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## Reviving the Prophylactic VRA: Section 3, *Purcell*, and the New Vote Denial

**ABSTRACT.** Since the 2020 election cycle, two significant developments have affected voting-rights litigation. On one hand, states have ramped up their efforts to restrict access to the polls, passing a host of laws that threaten to depress turnout and deter voters, particularly members of racial, ethnic, and language minorities. At the same time, the Supreme Court's increasingly broad use of the *Purcell* Principle to stay lower-court injunctions has made it harder for advocates to put a stop to vote denial before it can sway elections. It also creates harmful incentives for states to delay and obstruct litigation in hopes that if courts ultimately rule against them, it will be too late for advocates to secure a remedy.

Given these developments, Section 3 of the Voting Rights Act may be one of the last tools available to defend the franchise in an election year. This Note makes two observations about Section 3 that may help reinvigorate its use. First, Section 3 authorizes courts to impose preclearance based on any constitutional violation, not just those that allege intentional racial discrimination. Second, because Section 3 preclearance may be imposed following any "equitable relief," not just injunctions, it may be based on a declaratory judgment alone. This allows lower courts to bail offending jurisdictions into preclearance even when *Purcell* means it is too close to an election to issue an injunction. A credible threat of Section 3 preclearance would deter states from manipulating the *Purcell* window to restrict voting rights and prevent states that do unconstitutionally burden the right to vote from becoming repeat offenders down the road.

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**INTRODUCTION**

For almost fifty years, the centerpiece of the Voting Rights Act (VRA) was Section 5, which required states with a history of racial discrimination to preclear changes to their election laws with the Department of Justice (DOJ).<sup>1</sup> According to Section 4 of the Act, states with a history of presumptively discriminatory voting practices were automatically covered by preclearance,<sup>2</sup> though they could petition to bail out of coverage after ten years of good behavior.<sup>3</sup> For uncovered states, the Act was more lenient. Under Section 2, such states can be sued after the fact if they pass voting laws that result in denial or dilution of the right to vote based on race or language status.<sup>4</sup> And, if states violate constitutionally protected voting rights, they can be “bailed in” to preclearance under Section 3 of the Act, forcing them to get approval from a court before making subsequent changes to their election laws.<sup>5</sup>

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1. 52 U.S.C. § 10304 (2018) (“Section 5”). Preclearance required a jurisdiction to apply for and receive approval from the Department of Justice (DOJ) before it could enact or administer any changes to its election laws, practices, or procedures. *Id.*
  2. *Id.* § 10303(b) (“Section 4(b)”). Section 4(b)’s coverage formula had two parts. First, a state needed to have imposed a “test or device” in 1964, *id.*, which meant a literacy or education requirement, moral-character requirement, or requirement that eligibility to vote be vouched for by another registered voter, *id.* § 10303(c). The second prong of the test was satisfied if less than half of a state’s voting-age population was registered to vote or voted in November 1964. *Id.* § 10303(b). Congress updated the coverage formula in 1970 to reference the 1968 election and then updated it again in 1975 to reference the 1972 election. *See Section 4 of the Voting Rights Act*, U.S. DEP’T JUST., <https://www.justice.gov/crt/section-4-voting-rights-act> [<https://perma.cc/6H5P-2YSQ>]. From 1975 until 2013, the relevant election years for determining coverage remained 1964, 1968, and 1972. *Section 4 of the Voting Rights Act, supra.*
  3. 52 U.S.C. § 10303(a) (2018) (“Section 4(a)”). Section 4(a) defined good behavior as abstention from an enumerated list of problematic voting practices. *Id.*
  4. *Id.* § 10301 (“Section 2”). Section 2(a) prohibits any voting regulation that “results in” a “denial or abridgement of the right to vote” based on race, color, or language status. *Id.* Section 2(b), the source of vote-dilution claims, allows plaintiffs to prove a violation if “based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open” to a protected group. *Id.* Unequal openness includes having “less opportunity than other members of the electorate to . . . elect representatives of their choice.” *Id.*
  5. *Id.* § 10302(c) (“Section 3”). Section 3 preclearance is like Section 5 preclearance but requires that jurisdictions get approval from a reviewing federal court rather than DOJ. *Id.* It also only applies to changes made after the date that preclearance is imposed, for such a period as the court determines is “appropriate.” *Id.* The court has discretion to determine what types of election laws, practices, or procedures are covered by the preclearance requirement. *Id.*

In 2013, *Shelby County v. Holder* effectively ended Section 5 preclearance under the VRA.<sup>6</sup> Since then, states have played a game of cat-and-mouse with voting-rights lawyers who challenge election laws under either Section 2 of the Act or on constitutional grounds.<sup>7</sup> States pass restrictive voting laws, advocates get them enjoined, states tweak the laws to escape the injunctions, advocates sue again, and so on.<sup>8</sup> Though far from ideal, this cycle seemed perhaps tolerable in the years immediately after *Shelby*, with voting-rights advocates winning significant victories in states like Florida, Texas, and North Carolina.<sup>9</sup>

Since the 2020 election cycle, this fragile situation has become increasingly unstable. First, a number of states have engaged in aggressive vote denial,<sup>10</sup> erecting barriers to voter registration, purging voters from registration rolls, and even passing laws that require election officials to investigate and prosecute individuals suspected of voting illegally.<sup>11</sup> Not only are more of these laws passing, but the laws themselves are increasingly harsh and based on weak justifications. Exacerbating these trends is the recent surge in efforts to deny the legitimacy of the electoral process and the invocation of election fraud to justify meddling with

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6. 570 U.S. 529 (2013). The Court technically accomplished this by invalidating the coverage formula in Section 4(b), which determined which states were subject to automatic preclearance under Section 5. *Id.* at 557. Because the formula had not been updated since the 1960s, it no longer “ma[de] sense in light of current conditions.” *Id.* at 553.
  7. This is similar to the situation that faced civil-rights lawyers prior to the enactment of the Voting Rights Act (VRA). See Enbar Toledano, *Section 5 of the Voting Rights Act and Its Place in “Post-Racial” America*, 61 EMORY L.J. 389, 392 (2011) (“[T]he [Civil Rights Acts] gave rise to a cat-and-mouse game in which states could circumvent policy-specific injunctions by adopting endless variations on the same disfranchising practices. Because cessation of those variations would require new trials, this back-and-forth became a vicious cycle.”).
  8. One example is the protracted litigation over Texas’s efforts to enact a strict voter-ID law. See discussion *infra* Section III.A; see also Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2163-68 (2015) (discussing Section 2 litigation post-*Shelby*).
  9. See Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J.F. 799, 801-02 (2018).
  10. Vote-denial measures make it harder for individuals to exercise their right to vote. See Hayden Johnson, *Vote Denial and Defense: Reaffirming the Constitutionality of Section 2 of the Voting Rights Act*, 39 LAW & INEQ. 47, 47 (2021) (defining “vote denial” laws as those “which restrict where, when, and how voters can participate in the electoral process”).
  11. See Aaron Mendelson, *A Headlong Rush by States to Attack Voting Access – or Expand It*, CTR. FOR PUB. INTEGRITY (Oct. 6, 2022), <https://publicintegrity.org/politics/elections/who-counts/a-headlong-rush-by-states-to-attack-voting-access-or-expand-it> [https://perma.cc/R678-GPRB].

future electoral outcomes.<sup>12</sup> Advocates will thus find themselves ever more occupied with vote-denial litigation, which has historically been somewhat less common than challenges to redistricting or the use of at-large elections.<sup>13</sup>

Exacerbating this trend, the Supreme Court has significantly expanded the so-called *Purcell* Principle, which bars federal courts from enjoining state voting laws “in the period close to an election.”<sup>14</sup> The doctrine had previously been used to block changes made just one month before a general election.<sup>15</sup> Now it reaches as far as almost six months before a general election (and nearly two months before the start of primary elections).<sup>16</sup> Combined with *Shelby*, *Purcell* now makes it much easier for states to hold at least one election under unlawful procedures.<sup>17</sup> Restrictive laws are no longer subject to federal review before passing, and by delaying litigation, states can render them immune from injunctions once enacted. This creates harmful incentives for states to pass laws they suspect will

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12. See Ryan Teague Beckwith, *The Real Winner of GOP's 2022 Primaries Was Denial of 2020 Election*, BLOOMBERG (Sept. 6, 2022, 5:00 AM EST), <https://www.bloomberg.com/graphics/us-election-risk-index/2022-election-denier-candidates> [<https://perma.cc/6K2S-52N5>]; *60 Percent of Americans Will Have an Election Denier on the Ballot This Fall*, FIVETHIRTYEIGHT (Sept. 14, 2022, 4:31 PM), <https://projects.fivethirtyeight.com/republicans-trump-election-fraud> [<https://perma.cc/SDM7-WCA6>]. Most of the highest-profile election deniers who ran in 2022 lost, and the election was widely described as a repudiation of their views. See Charlotte Alter, *Defenders of Democracy Beat Election Deniers in Every 2024 Battleground*, TIME (Nov. 16, 2022, 9:15 PM EST), <https://time.com/6231852/election-deniers-2022-midterms-results> [<https://perma.cc/THH6-AH9N>]. Yet despite their losses, election deniers achieved much more mainstream success and recognition in 2022, and the movement will not necessarily disappear anytime soon. See Blake Hounshell, *Was Election Denial Just a Passing Threat? Or Is It Here to Stay?*, N.Y. TIMES (Nov. 28, 2022), <https://www.nytimes.com/2022/11/28/us/politics/election-deniers-2022-midterms.html> [<https://perma.cc/7VPV-2SUL>] (citing political scientists who believe that “America’s partisan geography offers fertile soil for unscrupulous politicians who seize upon public misconceptions about elections,” and noting that “election denial [was not] convincingly repudiated at the polls” in every state).
  13. See Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 167.
  14. *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (mem.) (Kavanaugh, J., concurring); see also *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (“This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.”).
  15. See *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006).
  16. See *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Courts have not recognized a period between a primary and general election during which *Purcell* would not apply, though the specific question does not appear to have been raised yet.
  17. See, e.g., *Feldman v. Ariz. Sec’y of State’s Off.*, 843 F.3d 366, 369 (9th Cir. 2016) (en banc) *stayed*, 137 S. Ct. 446 (2016) (“*Purcell* was decided prior to the Supreme Court’s opinion in *Shelby Cnty. Ala. v. Holder*. . . . In short, *Purcell* was decided when the preclearance regime under § 5 of the Voting Rights Act was still intact, and Arizona was a covered jurisdiction. . . . That same reassurance is absent here.” (citations omitted)).

eventually be struck down, as well as dawdle and delay in hopes that it will become too late to enjoin laws before the next election.<sup>18</sup>

This Note argues that these two developments—the coming wave of vote denial and the expansive *Purcell* Principle—should prompt a reappraisal of Section 3 of the VRA. Namely, the constitutional wins that are needed to trigger the bail-in remedy are likely to become relatively more attainable, and the injunctions that have historically been the alternative to bail-in are unlikely to be forthcoming. Although Section 3 cannot solve the immediate problem of an unconstitutional election, it can prevent the problem from compounding over time, deter efforts to delay and drag out litigation, and block repeat offenders from gaming the system.

