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The Roberts Court, The Shadow Docket, and the Unraveling of Voting Rights Remedies

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Year in and year out, the Supreme Court's major rulings in argued cases generate outsized attention. But the Supreme Court's merits docket is just half the story. This past year, some of the most important decisions came in unsigned, and sometimes unexplained, orders related to whether to stay a lower court's ruling; this part of the Court's docket has been called the "shadow docket" because it frequently goes unnoticed.[1]

Through these cursory orders, the Roberts Court has been rewriting the rules of our democracy to prevent courts from vindicating the right to vote in an election year. Even as our nation is battling a deadly pandemic that has made exercising the right to vote more difficult, the Roberts Court is closing the courthouse doors on citizens seeking to vindicate the right to vote when it matters most.

One year after John Roberts became Chief Justice, in a 2006 case called *Purcell v. Gonzalez*,[2] the Court announced that federal courts should be wary of issuing injunctions in voting rights cases close to an election. "Court orders affecting elections, especially conflicting orders," the Court explained, "can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[3]

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[1] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. of L. & Liberty 1, 1 (2015) (describing the Court's "shadow docket" as encompassing "a range of orders and summary decisions that defy its normal procedural regularity"); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 125 (2019) (describing the "shadow docket" as the "significant volume of orders and summary decisions that the Court issues without full briefing and oral argument"). As described by Baude, the shadow docket both includes stay orders, which generally are unsigned, considered expeditiously, and provide little to no substantive analysis, and summary reversals of lower court rulings, which receive more thorough consideration and typically result in the publication of a short opinion. My focus here is on the former type of orders.

[2] 549 U.S. 1 (2006) (per curiam).

[3] *Id.* at 4-5.

This past term, the Roberts Court has expanded *Purcell* dramatically in a series of rulings, setting forth a very broad rule that, rather than providing relief to voters, closes the courthouse doors on them. In April of 2020, in a 5-4 ruling in *Republican National Committee v. Democratic National Committee*,[4] the Supreme Court's conservative majority announced a seismic expansion of the *Purcell* principle, forcing citizens in Wisconsin to choose between exercising their right to vote and protecting their health. The consequences were felt hardest in communities of color in cities such as Milwaukee, where one hundred and seventy-five polling places were closed. Voters were left with only five polling places, requiring them to brave long lines at a time when a stay-at-home order was in place.

In *Republican National Committee*, the Court's majority held that citizens challenging voter suppression on the eve of an election cannot go to court for relief. As the unsigned order announced, "courts should ordinarily not alter election rules on the eve of an election."[5] Even the extraordinary circumstances in Wisconsin—thousands of voters would likely be disenfranchised because they had not received absentee ballots on a timely basis due to a public health crisis unparalleled in our lifetime—did not qualify for an exception from this so-called "ordinary rule."

In a string of unsigned, unexplained orders this summer, the Supreme Court has demonstrated that it will not protect the right to vote during an election year, despite the obvious truth that there is no time when the right to vote is more dear than when it is about to be exercised. The Court has considered emergency motions in cases challenging voting or ballot access restrictions in Alabama,[6] Florida,[7] Idaho,[8] Oregon,[9] and Texas.[10] Each and every time, the Court sided with the state in unexplained orders, prompting Justice Sonia Sotomayor to take the Court to task for its pattern of repeatedly "condoning disenfranchisement" and "forbid[ding] courts [from] mak[ing] voting safer during a pandemic."[11] As she observed, *Purcell* has become an inflexible rule that sanctions voter suppression and prevents courts from playing their historic role in protecting constitutional rights.

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[4] 140 S. Ct. 1205 (2020).
[5] *Id.* at 1207.
[6] *Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049 (S. Ct. July 2, 2020).
[7] *Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868 (S. Ct. July 16, 2020).
[8] *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (S. Ct. July 30, 2020).
[9] *Clarno v. People Not Politicians*, No. 20A21, 2020 WL 4589742 (S. Ct. Aug. 11, 2020).
[10] *Texas Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020).
[11] *Raysor*, 2020 WL 4006868 at *4 (Sotomayor, J., dissenting). The only exception to this pattern is the Court's recent order in *Republican Nat'l Comm. v. Common Cause RI*, No. 20A28, 2020 WL 4680151 (S. Ct. Aug. 13, 2020), where the Court declined to invoke *Purcell* to overturn a consent decree protecting voting rights. While *Purcell* applies "where a state defends its own law," here the Court stressed, "state election officials support the challenged decree." *Id.* at *1.

Purcell rests on a germ of truth: courts must take account of how its rulings will affect an upcoming election. But *Purcell*, particularly in the harsh form in which it has been applied, transforms this sensible principle into a wooden rule that prevents courts from stopping late-breaking acts of voter suppression. This harms our democracy. As this Issue Brief lays out, the *Purcell* principle developed by the Roberts Court is flawed in three ways.[12]

First, the *Purcell* principle, as it has emerged, is out of line with prior law that recognizes the essential responsibility of the courts to safeguard our fundamental rights and our democracy. Before *Purcell*, courts did not close the doors to individuals victimized by restrictive election rules simply because an election was approaching. When candidates brought suit to redress unduly burdensome ballot access rules, courts granted relief to allow voters more choices at the ballot box. When voters challenged discriminatory voting changes—whether under the Constitution or the Voting Rights Act—courts enjoined them, even close to the election. Neither *Purcell* nor its progeny took account of the regime it displaced.

