution by bringing them out from the shadows and discussing the qualities they bring to bear on *Purcell* cases. This Part also offers a normative contribution by arguing that the status quo is ultimately misplaced in, and distorts, a *Purcell* analysis.

In response to the first feature, Section A discusses the hidden "step zero" in the *Purcell* analysis before ultimately rejecting its use as inconsistent with *Purcell*. In response to the second feature, Section B identifies the two main types of order found in the *Purcell* case law and assigns them to a framework that denotes them as either "positive" or "negative" orders based on whether they add or remove voting restrictions.

A. Status Quo

Courts sometimes ask a threshold question when considering the *Purcell* Principle: which status quo applies?[174] The immediate problem with such a question is that it is not always clear what the rules are to begin with. But the bigger problem is that focusing on the status quo distorts the *Purcell* inquiry, taking it away from its intended use. Despite this, the status quo has largely taken a back seat in the scholarly discussion.[175] Because this threshold inquiry often influences the rest of a *Purcell* Principle analysis, this Article seeks to bring it out from the shadows and place it at the forefront of any discussion about *Purcell*.

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[174] *See, e.g.*, Raysor v. DeSantis, 140 S. Ct. 2600, 2603 (2020) (Sotomayor, J., dissenting); Frank v. Walker, 769 F.3d 494, 499 (7th Cir. 2014) (Williams, J., dissenting).

[175] The exception is Professor Muller, who first identified this point. *See* Derek T. Muller, *Justice Ginsburg Turns the "Purcell Principle" Upside Down in Wisconsin Primary Case*, EXCESS OF DEMOCRACY (April 6, 2020), https://excessofdemocracy.com/blog/2020/4/justice-ginsburg-turns-the-purcell-principle-upside-down-in-wisconsin-primary-case [https://perma.cc/2Q3B-9E9X].

Section A.1 explains how the status quo became a central feature of *Purcell* case law, operating as a hidden "step zero" in the analysis. It also discusses the importance of this inquiry, which is sometimes even outcome determinative, to the analysis and common scenarios in which it arises. Section A.2 identifies various methods of identifying the status quo and the benefits of each. Lastly, Section A.3 concludes that the idea that courts must—or even can—identify a status quo at all is misguided. In other words, it argues that there should be no "step zero" in a *Purcell* inquiry.

1. Purcell *"Step Zero"*

A hidden "step zero" has crept into *Purcell* Principle doctrine.[176] In "step zero," the Court first identifies a set of election procedures that they believe the public is used to—the status quo—and then measures voter confusion by how much the district court's injunction departs from those norms. And this makes intuitive sense. At its heart, *Purcell* is about a court changing the rules of the game, so it is logical to begin the inquiry by asking what the rules of the game are and how much they have been changed. After all, if the district court order is not disrupting the status quo, then it cannot confuse voters. For instance, Justice Sotomayor recently described *Purcell* as something that sought to avoid "disrupt[ing] a legal status quo."[177] Likewise, lower courts seem to have taken a similar interpretation. The Fifth Circuit, for instance, understood *Purcell* in the following way: "The Supreme Court has repeatedly instructed courts to carefully consider the importance of *preserving the status quo* on the eve of an election."[178]

Likewise, when *Frank v. Walker* was at the Seventh Circuit, after recounting what the Supreme Court did in *Purcell*, Judge Williams declared, "[h]ere too, the status quo . . . should be restored."[179] Yet nowhere was the phrase "status quo" mentioned or even alluded to in *Purcell*—the opinion mentioned only preventing confusion and the resulting voter chill. The idea likely crept into the doctrine because *Nken*, the case that established the stay standard, described a stay as something that "suspend[s] judicial alteration of the status quo."[180] But, as discussed in the next subsection, equating *Purcell* with this language is a mistake.

We can most clearly see "step zero" at work in cases like *Brakebill* and *RNC*,[181] in which something counterintuitive happens: the majority and dissent both agree that *Purcell* controls the outcome but reach different outcomes based on their applications. They do so because they identify different status quos. In other cases,

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[176] *Cf.* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (coining *Chevron* "step zero").

[177] *Raysor*, 140 S. Ct. at 2603.

[178] Veasey v. Perry, 769 F.3d 890, 892 (5th Cir. 2014) (emphasis added).

[179] *Walker*, 769 F.3d at 499 (Williams, J., dissenting).

[180] Nken v. Holder, 556 U.S. 418, 429 (2009) (quoting Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (2009) (Scalia, J., in chambers)).

[181] Brakebill v. Jaeger, 139 S. Ct. 10 (2018) (mem.); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam). *See supra* Part II.

where the baseline voting procedure is uncontested, a "step zero" analysis does not appear in the opinions—much like how *Chevron* "step zero" is only implicated in cases when it is unclear whether the agency acted with the force of law.[182] In cases in which "step zero" is implicated, debates over the status quo typically arise in two situations.

First, a district court injunction may be in effect for so long that it arguably becomes the status quo. Take *Brakebill v. Jaeger*, for example. To the majority, the state law was the status quo, so the district court's order disrupted the status quo.[183] But to the dissent, the district court's order was the status quo because it was in place for the most recent primary, meaning it was what voters and election administrators were most familiar with. And the appellate stay of the injunction disrupted that status quo.[184] Similarly, in *Raysor v. DeSantis*, the dissent argued that the preliminary injunction—which had been in place for a year before the Court's decision—was the status quo rather than the state law it enjoined.[185]

Second, the Supreme Court's order or a circuit court's order itself may disrupt the status quo. One example is *RNC v. DNC*.[186] There the per curiam majority approached the problem formalistically: the deadline set by state law was the status quo, and the district court's order changed that deadline, so *Purcell* counseled against the change.[187] Yet the Supreme Court's decision came on April 6—one day before the election. Is there not a hint of hypocrisy in the Supreme Court reprimanding a district court for "alter[ing] the election rules on the eve of an election," and then providing relief by *itself* altering the election rules on the actual eve of an election?[188] Justice Ginsburg thought so. Joined by the other three liberal Justices, she argued that the status quo was the district court order, not the state law.[189] Not only did the majority's order require voters to postmark their ballots by April 7 even if they had not received their ballots by April, which would, of course, disenfranchise some voters,[190] but election officials informed voters of the new

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[182] *See* Merrill & Hickman, *supra* note 176, at 836.

[183] *Brakebill*, 139 S. Ct. at 10 (2018) (mem.). This is, at least, what we can read into the majority's order based on the context and based on the dissent. The majority provided no written opinion in this case.

[184] *Id.* at 10–11 (Ginsburg, J., dissenting).

[185] Rayson v. DeSantis, 140 S. Ct. 2600, 2603 (2020) (Sotomayor, J., dissenting).

[186] 140 S. Ct. 1205 (2020) (per curiam) (staying a district court order that had extended Wisconsin's mail-in ballot deadline). Another is Justice Kavanaugh's concurrence in *DNC v. Wisconsin State Legislature*. *See* 141 S. Ct. 28, 31–32 (2020) (Kavanaugh, J., concurring).

[187] Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam) ("By changing the election rules so close to the election date . . . the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").

[188] *Id.*

[189] *Id.* at 1208–11 (Ginsburg, J., dissenting).

[190] *Id.* at 1209 ("While I do not doubt the good faith of my colleagues, the Court's order, I fear, will result in massive disenfranchisement. A voter cannot deliver for postmarking a ballot she has not received.").

deadline and created compliance procedures in the days following the district court order.[191] The *majority*'s intervention would thus confuse voters and election officials.[192] According to the dissent, "[i]f proximity to the election counseled hesitation when the District Court acted several days ago, this Court's intervention today—even closer to the election—is all the more inappropriate."[193]

2. Identifying the Status Quo

The Justices arrive at such different conclusions about what the status quo is because they measure the status quo in different ways. Broadly speaking, two methods of framing the status quo have emerged in the case law: (i) the "state law" frame and (ii) the "recency" frame. Each comes with distinct policy benefits, but, as the next subsection shows, each is also ultimately a misunderstanding of *Purcell*.

First, the "state law" frame views state law as the status quo. This approach assumes that public knowledge about voting procedures derives from state legislation. In doing so, it assumes an entirely informed voter—or at least entirely informed as to the state law—who will become confused if voting procedures differ from the procedures listed in the state code. This approach seems to be the viewpoint of the majorities in *RNC* and *Brakebill*.[194]

The state law frame's biggest benefit is its ability to foster doctrinal development. The state law frame ignores the confusion caused by appellate decisions, and by taking this longer-term approach to the status quo, the Court can consider not just the case at hand but the doctrine as a whole. While a few appellate decisions might, in reality, cause some immediate confusion, that confusion might be justified because appellate decisions provide guidance for the doctrine as a whole, creating a clearer rule for later district court decisions. Under this rationale, confusion from appellate review is a necessary growing pain in forming a coherent doctrine. To be sure, appellate review is at best a necessary condition to a coherent doctrine, not a sufficient condition—after all, *Purcell* was decided in 2006, and we are still dealing with its doctrinal issues today.

Second, the "recency frame" understands the status quo in terms of the rule that was predominantly in place for some period leading up to the current election. This period could be weeks, months, or years—whatever period is necessary for the court to declare that a certain rule is what a voter will expect when she arrives at the polls because of some sort of recency bias. The rule could be *either* a state law or a district court order—or even a rule promulgated in some other way, such as an executive order. This approach seems to be the viewpoint of the liberal Justices, as evidenced by their dissents in *RNC* and *Brakebill*, who have suggested that a rule can become the status quo if it was in place for a year beforehand, if it was in place for the most

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[191] *Id*. at 1210.

[192] *Id.* (noting that the majority's order "is sure to confound election officials and voters" and is "thus ill advised, especially so at this late hour." (citing Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006))).

[193] *Id.* at 1210–11.