This Note advances two interpretations of Section 3 that, if adopted, will help it meet the needs of the present moment. First, contrary to the widespread belief that Section 3 requires a finding of intentional racial discrimination, the text, history, and structure of the Act demonstrate that it can follow from an unconstitutional restriction of the fundamental right to vote under the Due Process Clause of the Fourteenth Amendment, as well as from non-race-based violations of the Equal Protection Clause.<sup>19</sup> The perception that Section 3 requires intentional discrimination has stunted its use<sup>20</sup> and lessens its applicability to the growing number of facially neutral state laws that burden voting across the

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18. Advocates are increasingly concerned about the prospect of strategic delay. For example, DOJ recently raised the issue in the context of a discovery dispute in its ongoing redistricting litigation in Texas. See Appellee United States’ Opposition to Motion for a Stay Pending Appeal at 21-22, *United States v. Texas*, No. 22-50662 (5th Cir. July 28, 2022) [hereinafter *Opposition to Motion for a Stay*].
  19. Section 3 applies when states violate the Fourteenth or Fifteenth Amendments. 52 U.S.C. § 10302(c) (2018). In *City of Mobile v. Bolden*, 446 U.S. 55, 67-68 (1980), the Supreme Court held that the Fifteenth Amendment only bars intentionally discriminatory voting restrictions. And in *Washington v. Davis*, 426 U.S. 229, 239-42 (1976), the Court held that the Equal Protection Clause of the Fourteenth Amendment also only bars intentional discrimination. Courts have not, however, considered basing Section 3 preclearance on the Due Process Clause. Unlike the Fifteenth Amendment and the Equal Protection Clause, the Due Process Clause requires at most intentional government action, not intentional nor invidious discrimination against a protected group. See Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1528 (1999). For examples of cases, see *infra* Section II.A.
  20. See *Standing in the Breach: Using the Remaining Tools in the Voting Rights Act to Combat Voting Discrimination*, NAACP LEGAL DEF. & EDUC. FUND 4 (Jan. 5, 2021) [hereinafter *Standing in the Breach*], <https://www.naacpldf.org/wp-content/uploads/LDF-Sections-2-and-3c-VRA-primer-1.5.21.pdf> [<https://perma.cc/676F-DBD9>] (stating that Section 3 is only “a remedy [for] a finding of intentional discrimination in violation of the U.S. Constitution” and that “discriminatory results” are “irrelevant to a Section 3 analysis”).

board.<sup>21</sup> Second, because declaratory judgments are a form of “equitable relief,” the text of Section 3 suggests that the bail-in remedy may be based on declaratory judgments alone. This would allow courts to impose consequences – preclearance for subsequent elections – on states without disrupting an ongoing election by issuing injunctions.

What effect would this have on states? First, as states likely want to avoid the cost, delay, and stigma associated with preclearance,<sup>22</sup> this strategy will force legislatures to think twice before passing potentially unconstitutional laws at the last minute. If the cost of holding one election under unconstitutional procedures is indefinite federal supervision, states might reevaluate the benefits of walking that path. Second, knowing that bail-in is a viable alternative to injunctions will reduce incentives for states to delay and drag out litigation in the hopes of benefiting from *Purcell*. Finally, knowing that bail-in will result from an adverse ruling on constitutional grounds will disincentivize the most egregious abuses of voting rights, causing states to err on the side of laws that, at most, violate voting-rights statutes without being unconstitutional.

Finally, because Section 3 is best understood as a mechanism for enforcing constitutional rights, it is less susceptible to constitutional attacks than other parts of the VRA. It also offers an opportunity for advocates to harmonize at least some of their strategies and rhetoric with the current Court’s understanding of the VRA. Importantly, this will generally require focusing on applying Section 3 to vote denial, not vote dilution,<sup>23</sup> and picking cases carefully to ensure that there are exceptionally solid constitutional claims in play.

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21. Both political parties have assumed that universal barriers to voting help Republicans. See Daron R. Shaw & John R. Petrocik, *Does High Voter Turnout Help One Party?*, NAT’L AFFS. (Fall 2021), <https://www.nationalaffairs.com/publications/detail/does-high-voter-turnout-help-one-party> [<https://perma.cc/TA9R-7AUW>] (explaining that, despite a lack of evidence, “[b]oth Republicans and Democrats are convinced—and have been for some time—that higher turnout will help Democrats and hurt Republicans”); see also *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [<https://perma.cc/5JE5-STVH>] (tracking the large number of bills pending in state legislatures that would restrict the ease of voting in the 2022 elections).

22. There have not been many statements regarding opposition to Section 3 specifically, as it has not been at stake in many cases. However, preclearance imposes substantial burdens on states and slows down their political processes. It also imposes on the state the costly burden of proving that election laws do not have a discriminatory effect. Although it is unclear how vigorously states will oppose Section 3 preclearance as such, the strong opposition to Section 5 preclearance indicates that resistance will be robust. Cf. *Shelby Cnty. v. Holder*, 570 U.S. 529, 545 (2013).

23. For a discussion of the distinction between vote denial and vote dilution, see *infra* notes 58–63 and accompanying text.

Part I of this Note traces the roots of the current crisis in voting rights and summarizes the scholarly literature on both the *Purcell* Principle and Section 3. Part II contributes to the literature on Section 3 by arguing that the bail-in remedy may be based on due-process violations (not just equal-protection ones), and that it may be based on declaratory judgments (not just injunctions). Part III explains how these observations can make Section 3 a more effective defensive tool for dealing with the impending wave of voting restrictions. Finally, Part IV addresses practical and constitutional counterarguments.

## I. ROOTS OF THE CURRENT CRISIS

### A. *The Coming Wave of Vote Denial*

Although legal fights over election practices are nothing new, some unique attributes of the present moment create serious risks to the franchise. Since the 2020 election, the volume of restrictive voting-rights laws being proposed in state legislatures has skyrocketed.<sup>24</sup> Restrictions on access to the polls have been driven primarily by Republican state legislatures and have been spurred in part by widespread support for conspiracy theories surrounding the 2020 election.<sup>25</sup> Nineteen states enacted new voting restrictions in 2021,<sup>26</sup> and seven states followed their lead in 2022.<sup>27</sup> Seven states also passed “election interference” laws in 2022, some of which bolstered state resources for the criminal investigation and prosecution of alleged election misconduct.<sup>28</sup> Analysts tracking election bills

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24. Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123, 124 (2021); Dave Davies, *The Future of U.S. Democracy Hangs in the Balance as States Battle over Voting Rights*, NPR (Feb. 17, 2022, 2:02 PM EST), <https://www.npr.org/2022/02/17/1081428996/the-future-of-u-s-democracy-hangs-in-the-balance-as-states-battle-over-voting-ri> [https://perma.cc/26Y4-8EJK] (interview with Michael Waldman, President, Brennan Ctr. for Just.).
25. Kaleigh Rogers, *The Big Lie’s Long Shadow*, FIVETHIRTYEIGHT (Jan. 12, 2022), <https://fivethirtyeight.com/features/the-big-lie-voting-laws> [https://perma.cc/TSH4-CVQE]; see also RICHARD L. HASEN, *CHEAP SPEECH* 25-29 (2022) [hereinafter HASEN, *CHEAP SPEECH*] (arguing that disinformation is responsible for the corrosion of democratic politics we are seeing today); RICHARD L. HASEN, *THE VOTING WARS* 134-35 (2012) [hereinafter HASEN, *THE VOTING WARS*] (tracing the concurrent increase in partisanship and the volume of election litigation over the last two decades).
26. Jane C. Timm, *19 States Enacted Voting Restrictions in 2021. What’s Next?*, NBC NEWS (Dec. 21, 2021, 7:02 AM EST), <https://www.nbcnews.com/politics/elections/19-states-enacted-voting-restrictions-2021-rcna8342> [https://perma.cc/J5VZ-X6TD].
27. *Voting Laws Roundup: December 2022*, BRENNAN CTR. FOR JUST. (Dec. 19, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022> [https://perma.cc/QVR5-X5M9].
28. *Id.*



expect 2023 to be “another prolific year for election-related legislation” based on early legislative activity.<sup>29</sup>

For example, take Arizona’s new Documentary Proof of Citizenship (DPOC) law, HB 2492, which passed in March 2022 and went into effect in January 2023.<sup>30</sup> Although Arizona already requires – lawfully – that new registrants for *state* elections provide DPOC,<sup>31</sup> HB 2492 goes much further. According to county-election officials, the law applies retroactively,<sup>32</sup> requiring them to purge voters who have not provided DPOC from registration rolls, possibly on the eve of elections.<sup>33</sup> The law also newly bars many registered voters from voting early by mail or voting at all in presidential elections if they have not provided DPOC.<sup>34</sup> Moreover, the law requires county-level officials to proactively investigate the citizenship of new registrants and registered voters using sources such as state driver-license and vehicle-registration databases, third-party public-health databases, and federal immigration databases.<sup>35</sup> Officials are also free to use whatever other