Second, even though *Purcell* requires the application of equitable considerations, which are supposed to demand a close examination of the totality of the circumstances in deciding whether to issue relief, the cases applying *Purcell* erect a near-absolute rule against judicial intervention close to the date of an election. As a result of this profound mismatch, the Court has taken a case-specific inquiry into equitable considerations and transformed it into a hard-and-fast rule that prevents enforcement of the constitutional right to vote across-the-board. This is a dangerous development that encourages partisan tampering with the electoral process. It is precisely in the run-up to Election Day that courts must carefully guard against state-sponsored voter suppression. If courts announce that they will essentially never intervene, they invite partisan manipulation of our democracy.

Third, the *Purcell* principle has a serious legitimacy deficit: it is entirely a product of the Court's summary orders process, which is characterized by rushed decision-making and rulings announced with little to no apparent reasoning. If "procedural regularity begets substantive legitimacy,"[13] there is good reason to be skeptical of the Court's development of the *Purcell* principle. The Supreme Court announced *Purcell* without full briefing and oral argument. It has repeatedly applied *Purcell* in a string of cases that, too, lacked full briefing and argument. The Court's provided reasoning in these cases ranges from cursory to none. It is not surprising that the Court has not given any attention to all the ways that *Purcell* diverges from the jurisprudential landscape that came before. The *Purcell* principle has been announced and

[12] For prior critiques of *Purcell*, see Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427 (2016); Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 Stan. L. Rev. 1, 28-43 (2007); Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 Ohio. St. L. J. 1065 (2007).

[13] Baude, *supra* note 1, at 12.

applied without the sustained consideration and reflection that characterizes the Supreme Court's normal decision-making process. As Justice Sotomayor has written, by intervening in this manner, the Court "undermines the public's expectation that its highest court will act only after considered deliberation."[14]

This Issue Brief proceeds as follows. Part I examines the pre-*Purcell* jurisprudential landscape, demonstrating that courts have long protected our Constitution's fundamental democratic principles by granting relief in the run-up to Election Day. *Purcell* and its progeny failed to grapple with or justify uprooting this regime that ensured that state and local governments honored the Constitution and other bedrock voting protections. Part II surveys the development of the *Purcell* principle. As this discussion demonstrates, although the *Purcell* principle claims roots in equity, the way the Court has applied it is irreconcilable with equity's flexible nature, which allows courts to take account of all facts and circumstances in shaping a remedy. By privileging the status quo and preventing courts from issuing remedies close to Election Day, it downgrades the right to vote—long described as "preservative of all rights"[15]—into a second-class right, which inevitably harms the marginalized and less powerful. Part III turns to examine a fundamental flaw in the Court's invention of the *Purcell* principle: its reliance on the summary orders process to introduce major doctrinal changes in voting rights remedies. As this part shows, deciding major voting rights issues, without full briefing, argument, and time for deliberation, tends to produce shoddy, error-ridden decisions. The *Purcell* principle should be reconsidered.

I. The Law *Purcell* Displaced: The Judicial Obligation to Fashion Voting Rights Remedies

Supreme Court precedent has long recognized that courts have a duty to remedy state denial and abridgment of the right to vote. As the Supreme Court observed in *Reynolds v. Sims*, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."[16] In redistricting, ballot access, and voting rights cases, the Court has made clear that courts have a duty to prevent enforcement of state laws and policies that infringe on constitutional protections. That duty does not somehow disappear simply because Election Day approaches.

Reynolds laid out in some detail the legal principles governing voting rights remedies in the redistricting context. First, there was a presumption that judicial remedies would exist for constitutional violations. "[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not

[14] *Little*, 2020 WL 4360897, at *4 (Sotomayor, J., dissenting).
[15] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
[16] 377 U.S. 533, 566 (1964).

taking appropriate action to insure that no further elections are conducted under the invalid plan."[17] Redistricting remedies are extraordinarily complex, but courts still have an obligation to fashion remedies for unconstitutional governmental action.

Second, *Reynolds* explained that the closeness of the election was a factor to be considered in deciding whether immediate relief should be ordered, not an absolute bar to relief:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.[18]

It commended the lower court for acting with "proper judicial restraint" by first giving the state legislature "an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme" and issuing relief "sufficiently early to permit the holding of elections pursuant to that plan without great difficulty."[19]

Reynolds recognized that, in certain circumstances, it would be too disruptive to provide a judicial remedy before the next election. In such cases, a court might conclude that the equities tipped against ordering immediate injunctive relief. Indeed, *Reynolds* commended the lower courts for "declining to stay the impending primary election."[20] As *Reynolds* observed, "under certain circumstances, such as 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 in a legislative apportionment case, even though the existing apportionment scheme was found invalid."[21] But this was a choice left to the court's discretion, not an absolute mandate across-the-board. Although "practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges,"[22] that should not be a court's first resort. As the Court's cases since *Reynolds* have made clear, permitting use of an unconstitutional reapportionment scheme can only be justified as a matter

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[17] *Id.* at 585; *Ely v. Klahr*, 403 U.S. 108, 114-15 (1971) ("We agree with appellant that the District Court should make very sure that the 1972 elections are held under a constitutionally adequate apportionment plan.").
[18] *Reynolds*, 377 U.S. at 585.
[19] *Id.* at 586.
[20] *Id.*
[21] *Id.* at 585.
[22] *Riley v. Kennedy*, 553 U.S. 406, 426 (2008).

of necessity.[23] In short, the presumptive remedy was injunctive relief, but that might have to give way in unusual circumstances in which there was a showing by the government that state electoral processes would be unduly disrupted.