[194] *See supra* Part II.

recent primary, or if it was listed on the Secretary of State's website in the months just before the current election.[195] Unlike the state-law frame, the recency frame includes the reviewing court's *own* order as a large part of the voter confusion calculus.

The recency frame can be applied in two ways. At the very least, a "weak recency" version of the frame mandates that a reviewing court balance how much confusion its own order would create against how much confusion the district court order, if left untouched, would create. Such an idea does not appear radical given the commands of *Purcell* and the broader injunction jurisprudence to weigh the relevant harms.[196] A weak recency approach was taken by Justice Ginsburg in *Brakebill* when she compared the harms that would result from the dissent's would-be order to those from the Eighth Circuit's.[197] Taken to its extreme, however, a "strong recency" version would mandate that an appellate court always defer to a district court when the district court's order was in place in prior elections or when the appellate court order would upset the status quo "close" to election day, regardless of how "closeness" is defined.[198] It is unclear whether Justice Ginsburg went as far as endorsing this approach in *RNC*. Her precise statement was that *if* the district court should not have intervened because of the closeness of the election, as the majority said, then the majority's order is worse.[199] This comment seems to be debating the majority's reasoning on its own terms—on the idea that timing alone is dispositive—rather than necessarily espousing support for a "strong recency" interpretation.

The recency frame, however conceptualized, has the benefit of providing a more realistic conception of the status quo—one with a stronger connection to actual voter confusion. An appellate order can, of course, confuse a voter even when it restores the state law. The state law might be a new law that voters are not used to, or it might have been superseded by an injunction for so long that voters are more used to the rules set forth under the injunction, as in cases like *Raysor* where the district court order controlled at the time of the last primary.[200] By recognizing this, the recency frame rejects the unrealistic assumption in the state law frame that voters

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[195] Brakebill v. Jaeger, 139 S. Ct. 10 (2018) (Ginsburg, J., dissenting); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam). *See supra* Part II for more discussion of these cases. To be sure, in *Brakebill*, Justice Ginsburg listed the last two justifications together, so we cannot know whether the dissent would have found that either one was independently sufficient to modify the status quo.

[196] *See supra* Part II.

[197] *Brakebill*, 139 S. Ct. at 10–11 (2018) (Ginsburg, J., dissenting) ("True, an order by this Court vacating the stay would. . . disrupt[] the status quo. . . . [But] [t]hat inconvenience pales in comparison to the confusion caused by the Eighth Circuit's order . . . .").

[198] To be sure, if *Purcell* is not a standalone rule and merely one part of one factor in a balancing analysis, then appellate courts should still be able to intervene if a balancing of the factors calls for it.

[199] *Republican Nat'l Comm.*, 140 S. Ct. at 1211 (Ginsburg, J., dissenting).

[200] *See supra* Part II.C.

are perfectly informed as to the state law. Such a rejection also aligns with *Purcell*, which itself assumes an uninformed voter can become confused.

3. Abandoning "Step Zero"

This all invites the question: which frame should courts use? The answer is neither of them. The idea of the status quo undermines *Purcell* and is normatively ill-advised. "Step zero" should thus be abandoned altogether. This subsection first considers the "strong recency" frame before turning to the "weak recency" and state-law frames.

First, the strong recency frame is most clearly incompatible with *Purcell* itself. To be sure, the recency frames do identify an important logical tension inherent in *Purcell*: the case commands an appellate court to do the very thing it counsels district courts against doing—changing the rules close to an election. Yet although this tension exists, *Purcell* condones the tension. The strong recency frame would rubber stamp all district court action close to an election. Indeed, no matter how close the district court's order is to an election, an appellate court order will be closer, meaning appellate courts could never restore the state law.[201] Although there are normative arguments for such a rule,[202] it simply cannot be what *Purcell* stands for—which itself overturned a district court order even when its own order was closer to the election than the district court's.[203]

A "strong recency" view also contradicts the central argument that the liberal Justices have been advancing for years: *Purcell* is not a bright-line rule.[204] If appellate courts did not reserve the right to overturn district court orders close to elections, the *Purcell* Principle would become a bright-line rule based only on timing.[205] There would be a "moratorium" on the Constitution as the election approaches,[206] but for the *Supreme Court*, not for the district court. And some things,

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[201] *See* Muller, *supra* note 175 ("That can't be what *Purcell* dictates. *Purcell*'s entire point is that lower courts can't change the rules of elections close in time to the election—not that once they do so, the Supreme Court (which always hears the case even closer to the election) can't restore the original rule.").

[202] *See* Tokaji, *supra* note 24, at 1094 (suggesting there should be a higher burden for intervening in election administration cases than in other matters "because of the practical complexity and difficult-to-measure implications of such cases").

[203] *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31–32 (2020) (Kavanaugh, J., concurring) ("Applicants retort that the *Purcell* principle precludes an appellate court . . . from overturning a district court's injunction of a state election rule in the period close to an election. That argument defies common sense and would turn *Purcell* on its head. . . . Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule.").

[204] *See, e.g.*, *id.* at 42 (noting that courts must consider "all relevant factors, not just the calendar").

[205] *See supra* Part I.A (describing *Purcell*'s place within the factor balancing analysis for preliminary injunctions and stays).

[206] *Cf.* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 42 (2020) (Kagan, J., dissenting).

like the necessity for clear guidance to lower courts across the country or the importance of setting the law straight, might outweigh any confusion caused by an appellate order. Suppose a district court closed hundreds of polling places under a gross misinterpretation of the case law—would we want to let such an injunction stand simply because it became the status quo?

Second, we are left with the state law and "weak recency" frames, both of which conflict with *Purcell* but for a more fundamental reason: the status quo—the idea these frames rely on—is itself incompatible with *Purcell*. The "step zero" inquiry should therefore be abandoned by courts because it obscures, rather than illuminates, a *Purcell* analysis.

Recall that the phrase "status quo" may have seeped into the doctrine through *Nken*, which describes a stay as something that corrects a judicial disruption of the legal status quo.[207] The state law frame most directly transplants this idea into the *Purcell* discourse by assuming that voter confusion should be measured by how far the new rule strays from the state law status quo. The weak recency frame also transplants the idea of the status quo into *Purcell*, but under a more realist conception of the status quo—one that considers the status quo of knowledge among voters, which may or may not track the legal status quo. The weak recency frame, in other words, warns against disrupting some set of election procedures that the public is used to.

Both approaches, however, commit an error by transplanting the idea of the status quo into the *Purcell* doctrine in the first place. There is a critical difference between the status quo that *Nken* refers to and the status quo that courts seem to believe *Purcell* alludes to. Namely, *Nken* describes a legal status quo, which is knowable: either the state law or the district court order controls. If a court departs from the legal status quo, it will say so, as clear as day, in its order. But the legal status quo has nothing to do with *voter confusion* because it has nothing to do with whether voters understand the legal status quo. While the weak recency frame hews closer to actual confusion than the state law frame, it still only measures confusion through the proxy of what the court believes the status quo of voter knowledge to be. Crucially, *voter confusion* is what *Purcell* warned against, not a disruption of the status quo. Its language—"voter confusion and consequent incentive to remain away from the polls"—is ambivalent toward what some status quo was.[208] *Purcell* only discusses whether voters will be confused by the change. Confusion is, of course, related to the idea of the status quo because voters might expect the so-called norm when they show up to the polls, but the two ideas are not identical. By equating the idea that courts should not cause confusion with the idea that courts should not change the status quo, a court implicitly assumes that there is a relationship between the two—that the status quo, legal or otherwise, mirrors the voter's knowledge of election procedures—which is not accurate.

In reality, the status quo is a poor proxy for voter confusion because it contains a faulty assumption: a critical mass of voters is used to or knows some set of election

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[207] Nken v. Holder, 556 U.S. 418, 429 (2009).
[208] Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006).

procedures. Yet identifying a status quo of voter knowledge is an elusive, and perhaps impossible, task. Even assuming there is a knowable status quo, identifying it necessarily involves a judgment about what the public considers to be the norm—a difficult analysis for a court to undertake in a small time period with little to no data on the public's knowledge.[209] But more importantly, there likely is no status quo in *Purcell* cases because the status quo for any one voter is not necessarily the status quo for another.

Brakebill serves as an example of this. There, the dissent argued that the rules in place at the time of the primary became the dominant status quo for the following general election.[210] Yet consider that 60.1% of eligible voters turned out for the general election in 2016,[211] while only 28.5% turned out for the primaries earlier that year.[212] Such data suggests that there were likely *two* status quos in *Brakebill*. For those who voted in the primary, the status quo was the rules in place at the time of the primary, which were put in place by the district court. For those who did not vote in the primary but only in the last general election, the status quo was the rules in place during the last general election, which were set by state law. To add to the problem, the state law changed in between the general elections, so the state law at issue in *Brakebill* was not even the same state law that the former group of voters was used to.[213] Even more illuminating is the survey submitted to the district court, which collected data on the North Dakota public's knowledge of the state's voting procedures.[214] The district court found that "knowledge levels regarding the [voting] law are very low . . . especially among Native Americans."[215] Indeed, only 23% of Native Americans knew that a voter identification law even existed and under 13% had seen an announcement or advertisement from the state about the change in the new voter identification law.[216]

The alternative to "step zero" is to return to the heart of the *Purcell* inquiry: voter confusion. To be sure, this still involves difficult questions because the above complications—lack of knowledge, lack of a uniform understanding, and difficulty advertising changes—remain even without the proxy of the status quo. And things

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[209] Although the district court considered survey data in *Brakebill*, it seems unlikely that similar data will be made available in every *Purcell* case. *See* Brakebill v. Jaeger, 139 S. Ct. 10, 10 (2018) (Ginsburg, J., dissenting).