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29. Fredreka Schouten, ‘Election Marshals’ and Runoff Rules: States Eye a New Round of Voting Changes Ahead of 2024, CNN (Dec. 18, 2022, 7:18 AM EST), <https://www.cnn.com/2022/12/18/politics/texas-georgia-2024-voting-laws-changes/index.html> [<https://perma.cc/3RGE-27MU>].
  30. 2022 Ariz. Sess. Laws, ch. 99 §§ 1-8 (“HB 2492”); see Alexander Mallin, *Justice Department Sues Arizona for Requiring Proof of Citizenship to Vote in Presidential Elections*, ABC NEWS (Jul. 5, 2022, 4:33 PM), <https://abcnews.go.com/Politics/justice-department-sues-arizona-requiring-proof-citizenship-vote/story?id=86259073> [<https://perma.cc/3YMM-LNKY>]; Complaint at 7, *United States v. Arizona*, No. 22-cv-01124 (D. Ariz. July 5, 2022) (noting the effective date of HB 2492).
  31. *Proof of Citizenship Requirements*, ARIZ. SEC’Y STATE, <https://azsos.gov/elections/voting-election/proof-citizenship-requirements> [<https://perma.cc/D5RX-YEDC>]. Arizonans can register to vote via the Federal Form, as required by the National Voter Registration Act, but such voters are known as “federal only” voters and are ineligible to vote in state elections. *Id.*
  32. Ben Giles, *Arizona Republicans Enact a Controversial New Proof-of-Citizenship Voting Law*, NPR (Mar. 30, 2022, 7:13 PM ET), <https://www.npr.org/2022/03/30/1089809421/arizona-republicans-enact-a-controversial-new-proof-of-citizenship-voting-law> [<https://perma.cc/7W5P-YLLU>]. The Governor of Arizona has disagreed with this view, publicly stating that the law does not reach voters who registered prior to the documentary proof of citizenship (DPOC) requirement. *Id.*
  33. 2022 Ariz. Sess. Laws, ch. 99 § 8.
  34. HB 2492 specifically bars voters who are currently registered to participate only in federal elections – so-called “federal only” voters – from voting early by mail and from voting in presidential elections, if they have not provided DPOC. 2022 Ariz. Sess. Laws, ch. 99 § 5. These restrictions would seem to blatantly contravene Supreme Court precedent. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 20 (2013) (holding that the National Voter Registration Act prohibited Arizona from imposing a DPOC requirement on voters only registering for federal elections using the Federal Voter Registration Form).
  35. 2022 Ariz. Sess. Laws, ch. 99 § 4.

sources they wish, with no formal limits in the statute.<sup>36</sup> As voting-rights advocates have noted, none of these databases contain comprehensive or reliable citizenship data.<sup>37</sup> If officials find evidence that they construe as disproving a registrant's citizenship, they must refer the case for investigation and prosecution.<sup>38</sup>

HB 2492 quickly provoked legal challenges on both constitutional and statutory grounds.<sup>39</sup> But Arizona is not the only state moving in this direction. Texas, for example, recently passed a law—SB 1—that imposes new restrictions on the time, place, and manner of voting. Most notably, SB 1 requires all applications for mail-in ballots to include either a driver's license number or the last four digits of a Social Security number.<sup>40</sup> Early-voting officials must reject any application for which the provided number does not match the existing identification on record with the voter's registration application.<sup>41</sup> A major problem is that many voters do not remember which of the two numbers they used to register. Evidence from Texas's 2022 primary elections indicates that the law is already imposing a severe burden on voters, with unprecedented numbers of vote-by-mail ballot applications rejected due to identification mismatches.<sup>42</sup> By the end of the primaries, at least 18,000 applications were rejected under the new rules.<sup>43</sup> In Harris County, where Houston is located, 19% of applications were

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36. *Id.*

37. *E.g.*, Complaint for Declaratory and Injunctive Relief at 4, 6, *Poder Latinx v. Hobbs*, No. 22-cv-01003 (D. Ariz. June 9, 2022) [hereinafter *Poder Latinx Complaint*].

38. 2022 Ariz. Sess. Laws, ch. 99 §§ 4, 7.

39. *See, e.g.*, *Poder Latinx Complaint*, *supra* note 37; First Amended Complaint, *Mi Familia Vota v. Hobbs*, No. 22-cv-00509 (D. Ariz. Sept. 6, 2022); First Amended Complaint for Declaratory and Injunctive Relief, *Living United for Change in Ariz. v. Hobbs*, No. 22-cv-00519 (D. Ariz. July 18, 2022); Complaint, *supra* note 30.

40. S.B. 1, 87th Leg., 2d Called Sess., § 5.02 (Tex. 2021).

41. *Id.*

42. Marcelino Benito, 'It's a Red Flag': Counties See Increase in Rejected Mail-In Ballot Applications Under New Texas Voting Rules, *KHOU 11* (Jan. 19, 2022, 4:56 PM CST), <https://www.khou.com/article/news/politics/texas-counties-increase-rejected-mail-in-ballot-applications/285-8746be6e-0d32-4f18-8802-08c3394fa6be> [https://perma.cc/W9KX-U97V].

43. Alexa Ura & Mandi Cai, *At Least 18,000 Texas Mail-In Votes Were Rejected in the First Election Under New GOP Voting Rules*, *TEX. TRIB.* (Mar. 11, 2022, 2:00 PM CT), <https://www.texas-tribune.org/2022/03/11/texas-mail-in-voting-lawsuit> [https://perma.cc/F9M4-TAW8].

rejected, compared to less than 0.3% in the 2018 primaries.<sup>44</sup> A lawsuit challenging the law on constitutional grounds is currently underway in the Western District of Texas.<sup>45</sup>

Although these laws are written in race-neutral language, they disproportionately burden racial minorities.<sup>46</sup> Some scholars, like Professor Atiba Ellis, have even argued that the current “crisis of exclusion” is “so extreme that it represents a resurgence of Jim Crow racial exclusion from the franchise.”<sup>47</sup> Substantial evidence indicates that voters of color, particularly Black voters, are more likely to lack identification documents,<sup>48</sup> more likely to vote without ID,<sup>49</sup> more likely to vote early on certain days (namely, Sundays, due to “Souls to the Polls” drives),<sup>50</sup> more likely to vote at overburdened polling places with already-long wait times,<sup>51</sup> and more likely to face polling-place closures due to reliance on

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44. Andrew Schneider, *19% of Harris County Mail-In Ballots in the 2022 Primary Were Rejected Due to SB 1, According to the Elections Administrator*, HOUS. PUB. MEDIA (Mar. 11, 2022, 6:19 PM), <https://www.houstonpublicmedia.org/articles/news/politics/2022/03/11/420985/the-states-new-election-law-led-to-19-of-harris-county-mail-ballots-in-the-primary-to-be-rejected> [https://perma.cc/EYV4-85QK].
45. *La Unión Del Pueblo Entero v. Abbott*, No. 21-cv-0844, 2022 WL 3052489 (W.D. Tex. Aug. 2, 2022).
46. See, e.g., Johnson, *supra* note 10, at 57-59.
47. Atiba R. Ellis, *Voter Fraud as an Epistemic Crisis for the Right to Vote*, 71 MERCER L. REV. 757, 757-58 (2020).
48. Matt A. Barreto, Stephen Nuño, Gabriel R. Sanchez & Hannah L. Walker, *The Racial Implications of Voter Identification Laws in America*, 47 AM. POL. RSCH. 238, 242 (2018).
49. Phoebe Henninger, Marc Meredith & Michael Morse, *Who Votes Without Identification? Using Individual-Level Administrative Data to Measure the Burden of Strict Voter Identification Laws*, 18 J. EMPIRICAL LEGAL STUD. 256, 271 (2021). But see Emily Rong Zhang, *Questioning Questions in the Law of Democracy: What the Debate over Voter ID Laws' Effects Teaches About Asking the Right Questions*, UCLA L. REV. (forthcoming), <https://ssrn.com/abstract=3942940> [https://perma.cc/YT27-J9BZ] (noting that social scientists have struggled to estimate the precise effect of voter-ID laws on turnout, and arguing that lawyers should instead focus on the additional burdens that these laws create for voters). Even if Zhang is correct that voter-ID laws do not significantly suppress voter turnout, the current wave of election restrictions stretches beyond voter-ID laws.
50. Kevin Morris, *Georgia's Proposed Voting Restrictions Will Harm Black Voters Most*, BRENNAN CTR. FOR JUST. (Mar. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most> [https://perma.cc/YEN3-UMYP].
51. Hannah Klain, Kevin Morris, Max Feldman & Rebecca Ayala, *Waiting to Vote: Racial Disparities in Election Day Experiences*, BRENNAN CTR. FOR JUST. 8 (June 3, 2020), [https://www.brennancenter.org/sites/default/files/2020-06/6\\_02\\_WaitingtoVote\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf) [https://perma.cc/35CC-CMGP]; M. Keith Chen, Kareem Haggag, Devin G. Pope & Ryne Rohla, *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data* 12-15 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26487, 2020), <https://www.nber.org/papers/w26487> [https://perma.cc/4H6Q-LTZA].

public transportation.<sup>52</sup> This disparate impact of voting restrictions on minority voters is no mere coincidence: it is directly related to past racial discrimination. For example, elderly Black voters in the South are less likely than other voters to have a valid birth certificate because Jim Crow laws often prohibited their mothers from giving birth in hospitals that would have generated such documents.<sup>53</sup>

Latino voters, Asian American and Pacific Islander voters, and other members of language minorities are also disproportionately harmed by restrictive voting laws, particularly those that impose burdensome DPOC requirements or target naturalized citizens for investigation and prosecution.<sup>54</sup> For example, Puerto Rican birth certificates do not meet standards for proof of citizenship in some REAL ID states, making it difficult or impossible for people born in Puerto Rico to vote there should those states adopt a DPOC requirement.<sup>55</sup> And naturalized citizens, who are more likely to belong to racial or language minority groups, may need to pay hundreds or thousands of dollars to replace a lost naturalization or citizenship certificate.<sup>56</sup> Threats of punitive investigation and prosecution for registration deficiencies may also have a chilling effect on registration and voting, even for voters who are eligible and have access to proper documentation.<sup>57</sup>

It is important to distinguish these threats from disputes over how to draw electoral districts. Voting lawsuits generally fall into two genres: vote dilution and vote denial.<sup>58</sup> The former might involve a challenge to a redistricting plan that makes it harder for a minority voting bloc to elect its candidate of choice or to the use of at-large elections rather than single-member districts. These kinds of policies reduce minority groups' "electoral influence," but they do not directly block their participation in the electoral process.<sup>59</sup> However, vote denial – such as rejecting imperfect ballots, erecting barriers to voter registration, or removing

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52. Guy Marzorati, *Report: Reducing Voting Locations 'Discouraged Participation' for California's Black and Latino Voters in 2020*, KQED (Mar. 4, 2022), <https://www.kqed.org/news/11907125/report-reducing-voting-locations-discouraged-participation-for-californias-black-and-latino-voters-in-2020> [https://perma.cc/P44S-KK7F].

53. U.S. COMM'N ON C.R., *AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 125* (2018) [hereinafter *CIVIL RIGHTS COMMISSION REPORT*].

54. Ana Henderson, *Citizenship, Voting, and Asian American Political Engagement*, 3 U.C. IRVINE L. REV. 1077, 1094-1104 (2013).

55. *CIVIL RIGHTS COMMISSION REPORT*, *supra* note 53, at 126.

56. *Id.* at 126-27.

57. Alexa Ura & Ryan Murphy, *These Naturalized Citizens Belong on the Texas Voter Rolls. A State Review Could Have Kicked Them Off*, TEX. TRIB. (Mar. 22, 2019), <https://apps.texastribune.org/features/2019/texas-voter-roll-review-naturalized-voices> [https://perma.cc/H3TJ-5R32] (describing a previous round of citizenship investigations conducted by Texas in 2019).