Four years after *Reynolds*, in *Williams v. Rhodes*,[24] the Supreme Court applied these principles in the ballot access context and ordered a state to add a minor political party to the ballot shortly before the 1968 elections. Injunctive relief was the appropriate remedy to enforce the Constitution, even just a matter of weeks before Election Day.

In *Williams*, the Court struck down a series of Ohio statutes regulating ballot access, which "made it virtually impossible for a new political party, even though it has hundreds of thousands of members, or an old party, which has a very small number of members, to be placed on the state ballot to choose [presidential] electors."[25] The district court had agreed that the statutes were unconstitutional, but had refused to place the American Independent Party on the ballot. Rather than mandate ballot access, the court gave voters the option to cast a write-in ballot for the party. The Supreme Court rejected this remedy as too narrow. It ordered Ohio to place the party on the ballot, relying on the state's concession that the "Independent Party's name could be placed on the ballot without disrupting the state election."[26] The Court, however, refused to order the state to add the Socialist Labor Party to the ballot, reasoning that, because of the party's delay in seeking relief, "it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots."[27]

Williams, like *Reynolds*, confirmed the obligation of the courts to provide voting rights remedies, while also setting limits on those remedies. First, like *Reynolds*, it recognized that injunctive relief is the presumptively appropriate remedy, even in the weeks approaching Election Day. An individual who has expeditiously litigated his or her case in a manner consistent with the interest of state authorities in the orderly administration of the election should not be denied relief simply because Election Day is close. Second, it recognized that in certain circumstances, the equities may tip against injunctive relief. For example, where a party

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[23] *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("It is true that we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations." (internal citations omitted)).

[24] 393 U.S. 23 (1968).

[25] *Id.* at 24.

[26] *Id.* at 34.

[27] *Id.* at 35; *id.* at 40 (Douglas, J., concurring) ("[I]t started the present action so late that concededly it would now be impossible to get its name on all the ballots. The relief asked is of such a character that we properly decline to allow the federal courts to play a disruptive role in this 1968 state election.").

delays filing suit and threatens to disrupt state electoral processes, courts can properly stay their hand.

Williams is not the only case in which the Supreme Court has ordered a state to add a candidate to the ballot upon finding that the state ballot access rules were unduly burdensome. In 1976, in *McCarthy v. Briscoe,*[28] a little more than a month before the 1976 presidential elections, the Court ordered Texas to add former Senator Eugene McCarthy to the ballot, finding that the state had refused to provide any method for independent candidates to obtain ballot access in contravention of binding Supreme Court precedent. The lower courts had denied relief, insisting that it was too late in the day, but the Court refused to accept that the "violation of the applicants' constitutional rights must go unremedied."[29] While the Court was sensitive to the state interest in limiting the ballot to well-supported candidates and preventing laundry list ballots that might confuse voters, the Court concluded that there was no question that former Senator McCarthy had the "requisite community support."[30]

The Supreme Court's jurisprudence under the Voting Rights Act, too, has recognized the obligation of courts to issue voting rights remedies, even as Election Day approaches. Until the Supreme Court invalidated the preclearance requirement's coverage formula in *Shelby County v. Holder*,[31] courts granted injunctive relief close to Election Day where states had failed to comply with the Voting Rights Act's preclearance requirement.

The seminal case in this area, *Clark v. Roemer*,[32] arose out of Louisiana's effort to move forward with judicial elections, despite the Attorney General's refusal to preclear the creation of certain judgeships. In the fall of 1990, with preclearance requests still outstanding, Louisiana sought to move forward with elections. The Supreme Court first stayed these elections,[33] and then, later, on full review, unanimously held that courts have a responsibility to enjoin unprecleared voting changes, even close to the date of an election.

Justice Anthony Kennedy's opinion for the Court refused to carve out an exception to the rule that, under the Voting Rights Act, courts must enjoin unprecleared voting changes. The lower court had held that it was inappropriate to enjoin the upcoming election, citing the "short time between election day and the most recent request for injunction, the fact that qualifying and absentee voting had begun, and the time and expense of the candidates."[34] But the Court rejected that argument. The voters had "displayed no lack of diligence in challenging elections

[28] 429 U.S. 1317 (1976) (Powell, J., Circuit Justice).
[29] *Id.* at 1322.
[30] *Id.* at 1323.
[31] 570 U.S. 529 (2013).
[32] 500 U.S. 646 (1991).
[33] *Clark* v. *Roemer*, 498 U. S. 953, *modified by* 498 U.S. 954 (1990).
[34] *Clark*, 500 U.S. at 653.

for the unprecleared seats" and were entitled to relief, even with the election fast approaching.[35] Further, "vague concerns about voter confusion and low voter turnout" did not justify "refus[ing] to enjoin the illegal elections. Voters may be more confused and inclined to avoid the polls when an election is held in conceded violation of federal law."[36]

The Court drew a sharp distinction between cases in which "the elections in question had been held already," and the only available remedy was to "set aside illegal elections," and those in which the election is in the offing and there is still time for a court to enforce the right to vote free from discrimination before the election is held.[37] In such cases, in which the court faced "the *ex ante* question whether to allow illegal elections to be held at all," the Voting Rights Act's "prohibition against implementation of unprecleared changes required . . . enjoin[ing] the election."[38]

The Supreme Court left open the possibility that, in extreme cases, the equities might tip against relief, even in the face of an uncleared voting change. "An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed."[39] But "[n]o such exigency" justified withholding injunctive relief in the case before the Court.[40]

In all these areas, the Supreme Court's case law insisted that the judiciary had the responsibility to protect the right to vote even close to Election Day, while also recognizing that there might be some cases in which the equities tipped against injunctive relief.