[210] *Id.*

[211] *2016 November General Election Turnout Rates*, UNITED STATES ELECTION PROJECT, http://www.electproject.org/2016g [https://perma.cc/BY5Y-TLPT] (last visited Feb. 12, 2021).

[212] Drew Desilver, *Turnout Was High in the 2016 Primary Season, but Just Short of 2008 Record*, PEW RSCH. CTR. (June 10, 2016), https://www.pewresearch.org/fact-tank/2016/06/10/turnout-was-high-in-the-2016-primary-season-but-just-short-of-2008-record/ [https://perma.cc/ZX4Z-EQDB].

[213] *See* Brakebill v. Jaeger, No. 1:16-CV-008, 2018 WL 1612190, at *1 (D.N.D. Apr. 3, 2018) (explaining that the state law was enjoined before the 2016 primary election and amended in 2017), *vacated and remanded*, 932 F.3d 671 (8th Cir. 2019).

[214] *Id.* at *2–3.

[215] *Id.* at *3.

[216] *Id.*

that are relevant to the status quo, like the rule in place during the last election, can still be relevant to a voter confusion analysis. The difference is that a voter confusion analysis escapes the formalistic notion that these procedures *necessarily* mirror voter knowledge. Instead, a more focused inquiry into confusion, the issue at the heart of the matter, will allow courts to develop a clearer picture without the distorting effect that a faulty conception of the status quo fosters. What is more, frameworks can be developed to help determine whether voter confusion is relevant in any given case. As shown in the next section, *Purcell* cases can be grouped into two categories, only one of which tends not to produce meaningful voter confusion.

To put it in more concrete terms, let us return to the question of whether an appellate court could ever properly stay its hand because of the confusion its own order might produce. When *Purcell* is understood through a voter confusion lens, the answer is yes—the same answer put forth by the dissent in *Brakebill*.[217] But not because, as the dissent suggested, the district court order became the so-called status quo that now requires protection. Instead, an appellate court could decide to stay its hand because *Purcell* asks the court to consider the voter confusion that could result from conflicting orders—which necessarily includes its own order—and *Purcell* sits within a larger balancing test that considers the public interest at large.[218] Of course, *Purcell* does not mandate that a court do so, as the Court in *Purcell* itself chose not to stay its own hand. But the option is on the table in this equitable landscape.

In sum, determining the state of voter knowledge is a difficult judgment for a court to make. But when courts discuss a "status quo" as though it is somehow predictive of voter knowledge, they are both straying from *Purcell*'s command to focus on confusion and distorting the inquiry into whether voters will be confused. Accordingly, the "step zero" that has emerged in the case law should be abandoned in favor of a tighter focus on voter confusion itself. This alternative is made easier by the framework presented in the next section, which sorts orders into two categories depending on the types of confusion they produce.

B. Purcell *Typology: Positive and Negative*

The case law reveals two main ways a court can abide by *Purcell*'s command to avoid confusion and voter chill. This Article is the first to identify and taxonomize them. First is when an appellate court applies *Purcell* "negatively"—to *remove* or *lessen* restrictions on voting. The second is when a court applies *Purcell* "positively"—to *add* restrictions on voting.[219] The positive-negative framework does not merely separate the two main types of *Purcell* cases that courts decide for the sake of it. Instead, the dichotomy enjoys an important relationship with *Purcell*'s central inquiry into voter confusion. Sorting the cases in this way reveals that the

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[217] Brakebill v. Jaeger, 139 S. Ct. 10, 10–11 (2018) (Ginsburg, J., dissenting).

[218] *See supra* Part I.B.

[219] The "positive" and "negative" labels in no way imply normative value. Instead, the labels "positive" and "negative" simply describe whether an appellate court's order has the effect of adding or taking away voting restrictions.

liberal Justices seem to believe that negative orders cannot cause, or, at the very least, are unlikely to cause, voter confusion. This finding carries with it sizable doctrinal implications because the vast majority of *Purcell* cases that the Supreme Court has decided—ten out of thirteen—have been positive, restriction-adding orders.[220]

Section B.1 describes how the initial order, often issued by a district court, serves as the reference point in the framework. Sections B.2–3 describe how reviewing courts apply *Purcell* positively and negatively, offering examples of how each application plays out in practice. Section B.4 discusses additional factors to consider when classifying orders, such as how the redistricting cases interact with the positive-negative dichotomy. Section B.5 concludes by articulating why the dichotomy matters: only positive orders tend to produce confusion that results in voter suppression.

1. The Reference Point

When sorting cases into the positive-negative framework, the starting point is the first instance of relief given to plaintiffs. This is usually provided by the district court, although circuit courts and the Supreme Court sometimes issue injunctions on their own.[221] This initial form of relief can itself be either "positive" or "negative," depending on whether the order makes it easier or harder to vote.

Suppose that a district court, like the one in *DNC v. Wisconsin*, extends the mail-in ballot deadline at the request of the plaintiff.[222] Such an order is restriction-removing because it allows the plaintiff more freedom to vote than the state law previously allowed. Suppose now that rather than extending the mail-in ballot deadline, a district court shortens the deadline at the request of a plaintiff. Such an order is restriction-adding because it makes it harder to vote than under the state law regime. Positive orders are, however, unlikely to occur at the district court level. In fact, the Supreme Court has never heard a *Purcell* case in which the district court added restrictions to a state law.[223]

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[220] The number is ten out of thirteen since *Purcell* was decided. If *Purcell v. Gonzalez* itself is included in the calculus, the number of positive applications rises to eleven out of fourteen. To be sure, determining what is and what is not a *Purcell* case requires judgment calls, especially when some shadow docket orders contain no opinions at all, but all cases included in this calculation are described in detail in Part II. One case in particular, *McCrory v. Harris*, is harder to categorize but is assigned to the negative grouping. 136 S. Ct. 1001. *See infra* Part III.B.4 (discussing redistricting cases).

[221] *See supra* Part I.A.

[222] *See* Democratic Nat'l Comm. v. Bostelmann, 488 F.Supp. 3d 776, 784 (W.D. Wis. 2020) (granting plaintiff's motion for a preliminary injunction and requiring the state to count ballots postmarked by election day).

[223] *See supra* Part II. This is perhaps because plaintiffs rarely ask courts to add restrictions to the state law, especially when compared to the number that ask courts to lessen restrictions.

More commonly, a district court rejects a plaintiff's request to remove restrictions, thereby leaving current state law restrictions in place.[224] In the mail-in ballot scenario, for example, a district court might reject the plaintiff's request to extend the deadline, keeping the deadline where it was under state law. Although this is the closest analog to a positive order, such an order cannot properly be considered a positive application because it is not adding any restrictions to the existing rule.[225] An appellate court order that reinstates state law restrictions can, however, be a positive application. Under the positive-negative framework, appellate orders are considered in relation to the lower court order(s) on which they rule. In other words, whether an appellate court applies *Purcell* positively or negatively turns on whether it upholds or overturns a positive or negative district court order, as the next two subsections illustrate.

2. Positive Applications

The first way a reviewing court can invoke *Purcell* is through a "positive" application—one that *adds* or *maintains* restrictions on voting.[226] The bulk of the Supreme Court's *Purcell* applications have been positive—in fact, all but three of its applications added restrictions.[227] And a positive application can occur in two ways. The first, which represents most of the Supreme Court's *Purcell* applications, occurs when the reviewing court overturns a negative, or restriction-removing, district court injunction.[228] These decisions have the practical effect of *adding* restrictions to voting because by staying the injunction, they reinstate a state law that necessarily contained greater restrictions. For example, suppose a district court enjoins voter identification requirements, and an appellate court stays that order. The stay has the effect of reinstating those greater state law identification requirements by removing the injunction placed upon them.[229] The second way an appellate court can apply *Purcell* positively is by upholding positive orders.[230] This could occur if

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[224] For example, this occurred in *Purcell* itself. *See* Purcell v. Gonzales, 549 U.S. 1, 3 (2006) (describing district court proceedings).

[225] Ultimately, the positive-negative distinction is a guide to the types of confusion an order is likely to cause. Because district court orders that refuse to change anything are unlikely to cause confusion of any type, they have been left out of the positive-negative analysis. *See infra* Part III.B.5.

[226] Reviewing courts, of course, only "add" restrictions in comparison to the district court order. When they apply *Purcell* positively, they do not add restrictions to the state law—they merely reinstate the preexisting state law that itself contains greater restrictions than the district court order.

[227] *See supra* note 220 (illustrating that ten out of thirteen applications have been positive).

[228] *See, e.g.*, Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam).

[229] *See, e.g.*, Veasey v. Perry, 135 S. Ct. 9, 9–10 (2014) (mem.) (refusing to vacate the Fifth Circuit's stay on a district court order that enjoined Texas voter identification restrictions).

[230] *See, e.g.*, Raysor v. DeSantis, 140 S. Ct. 2600 (2020) (mem.).

an appellate court upheld a positive district court order, but, as discussed, those orders are rare. Positive applications more commonly occur when the Supreme Court upholds a circuit court's positive order—when a district court enjoins the state law to remove restrictions, a circuit court adds those restrictions back, and the Supreme Court upholds the circuit court's decision to do so.

Two of the Court's most recent applications illustrate how this looks in practice. In *RNC v. DNC*, recall that the district court's order extended the mail-in ballot deadline.[231] Such an order lessens voting restrictions by giving voters more time to cast their ballots than the state law allowed, making it a negative order under the framework. When the Supreme Court stayed that order, thereby reinstating the earlier deadline under state law, the Supreme Court had the effect of adding restrictions to voting.