58. See Stephanopoulos, *supra* note 13, at 167-69.

59. *Id.* at 167.

voters from registration rolls without notice – threatens to exclude people from the electoral process entirely.<sup>60</sup> Historically, most VRA litigation has focused on vote dilution rather than vote denial.<sup>61</sup>

Whatever the merits of vote-dilution litigation, the current increase in vote-denial laws is a problem unto itself. Yet scholarly work on voting-rights litigation, and particularly prior work on Section 3, often lumps vote dilution and vote denial together. This is partly because many of the cases involving Section 3 in the past have been vote-dilution cases.<sup>62</sup> As a result, when scholars try to tease out the scope of Section 3 and develop standards that courts might apply when invoking it, they have relied on vote-dilution cases to inform their analysis.<sup>63</sup>

This is problematic because entire classes of constitutional challenges – namely, those based on the Due Process Clause of the Fourteenth Amendment – generally do not apply to redistricting challenges. More importantly, focusing narrowly on redistricting challenges makes it look harder to win constitutional challenges than it may be in the vote-denial context moving forward.<sup>64</sup> Finally, the nakedly partisan valence of many redistricting cases might make courts unwilling to step into what they perceive as the ordinary hurly-burly of politics. Courts may be less hesitant when litigation seeks to maintain some of the most popular and commonly used voting methods or seeks to avoid removing voters from registration rolls just before elections.

An unintended consequence, then, of this wave of new voting restrictions is that it may reinvigorate constitutional voting-rights litigation. This is already evident in suits challenging the most egregious of the new laws, such as Arizona's

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60. *Id.*

61. *Id.*; see also Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 73-74 (“While the VRA prohibits both vote dilution and vote denial, the former has accounted for the vast majority of activity under both Section 2 and Section 5.”); DAVID GUNTER, VICTORIA L. KILLION, JARED P. COLE, KEVIN J. HICKEY, BRANDON J. MURRILL & L. PAIGE WHITAKER, CONG. RSCH. SERV., R46910, THE SUPREME COURT’S OCTOBER 2020 TERM: A REVIEW OF SELECTED MAJOR RULINGS 2 (2021) (“Historically, Section 2 has been invoked primarily to challenge redistricting maps, also known as ‘vote dilution’ cases.”). This comparative focus on vote dilution may be because Section 5 preclearance historically stopped the most egregious forms of vote denial before they went into effect.

62. See, e.g., *Sanchez v. King*, 550 F. Supp. 13 (D.N.M. 1982) (redistricting); *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990) (redistricting and majority-vote requirements); *Kirkie v. Bufalo Cnty.*, No. 03-cv-3011, 2004 U.S. Dist. LEXIS 30960 (D.S.D. Feb. 12, 2004) (redistricting); *Blackmoon v. Charles Mix Cnty.*, 505 F. Supp. 2d 585 (D.S.D. 2007) (malapportionment).

63. E.g., Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2006-15 (2010) (canvassing precedent for the use of Section 3 and discussing a variety of redistricting cases).

64. See *infra* Section III.C.

DPOC requirement. There, plaintiff groups have foregrounded a range of sophisticated constitutional arguments, most of which do not involve claims of intentional racial discrimination.<sup>65</sup> Suits like this, though not exactly rare, will only become more common as states severely restrict the ease of voting based on unsubstantiated and irrational allegations of voter fraud.<sup>66</sup>

### B. *The Purcell Problem*

The *Purcell* Principle takes its name from *Purcell v. Gonzalez*, a 2006 lawsuit challenging a voter-ID law in Arizona.<sup>67</sup> After a Ninth Circuit panel enjoined enforcement of the law roughly one month prior to the general election, the Supreme Court stayed the circuit court's injunction.<sup>68</sup> Taking no position on the merits, the Court wrote that the circuit court's injunction risked creating confusion among voters in the period immediately before the election and had to be stayed "as a procedural matter."<sup>69</sup> The Court emphasized both the fact that the circuit court's injunction conflicted with the stance of the district court and the fact that Arizona's law had already been approved by DOJ pursuant to Section 5 preclearance under the VRA.<sup>70</sup> Importantly, the Court found that voter confusion was likely even though the lower court's injunction removed, rather than imposed, barriers to voting.<sup>71</sup>

Over time, the Principle has expanded to cover a significant amount of election-related litigation. In 2020, the Supreme Court invoked *Purcell* to stay a

65. See sources cited *supra* notes 37 & 39.

66. One might object that the Supreme Court in *Crawford* held that policing voter fraud is a legitimate state interest. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191, 196 (2008). Yet it is worth remembering that *Crawford* was decided more than a decade before the current climate transformed false allegations of election fraud into such a serious threat to the integrity of our electoral system. In recent years, courts have at times been willing to reject entirely unsubstantiated references to fraud prevention as a state interest, see, for example, *Fish v. Schwab*, 957 F.3d 1105, 1133-36 (10th Cir. 2020), and also rejected such claims broadly in the wake of the 2020 election. For more on this issue, see *infra* notes 311-318 and accompanying text.

67. 549 U.S. 1 (2006) (per curiam). The law required voters to present proof of citizenship when registering to vote and identification on Election Day. *Id.* at 2.

68. *Id.* at 2.

69. *Id.* at 4-5.

70. *Id.* at 2-5.

71. The injunction removed an ID requirement and imposed no new requirements on voters. So, if voters simply complied with the law prior to the injunction, they would have had no problem voting after it was issued. The Court did not include any consideration of whether the injunction's last-minute changes increased or decreased barriers to voting, holding instead that the change itself was what threatened to confuse voters. See *id.* at 4-5.

number of last-minute injunctions of election laws that burdened voting in the midst of the COVID-19 pandemic.<sup>72</sup> In some cases, the Supreme Court explicitly cited *Purcell*.<sup>73</sup> In others, the Court simply issued summary stays.<sup>74</sup> The seemingly broad scope of *Purcell* has been exacerbated by a lack of clarity regarding how far before an election it reaches and what types of judicial interventions are seen as causing confusion among voters. Because *Purcell* is, by definition, a feature of the Court's shadow docket – it arises in emergency stays, not merits opinions – the Court has not had the opportunity or inclination to lay out clear principles for its application.<sup>75</sup>

In its most recent decision invoking *Purcell* – *Merrill v. Milligan* – the Court intervened to stay an injunction of Alabama's newly drawn congressional maps.<sup>76</sup> In doing so, the Court appeared to significantly expand the time period prior to an election during which *Purcell* applies. Although *Milligan* is a redistricting case and is thus substantively different from the kinds of cases on which this Note focuses, it has become the leading citation for the *Purcell* Principle, including in vote-denial cases.<sup>77</sup>

In *Milligan*, the district court had determined that Alabama's new maps unlawfully diluted minority votes in violation of Section 2 of the VRA and enjoined their use on that basis.<sup>78</sup> Concurring in granting a stay, Justice Kavanaugh described the *Purcell* Principle as comprising the propositions “(i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when,

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72. See, e.g., *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (mem.) (Kavanaugh, J., concurring) (collecting cases); *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020) (mem.); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

73. E.g., *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (mem.) (Kavanaugh, J., concurring).

74. E.g., *Merrill v. People First of Ala.*, 141 S. Ct. 25, 25 (2020) (mem.).

75. Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, ELECTION L. BLOG (Sept. 27, 2020, 12:22 PM), <https://electionlawblog.org/?p=115834> [<https://perma.cc/3V4Z-G2SV>] (“Despite all this activity, the *Purcell* principle remains remarkably opaque. Precisely because it is a shadow doctrine, appearing only in the Court's shadow docket, its contours have never been clarified.”); see also *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 n.6 (11th Cir. 2022) (expressing uncertainty about the “precise boundaries” of the *Purcell* Principle).

76. *Milligan*, 142 S. Ct. at 879.

77. For example, the Eleventh Circuit recently stayed a district-court injunction of Florida's new voting restrictions based on *Purcell*, citing *Milligan*, 142 S. Ct. 879. See *League of Women Voters of Fla., Inc.*, 32 F.4th at 1370.

78. Because the district court assumed that the Section 2 claim was a sufficient basis for its injunction, it cited constitutional avoidance as a justification for not deciding plaintiffs' constitutional claims on the merits. See *Singleton v. Merrill*, No. 21-cv-1291, 2022 WL 265001, at \*82 (N.D. Ala. Jan. 24, 2022), *order clarified*, 2022 WL 272637 (N.D. Ala. Jan. 26, 2022).

as here, lower federal courts contravene that principle.”<sup>79</sup> Kavanaugh declined to lay out a clear test for “[h]ow close to an election is too close,” instead explaining that it depends on a variety of different factors, including whether changes can be implemented by the state without “significant cost, confusion, or hardship.”<sup>80</sup> Kavanaugh also argued that the strength of plaintiffs’ arguments should factor into the determination, requiring not only that they are likely to succeed—the normal requirement for an injunction—but that the “underlying merits are entirely clearcut in favor of the plaintiff.”<sup>81</sup> The indeterminacy of this articulation gives reviewing courts tremendous discretion to stay challenges that have even the slightest flaws.

In *Milligan*, the Court was willing to grant a stay seven weeks before the start of primary elections and almost six months before the general election. The Court has articulated some modest limits—for example, a defendant might waive *Purcell* based on representations to a trial court<sup>82</sup>—but has generally allowed lower courts to apply *Purcell* aggressively. In Florida, for example, the Eleventh Circuit invoked *Purcell* after disregarding the district court’s factual determination that its injunction would not impose an administrative burden on the State or generate confusion.<sup>83</sup> The injunction was issued almost eight months before the general election and almost four months before statewide primaries.<sup>84</sup>

Even worse, the Eleventh Circuit noted that “the district court’s injunction implicates voter registration—which is currently underway.”<sup>85</sup> But voter registration is *always* underway, and it is unclear what judicial intervention would not implicate it. Similarly, the Sixth Circuit invoked *Purcell* six months before a general election (in a matter that had nothing to do with party primaries), writing that “the November election itself may be months away but important, interim deadlines . . . are imminent.”<sup>86</sup> The court observed that “[m]oving one piece on the game board invariably leads to additional moves,” and election disputes

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79. *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurring).

80. *Id.* at 881 & n.1.

81. *Id.* at 881.

82. See *Rose v. Raffensperger*, 143 S. Ct. 58, 59 (2022) (mem.).

83. *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363, 1370 (11th Cir. 2022).

84. *League of Women Voters of Fla., Inc. v. Lee*, No. 21-cv-186, 2022 WL 969538, at \*102 (N.D. Fla. Mar. 31, 2022), *stayed pending appeal sub nom. League of Women Voters of Fla., Inc.*, 32 F.4th 1363. According to the Eleventh Circuit, local elections were already ongoing. *League of Women Voters of Fla., Inc.*, 32 F.4th at 1371.