How did the Supreme Court sweep aside these precedents and fashion an across-the-board bar to injunctive relief close to Election Day? An important part of the answer lies in the fact that the Court developed the *Purcell* principle in the shadows, in cases in which the Justices did not have full briefing and oral argument.

II. The *Purcell* Principle

Requests for interim relief have long been governed by a mix of case-specific considerations, some inextricably tied to the merits and some based on the equities of the case. The Supreme Court has long considered four factors in deciding whether to stay a lower court order or issue an injunction pending appeal: (1) whether the party seeking relief is likely to succeed on the

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[35] *Id.*
[36] *Id.* at 653-54.
[37] *Id.* at 654.
[38] *Id.*
[39] *Id.* at 654-55.
[40] *Id.* at 655.

merits; (2) whether the party seeking relief will suffer irreparable injury; (3) whether issuance of relief will substantially injure other parties to the proceeding; and (4) whether the public interest favors the grant of relief.[41] This standard is similar to the standard for awarding preliminary injunctive relief.[42]

A. The *Purcell* Decision

In *Purcell,* the Supreme Court considered a request to vacate an interlocutory injunction blocking a 2004 ballot measure that required citizens to present proof of citizenship when registering to vote and to present identification when casting a ballot. The district court refused to preliminarily enjoin the law, but a federal court of appeals issued an injunction pending appeal a month before the 2006 elections. The Supreme Court held that the injunction should not have been granted.

The Court reasoned that the injunction was improper because "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," specifically the fact that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."[43] It is highly debatable whether an injunction issued a month before Election Day would cause so much confusion that voters would stay at home, but the decision to stay the injunction seems sound. The district court had denied relief, and the court of appeals had offered no reason to think that the district court had erred. As the Supreme Court noted, "[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect."[44] The better course, as Justice John Paul Stevens emphasized in a concurring opinion, would have been to "[a]llow[] the election to proceed without enjoining the statutory provisions at issue," which would "provide the courts with a better record on which to judge their constitutionality."[45]

Purcell is best understood as reflecting longstanding equitable principles governing interim injunctive relief. The Court did not erect any hard-and-fast rule, but simply insisted that the equitable balance take into account election-specific consequences. This, in fact, did not break new ground, but simply confirmed that courts must be mindful of the approach of the coming

[41] *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Nken v. Holder*, 556 U.S. 418, 434 (2009); Hasen, *Reining in the* Purcell *Principle, supra* note 12, at 429-37 (collecting cases).
[42] *Nken*, 556 U.S. at 434; *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).
[43] *Purcell*, 549 U.S. at 4-5.
[44] *Id.* at 5.
[45] *Id.* at 6 (Stevens, J., concurring).

election in deciding whether to grant relief.[46] And the denial of relief was appropriate because the lower court had concluded that the law's challenger was unlikely to succeed on the merits.[47]

The Supreme Court decided *Purcell* in a hasty, cursory fashion—and it shows.[48] *Purcell* may have reached the right result, but its reasoning was woefully deficient. It ignored the Court's previous caselaw and, in fact, cited no cases bearing on the remedial question before it. It offered a number of considerations for lower courts to consider, but no governing rule, leaving lower courts with no real guidance for the future. And, making matters worse, the Court in *Purcell* suggested that it need not opine on the merits at all to decide whether to lift the injunction.[49] The next set of cases would leave lower courts with even less guidance.

B. *Purcell's* Anti-Democratic Progeny

In *Purcell*, the Justices criticized the Ninth Circuit's failure to explain its reasoning. But in a series of shadow docket rulings in the weeks before the 2014 elections, the Supreme Court turned around and did the same thing. In four separate rulings, the Court offered no reasoning explaining its decisions at all. The Court's omission was particularly glaring because the cases raised serious concerns about laws and practices that deprived hundreds of thousands of Americans of their right to vote.

In the wake of the Supreme Court's 2013 decision in *Shelby County v. Holder*, which gutted the Voting Rights Act, southern states formerly under federal supervision sought to enact tough new restrictions designed to make it harder for citizens, particularly in communities of color, to exercise their right to vote. Texas enacted the nation's most restrictive voter ID law, while North Carolina enacted an omnibus law that, one court later observed, "target[ed] African Americans with almost surgical precision."[50] Voter suppression measures were not confined to jurisdictions previously under federal supervision. In Ohio, the state eliminated an entire week of early voting, while Wisconsin enacted a tough voter ID law that would have disenfranchised as many as 300,000 voters.

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[46] *See supra* Part I.

[47] Hasen, *Untimely Death*, *supra* note 12, at 33 (arguing that "the Court's decision to reverse the Ninth Circuit is defensible, given the circuit court's failure to provide any reason for not deferring to a lower court's decision not to issue the preliminary injunction").