Raysor v. Desantis was similar, albeit with the added layer of a circuit court's decision. The district court enjoined portions of a Florida law that restricted the extent to which those with prior felony convictions could vote.[232] Again, this was a negative application because it removed impediments that a group of voters faced in exercising their right to vote. The Eleventh Circuit stayed that order,[233] which was a positive application because—by reinstating the state law—the court added back the voting restrictions. The Supreme Court refused to vacate the Eleventh Circuit's stay,[234] which was also a positive application because it allowed the added restrictions to remain in place. For the purposes of the framework, an added layer of appellate review does not affect application type. If, like *RNC*, the case was appealed directly from the district court to the Supreme Court, then the Supreme Court staying the injunction by itself would also have been a positive application.

3. Negative Applications

The other type of *Purcell* application is a "negative" application—one that *removes* or *lessens* voting restrictions. Like positive applications, a negative application can occur in two ways. The first is when an appellate court upholds a district court's negative, restriction-removing injunction. For example, imagine that the Court had upheld the district court's extension of the mail-in ballot deadline in *RNC* or *DNC*. The second is when an appellate court overturns a district court's positive, restriction-adding injunction. For example, suppose a district court enjoined a state law and added restrictions to its voting procedures. An appellate stay of that order would, by reinstating the less restrictive state law, have a negative,

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[231] *Republican Nat'l Comm.*, 140 S. Ct. at 1206.
[232] *Raysor*, 140 S. Ct. 2600, 2600 (2020) (Sotomayor, J., dissenting).
[233] *Id.* at 2600–01.
[234] *Id.* at 2600 (mem.).

restriction-removing effect.[235] At the Supreme Court level, negative applications are uncommon: a majority of the Court has only applied *Purcell* negatively on three occasions.[236]

One of those instances was *Frank v. Walker*.[237] There, the district court enjoined Wisconsin's new voter identification requirements, which threatened to disenfranchise up to 10% of registered voters in the state in the 2014 election.[238] Such an order was negative because the order made it easier for more people—namely those without qualifying identification—to vote. The Seventh Circuit issued a positive application by staying the order and reinstating the restrictions.[239] The Supreme Court—in a likely six-Justice majority of Justices Kagan, Sotomayor, Breyer, Souter, Ginsburg, and Roberts—vacated the Seventh Circuit's stay.[240] The Court's application of *Purcell* was negative because it reinstated the district court order, which removed restrictions on voting.

4. Additional Considerations

The above represents the basic positive-negative framework, but two more considerations are in order. First, the positive-negative dichotomy has no relation to the formal ruling an appellate court enters (stay, denial of a stay, or its own injunction) or to whether it reverses the court below. Instead, what guides the positive-negative distinction is the nature of the order—whether it adds or removes restrictions on voting. Imagine a district court enjoins a state law that restricts the number of ballot drop boxes in a county. The district court's order is negative because it increases the number of ballot drop boxes available. If an appellate court stays that injunction based on *Purcell*, the appellate court has applied *Purcell* to strike down a negative order, one that removed restrictions, with its own positive order. But now, imagine that the district court enters an order that restricts the number of days in which voters can mail in their ballots. Then, if an appellate court stays that injunction based on *Purcell*, it has applied *Purcell* to strike down a positive order, one that added restrictions, with its own negative order. Even though the appellate court's formal ruling—a stay—was the same in both cases, whether it applied *Purcell* positively or negatively differed.

Second, while most cases sort neatly into the positive-negative framework, redistricting cases require further elaboration. Gerrymandering cases, which can be brought under the Equal Protection Clause of the Fourteenth Amendment and under

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[235] But, as discussed in Part III.B.1., the second scenario is unlikely to come before the court.

[236] *See supra* note 220.

[237] 574 U.S. 929 (2014).

[238] *See* Frank v. Walker, 769 F.3d 494, 498 (7th Cir. 2014) (Williams, J., dissenting).

[239] *Id*. at 496–98 (majority opinion).

[240] *See Frank*, 574 U.S. at 929. As is often the case on the shadow docket, the Court did not provide the names of the Justices in the majority. *See supra* notes 10–15 and accompanying text. But Justices Alito, Thomas, and Scalia were the only Justices who noted their dissent. *Id.*

Section 2 of the Voting Rights Act, allege that voting districts have been drawn improperly.[241] And courts' remedies in gerrymandering cases often require that the state legislature redraw its districts. Unlike most cases, where it is clear whether the court is adding or removing restrictions, when a court makes a state redraw its districts, it is less clear whether its order should be classified as positive or negative.[242]

On the one hand, a district court order requiring redistricting is likely to cause at least some "chaos" that Justice Kavanaugh warned of in *Merrill v. Milligan.*[243] In newly altered districts, candidates would need to appeal to new voters, and voters would need to size up fresh candidates—all on short notice. That's why in a set of 1960s cases that held district maps unconstitutional, the Court made their changes effective for the *next* election cycle.[244] On the other hand, although an order requiring redistricting might add confusion, it does not necessarily add *restrictions*—everyone affected can still vote even if in a different district. And in a different district, many of those who previously lived in an unconstitutionally gerrymandered district would have a greater ability to elect a candidate of their choice. In this sense, a court's lack of intervention could sometimes suppress more votes than a court's intervention.[245] When it comes to redistricting cases, then, whether an order requiring a new map is positive or negative depends on the facts of the case at hand: the voter chill created by a late switch to a new map must be weighed against the suppression that would result from sticking with the existing, gerrymandered map.

In sum, *Purcell* cases can be taxonomized into two groups: positive orders that add voting restrictions and negative orders that remove restrictions. Most of the Supreme Court's *Purcell* applications to date have been positive, restriction-adding orders—likely under the theory that *Purcell* is a bright-line rule. This is a worrying

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[241] For a discussion of redistricting claims under the Equal Protection Clause, see Michael C. Li, *The Surprise Return and Transformation of Racial Gerrymandering*, 94 N.Y.U. L. REV. 136 (2019). For a discussion of claims under Section 2 of the Voting Rights Act, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Ac*t, 57 S.C. L. REV. 689, 692 (2006) (describing the differences between "vote denial" and "vote dilution" claims).

[242] For another discussion of how the court should weigh these cases, but one focusing on *Purcell*'s interaction with the other factors in an injunction analysis, see Hasen, *supra* note 2, at 441–43.

[243] 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

[244] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 585 (1964) (delaying relief until after the present election despite finding the state's apportionment scheme unconstitutional); Williams v. Rhodes, 393 U.S. 23, 34–36 (1968) (holding that the state was not required to place a party on the ballot for the upcoming election, despite the fact that leaving the party off the ballot was a constitutional violation).

[245] *See* Stephanopoulos, *supra* note 27 ("[J]udicial *intervention* isn't the only step that can lead to disenfranchisement. Judicial *abstention* can, too, when it allows an unconstitutional policy that unjustifiably burdens voting to stay in effect. . . . *Purcell*'s own goal of minimizing voters' 'incentive to remain away from the polls' [can be] advanced by courts entering the fray." (quoting Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006))).

trend because, as the next subsection shows, positive and negative orders tend to cause vastly different types of confusion.

5. Why It Matters: Positive and Negative Orders Cause Different Types of Confusion

So why does the positive-negative dichotomy matter? *Purcell* tells courts to consider "voter confusion and consequent incentive to remain away from the polls"—but how should they do so? The positive-negative framework offers a way for courts to measure confusion and disenfranchisement. It shows that positive and negative orders lead to radically different types of voter confusion: only positive orders tend to lead to confusion that results in disenfranchisement. Indeed, such an idea appears to be motivating the liberal Justices' thinking. While they have not articulated a bright-line rule saying as much or categorized cases as "positive" or "negative," reading their dissents as a whole reveals that they seem to believe negative orders cannot—or at least are unlikely to—cause the type of confusion that *Purcell* protects against.

Imagine that a new state law requires voters to bring state-issued identification to vote in person when the state previously required no forms of identification to vote. Consider the following scenarios, with a particular focus on the way a voter would be confused by each:

> Scenario A: The district court enjoins the law. A year later, the circuit court stays the order close to the election and reinstates the identification requirements. Relying on *Purcell*, the Supreme Court leaves the stay in place.
>
> Scenario B: The district court refuses to enjoin the law. A year later, the circuit court enjoins the law close to the election. Relying on *Purcell*, the Supreme Court leaves the injunction in place.

Scenario A is an example of the Supreme Court applying *Purcell* positively, while Scenario B is an example of the Court applying *Purcell* negatively. In both cases, the circuit court changed an existing rule close to the election. But the sorts of voter confusion caused by each order differs. In Scenario A, voters might be unaware that the circuit court *added* identification requirements by reinstating the state law. This kind of confusion runs the risk of disenfranchising voters because if they believe the district court's rule is still in place, they might show up to the polls without the identification they need to vote.[246] In Scenario B, voters might again be

[246] To be sure, in many states, a voter in this situation could request a provisional ballot, although some states are exempt from the federal law requiring provisional ballots and do

unaware of the circuit court order just before the election. But this time, the circuit court order *removed* requirements. Voters who, like in Scenario A, believe the old rule is still in place will not be affected in the same way because, at worst, confused voters will show up to the polls with more identification than necessary. True, those voters will still be confused about what the rule is, but they will not be confused in a way that results in their disenfranchisement—this is "no harm, no foul" confusion. The Supreme Court, therefore, likely misapplied *Purcell* in Scenario A but not in Scenario B.

To be sure, some voters could still be disenfranchised in Scenario B. If voters who lack qualifying identification know about the state law that would prevent them from voting but not about the circuit court's order enjoining it, they will still believe that they cannot vote. That, however, is hardly a result of the circuit court's negative order. Such confusion stems from the state law and would occur regardless of whether or not the circuit court enjoined the state law—if anything, the circuit court order at least gives these voters a chance. Additionally, some voters may be confused in unpredictable ways because of a communication breakdown at some point along the chain from court to voter. Whenever a rule is in place, whether it is changed or not, there is the potential for a voter to be confused by something. That possibility, though, does not mean that such confusion is likely as a general matter or that the Supreme Court should cater to potential confusion because it is no more likely when a court removes restrictions than when a court adds restrictions.