85. *League of Women Voters of Fla., Inc.*, 32 F.4th at 1371.

86. *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020).



“rarely end[] with one court order.”<sup>87</sup> This implies that even *appeals* of injunctions must be resolved months before voter registration begins, theoretically allowing *Purcell* to block court orders over a year before Election Day itself.

To see the impact that *Purcell* could have, it is helpful to consider a counterfactual example. In 2016, plaintiffs in *NAACP v. McCrory* challenged a series of voting restrictions enacted in North Carolina, including a “photo ID requirement, [] reduction in days of early voting, and the elimination of same-day registration, out-of-precinct voting, and preregistration.”<sup>88</sup> Conducting a totality-of-circumstances analysis under *Arlington Heights*, the Fourth Circuit determined that the challenged restrictions were enacted with racially discriminatory intent and enjoined them.<sup>89</sup>

If a case like *McCrory* were decided today, the outcome might be very different. Following *Milligan*, a court would likely decline to issue an injunction – or a higher court would stay such an injunction.<sup>90</sup> Admittedly, this would depend upon the strength of the court’s conviction that unconstitutional conduct had occurred. Still, in all but the most egregious cases, the *Purcell* Principle would weigh against a preelection remedy. A general election might then take place under unconstitutional rules.

After the election, the court might enjoin the problematic law, but depending on the nature of plaintiffs’ claims, a court might also find the initial challenge moot once the election has ended.<sup>91</sup> North Carolina, however, would likely go

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87. *Id.*

88. 831 F.3d 204, 219 (4th Cir. 2016).

89. *Id.* at 233-41. Of note, plaintiffs asked the Fourth Circuit to bail in North Carolina under Section 3, but the court declined, cursorily explaining that preclearance was “not necessary here in light of our injunction.” *Id.* at 241. For more on *McCrory* and bail-in, see *infra* notes 319-326.

90. One might counter that the injunction in *McCrory* came after the primary election and three months before the general election, and should therefore be permitted. This seems like a tenuous and implausible reading of *Purcell*, even given the doctrine’s current ambiguity. Courts have treated primaries as part of an overall election process that they are loathe to interrupt, see *supra* notes 83-87, and it is doubtful that an injunction in the few months between a primary and a general election would be treated as less confusing or disruptive than multiple months before the primary. Moreover, at least some appeals courts have applied *Purcell* more than six months prior to the immediately proximate election. See *supra* notes 86-87.

91. See, e.g., *Ritter v. Migliori*, 143 S. Ct. 297, 298 (2022) (mem.). In *Ritter*, voters in a 2021 county judicial election challenged Pennsylvania’s failure to count ballots that did not have a handwritten date on the outside of the ballot-return envelope. In mid-2022, the Third Circuit determined that the State’s actions had violated the Materiality Provision of the Civil Rights Act and ordered the district court to ensure that the ballots be counted. *Migliori v. Cohen*, 36 F.4th 153, 162-64 (3d Cir. 2022). The ballots were subsequently counted, and the election was certified. Petition for Writ of Certiorari at 5, *Ritter*, 143 S. Ct. 297 (No. 22-30). Then, essentially

back to the drawing board and pass a new law with slight modifications. The presumption that the legislature acted in good faith and the fact that discriminatory-intent findings do not automatically taint substitute laws mean that the initial injunction would not necessarily bar the new law.<sup>92</sup> If advocates then sued to challenge the new law, the process would begin again, with the State seeking to delay at every turn in order to make it into the *Purcell* window once more.<sup>93</sup>

Because political partisanship and the volume of late-breaking election litigation have increased, *Purcell* is now more likely to impede legitimate challenges to unlawful voting procedures.<sup>94</sup> But beyond merely interfering with challenges to existing election laws, the expansion of *Purcell* has created new, harmful incentives for states already mired in litigation. Indeed, voting-rights advocates have already expressed concern about this dynamic. For example, in DOJ's current challenge to Texas's SB 1, the Department opposed a stay pending an interlocutory appeal by arguing that such a delay might make it difficult to secure preelection relief should the Department ultimately prevail at trial.<sup>95</sup> Although there are already plenty of incentives for defendants to game the discovery process in order to delay trial proceedings,<sup>96</sup> *Purcell* substantially adds to those incentives.

Of course, not everything is traceable to legal doctrine—partisanship, the rancor of the last two elections, and the propagation of election misinformation

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because plaintiffs had won, the Supreme Court vacated the Third Circuit's decision—eliminating its precedential effect—and remanded with orders to dismiss the case as moot. *Ritter*, 143 S. Ct. at 298. Although a full exploration of the Court's evolving mootness jurisprudence is beyond the scope of this Note, *Ritter* demonstrates the difficulty of winning challenges to election procedures once the election has taken place and the results have been certified.

92. *Veasey v. Abbott*, 888 F.3d 792, 801 (5th Cir. 2018) (holding that the state does not bear the burden of proving that a substitute for a racially discriminatory law is no longer racially discriminatory).
93. As the Eleventh Circuit recently demonstrated, the *Purcell* Principle would still be able to block challenges to the new law, even though the law would not have gone into effect yet. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371-72 (11th Cir. 2022).
94. David M. Konisky & Paul Nolette, *The State of American Federalism, 2020-2021: Deepening Partisanship amid Tumultuous Times*, 51 *PUBLIUS: J. FEDERALISM* 327, 332 (2021) (“[T]his previously relatively obscure *Purcell* principle seems likely to be more important in election-related disputes moving forward.”).
95. Opposition to Motion for a Stay, *supra* note 18, at 21-22 (“The district court expedited the schedule here both to afford the Texas Legislature an opportunity to enact a remedy for any violation found and to lessen the chance that this case (including appellate review) will extend into candidate qualifying in late 2023, which would potentially risk a delay in any relief for the 2024 election cycle.”).
96. See, e.g., William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 *JUDICATURE* 178, 178-80 (1990-1991) (describing issues with discovery generally).

play a role.<sup>97</sup> But *Purcell* seems likely to have exacerbated the current crisis.<sup>98</sup> Now, states have an incentive to pass harsher laws, and to delay and drag out litigation, since they essentially get a free pass if legal challenges have not been resolved well in advance of elections.<sup>99</sup> The lesson states have learned? If you are going to sin, sin boldly.

Accordingly, there has been substantial scholarship on the *Purcell* Principle, particularly in the most recent two election cycles.<sup>100</sup> Such work has been overwhelmingly critical. Scholars have concluded that the Principle is an unjustified devaluation of voting rights;<sup>101</sup> that it requires undue deference to state legislatures, particularly in crises;<sup>102</sup> and that it has been applied inconsistently without the Supreme Court articulating manageable standards to guide lower courts.<sup>103</sup> Even scholars who argue that election litigation should ideally occur as far before

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97. See, e.g., HASEN, CHEAP SPEECH, *supra* note 25, at 43–56 (2022) (arguing that disinformation is responsible for the corrosion of democratic politics we are seeing today). See generally HASEN, THE VOTING WARS, *supra* note 25 (tracing the concurrent increase in partisanship and the volume of election litigation over the last two decades).

98. See Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 275 (2020).

99. Ian Milhiser, *The Dangerous Legal Rule Behind the Supreme Court's Latest Voter Suppression Decision*, THINKPROGRESS (Oct. 18, 2014, 6:59 PM), <https://archive.thinkprogress.org/the-dangerous-legal-rule-behind-the-supreme-courts-latest-voter-suppression-decision-6c1eadb946d3> [<https://perma.cc/AZ28-FKDB>] (“Vote suppressors will often get one free election when they enact a law making it harder to vote, where the law will go into effect regardless of whether or not it violates the Constitution or federal law.”).

100. See, e.g., Zhang, *supra* note 24, at 137 (criticizing the Principle as inconsistently applied and based on the “untested assumption” that preserving existing election laws “always minimizes voter confusion”); HASEN, THE VOTING WARS, *supra* note 25, at 71 (criticizing *Purcell* generally); Ruoyun Gao, Note, *Why the Purcell Principle Should Be Abolished*, 71 DUKE L.J. 1139, 1145 (2022) (arguing for the elimination of the Principle).

101. See David Gans, *The Roberts Court, the Shadow Docket, and the Unraveling of Voting Rights Remedies*, AM. CONST. SOC'Y 4 (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/10/Purcell-Voting-Rights-IB-Final-Version.pdf> [<https://perma.cc/G5MH-M4X3>] (arguing that *Purcell* “downgrades the right to vote” into a “second-class right”); Nicholas Stephanopoulos, *Election Litigation in the Time of the Pandemic*, 2020 U. CHI. L. REV. ONLINE 18, 18 (describing the Supreme Court’s use of *Purcell*, along with other election-law doctrines, as an “anti-Carolene” hostility to “efforts to vindicate democratic values”).

102. See Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 63–64 (2021) (arguing that *Purcell* requires too much deference to state legislatures).

103. See Wilfred U. Codrington III, *Purcell in Pandemic*, 96 N.Y.U. L. REV. 941, 961 (2021) (criticizing the lack of clear and consistent principles undergirding the application of *Purcell* in the most recent election cycle).

Election Day as possible<sup>104</sup> have expressed concerns about the Court's expansion of *Purcell*.<sup>105</sup>

Perhaps because the doctrinal shift to a maximalist *Purcell* Principle is so new, however, scholars have focused on rolling back the doctrine rather than developing strategies to live with it.<sup>106</sup> To the extent that solutions have been proposed, they have focused on extradoctrinal paths, such as boosting the involvement of nonjudicial institutions in election administration<sup>107</sup> or encouraging state legislatures to pass new protections for voters.<sup>108</sup> Yet, for better or worse, the *Purcell* Principle is here to stay, and advocates unfortunately will need to live with it. One tool that may help them do so is Section 3 of the VRA.

### C. Section 3: The Voting Rights Act's Underused "Pocket Trigger"

Beyond just blocking voting restrictions before they go into effect, voting-rights litigation should lay the groundwork for protecting future elections. Winning an injunction against a restrictive voting law under Section 2 may protect one election, but it is a costly effort for plaintiffs and does not deter states from trying again.<sup>109</sup> Subjecting a state to preclearance under Section 3, however, both protects the integrity of future elections and deters states that fear preclearance from behaving unlawfully in the first place.

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104. E.g., Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 ELECTION L.J. 150, 152 (2022).