[48] *Id.* at 34 (calling *Purcell*'s reasoning "sloppy"); Tokaji, *supra* note 12, at 1088 (arguing that *Purcell* "does more to confuse than to clarify").

[49] *Purcell*, 549 U.S. at 5 ("[W]e express no opinion here on the correct disposition . . . or on the ultimate resolution of these cases.").

[50] *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert denied by North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

In three cases decided in September and October 2014, a sharply divided Supreme Court let the North Carolina, Ohio, and Texas laws go into effect,[51] with the Court's more liberal Justices, or some set of them, in dissent. In a fourth case, the Court blocked enforcement of Wisconsin's voter ID law, vacating a stay that would have allowed Wisconsin to implement immediately its voter ID law.[52] Three Justices would have allowed Wisconsin to enforce its voter ID law, even though the state conceded that ten percent of the state's voters would be unable to obtain ID before the election and "absentee ballots have been sent out without any notation that proof of photo identification must be submitted."[53] *Purcell*, together with the Court's ruling in *Shelby County*, left voters without a remedy against voter suppression.[54]

In the Texas ruling, *Veasey v. Perry*, Justice Ruth Bader Ginsburg's dissent, joined by Justices Sonia Sotomayor and Elena Kagan, argued that the Court was creating a mischievous doctrine that prevented courts from remedying unconstitutional abridgements of the right to vote. She explained why courts should apply long settled standards for considering requests for stays or interim injunctive relief, which make the likelihood of success on the merits and irreparable injury critical. "*Purcell* held only that courts must take careful account of considerations specific to election cases," she wrote, "not that election cases are exempt from traditional stay standards."[55] Where the record showed that citizens were being deprived of their right to vote, she urged, courts must step in to vindicate the Constitution, even in the run-up to Election Day. "The greatest threat to public confidence in elections in this case is the prospect of enforcing a purposefully discriminatory law, one that . . . risks denying the right to vote to hundreds of thousands of eligible voters."[56] The closeness of an election, she argued, was a factor to be considered, not an absolute rule barring courts from vindicating the Constitution.

But unfortunately, Justice Ginsburg's position did not carry the day. The Court has continued to apply the *Purcell* principle to leave citizens no recourse when states deny or abridge the right of citizens to vote. In 2018, in *Brakebill v. Jaeger*,[57] the Supreme Court let a restrictive voter ID law be enforced in the 2018 midterm elections, ignoring that the law would disenfranchise thousands of Native American voters who did not have a residential street

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[51] *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014); *Husted v. Ohio State Conference of the NAACP*, 573 U.S. 988 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014).
[52] *Frank v. Walker*, 574 U.S. 929 (2014).
[53] *Id.* at 929 (Alito, J., dissenting).
[54] In each case, the Court's action was seemingly based on *Purcell*, but we have no way of knowing for sure because the Court offered no explanation for any of its rulings. For a thorough review and critique of these rulings, see Hasen, *Reining in the Purcell Principle*, *supra* note 12, at 447-61.
[55] *Veasey*, 135 S. Ct. at 10 (Ginsburg, J., dissenting).
[56] *Id.* at 12; *League of Women Voters*, 574 U.S. at 927 (Ginsburg, J., dissenting) (urging majority to respect "record-based reasoned judgment" that challenged provisions "risked significantly reducing opportunities for black voters to exercise the franchise in violation of § 2 of the Voting Rights Act").
[57] 139 S. Ct. 10 (2018).

address and therefore could not satisfy the law's requirement that they show a voter ID containing a current residential street address. This requirement had been enjoined for the primary election, but in an unsigned and unexplained order, the Supreme Court refused to vacate a stay granted by the Eighth Circuit and permitted the law to be enforced for the general election. In dissent, Justice Ginsburg, joined by Justice Kagan, argued that the requirement should have been blocked because "the risk of disenfranchisement" and the "risk of voter confusion appears severe."[58] She feared that voters would come to the polling place only to find out they could not exercise their right to vote "because their formerly valid ID is now insufficient."[59]

Now, in the run up to the 2020 elections, the Supreme Court has made the *Purcell* principle even worse, establishing a hard-and-fast rule that lower courts should not enjoin voting changes close to Election Day, even when doing so is necessary to vindicate the right to vote and prevent constitutional violations. The Court's recent formulation rips *Purcell* from its moorings, erecting an across-the-board rule that cannot be justified based on equitable principles that govern requests for injunctive relief. This appears to displace the traditional standards that focus on likelihood of success on the merits, the balance of hardships, and the public interest. Instead, the Court's approach suggests that—irrespective of the merits—courts should not enter injunctive relief close to Election Day.

In *Republican National Committee*,[60] the district court had concluded that voters should not be forced to risk their health to exercise their right to vote—particularly at a time when a stay-at-home order was in place—and had given voters six extra days to receive and mail back absentee ballots, many of which had not been received because state authorities had been overwhelmed by record requests for such ballots. The Supreme Court, by a 5-4 vote, vacated the district court's injunction. Even in the midst of a public health crisis—the likes of which we have never seen in our lifetimes—the Supreme Court's majority insisted that *Purcell* foreclosed a remedy to preserve the right to vote. The decision not only overturned the relief ordered by the lower courts but also invented a new, last-minute restriction on voters not found in Wisconsin election law. Only absentee ballots *postmarked* by Election Day, the majority announced, would count.