These scenarios illustrate that there is a general principle inherent in the positive-negative dichotomy. When an order *adds* restrictions, the confusion stemming from that order is likely to cause the sort of confusion that disenfranchises voters. This is because confused voters in such a situation are prone to act in an underinclusive manner—without the tools necessary to vote. When an order *removes* restrictions, the confusion stemming from the order is likely to cause confusion that results in harmless errors. In this situation, confused voters are likely to act in an overinclusive manner—with more tools than necessary to vote.

The liberal Justices have taken a similar line of reasoning, without articulating a rule, in some cases. In *DNC v. Wisconsin*, for instance, Justice Kagan argued that the district court's order extending the mail-in ballot deadline was unlikely to confuse voters because a voter who was unaware of the district court's extension

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not use them. *See Provisional Ballots,* NAT'L CONF. STATE LEGISLATURES, (Jan. 10, 2022), https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx#don't%20use [https://perma.cc/A878-LLWY] (noting that Idaho, Minnesota, and New Hampshire do not use provisional ballots, and that North Dakota only uses them when polling place hours are extended). Because of this, and because many provisional ballots are ultimately not counted, this complication is assumed away for argument's sake. *See* Drew Desilver, *Most Mail and Provisional Ballots got Counted in Past U.S. Elections – But Many Did Not*, PEW RSCH. CTR. (Nov. 10, 2020), https://www.pewresearch.org/fact-tank/2020/11/10/most-mail-and-provisional-ballots-got-counted-in-past-u-s-elections-but-many-did-not/ [https://perma.cc/Q9WR-GR98] (finding that in 2016, 28.5% of provisional ballots were not counted).

would, at worst, mail their ballot earlier than needed.[247] Similarly, in *Brakebill*, Justice Ginsburg argued that the confusion that would result from requiring less identification than the state law would, at worst, result in voters turning up to the polls with more identification than necessary.[248] And some circuit court judges have made similar arguments.[249] Yet there were other cases, such as *RNC* and *Merrill*, in which this argument was available to the liberal Justices but not invoked.[250] That might be a function of the shadow docket, where cases are decided quickly, not fully briefed, and the opinions lack detail.[251] Or it might be a function of the fact that, in at least some of those cases, the liberal Justices showed that voters' confusion was unlikely for other reasons and perhaps did not feel the need to reach this line of argumentation.[252] But these Justices do, as a general matter, seem to believe that negative orders are less likely to cause confusion.

To be clear, this is a tendency and not a bright-line rule because negative orders *can* cause voter confusion. Beyond the fact that any rule can cause confusion, there might even be some circumstances in which a negative order will foreseeably cause confusion. Suppose a state law requires voters to bring two forms of identification to vote in person. If a district court strikes down the identification requirement in part, such that voters now only need to bring one form of identification, some voters might show up with no identification at all.[253] It is not a stretch to imagine that some

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[247] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 42 (2020) (Kagan, J., dissenting) ("It is hard to see how the extension of a ballot-receipt deadline could confuse citizens about how to vote: At worst, a voter not informed of the new deadline would (if she could) put her ballot in the mail a few days earlier than needed. Nor would that measure discourage Wisconsin citizens from exercising their right to the franchise.").

[248] Brakebill v. Jaeger, 139 S. Ct. 10, 10 (2018) (Ginsburg, J., dissenting) ("[T]he confusion arising from vacating the stay would at most lead to voters securing an additional form of ID.").

[249] Democratic Nat'l Comm. V. Bostelmann, 977 F.3d 639, 645 (7th Cir. 2020) (Rovner, J., dissenting) (concluding that the risk of voter confusion is minimal because the changes the district court made "redound to the benefit of voters, and certainly do not lay a trap for the unwary.").

[250] *See supra* Part II.

[251] *See supra* Part I.

[252] *See, e.g.*, Merrill v. People First of Ala., 141 S. Ct. 25, 27 (2020) (Sotomayor, J., dissenting) (arguing that the injunction will not create voter confusion because counties can choose whether to adopt curbside voting or not); Veasey v. Perry, 135 S. Ct. 9, 10 (2014) (Ginsburg, J., dissenting) (arguing that the district court's injunction was not at fault for any voter confusion because the state had almost a year to prepare for the possibility of the injunction).

[253] Thanks to Professor Michael S. Kang for this helpful example.

headlines would read "Court Strikes Down Identification Requirement" or that the nuances of the order would get lost in word-of-mouth communication.[254]

In sum, there is at least a general principle inherent in the positive-negative dichotomy: positive orders tend to result in voter confusion that leads to voter suppression, while negative orders tend to result in confusion that does not.

IV. NEGATIVE *PURCELL* APPLICATIONS AND PRESUMPTIVE VALIDITY

This Article has identified the two main types of orders found in *Purcell* Principle cases: positive and negative. It has also identified that negative orders generally pose less of a voter suppression risk than positive orders. Despite this, the Supreme Court continues to favor positive applications over negative applications at an alarmingly high rate. This Part, the Article's central normative contribution, explains why negative orders ought to enjoy a presumption of no confusion: when an order removes restrictions, courts should presume that it does not cause voter confusion until evidence suggests otherwise. This Part builds on an idea that some Justices have hinted at in the *Purcell* jurisprudence to offer a fully developed account not just of how *Purcell* should apply but of why it should apply in that way. In addition, this Article explores the doctrinal history of *Purcell* and uses it to develop a more holistic theory that reunites the *Purcell* Principle with its roots and with its own text.

Section A discusses the mechanics of the presumption. Section B delves into *Purcell*'s text and history to show that voter suppression is the north star guiding its analysis. Lastly, Section C considers the normative benefits of the presumption.

A. The Presumption

The presumption itself is simple: courts should presume that negative, restriction-removing orders do not cause voter confusion that results in voter chill. This could come up in a *Purcell* analysis in two ways. A court could apply the presumption to the negative order it is reviewing—such as when an appellate court reviews a district court order. Or a court could apply the presumption to its own order—that is, when considering whether its own negative order will cause confusion, a court should presume that it will not. This leaves two remaining issues: (i) why a presumption—not a rule—is the right approach, and (ii) how the presumption fits into the *Purcell* analysis and what kind of showing rebuts the presumption.

First, courts ought to adopt a presumption, not a bright-line rule, because the positive-negative dichotomy predicts the types of confusion that orders *tend* to

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[254] *See also* Stephanopoulos, *supra* note 27 ("Take a requirement that voters procure two witnesses for absentee ballots and then have them notarized. If a court struck down the notarization rule but left the two-witness rule in place, then voters might be quite confused. They might be unsure what their new obligations were, and some might throw up their hands and forget about voting. But if a court invalidated *both* rules, then its ruling might be substantially more understandable.").

produce. Some changes, like redistricting,[255] are so fundamental to the electoral system that they might cause detrimental voter confusion even if they remove restrictions. Professor Stephanopoulos describes a category of "building blocks" that often should not be changed close to an election because they comprise an "electoral environment" that candidates, fundraising, media, and voters all rely on.[256] For example, a jurisdiction's method of selecting candidates, such as at-large voting or ranked-choice voting, are all building blocks that should remain unchanged before an election.[257] Other negative changes, even if they do not affect electoral building blocks, might cause confusion due to their complicated nature, such as the prior example of a district court removing only one out of two voter identification requirements.[258] These changes are not the norm, and only one Supreme Court case applying the *Purcell* Principle has contemplated such a change,[259] but they are reason enough for negative orders to warrant a presumption rather than a rule. Not to mention, *Purcell* is a doctrine steeped in equity—in fact, it is a balancing test within a balancing test[260]—so it would make little sense to transform the *Purcell* Principle into a bright-line rule.

Second, the presumption fits naturally into *Purcell*'s own balancing analysis. While *Purcell*'s exact location in the injunction analysis remains somewhat mysterious,[261] scholars agree that it must live within the public interest prong of the preliminary injunction, permanent injunction, and stay factor balancing tests.[262] On top of this, *Purcell* is itself a balancing test, evidenced by the fact the Court in *Purcell* required lower courts to "weigh" both "the harms attendant upon issuance or nonissuance of an injunction" (the injunction or stay balancing tests) as well as "considerations specific to election cases" (*Purcell*'s balancing test).[263] And the Court made clear that those considerations include two things: voter confusion and clear guidance to the state.[264] So the *Purcell* Principle is a balancing test within a balancing test.[265] Like a Russian nesting doll, the presumption proposed in this

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[255] *See supra* Part III.B.4 (discussing the confusion that results from redistricting).

[256] Stephanopoulos, *supra* note 27.

[257] *See id.* ("Some policies, like a district plan or a jurisdiction's underlying electoral rule (at-large voting, plurality voting, ranked-choice voting, and so on), affect every aspect of the political process. . . . Such basic building blocks of the election should almost never be upset when time is limited.").

[258] *See supra* Part III.B.4 (discussing this and related examples).

[259] *See* McCrory v. Harris, 136 S. Ct. 1001 (2016) (mem.) (refusing to stay an order requiring that North Carolina redraw its congressional districts).

[260] *See supra* notes 56–58 and accompanying text.

[261] *Id.*

[262] *Id.*

[263] Purcell v. Gonzalez, 549 U.S. 1, 4 (2006).

[264] *Id.* at 4–5.

[265] *See* Stephanopoulos, *supra* note 27 ("*Purcell* is just a part of the broader legal analysis that courts conduct when determining whether to grant or lift a stay. . . . So *Purcell* is an odd hill for proponents of rigid rules to die on. It lies in territory, the fashioning of remedies, that has long been ceded to flexible standards.").