105. E.g., Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 443 (2016).

106. See, e.g., *id.* at 456–61 (arguing for a less expansive application of *Purcell*); Andrew Vazquez, *Abusing Emergency Powers: How the Supreme Court Degraded Voting Rights Protections During the COVID-19 Pandemic and Opened the Door for Abuse of State Power*, 48 FORDHAM URB. L.J. 967, 1009–14 (2021) (urging the Court to clarify the *Purcell* Principle and create an exception to its use during emergencies); Danika Elizabeth Watson, Note, *Free and Fair: Judicial Intervention in Elections Beyond the Purcell Principle and Anderson-Burdick Balancing*, 90 FORDHAM L. REV. 991, 1019–22 (2021) (arguing that courts should return to the core principles of the *Carolene Products* case and focus election-law doctrines on protecting minorities' access to the political process).

107. See, e.g., Shane Grannum, Note, *A Path Forward for Our Representative Democracy: State Independent Preclearance Commissions and the Future of the Voting Rights Act After Shelby County v. Holder*, 10 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 95, 128–30 (2018) (proposing the use of independent preclearance commissions by states to overcome judicial inability to ameliorate voter discrimination).

108. See, e.g., Joshua Perry & William Tong, Essay, *Protecting Voting Rights After 2020: How State Legislatures Should Respond to Restrictive New Trends in Election Jurisprudence*, 53 CONN. L. REV. ONLINE 1, 22–26 (2021) (urging states to enact new statutory voting-rights protections).

109. One example is the endless whack-a-mole litigation over Texas's voter-identification laws. See *infra* Section III.A.

Under Section 3 (sometimes called the VRA’s “Pocket Trigger” due to the way it targets “pockets” of discrimination), a court may force a jurisdiction that has already enacted unconstitutional voting laws or practices to get prior approval from the court before making and enforcing subsequent changes to its election machinery.<sup>110</sup> Because this Note interprets Section 3, it is worth quoting from the relevant part—Section 3(c)—at length:

[I]f the court finds that *violations of the fourteenth or fifteenth amendment justifying equitable relief* have occurred . . . the court, in addition to such relief as it may grant, *shall retain jurisdiction* for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced *unless and until* the court finds that such qualification, prerequisite, standard, practice, or procedure *does not have the purpose and will not have the effect* of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title.<sup>111</sup>

Once a court imposes preclearance, the court may block enforcement of any laws that it finds have either the purpose or effect of restricting voting rights based on race or language status.<sup>112</sup> This is called “bailing in” a jurisdiction to preclearance.<sup>113</sup> Though the statute does not dictate proof standards that courts must apply to bailed-in jurisdictions, the preclearance language mirrors that of Section 5.<sup>114</sup> This indicates that covered jurisdictions likely bear the burden of demonstrating that their plans do not have a discriminatory purpose or effect.<sup>115</sup> Importantly, the party that bears the burden of proof under preclearance—the state—is different from the party that bears the burden of proof for the initial constitutional violation that leads to preclearance—the plaintiff.<sup>116</sup>

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110. See Crum, *supra* note 63, at 2006.

111. 52 U.S.C. § 10302 (2018) (emphasis added).

112. Section 10303(f)(2) prohibits voting laws that discriminate based on language status.

113. See Crum, *supra* note 63, at 1995 n.11, 1997.

114. Compare 52 U.S.C. § 10302(c) (2018) (Section 3), with *id.* § 10304 (Section 5). DOJ, per its regulations, also applies the same standards to jurisdictions under Section 3 and Section 5 preclearance when Section 3 jurisdictions proactively seek review by the Department. See 28 C.F.R. § 51.8 (2009).

115. John P. MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U. L. REV. 107, 108 n.8 (1979).

116. Paul M. Wiley, Note, *Shelby and Section 3: Pulling the Voting Rights Act’s Pocket Trigger to Protect Voting Rights After Shelby County v. Holder*, 71 WASH. & LEE L. REV. 2115, 2118–19 (2014).

Section 3 has historically been considered the ugly stepchild of Section 5 — so limited as to be practically useless.<sup>117</sup> As scholars,<sup>118</sup> advocates,<sup>119</sup> and courts<sup>120</sup> have noted, Section 3 is rarely used. Section 3 requires a constitutional violation, and establishing one is a costly and time-intensive task.<sup>121</sup> And because Section 3 has long been understood to require a finding of intentional racial discrimination, advocates have understood it as applying to only a narrow range of cases.<sup>122</sup> Courts often never even reach the question, dismissing it on constitutional-avoidance grounds after finding a lesser, statutory violation.<sup>123</sup> Preclearance has been invoked only twenty-two times in the last four decades, and an even smaller number of jurisdictions are subject to preclearance today.<sup>124</sup> Most of those cases involved jurisdictions accepting preclearance as part of settlement negotiations;

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117. In fact, DOJ's discussion of the VRA on its own website does not discuss Section 3(c) among the parts of the law that the Department uses to defend voting rights. The only mention of Section 3 involves its provisions relating to poll observers. See *Statutes Enforced by the Voting Section*, U.S. DEP'T JUST. (Nov. 29, 2021), <https://www.justice.gov/crt/statutes-enforced-voting-section> [<https://perma.cc/W7D2-6DMF>]. Although Section 3 is remedial and is thus not an affirmative requirement that the Department "enforces," this omission is nonetheless telling.

118. See Crum, *supra* note 63, at 1997.

119. See, e.g., *Standing in the Breach*, *supra* note 20, at 4 (citing Crum, *supra* note 63, at 1997-98).

120. See, e.g., *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016).

121. See Tharuni Jayaraman, *Veasey v. Perry & the Voting Rights Amendment Act*, HARV. L. & POL'Y REV. (Oct. 12, 2014), <https://harvardlpr.com/2014/10/12/veasey-v-perry-the-voting-rights-amendment-act> [<https://perma.cc/WB4U-7M9V>]; Elmendorf & Spencer, *supra* note 8, at 2186 ("The legislative history makes clear that section 2's results test was supposed to alleviate some of the evidentiary burdens associated with conventional intent tests in constitutional law . . .").

122. Michelle L. Davis, *The Voting Rights Act in the Wake of Shelby*, 22 PUB. LAW. 12, 14 (2014) ("Much legal and academic interest has percolated over this obscure provision of the act since the *Shelby* decision, but it is clear that section 3 bail-in is no replacement for preclearance. The provision appears only to apply to constitutional claims of 'intentional' discrimination — leaving out an entire subset of statutory violations that merely have the 'effect' of abridging the right to vote. Bail-in is further limited in that courts have historically implemented bail-in judiciously . . .").

123. See, e.g., *Veasey v. Abbott*, 830 F.3d 216, 229 (5th Cir. 2016) (vacating the district court's constitutional findings under "the doctrine of constitutional avoidance"); see also *McCrory*, 831 F.3d at 241 (finding Section 3 preclearance "not necessary here in light of our injunction").

124. Abby Rapoport, *Get to Know Section 3 of the Voting Rights Act*, AM. PROSPECT (Aug. 19, 2013), <https://prospect.org/power/get-know-section-3-voting-rights-act> [<https://perma.cc/FW2B-DJGN>] (noting that, as of 2013, "Section 3 ha[d] only been invoked 18 times in the last four decades"). Just four jurisdictions — two cities, a school district, and the State of Florida — were adversely bailed in from 2013 to 2022. See *infra* note 125 (collecting cases). The Florida bail-in decision was later stayed on appeal, based in part on *Purcell*. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1374 (11th Cir. 2022).

only six involved the adverse imposition of Section 3 preclearance.<sup>125</sup> Even in the most recent case where a court granted Section 3 relief – in April 2022 – the judge lamented that the “parties treat[ed] this issue as an afterthought.”<sup>126</sup> There is no appellate case law interpreting Section 3.<sup>127</sup>

Another reason why Section 3 has flown under the radar may be related to the “retrogression” principle that both it and Section 5 employ.<sup>128</sup> Unlike Section 2, which can be used in certain circumstances to force affirmative expansions of voting rights, Sections 3 and 5 can prevent only backsliding, or retrogression. The scope of problems that Section 3 can address is thus somewhat limited. It could not, for example, have been applied in *Merrill v. Milligan*, where plaintiffs tried to force the creation of a *new* majority-minority district in Alabama.<sup>129</sup> Yet this does not mean Section 3 is useless. Today, one of the biggest threats to our democracy is the kind of backsliding that Section 3 *can* address, such as intensified voter-ID laws, polling-site closures, bans on drop boxes, restrictions on mail-in voting, and efforts to reject lawfully cast ballots.<sup>130</sup> Section 3 clearly reaches such conduct.

Likely due to practical inattention to Section 3, in-depth scholarly treatments have been sparse as well.<sup>131</sup> Some, like Travis Crum’s groundbreaking 2010 student note, drew attention to Section 3 and defended its constitutionality as signs

125. Of the six, four imposed preclearance on municipal jurisdictions. See *NAACP v. Gadsden Cnty. Sch. Bd.*, 589 F. Supp. 953, 958–59 (N.D. Fla. 1984) (bailing in a school district); *Allen v. City of Evergreen*, No. 13-0107, 2014 WL 12607819, at \*1 (S.D. Ala. Jan. 13, 2014) (bailing in a city); *Patino v. City of Pasadena*, No. H-14-3241, 2017 WL 10242075, at \*3 (S.D. Tex. Jan. 16, 2017) (bailing in a city); *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 19-cv-01821, 2019 WL 7500528, at \*4 (N.D. Ala. Dec. 16, 2019) (bailing in a school district). Only two cases adversely imposed preclearance on a state. *Jeffers v. Clinton*, 740 F. Supp. 585, 601-02 (E.D. Ark. 1990) (bailing in Arkansas); *League of Women Voters of Fla., Inc. v. Lee*, No. 21-cv-186, 2022 WL 969538, at \*107 (N.D. Fla. Mar. 31, 2022), *stayed pending appeal sub nom. League of Women Voters of Fla., Inc.*, 32 F.4th at 1375 (bailing in Florida).

126. *League of Women Voters of Fla., Inc.*, 2022 WL 969538, at \*103.

127. *Id.* at \*105 (“The only case to devote substantial analysis to section 3(c), *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), remains the seminal case interpreting the section.”). The Eleventh Circuit did not discuss the substance of Section 3 preclearance in its stay. *E.g.*, *League of Women Voters of Fla., Inc.*, 32 F.4th at 1371.

128. See Crum, *supra* note 63, at 2008 n.91.

129. See *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring).

130. Wendy R. Weiser & Madiba Dennie, *Voting Rights: A Critical Two Years*, BRENNAN CTR. FOR JUST. (June 14, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/voting-rights-critical-two-years> [<https://perma.cc/HCA6-3FVM>]. It is also notable that backsliding can apply to redistricting if states eliminate existing minority-opportunity districts.