"By changing the election rules so close to the election date," the majority claimed, "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."[61] Equitable considerations which had loomed large in *Purcell* formed no part of the majority's reasoning. It did not matter that, in the midst of a deadly

[58] *Id.* at 10 (Ginsburg, J., dissenting).
[59] *Id.* at 11.
[60] 140 S. Ct. 1205 (2020).
[61] *Id.* at 1207.

pandemic, voters would have to risk their health in order to exercise their right to vote. To the majority—blind to the reality of what it would mean to go to the polls in the midst of a pandemic—there was no reason to think that "these voters here would be in a substantially different position from late-requesting voters in other Wisconsin elections with respect to the timing of their receipt of absentee ballots."[62] Citing only *Purcell*, and its prior unexplained orders in *Veasey* and *Frank*, the Court concluded that "when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error."[63] To the majority, this "narrow, technical" issue was dispositive, even in the midst of a pandemic that had left many voters still waiting to receive their absentee ballot.[64]

In a bitterly worded dissent, Justice Ginsburg castigated the majority for forcing voters to "brave the polls, endangering their own and others' safety" or "lose their right to vote, through no fault of their own."[65] The Court's newly minted post-marking requirement, she wrote, "will result in massive disenfranchisement. A voter cannot deliver for postmarking a ballot she has not received."[66] The majority's concerns about changing the rules close to Election Day "pale in comparison to the risk that tens of thousands of voters will be disenfranchised. Ensuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern."[67] As she explained, the Court's last-minute intervention in the midst of a health crisis undercut our Constitution's promise of democracy and made a terrible health crisis even worse. Her voice on these issues will be sorely missed.

The *Purcell* juggernaut shows no signs of slowing down. In a string of unexplained orders during the summer of 2020, a majority of the Supreme Court has repeatedly stayed lower court rulings that vindicated the right to vote. Even as the pandemic ravages the nation, the Court continues to intervene to make it harder to exercise the fundamental right to vote.

On July 2, in *Merrill v. People First of Alabama*,[68] the Justices stayed, by a 5-4 vote, a lower court order that sought to ensure that citizens with a high-risk of contracting COVID-19 could safely exercise their fundamental right to vote. The district court preliminarily enjoined a pair of Alabama laws (one requiring the mailing of copy of an individual's photo ID with an absentee ballot application and ballot, the other that required that the absentee ballot envelope be signed by two witnesses or notarized) that would have required plaintiffs to violate social distancing

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[62] *Id.*
[63] *Id.*
[64] *Id.* at 1206.
[65] *Id.* at 1211 (Ginsburg, J., dissenting).
[66] *Id.* at 1209; see *infra* text accompanying notes 84-86 (discussing the Court's creation of a novel post-marking requirement).
[67] *Id.* at 1211.
[68] *Merrill*, 2020 WL 3604049.

rules and risk contracting COVID-19 in order to exercise their fundamental right to vote. The Court's conservative majority stayed that relief, forcing high-risk voters to risk their health in order to vote by mail.

A few weeks later, in *Raysor v. DeSantis*,[69] the Supreme Court refused to vacate a stay of a lower court ruling that held unconstitutional Florida's scheme of disenfranchising voters too poor to pay outstanding fines and fees. The Eleventh Circuit had stayed the order late in the day—just several weeks before the state's registration deadline for voting in primary elections—but the Supreme Court refused to intervene. In a strongly worded dissent, Justice Sotomayor argued that the majority's "order prevents thousands of otherwise eligible voters from participating in Florida's primary election simply because they are poor" and "continues" the Court's "trend of condoning disenfranchisement."[70] The stay, she argued, "disrupts a legal status quo and risks immense disenfranchisement," the very "situation *Purcell* sought to avoid."[71]

The Supreme Court has even rebuffed efforts to bring voting rights cases to the Supreme Court well in advance of the election. In *Texas Democratic Party v. Abbott*, a challenge brought under the Twenty-Sixth Amendment to a Texas statute that gives a right to vote by mail without excuse only to citizens aged 65 or older, plaintiffs urged the Court to vacate a lower court stay and schedule the case for expedited consideration before judgment in the Fifth Circuit. The Court rejected the request.[72] The case was not heard by the Fifth Circuit until the very end of August.[73] By the time the case gets back to the Supreme Court, any effort to ensure that all voters regardless of age may vote by mail will, in all likelihood, face a serious *Purcell* problem. The Court's "heads I win, tails you lose" approach leaves voters subject to state denial or abridgement of the right to vote when it matters most.

Purcell should be reconsidered. Through a series of orders that either offer no reasoning or simply rely on *Purcell* and its progeny, the Court has effectively displaced a long line of prior precedents that recognized the judiciary's obligation to enforce the Constitution and voting rights laws, while also placing limits on the scope of remedies consistent with long-standing equitable principles. Reconsidering the *Purcell* principle would not mean courts would grant injunctive relief across the board. Rather in line with *Reynolds* and other cases, the Court would

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[69] *Raysor*, 2020 WL 4006868.
[70] *Id.* at *1, 4 (Sotomayor, J., dissenting).
[71] *Id.* at 4.
[72] *Texas Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (refusing to vacate stay); *Texas Democratic Party v. Abbott*, No. 19-1389, 2020 WL 3578675 (S. Ct. July 2, 2020) (refusing to expedite petition for writ of certiorari before judgment).
[73] Charles Miller, *Fifth Circuit Slow-Walks Argument in Critical Texas Voting Rights Case*, Constitutional Accountability Center (Aug. 6, 2020), https://www.theusconstitution.org/blog/fifth-circuit-slow-walks-argument-in-critical-texas-voting-rights-case/.