Article fits within *Purcell*'s command to consider voter confusion.[266] The upshot of all this is that because the presumption is located within balancing tests, even if the litigants fail to rebut the presumption, a Court might still strike down a negative order. It might find that the claim fails *Purcell*'s own balancing test, which could happen if the order was egregiously unclear to state election administrators, or it might find that the rest of the factors weigh against intervention, even when the *Purcell* Principle supports intervention.[267]

B. The North Star: Voter Suppression

Purcell has two mandates: First, court orders should provide clear guidance to election administrators and second, courts orders should not confuse voters. But for too long, the *Purcell* Principle has developed as a rule independent of its reasons. This Article is the first to bring the doctrine back to its roots, which are surprisingly pro-voting, despite the way the Supreme Court has wielded the doctrine.[268] As to *Purcell*'s first mandate, these roots illustrate that courts merely need to make their remedies clear to election administrators—not, as some have suggested, that courts cannot burden administrators. As to the second mandate, the roots show that voter confusion writ large is *not* what *Purcell* protects against. Instead, it protects only against *meaningful* voter confusion—confusion that leads to disenfranchisement. These insights lead to the conclusion that the positive-negative dichotomy and the presumption resulting from it are natural outgrowths of the text of *Purcell* itself and the doctrine underlying it. In practice, this means that the Supreme Court's *Purcell* jurisprudence is sorely misguided. While the Court tends to apply *Purcell* to negative orders,[269] doing so is in tension with the very ground *Purcell* stands upon. In fact, the Court's jurisprudence is a mirror image of what it should be: courts should tend to let negative orders stand and tend to strike down positive orders.

Section B.1 discusses the text of the *Purcell v. Gonzalez* opinion. Section B.2 discusses the doctrine preceding *Purcell*.

1. The Text of Purcell

The text of *Purcell* itself illustrates that courts should only consider voter confusion or burdens on election administrators when those things result in voter suppression. In *Purcell*, the Supreme Court struck down a Ninth Circuit injunction

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[266] *Purcell*, 549 U.S. at 4.

[267] *See* Democratic Nat'l Comm. V. Bostelmann, 977 F.3d 639, 645 (7th Cir. 2020) (Rovner, J., dissenting) (noting that courts must "conscientiously evaluate all of the factors that bear on the propriety of judicial intervention . . . including in particular the possibility of voter confusion.").

[268] *See* Raysor v. DeSantis, 140 S. Ct. 2600, 2603 (2020) (Sotomayor, J., dissenting) ("[T]his Court has wielded *Purcell* as a reason to forbid courts to make voting safer during a pandemic[.]").

[269] *See supra* note 220 (illustrating that ten out of thirteen of the Court's orders are positive, restriction-adding applications).

on Arizona's voter identification law.[270] It did so because cases close to elections trigger special considerations that the Ninth Circuit did not engage with.[271]

The Court held that courts must "weigh" the traditional injunction factors with "considerations specific to election cases."[272] This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls"—a risk that will "increase" as the election draws nearer.[273] The Court also included another justification for its holding when closing out its opinion: "the necessity for clear guidance" to state election administrators.[274] With these few words, the Court gave rise to the *Purcell* Principle.

But at some point, this message was scrambled. Despite its clear command to "weigh" various "considerations" that "can" result in harm,[275] the Court continues to treat *Purcell* as a bright-line rule—or something very close to it.[276] Beyond this, the Court also misinterprets the meaning of two more of *Purcell*'s features: (a) voter confusion and (b) clear guidance.

(a) Voter Confusion

First, the text of the opinion shows that voter confusion must lead to voter suppression for courts to take confusion into account. The Court did not establish a per se rule against court orders close to elections merely because such orders could cause confusion. Rather, it cautioned that such orders could lead to "voter confusion *and consequent* incentive to remain away from the polls."[277] The most natural reading of this phrase is that voter suppression stemming from voter confusion, not voter confusion alone, is the operative inquiry.

As a starting point, we should assume that the Court included the second clause for a reason.[278] Nothing suggests that "consequent incentive to remain away from the polls" is redundant with "voter confusion"—especially as the Court joined the

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[270] *Purcell*, 549 U.S. at 5.

[271] *Id.*

[272] *Id.* at 4.

[273] *Id.* at 4–5.

[274] *Id.* at 5 ("In view of the impending election, the necessity for *clear guidance* to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals." (emphasis added)). Clear guidance, however, is often treated secondarily to voter confusion. In the opinion itself, the "clear guidance" language is offset from the main discussion and placed in the middle of a summary sentence at the end of the opinion. *See supra* Part II (showing that the battle is often fought over voter confusion, not clear guidance).

[275] *Id.* at 4–5; s*ee also* Stephanopoulos, *supra* note 27.

[276] *See supra* Part II.

[277] *Purcell*, 549 U.S. at 4–5 (emphasis added).

[278] *Cf.* LARRY M. EIG, CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, 14–15 (2014) ("A basic principle of statutory interpretation is that courts should 'give effect, if possible, to every clause and word of a statute . . . .'" (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883))).

two with the word "and," suggesting that they are two distinct elements.[279] So we cannot, as the Court's conservative majority often has,[280] simply forget about the second part of the sentence. It is also clear that voter confusion does not satisfy *Purcell* by itself. First, the Court intentionally grouped the two together—if it wanted to caution lower courts against creating either confusion or voter chill, then it could have used "or" rather than "and." To be sure, it is commonplace to use the word "and" when listing two independently sufficient conditions. For example, the statement "it gets cold in the winter and when it rains" does not necessarily mean that it is cold when it rains *only* in the winter. While "or" would be more precise, the court might not have been thinking so precisely. This counterargument, however, is foreclosed by the fact that the Court used the term "and consequent." This term explicitly links voter confusion with voter chill by describing voter chill as an outcome of voter confusion. But more importantly, it shows that the inquiry *Purcell* endorsed focused on voter chill stemming from voter confusion, not merely voter confusion. The context surrounding the text also supports this reading. Voter confusion without voter chill is relatively harmless. Confusion alone might result in a voter sending in a mail-in ballot earlier than needed or showing up at the polls with more identification than they will be asked for,[281] but mere inconvenience is not something on which the Supreme Court would base a doctrine. In light of all this, we can safely conclude that the operative inquiry in *Purcell* is whether "consequent" voter suppression will result from any confusion.

In sum, the text of *Purcell* cautions courts against creating voter confusion when, and only when, voter confusion leads to voter chill.

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[279] *Cf.* Moskal v. United States, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) ("The principle [against surplusage] is sound, but . . . [i]t should not be used to distort ordinary meaning. Nor should it be applied to the obvious instances of iteration to which lawyers, alas, are particularly addicted . . . .").

[280] *See, e.g.*, Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting) ("To prevent *confusion*, we have thus repeatedly—although not as consistently as we should—blocked rule changes made by courts close to an election." (emphasis added)); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) ("[*Purcell*] not only prevents voter *confusion* but also prevents election administrator *confusion*") (emphasis added). By contrast, when the liberal Justices refer to "voter confusion," they often include references to "consequent incentive to remain away from the polls" as well. *Id.* at 41–42. *See, e.g.*, Raysor v. DeSantis, 140 S. Ct. 2600, 2603 (2020) (Sotomayor, J., dissenting) ("[T]he Eleventh Circuit has created the very confusion *and voter chill* that *Purcell* counsels courts to avoid." (emphasis added) (quotations omitted)).

[281] *Cf., e.g.*, *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (mail-in ballots); Veasey v. Perry, 135 S. Ct. 9 (2014) (mem.) (addressing voter identification).

(b) Clear Guidance

Second, the breadth of the Court's command to give "clear guidance" to state election administrators has been misunderstood.[282] Courts and scholars often conflate the idea that courts should provide *clear guidance* to election officials with the idea that courts should not *burden* election officials. But these standards are not the same. Interpreting the opinion to require the latter would swallow the equitable injunction and *Purcell* Principle tests, barring almost any kind of judicial intervention.

Judicial and scholarly interpretation of the "clear guidance" clause has been a mixed bag. In *DNC v. Wisconsin*, Justice Kavanaugh understood *Purcell* to not only caution against giving unclear guidance to election administrators,[283] but also against placing added burdens on them. To Justice Kavanaugh, it was relevant that the state would have to create plans to carry out the injunction as well as determine how to inform voters and election officials of it.[284] Likewise, some scholars have characterized the clause as a mandate to avoid placing "burdens on election administrators."[285] By contrast, in *RNC v. DNC*, Justice Kagan appeared to understand the clear guidance clause to command only clear guidance.[286] And Professor Stephanopoulos, although not directly interpreting the "clear guidance" clause, argues that courts should not intervene under *Purcell* when doing so will lead to administrator error.[287]

The second approach is a more accurate interpretation of *Purcell*'s text. To be clear, election officials are important and selfless public servants, who deserve all the credit they get and more. But *Purcell* is simply not a vehicle that protects their workload. Not one line in the opinion discusses the burdens placed on administrators or suggests that the Ninth Circuit should have addressed them. What *Purcell* says is simple: give clear guidance to states. This distinction matters in practice because

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[282] *Purcell*, 549 U.S. at 5 ("In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals.").

[283] *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (2020) (Kavanaugh, J., concurring) ("[*Purcell*] not only prevents voter confusion but also prevents election administrator confusion[.]").

[284] *Id.* ("If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes.").

[285] *See, e.g.*, Hasen, *supra* note 2, at 464 (describing the *Purcell* Principle as an inquiry in which "courts should weigh the risk of voter confusion and the burdens on election administrators when courts make changes to election rules close to an election.").

[286] *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1210 (2020) (Ginsberg, J., dissenting) ("For this Court to upend the process—a day before the April 7 postmark deadline—is sure to confound election officials and voters.").