131. See Crum, *supra* note 63; Wiley, *supra* note 116; Edward K. Olds, Note, *More than “Rarely Used”: A Post-Shelby Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185

built that the Supreme Court was going to strike down the Section 5 preclearance regime.<sup>132</sup> Others, like Edward K. Olds's 2017 note, made similar arguments post-*Shelby*, claiming that Section 3 could be a partial replacement for Section 5.<sup>133</sup> And some scholars predicted an increase in real-world use of Section 3 after *Shelby*.<sup>134</sup> At first, the Justice Department under Attorney General Eric Holder seemed poised to oblige.<sup>135</sup> When initial efforts failed, though, calls to invoke Section 3 died down.<sup>136</sup> Some pushed for congressional action to expand Section 3, yet that died with the failure of the Voting Rights Advancement Act.<sup>137</sup>

Now, because the injunctions that gave Section 2 bite are no longer reliably available – at least not anywhere remotely close to Election Day – Section 3 is one of the best tools left to combat vote-denial laws. And unfortunately, because the opponents of voting rights are getting bolder, proving constitutional violations may become easier than it used to be.

Yet Section 3 may also offer more than a cut-and-run retreat. Without preclearance, voting-rights litigation is an endless game of cat-and-mouse. It is a lengthy, labor- and time-intensive process, and one that is extremely costly to complete in time for it to matter.<sup>138</sup> It is also easy for jurisdictions to revise technical features of problematic laws, forcing plaintiffs to sue again and again just

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(2017); Brian F. Jordan, Note, *Finding Life in Hurricane Shelby: Reviving the Voting Rights Act by Reforming Section 3 Preclearance*, 75 OHIO ST. L.J. 969 (2014); Roseann R. Romano, Note, *Devising a Standard for Section 3: Post-Shelby County Voting Rights Litigation*, 100 IOWA L. REV. 387 (2014).

132. See Crum, *supra* note 63, at 2021-37 (arguing that even if the broader preclearance regime under Sections 4 and 5 were unconstitutional, Section 3 will likely survive, and that Congress should amend Section 3 to include an effects test).
133. See Olds, *supra* note 131, at 2189, 2222 (proposing a “judicial framework” for implementing Section 3 and arguing that preclearance should be imposed on Texas); see also Wiley, *supra* note 116, at 2132-53 (defending Section 3’s constitutionality and proposing judicial standards for deciding when to impose preclearance).
134. E.g., Steven R. Morrison, *The Post-Shelby County Game*, 16 BERKELEY J. AFR.-AM. L. & POL’Y 236, 246 (2015) (briefly noting that voting-rights advocates may devote more attention to Section 3 after *Shelby*).
135. See Statement of Interest of the United States with Respect to Section 3(c) of the Voting Rights Act at 1, *Perez v. Perry*, No. 11-cv-360 (W.D. Tex. July 25, 2013), ECF No. 827 (requesting a bail-in remedy).
136. See *infra* Section III.A (explaining what happened in the Texas voter-ID litigation).
137. See Gabriel J. Chin, *The Expansion of the Section 3 Bail-In Remedy*, 8 ADVANCE 13-15 (2014) (defending the Voting Rights Advancement Act of 2019’s expansion of Section 3 to cover violations of Section 2, not just constitutional violations).
138. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (“Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial.”).



to get back to square one.<sup>139</sup> And allowing such laws to crop up repeatedly in new guises creates a situation where citizens live permanently under an unconstitutional election regime. This situation further degrades faith in the rule of law and confidence in the integrity of our elections.<sup>140</sup> Conversely, imposing Section 3 preclearance could short-circuit this cycle by preventing a jurisdiction from repeating the same shenanigans twice in a row. Thus, advocates might emerge from such a strategic shift in a better position than before, if only because they would no longer need to spend significant resources shoring up victories they have already won.

## II. TWO DOCTRINAL INNOVATIONS TO REALIZE THE PROMISE OF SECTION 3

To meet the challenges of the current moment, Section 3 doctrine needs updating. In this Part, I propose two novel interpretations of Section 3, both grounded in its plain statutory language.

### A. Section 3 Applies Based on Both Due-Process and Equal-Protection Violations

One longstanding misinterpretation of Section 3 is that it applies in cases of “intentional discrimination” only.<sup>141</sup> This is based on the Supreme Court’s opinion in *City of Mobile v. Bolden*, which held that voting-rights claims based on the

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139. See *id.*; see also H.R. REP. NO. 89-439, at 10 (1965) (lamenting that injunctions cause “no change in result, only in methods”). But see *OCA Greater Hous. v. Texas*, No. 15-cv-679, 2022 WL 2019295, at \*1 (W.D. Tex. June 6, 2022) (applying a previous injunction to sections of a new law that were similar to the enjoined laws).

140. *League of Women Voters of Fla., Inc. v. Lee*, No. 21-cv-186, 2022 WL 969538, at \*106 (N.D. Fla. Mar. 31, 2022), *stayed pending appeal sub nom.* *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363 (11th Cir. 2022) (explaining that allowing states to get away with repeated attempts to restrict voting rights “makes a mockery of the rule of law”); Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 5 (2007) (arguing that partisan election administration degrades confidence in our elections and threatens the stability of democracy in the long run).

141. See Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 782 (2018) (“[I]ntentional discrimination claims, where successful, open the door to preclearance under Section 3 of the VRA.”); see also Olds, *supra* note 131, at 2188-89 (“Much of the limited scholarship surrounding Section 3 traverses a common path: First, articles lament how Section 3 requires a judicial finding of discriminatory intent . . . .”); Jordan, *supra* note 131, at 992 (“Section 3’s potential benefits may never be realized because Section 3 demands proof of intentional discrimination.”); Romano, *supra* note 131, at 404-05 (noting that courts currently require a finding of intentional discrimination

Fifteenth Amendment and the Equal Protection Clause require proof of discriminatory intent.<sup>142</sup> And it is consistent with the Court’s general constitutional disparate-impact jurisprudence, which does not encompass claims based solely on “disproportionate effects.”<sup>143</sup> Because Section 3 preclearance must be based on a violation of either the Fourteenth or Fifteenth Amendment, scholars have generally assumed that it, too, requires a finding of discriminatory intent.<sup>144</sup> And the only two courts to have confronted the question—district courts in Texas and South Dakota—agreed.<sup>145</sup>

However, the text of Section 3 says bail-in is available for *any* violation of the Fourteenth Amendment, not just violations of the Equal Protection Clause.<sup>146</sup> This is important because a law or regulation that burdens the right to vote can violate the substantive-due-process guarantee of the Fourteenth Amendment without being intentionally discriminatory.<sup>147</sup> For example, in *Anderson v. Celebrezze*, the Court held that “ballot access restrictions” implicated liberty interests protected by the Due Process Clause,<sup>148</sup> and in *Norman v. Reed*, it held that restrictions on creating new political parties violate the First and Fourteenth Amendments by impeding the right of “*all* voters to express their own political preferences.”<sup>149</sup> The Court has restated the core principle numerous times: “[S]ubstantial burdens on the right to vote or to associate for political purposes

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but arguing that the standard should be lessened to one of “invidious” discrimination); Wiley, *supra* note 116, at 2136–37 (agreeing that Section 3 requires discriminatory purpose but saying that the burden of (dis)proof should lie with the defendant).

142. 446 U.S. 55, 63, 67–68 (1980).

143. *Id.* at 67; see also *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact.” (emphasis omitted)).

144. Crum’s 2010 note leaves this as an open question. Crum, *supra* note 63, at 2035–36 (“Could a *Shaw* finding trigger coverage? . . . Should a violation of the Fourteenth or Fifteenth Amendment require a showing of intentional discrimination? . . . Since the 1982 VRA amendments, litigators have shied away from these issues in front of the Court. All of these questions can now be litigated under the pocket trigger.”).

145. *Perez v. Abbott*, 390 F. Supp. 3d 803, 813–14 (W.D. Tex. 2019); *Blackmoon v. Charles Mix Cnty.*, 505 F. Supp. 2d 585, 587 (D.S.D. 2007).

146. Section 3 applies to all “voting guarantees of the fourteenth or fifteenth amendment.” 52 U.S.C. § 10302(c) (2018).

147. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). While substantive due process is no longer in its heyday before the Court, the line of cases protecting voting rights under the Due Process Clause is long and well-established.

148. 460 U.S. 780, 787 (1983).

149. 502 U.S. 279, 288 (1992) (emphasis added).

are constitutionally suspect and invalid under the First and Fourteenth Amendments *and* under the Equal Protection Clause unless essential to serve a compelling state interest.”<sup>150</sup>

Since these early cases, both the Supreme Court and the lower federal courts have consistently invoked the language of fundamental rights and due process in cases grappling with severely burdensome but nondiscriminatory barriers to voting.<sup>151</sup> Courts have taken care to articulate distinct injuries based on “the Fourteenth Amendment’s guarantee of the fundamental right to vote,” and “the Equal Protection Clause[’s]” requirement that laws not “impose[] a disproportionate burden on” a subgroup of citizens.<sup>152</sup>

The framework that emerged from these cases has been named the *Anderson-Burdick* test after two cases in which the Court invalidated unconstitutional election laws.<sup>153</sup> The test applies to both due-process challenges and equal-protection challenges that do not involve discriminatory intent, and entails balancing the severity of the burden imposed by election laws with the state’s interest in

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150. *Storer v. Brown*, 415 U.S. 724, 729 (1974) (emphasis added).

151. See, e.g., *Stewart v. Blackwell*, 444 F.3d 843, 852 (6th Cir. 2006), *vacated on other grounds*, 473 F.3d 692 (6th Cir. 2007) (holding that technologically flawed voting machines constituted both a violation of the Equal Protection *and* Due Process Clauses of the Fourteenth Amendment); *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 383 (6th Cir. 2020) (agreeing that *Anderson-Burdick* was the correct framework for determining whether an absentee-ballot signature-verification requirement violated the “fundamental right to vote under the First and Fourteenth Amendments,” but not reaching the merits after concluding that plaintiffs lacked standing); *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) (explaining that *Anderson-Burdick* merges the equal-protection, due-process, and First Amendment constitutional standards in the realm of voting rights); *Greidinger v. Davis*, 988 F.2d 1344, 1355 (4th Cir. 1993) (holding that a state law permitting public disclosure of one’s Social Security number as part of the voter-registration process “creates an intolerable burden” on the right to vote “protected by the First and Fourteenth Amendments”); *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (holding that an “incumbent first” ballot-ordering law *both* gave “rise to the equal protection question whether the inequality is such as offends the fourteenth amendment” *and* potentially burdened the “fundamental right to vote possessed by supporters of the last-listed candidates, in violation of the fourteenth amendment”); *Jones v. Governor of Fla.*, 950 F.3d 795, 833 (11th Cir. 2020) (striking down Florida’s onerous requirements that felons pay back court fees before registering to vote as an impermissible classification based on wealth under the Equal Protection Clause); see also *Democratic Nat’l Comm. v. Reagan*, 904 F.3d 686, 697 (9th Cir. 2018), *on reh’g en banc sub nom. Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020), *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (not finding a constitutional violation but asking the same question of whether there was an impermissible burden placed on the fundamental right to vote under the First *and* Fourteenth Amendments).