consider longstanding equitable principles, which require consideration of the likelihood of success on the merits, the balance of hardships, and the public interest, including the interest in the orderly administration of the election.[74] As *Reynolds* laid out, "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree."[75]

III. The Perils of Making Law Through the Shadow Docket

The Supreme Court's regular decision-making process is slow and methodical. The Court carefully selects a case for full review, receives full briefing both from the parties and *amici*, and hears oral argument, peppering the attorneys with questions that force them to consider their case from every possible angle. And at the end of this process, the Court explains its reasoning in an opinion. The Supreme Court's decision-making process on stay orders could not be more different. The Justices' consideration and decision-making is rushed, briefing takes place on a very expedited schedule, which often precludes briefing by friends-of-the-court, and there is no opportunity for oral argument. These shadow docket orders are often accompanied by cursory opinions or no reasoning at all.

This practice hampers the Supreme Court's ability to decide cases in the careful manner they deserve. As William Baude has summed up, "[t]he Court's procedural regularity is at its high point when it deals with the merits cases."[76] By contrast, the orders process is often shrouded in mystery. "Not only are we often ignorant of the Justices' reasoning, we often do not even know the votes of the orders with any certainty. While Justices do sometimes write or note dissents from various orders, they do not always note a dissent from an order with which they disagree."[77]

Despite these shortcomings, the Supreme Court has an orders docket because an expedited process is necessary in some cases: the Court must act quickly on certain matters, such as emergency stay requests and the like. These orders determine the rights of the parties before

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[74] *See* Hasen, *Reining in the* Purcell *Principle*, *supra* note 12, at 444 ("[T]he Supreme Court should adjudicate its election disputes consistent with the general standards and levels of deference it has established for considering non-election requests to stay a lower court order, vacate a lower court stay, or issue an injunction in its own right. Special considerations related to elections should be one, but not a dominating, factor.").

[75] *Reynolds*, 377 U.S. at 585.

[76] Baude, *supra* note 1, at 12.

[77] *Id.* at 18 (emphasis omitted).

it—sometimes in very significant ways—but they do not generally establish new binding precedents. And most of the time when the Court grants some form of interim relief, such as a stay pending the filing of a petition for certiorari, it is but a prelude to fuller consideration of the case down the road.

Consider one of this past term's blockbuster cases, *June Medical Services v. Russo*,[78] which involved a challenge to a Louisiana abortion statute virtually identical to one of the laws struck down four years ago in *Whole Woman's Health v. Hellerstedt*.[79] Following the Fifth Circuit's decision upholding the law,[80] the plaintiffs asked the Supreme Court to stay the Fifth Circuit's decision and prevent the state from enforcing the law while the Court considered whether to grant full review. A divided Court issued the stay by a 5-4 vote.[81] This was a consequential decision—it ensured that clinics in Louisiana would not be forced to close and individuals in Louisiana who needed an abortion would be able to effectuate their constitutional right to obtain one pending the Court's final resolution of the case—but it did not establish any legal rules. That would await the Court's ultimate resolution of the case on the merits.

Purcell and the cases applying it are troubling because the Court has utilized its shadow docket to establish new doctrinal rules that limit the power of the federal courts to grant voting rights remedies close to Election Day. The Court's shadow docket decision-making processes are ill-suited to establishing binding legal rules. Rushed decision-making and the lack of full briefing, *amicus* participation, and oral argument create an overwhelming risk of error. *Purcell* and its progeny have ignored a number of important precedents, detailed in Part I, about the authority of federal courts to fashion voting rights remedies close to Election Day. This inattention to precedent is the inevitable result of using the shadow docket to establish new legal rules.

The Court's overreliance on shadow-docket decision-making is particularly harmful to the law of democracy for other reasons as well. In voting rights and other election law cases, the decision to grant a stay may, for all intents and purposes, be outcome-determinative, at least for the current election cycle. If the Court issues a cursory order that allows a restrictive law to be enforced for the upcoming election, no later order can undo the denial of the right to vote for citizens whose votes have been suppressed. As Rick Hasen has recognized, if a restrictive voting law "is indeed disenfranchising, there is likely no effective post-election remedy to restore the right to vote."[82]

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[78] *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).
[79] 136 S. Ct. 2292 (2016).
[80] *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018).
[81] *June Med. Servs. L.L.C. v. Gee*, 139 S. Ct. 663 (2019).
[82] Hasen, *Untimely Death*, *supra* note 12, at 37.

Tellingly, in *Purcell* and cases that have applied it, the Court's shadow-docket order proved to be its last word, at least for that election cycle. Having foreclosed relief when it was urgently needed, the Supreme Court had no opportunity to give more fulsome consideration to the scope of its remedial authority. *Veasey* and the North Carolina voter ID case eventually returned to the Court, but the remedial issues about the *Purcell* principle did not.[83] There does not appear to be any process to correct the Court's shadow-docket decisions foreclosing relief under *Purcell*. These rulings defy correction.