[287] Stephanopoulos, *supra* note 27 ("Courts should avoid changing election regulations near an election when, by doing so, they would likely cause election officials to make serious mistakes.").

plenty of judicial orders will burden but not confuse election officials.[288] The first interpretation discussed above broadens *Purcell* far beyond its scope, fitting a turbocharged engine in the car that courts are already driving recklessly. As the Eleventh Circuit responded to an argument that the district court's order was too burdensome, "*Purcell* is not a magic wand that defendants can wave to make any unconstitutional election restriction disappear so long as an impending election exists."[289] The second interpretation also squares more naturally with the context surrounding the "clear guidance" consideration. The idea behind *Purcell* is to prevent disenfranchisement,[290] and disenfranchisement occurs when election officials do not know what the rules are or the rules are impossible to carry out, not merely when the rules create more work. Not to mention, one would be hard-pressed to find an order that does not create more work for officials—they will always have to alter the website, inform poll workers, and so forth. Understanding *Purcell* to counsel against any order that creates work for officials would be an absurd interpretation that swallows the rest of the rule.

In sum, when the Court in *Purcell* stressed the need for "clear guidance," it meant just that—not an interpretation encompassing any burdens on officials that would preclude district court intervention in almost every case. As the next subsection shows, this interpretation is also supported by the doctrine underlying *Purcell*.

2. Purcell *in Light of the Doctrine*

Purcell does not stand alone in the sea of election law jurisprudence, but up until this point, scholarship has not explored the relationship between *Purcell* and its predecessor cases. Courts and scholars tend to begin their inquiry with *Purcell* itself, but the line of cases cautioning against late-in-the-day judicial intervention has a long history. This section excavates *Purcell*'s long-forgotten roots, showing that they stand for the same general principle as *Purcell*'s text: judicial intervention is ill-advised only when it is likely to lead to voter suppression. This judicial north star shines light on *Purcell*'s meaning, how courts should apply *Purcell*, and the presumption of no confusion.

The *Purcell* Principle did not begin in 2006. As Judge Williams identified in her *Frank v. Walker* dissent, "*Purcell* was not the first time the Court recognized these realities."[291] She argued that *Purcell* is steeped in a line of cases going back to the 1960s: *Reynolds v. Sims*,[292] *Williams v. Rhodes*,[293] and *Westermann v. Nelson*.[294]

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[288] *Id.* ("[A]dministrator *error* . . . isn't equivalent to administrator *inconvenience*.").

[289] People First of Ala. v. Sec'y of State for Ala., 815 F. App'x 505, 514 (11th Cir. 2020) (Rosenbaum, J., concurring) ("At most, [the order] requires defendants to provide additional training to ballot workers—a feat hardly impossible in the allotted time.").

[290] Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006).

[291] Frank v. Walker, 769 F.3d 494, 499 (7th Cir. 2014) (Williams, J., dissenting).

[292] 377 U.S. 533 (1964).

[293] 393 U.S. 23 (1968).

[294] 409 U.S. 1236 (1972).

Although Judge Williams cited these cases to argue that the Seventh Circuit should restore the status quo, an idea this Article has rejected,[295] delving into the cases reveals something else entirely about *Purcell*. These cases show that voter suppression is the key factor in determining whether judicial intervention is warranted, and confusion to voters or election officials is important only if it chills votes.

In *Reynolds v. Sims*, the Court held that the Alabama legislature was apportioned unconstitutionality but did not require the state to remedy the violation before the election.[296] The Court stressed that it would be "unusual" for a court not to be justified in preventing an election from taking place under an invalid procedure, but it carved out an exception: "where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief."[297] As to when these equitable considerations justify withholding relief, the Court explained that courts should consider the closeness of the election and avoid making unreasonable demands on election officials because doing so might cause a "*disruption of the election process*."[298]

The other cases took a similar line of reasoning. In *Williams v. Rhodes*, the Court held that an Ohio law unconstitutionally excluded the Socialist Labor Party from the ballot, but the court again refused to offer relief before the upcoming election.[299] It did so because the nature of the relief, at a date so close to the election, would have caused "serious *disruption of election process*."[300] Crucially, the court did not simply note that the change would cause voter confusion but that "the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio Citizens," like absentee voters.[301] Similarly, in *Westermann v. Nelson*, the Court admitted that candidates who could not get on the ballot "may" have had a valid claim but refused to offer relief before the election.[302] It did so because Arizona's "election machinery [was] already under way"—for instance, some absentee ballots had already been sent out and returned—and its "election processes would likely be *disrupted* by so late an action."[303]

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[295] *See supra* Part III.A.

[296] 377 U.S. at 533 (1964) (establishing the "one person, one vote" principle).

[297] *Id.* at 585.

[298] *Id.* (emphasis added).

[299] 393 U.S. 23, 34–35 (1968).

[300] *See id.* at 35 (accepting the State's argument that the relief would cause "serious disruption of election process" by noting that "it would be extremely difficult, if not impossible, for [the state] to provide still another set of ballots." (emphasis added)).

[301] *Id.*

[302] 409 U.S. 1236, 1236 (1972).

[303] *Id.* at 1236–37 (emphasis added). The Court also noted that it would be expensive for the state to reprint all of the ballots, which might support the "burdens" interpretation of

These cases share a guiding principle: disenfranchisement. None focus solely on timing, confusion, or a lack of clear guidance. Instead, they focus on the disruption of election processes. And they do so because when election machinery is disrupted, citizens cannot vote.[304] To be sure, timing, confusion, and clear guidance do factor into their analyses. But these considerations are factors because they might result in disenfranchisement, not because they are dispositive in their own right. Compare, for example, *Westermann* with *DNC v. Wisconsin*. In the former, the Court refused to provide relief at such a late date because ballots that had already been returned would have to be discarded.[305] In the latter, Justice Kavanaugh refused to provide relief at such a late date because it was such a late date.[306]

This precedent is the ground that *Purcell* grows upon. If the genealogy was not clear enough, *Purcell* even explicitly invokes the same principle—voter confusion matters when it leads to disenfranchisement—in the language "voter confusion *and consequent* incentive to remain away from the polls."[307] Importantly, the precedent expands upon the metes and bounds of the *Purcell* principle in a way that is sorely lacking in modern *Purcell* jurisprudence. *Purcell* has developed as a rule independent of its reasons—the reasons given in *Reynolds*, *Williams*, and *Westerman*—and it is high time to realign *Purcell* with those reasons.

Such an interpretation of *Purcell* also tracks the Court's broader election administration case law, which stands for two general propositions. First, the Court's guiding principle in election administration cases is the vindication of the right to vote. Take *Bullock v. Carter*, for instance, in which the Court struck down a Texas law requiring candidates to pay a filing fee to get on the ballot.[308] Even though the state argued that the revenue from the fees was necessary to finance elections, the Court held that the voters' interest in electing a candidate of their choice was even more important.[309] Or take *Tashjian v. Republican Party*, in which the Court held

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the clear guidance requirement. *See supra* Part IV.B.1(b). This language, however, was likely dicta. At the end of its opinion, the court explicitly stated that it denied relief "because . . . orderly election processes would likely be disrupted," and did not list any other determinative reasons. *Westermann*, 409 U.S. at 1236–37 (1972).

[304] *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 35 (1968) ("[T]he confusion that would attend such a last-minute change poses a risk of interference with the rights of Ohio Citizens . . . ").

[305] *Westermann*, 409 U.S. at 1236–37.

[306] Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring) ("[T]he District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents.").

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

[308] 405 U.S. 134, 149 (1972).

[309] *Id.* ("Without making light of the State's interest . . . we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters."). *See also, e.g.*, Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986) (holding that the state could not prevent a party from opening up its primary to independent voters "to broaden the base of public participation in and support for its activities.").

that Connecticut could not prevent a party from opening up its primary—allowing independent voters to participate in it—despite the state arguing that open primaries cause voter confusion.[310] Second, even when the Court holds that a state interest in a restriction outweighs a voter or party interest, the function of the state interest is always to aid the political process.[311] In other words, a state can overcome an individual's interest in voting, but only when the state's interest ensures the right to vote more generally.

In sum, like the text of *Purcell* itself, *Purcell*'s roots show that the analysis should hinge on voter suppression—not voter confusion alone. The presumption of no confusion reflects this finding and realigns the *Purcell* Principle's sights on voter suppression.

C. Benefits of the Presumption

There are also normative benefits to adopting the positive-negative dichotomy and the presumption of no confusion. Beyond crafting a more coherent doctrine by reconciling *Purcell* with its predecessor cases and the election administration case law at large, the dichotomy promotes three goals: certainty, institutional legitimacy, and deference to the best-positioned fact finder.

First, the *Purcell* Principle is riddled with uncertainty. To start, the Court has not articulated where the principle fits within the injunction or stay factors; *Merrill v. Milligan* even suggested that the principle might *modify* the factors.[312] Courts already have wide discretion when they consider the amorphous injunction and stay factors, especially given the multitude of ways in which courts can balance those factors against each other.[313] And because *Purcell* lacks guardrails, courts have more discretion still in emergency election cases.[314] When applying *Purcell,* courts face a menu of options, ranging from considering *Purcell* as one part of the public interest factor to considering it as a bright-line rule that trumps all the equitable injunction factors.[315]

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[310] 479 U.S. at 220–22.

[311] *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 532 U.S. 666 (1998) (upholding a state law excluding an independent candidate because the law simplifies the process for voters); Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (upholding a state fusion restriction because of the state's interest in preventing political advertising channels public focus into serious candidates); Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (upholding a law placing ballot restrictions on minor candidates because of the state's interest in winnowing down candidates, which simplifies the process for voters).

[312] 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring).

[313] *See supra* Part I.A (describing the threshold approach, the sequential approach, and the sliding scale approach).

[314] *See* Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 645 (7th Cir. 2020) (Rovner, J., dissenting) (criticizing the Court for not giving lower courts "more guidance than *Purcell* and an occasional sentence or two in its stay rulings . . . .").

[315] *See supra* Part II (describing the differing approaches courts take).

So lower courts have too much discretion and too little guidance—but how can they conform their conduct to the doctrine without an explanation of what the doctrine is?[316] *Purcell* and its subsequent case law emerged from the shadow docket, where cases are not fully briefed, written explanations are non-existent or short, and the Justices do not always explain their votes.[317] The contours of doctrine are unknown because the Court has raised *Purcell* in the dark—a troubling feature for a doctrine that decides some of our most critical election cases.[318]

But a clearer doctrine is possible. Scholars have rightfully suggested that the Court clarify how *Purcell* interacts with the injunction factors,[319] reform its shadow docket procedures,[320] and consider certain factors to determine when judicial intervention is advisable.[321] Few, however, seek to constrain *Purcell* itself.[322] The positive-negative dichotomy and the presumption of no confusion do just that by transforming an open-ended inquiry into one with guardrails.[323] Much like tiers of scrutiny,[324] the dichotomy performs a sorting function: positive orders are inherently suspect, and negative orders are not. This gives the analysis a starting point. Further, because courts are forced to explain when a positive order raises a *Purcell* concern, the presumption naturally leads to a more fleshed-out doctrine. Over time, courts will fill out exceptions to the presumption, which will help explain the kinds of intervention that *Purcell* does and does not counsel against. And by providing lower

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[316] *See* Baude, *supra* note 11, at 14 ("[I]t is difficult for lower courts to follow the Supreme Court's lead without an explanation of where they are being led."). The shadow docket also reduces accountability because Justices do not have to put their name next to a decision, making it impossible for reporters and academics to point out inconsistent positions. *See* Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 33, 42 (1994) (stating that "[e]ven if [a Justice] do[es] not personally write the majority or the dissent, their name will be subscribed to the one view or the other. They cannot, without risk of public embarrassment, meander back and forth").

[317] *See supra* notes 10–15 and accompanying text.

[318] *See* Hasen, *supra* note 14 (noting that piecing together shadow docket orders is "guess work.").

[319] *See, e.g.*, Gilleran, *supra* note 26, at 468–70.

[320] *See, e.g.*, Hasen, *supra* note 2, at 461–63 (proposing that the Court should explain its shadow docket rulings, even if it must do so after the fact, much like some lower courts); Gilleran, *supra* note 26, at 470–71 (proposing the same); Baude, *supra* note 11, at 18 (proposing that the Court disclose the vote of each justice).

[321] *See* Stephanopoulos, *supra* note 27.

[322] Professor Stephanopoulos's proposal is the exception. *See id.* And to be sure, a bright-line rule that no court orders may take effect after some predetermined date would promote the most certainty. *See* Gilleran, *supra* note 26, at 466 (identifying six weeks as the "zone of danger" in modern *Purcell* jurisprudence). But this would make certainty the sole consideration, in contravention of *Purcell*'s text, history, and the fundamental equitable principles in the body of law in which it sits. *See supra* Part I.

[323] The proposal set forth here could even work in conjunction with Professor Stephanopoulos's proposal by acting as a device to evaluate the first three factors in his framework. *See* Stephanopoulos, *supra* note 27.

[324] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing the tiers of scrutiny).

courts with an established framework within which to work, the dichotomy and presumption will also provide state legislatures, election officials, and plaintiffs with much-needed predictability.

Second, emergency election cases are so intertwined with election outcomes that the Court risks denting its institutional legitimacy with every *Purcell* Principle decision. A line of scholarship suggests that, because the Supreme Court cannot enforce orders itself and relies on voluntary compliance,[325] the Justices are "keenly aware" of preserving the Court's legitimacy in the eyes of the public.[326] Yet, in *Purcell*, the Court has crafted a doctrine in which Republican-backed voting restrictions almost always win.[327] Since 2006, the Court has increasingly sided in favor of upholding voting restrictions, and in 2020 it did so in every single one of its *Purcell* cases—almost always along partisan lines.[328] This is against the backdrop of increasingly "hyperpartisan" election litigation in which political actors nakedly seek to manipulate the rules of the game for partisan advantage.[329] The positive-negative dichotomy and the presumption of no confusion proposed by this Article offer courts a legitimacy buffer. The dichotomy and the presumption are objective, repeatable tools that sort cases into one of two categories, with an established presumption that always accompanies one category. Because this makes the Court more predictable, it goes some way to dispelling the notion that the Court is acting under ulterior motives in these highly charged election cases. By announcing a prospective rule, and one that requires an explanation of the evidence should the

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[325] *See* James L. Gibson & Michael J. Nelson, *The Legitimacy of the Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANNU. REV. L. SOC. SCI. 201, 203 n.4 (2014) (noting that after *Worcester v. Georgia*, Andrew Jackson famously remarked, "John Marshall has made his decision; now let him enforce it.").

[326] *Id*. at 201–03.

[327] *See supra* Part II; s*ee also, e.g.,* Julián Aguilar, *Voter ID Passes House After Long, Emotional Debate*, TEX. TRIB. (Mar. 23, 2011, 6:00 PM), https://www.texastribune.org/2011/03/23/voter-id-passes-house-after-long-emotional-debate/ [https://perma.cc/GZ8G-Y4U5] (illustrating the Republican support and Democrat opposition to the legislation that was allowed by the Supreme Court in Veasey v. Perry); Zach Montellaro, *Supreme Court Sides with Republicans, Reinstates Witness Requirement in South Carolina*, POLITICO (Oct. 5, 2020, 10:03 PM), https://www.politico.com/news/2020/10/05/supreme-court-reinstates-witness-requirement-south-carolina-426652 [https://perma.cc/R96Z-NSJ6] (describing the decision in Andino v. Middleton as a "victory for Republicans"); *Tim O'Donnell, Arizona GOP Lawyer Tells Supreme Court the Party Needs Certain Voting Restrictions to Compete with Democrats*, THE WEEK (March 2, 2021), https://theweek.com/speedreads/969826/arizona-gop-lawyer-tells-supreme-court-party-needs-certain-voting-restrictions-compete-democrats [https://perma.cc/96AL-RXB2] (quoting an RNC lawyer in Supreme Court oral argument admitting that striking down restrictions "puts [Republicans] at a competitive disadvantage relative to Democrats").

[328] *See supra* Part II.

[329] *See generally* Michael S. Kang, *Voting Rights from Judge Frank Johnson to Modern Hyperpolarization*, 71 ALA. L. REV. 793, 801–08 (2020) (discussing hyperpartisanship in election administration).

court wish to restrict voting, the Court can distance itself from accusations that it is restricting voting for political reasons.

Third, the presumption of no confusion best positions courts according to their capabilities. Consider the two forces at issue in a *Purcell* case. When the initial court issues an injunction, it does so because it concludes that an election procedure is likely unlawful—not something to take lightly.[330] When a reviewing court stays that injunction, it does so because it concludes that the injunction might cause voter confusion, not necessarily because the lower court is incorrect about the illegality of the procedure.[331] And reviewing courts sometimes do so only because the order came close to the election, without any evidence that the order *will* confuse voters.[332] But consider the positions of these two courts. The initial court—most often a district court—reviews the evidence, hears the parties' arguments, and sits closest to the facts on the ground.[333] The reviewing court, on the other hand, receives little briefing and perhaps no oral argument.[334] The presumption safeguards against this imbalance by identifying orders that are unlikely to cause confusion and requiring a greater showing to overturn those orders. It prevents a reviewing court from reinstating a potentially unlawful procedure based on a platitude—courts should not intervene close to elections—that might not track reality in the case at hand.

In sum, the presumption is a simple tool that assists courts faced with the question of whether it is too close to an election to change the rules. Importantly, the presumption does so in a way that both reshapes the *Purcell* Principle into its intended form and offers a host of normative benefits to courts and the development of the doctrine.

CONCLUSION

The *Purcell* Principle is now on the big stage—it has decided, and will continue to decide, some of our most consequential election litigation. But it's an underdeveloped character. The Supreme Court has overwhelmingly used *Purcell* to uphold voting restrictions. And the Court has done so under the theory that *Purcell* is a bright-line rule, or something very close to that. Yet *Purcell* calls for a balancing

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[330] More precisely, it does so after considering four factors, the weightiest of which is likelihood of success on the merits. *See supra* Part I.A (describing the test courts apply to motions for preliminary and permanent injunctions).

[331] To be sure, a reviewing court could stay an injunction both because it concludes *Purcell* counsels against the change and because it concludes the procedure is likely lawful. *See supra* Part I.A.

[332] *See, e.g.*, Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 (2020) (Kavanaugh, J., concurring) (concluding that the district court's injunction was improper for three reasons, one of which was that "[t]he District Court changed the state election laws *too close* to the election," and the other two of which had no relation to voter confusion (emphasis added)).

[333] *See generally* Tokaji, *supra* note 24.

[334] *See supra* notes 10–15 and accompanying text (describing the Supreme Court's shadow docket procedures).

analysis, not a bright-line rule. Unfortunately, lower courts have little to go by when engaging in that balancing analysis. This Article offers a solution. Orders in emergency election cases can be grouped into two categories: positive orders (which add voting restrictions) and negative orders (which remove restrictions). A positive order risks disenfranchising voters who mistakenly believe that an old, less rigorous voting rule is still in effect. But negative orders do not present the same risk because a voter acting in accordance with a prior, more rigorous rule will likely still be able to vote. To account for that reality, this Article—drawing on the text of *Purcell* and its predecessor cases—crafts a "presumption of no confusion": negative orders are presumed not to confuse voters in a way that leads to disenfranchisement until evidence suggests that they do, in fact, disenfranchise voters. Applying the presumption to the Supreme Court's precedent shows that *Purcell* Principle doctrine is a near mirror image of what it should be. With our elections hanging in the balance, it is high time to bring *Purcell* back in line with its rationale.