Finally, election law cases are notoriously factually complex. Deciding them in a rushed manner is likely to lead to mistakes.[84] The decision in *Republican National Committee* exemplifies this. The Court fashioned a novel postmarking requirement, ignoring that a lot of mail is not postmarked by the post office. The upshot was that thousands of absentee ballots that arrived on a timely basis were not counted because the ballots were not postmarked.[85] As a result, countless voters were effectively denied their constitutional right to vote for no good reason and through no fault of their own. As the City Clerk in Madison, Wisconsin commented, "[i]t's heartbreaking to see that many of them have no postmark. . . . That's not the fault of the voter. The voter has no control over that."[86]

In election law, the devil is often in the details and hasty, rushed decision-making often results in the courts getting the details wrong, which could likely be avoided if the courts had the time to fully think through their rulings. But *Purcell* and its progeny encourage this rushed decision-making. This undercuts our Constitution's promise of democracy. As Judge Jill K. Karovsky, the Wisconsin Supreme Court Justice who won a Supreme Court seat in the April

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[83] *Abbott v. Veasey*, 137 S. Ct. 612 (2017); *North Carolina v. North Carolina State Conference of the NAACP*, 137 S. Ct. 1399 (2017).

[84] Tokaji, *supra* note 12, at 1067 (arguing that "*Purcell* provides a cautionary lesson in the dangers of rushing to judgment on an unfamiliar issue without recognizing the underlying political realities or the competing democratic values at play").

[85] Ian Millhiser, *Thousands of Wisconsin Ballots Could be Thrown Out Because They Don't Have a Postmark*, Vox (Apr. 11, 2020), https://www.vox.com/2020/4/11/21217546/wisconsin-ballots-postmark-supreme-court-rnc-dnc; Amy Gardner, et al., *Unexpected Outcome in Wisconsin: Tens of Thousands of Ballots That Arrived After Election Day Were Counted, Thanks to Court Decisions,* Wash. Post., (May 3, 2020), https://www.washingtonpost.com/politics/unexpected-outcome-in-wisconsin-tens-of-thousands-of-ballots-that-arrived-after-voting-day-were-counted-thanks-to-court-decisions/2020/05/03/20c036f0-8a59-11ea-9dfd-990f9dcc71fc_story.html (reporting that "[t]housands of ballots were rejected because of postmark issues").

[86] Laura Schulte & Patrick Marley, *Many Wisconsin Absentee Ballots Have Returned Without Postmarks and May Not Be Counted Because of It*, Milwaukee Journal Sentinel (Apr, 10, 2020), https://www.jsonline.com/story/news/2020/04/10/wisconsin-election-votes-may-not-count-ballots-without-postmark/5123238002/.

election, put it, when our democracy is on the line, the courts deliver rulings that are "wrong on the law" and "wrong on process."[87] Our constitutional democracy deserves better.

IV. Conclusion

The Court's insistence that the *Purcell* principle forecloses relief to vindicate the right to vote close to the Election Day is harmful. In recent years, we have seen a huge increase in election year litigation, as the voting wars have come to the courts. In the last two decades, U.S. election lawsuits each year have almost tripled in number,[88] and many of those involve suits seeking emergency relief to protect the right to vote. Recently, the Federal Judicial Center published a case study of emergency election litigation, cataloguing over four hundred case studies of such suits across many subject areas.[89] 2020 was already expected to be a record-year for voting rights suits, even before the pandemic hit.[90] Now, hundreds of lawsuits are underway throughout the country seeking to ensure that citizens do not have to risk their health to exercise their right to vote and to ensure the proper counting of mail-in ballots.[91] *Purcell* looms over all of these cases. The Court seems poised to block any relief ordered too close to Election Day.

The Supreme Court is supposed to vindicate our constitutional rights. But as a result of the *Purcell* principle, the Roberts Court is sending the message that it will not be on the side of protecting the right to vote and safeguarding our democracy. *Purcell* erodes our democracy and should be reconsidered.

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[87] Jill J. Karovsky, *I'm the Judge Who Won in Wisconsin. This Principle is More Important Than Winning*, N.Y. Times, (Apr. 27, 2020), https://www.nytimes.com/2020/04/27/opinion/wisconsin-election.html.

[88] Richard L. Hasen, *Why Trump and the RNC Are Spending $10 Million to Fight Democrats' Voting Rights Lawsuits*, Wash. Post (Mar. 5, 2020), https://www.washingtonpost.com/politics/2020/03/05/why-trump-rnc-are-spending-10-million-fight-democrats-voting-rights-lawsuits/.

[89] Federal Judicial Center, *Election Litigation: Case Studies in Emergency Election Litigation*, https://www.fjc.gov/content/case-studies.

[90] Alexandra Hutzler, *2020 Was Already Expected to Be a Record Year for Election-Related Lawsuits—Then Coronavirus Happened*, Newsweek (Apr. 23, 2020), https://www.newsweek.com/2020-was-already-expected-record-year-election-related-lawsuitsthen-coronavirus-happened-1499900.

[91] Pam Fessler, *Coronavirus Likely to Supercharge Election-Year Lawsuits Over Voting Rights*, NPR (Apr. 17, 2020), https://www.npr.org/2020/04/17/836671427/coronavirus-likely-to-supercharge-election-year-lawsuits-over-voting-rights; Peter Baker, et al., *The Voting Will End Nov. 3. The Legal Battle Probably Won't*, N.Y. Times (Aug. 8, 2020), https://www.nytimes.com/2020/08/08/us/politics/voting-nov-3-election.html (noting that "party organizations, campaigns and interest groups have filed 160 lawsuits across the country trying to shape the rules of the election").

About the Author

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