152. *Gonzalez v. Arizona*, 485 F.3d 1041, 1046 (9th Cir. 2007).

153. *Anderson*, 460 U.S. at 787; *Burdick v. Takushi*, 504 U.S. 428, 430 (1992).

enforcing the laws.<sup>154</sup> Severely burdensome laws must be justified by state interests that are more compelling and narrowly drawn than those justifying less burdensome laws.<sup>155</sup> Though scholars<sup>156</sup> and lower courts<sup>157</sup> have interpreted this inquiry in different ways, they generally agree that nondiscriminatory burdens on voting can be severe enough to infringe constitutional rights.<sup>158</sup>

This point is crucial. Proving discriminatory animus is tough, even when lawmakers publicly use racialized rhetoric.<sup>159</sup> Moreover, those looking to block racial minorities from voting are increasingly unlikely to pass facially discriminatory laws, as making it harder for everyone to vote can achieve the same racially inflected goals.<sup>160</sup> Such laws take advantage of preexisting inequities and pervasive societal discrimination to do their discriminatory work for them.<sup>161</sup>

Fortunately, recent challenges not based on intentional discrimination have succeeded where intentional-discrimination challenges likely would not have. For example, when South Carolina refused to waive its witness-signature requirement for absentee ballots, the district court based its injunction of the law solely on the fact that the law excessively burdened the fundamental right to vote.<sup>162</sup> But, as the complaint in that case noted, the burdens of the law were also likely to fall disproportionately on South Carolina's Black population since Black people were, at the time, far more likely to experience complications and die from

154. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008).

155. *Id.*

156. *E.g.*, Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1837-51 (2013); Vikram David Amar & Jason Mazzone, *Wisconsin's Decision to Have an Election This Month Was Unjust, but Was It Also Unconstitutional? Why the Plaintiffs (Rightly) Lost in the Supreme Court*, VERDICT (Apr. 20, 2020), <https://verdict.justia.com/2020/04/20/wisconsins-decision-to-have-an-election-this-month-was-unjust-but-was-it-also-unconstitutional> [<https://perma.cc/C8AZ-52EY>].

157. *See generally* *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG, <https://www.scotusblog.com/election-law-explainers/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions> [<https://perma.cc/EF7L-YFM7>] (describing how the indeterminate nature of *Anderson-Burdick* balancing has led to considerable divergence among lower-court judges).

158. *See* Foley, *supra* note 156, at 1849-51.

159. *See* Nabiha Aziz, Note, *Dog Whistles and Discriminatory Intent: Proving Intent Through Campaign Speech in Voting Rights Litigation*, 69 DUKE L.J. 669, 681-83 (2019) (describing the difficulty of proving intent and the challenges it poses for Section 3 litigation).

160. *See supra* note 21 and accompanying text.

161. *See supra* notes 46-57 and accompanying text.

162. *See, e.g.*, *Middleton v. Andino*, 488 F. Supp. 3d 261, 287, 296 (D.S.C. 2020). Note that the district court's injunction was later stayed by the Supreme Court. In his concurrence, Justice Kavanaugh explained the stay as based on *Purcell*. *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (mem.) (Kavanaugh, J., concurring).

COVID-19.<sup>163</sup> Thus, although the district court found a constitutional violation that disproportionately harmed Black voters, the violation itself was of due process, not equal protection, since the latter bars only discriminatory intent, not effect.<sup>164</sup> In situations like these, convincing courts to preclear future laws for discriminatory effect based on an initial due-process violation would be a significant win.

Similarly, in *Fish v. Schwab*, the Tenth Circuit applied *Anderson-Burdick* to strike down Kansas's DPOC requirement without finding racially discriminatory intent.<sup>165</sup> The court explained that "even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."<sup>166</sup> "However slight the burden imposed on the right to vote may appear," the court held, "it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation."<sup>167</sup> The level of constitutional scrutiny applied then depends on the severity of the burden imposed.<sup>168</sup> Although the court did not apply traditional equal-protection or intentional-discrimination reasoning, DPOC requirements have dramatically differential impacts on racial and language minorities.<sup>169</sup> The ability to secure Section 3 preclearance in response to such violations would help ensure that state defendants do not merely implement different policies in the future with similar discriminatory results.

A third example is the Eleventh Circuit's 2020 decision striking down Florida's requirement that ex-felons pay back fines and fees before registering to

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163. Complaint for Injunctive and Declaratory Relief at 4-5, *Middleton*, 488 F. Supp. 3d 261 (D.S.C. 2020) (No. 20-cv-01730), 2020 WL 2115602; see also Latoya Hill & Samantha Artiga, *COVID-19 Cases and Deaths by Race/Ethnicity: Current Data and Changes over Time*, KAISER FAM. FOUND. (Aug. 22, 2022), <https://www.kff.org/coronavirus-covid-19/issue-brief/covid-19-cases-and-deaths-by-race-ethnicity-current-data-and-changes-over-time> [<https://perma.cc/QP7Z-FTV6>].

164. See *supra* notes 142-143 and accompanying text.

165. Although the *Fish* court couched its application of *Anderson-Burdick* in equal-protection language, rather than due process, it recognized that the two domains are blurred, and that *Anderson-Burdick* "does not entail 'a traditional equal-protection inquiry.'" *Fish v. Schwab*, 957 F.3d 1105, 1122 n.3 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 965 (2020) (quoting Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1319 (11th Cir. 2019)). For the purposes of this Note, it does not matter whether a case is decided under the Due Process Clause or the Equal Protection Clause without a finding of intent—both are Fourteenth Amendment violations and are included in Section 3(c).

166. *Fish*, 957 F.3d at 1124 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008)).

167. *Id.* (internal quotation marks and alteration brackets omitted) (quoting *Crawford*, 553 U.S. at 191).

168. *Id.* at 1124-26.

169. See *supra* notes 54-57 and accompanying text.

vote.<sup>170</sup> There, the court based its analysis on wealth, not race discrimination.<sup>171</sup> Acknowledging that wealth is not a suspect class, the court nonetheless applied heightened scrutiny because the requirement burdened a “fundamental right.”<sup>172</sup> The court equivocated about whether this was a pure application of equal-protection principles or something more like a “hybrid analysis of equal protection and due process.”<sup>173</sup> Regardless, the court was clear that proof of intent was not needed, noting that the Supreme Court has never required intent in wealth-discrimination cases.<sup>174</sup> Felon voting restrictions, however, disproportionately harm racial minorities, particularly Black people, due to gross inequities in the criminal-justice system.<sup>175</sup> If the current consensus that Section 3 requires intentional discrimination were correct, then preclearance was not available. Fortunately, the statutory language encompasses *all* Fourteenth Amendment violations.<sup>176</sup> Had the Eleventh Circuit (or a district court) understood this and bailed in Florida back in 2020, Florida might not still be successfully passing restrictive voting laws today.<sup>177</sup>

Only two courts, both at the district level, have considered whether Section 3(c) requires a discriminatory-intent finding.<sup>178</sup> In *Perez v. Abbott*, the plaintiffs asked the court to bail in Texas, relying in part on the State’s commission of “*Shaw*-type” redistricting violations in 2013.<sup>179</sup> A “*Shaw*-type” violation is a form

170. *Jones v. Governor of Fla.*, 950 F.3d 795, 825 (11th Cir. 2020). The Eleventh Circuit upheld a district-court decision that the requirement was “unconstitutional as applied to felons who genuinely cannot pay.” *Id.*

171. *See id.* at 829.

172. *Id.*

173. *Id.* at 825 n.12 (quoting *Walker v. City of Calhoun*, 901 F.3d 1245, 1260 (11th Cir. 2018)).

174. *See id.* at 827–28 (“[T]he State argues that we cannot hold that the [legal financial obligation] requirement violates the Equal Protection Clause without proof of discriminatory intent . . . [b]ut this is not a race discrimination case. . . . This is a wealth discrimination case. And the Supreme Court has squarely held that *Davis*’s intent requirement is not applicable in wealth discrimination cases . . . [T]he Supreme Court has *never* required proof of discriminatory intent in a wealth discrimination case.” (internal citations omitted)).

175. *See* Jennifer Rae Taylor, *Jim Crow’s Legacy at the Ballot Box*, MARSHALL PROJECT (Aug. 20, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/08/20/jim-crow-s-lasting-legacy-at-the-ballot-box> [<https://perma.cc/2YTP-5P4J>].

176. *See* 52 U.S.C. § 10302(c) (2018) (authorizing preclearance if a court finds “violations of the fourteenth or fifteenth amendment justifying equitable relief”).

177. *E.g.*, Michel Martin & Ashley Lopez, *Florida Election Laws Are Changing Voting This Year*, NPR (Oct. 30, 2022, 5:06 PM ET), <https://www.npr.org/2022/10/30/1132724631/florida-election-laws-are-changing-voting-this-year> [<https://perma.cc/CW2M-YKDD>] (describing recently enacted changes to Florida’s voting laws and procedures).

178. *Perez v. Abbott*, 390 F. Supp. 3d 803, 813 n.7 (W.D. Tex. 2019) (“No court seems to have directly considered this question, and a law review note poses it as an open question.”).

179. *Id.* at 814.

of impermissible racial gerrymandering that can occur when the government draws a majority-minority district pursuant to the VRA but has an insufficient basis for doing so.<sup>180</sup> In such cases, the government has an “improper focus” on race but does not necessarily have “discriminatory motive.”<sup>181</sup> The district court declined to impose bail-in based on the plaintiffs’ *Shaw*-type claims, holding that “triggering violations for bail-in relief must be violations of Fourteenth and Fifteenth Amendment protections against intentional racial discrimination in voting.”<sup>182</sup> The *Perez* court cited a prior case — *Blackmoon v. Charles Mix County*<sup>183</sup> — that found Section 3 inapplicable to a malapportionment violation.<sup>184</sup> Both courts made the same arguments, with *Perez* relying heavily on the analysis in *Blackmoon*. In a blog post following *Perez*, Travis Crum, the author of the first student note on Section 3,<sup>185</sup> agreed with the district court’s interpretation.<sup>186</sup> Although neither opinion constitutes binding precedent, the rest of this Section responds to those courts’ substantive arguments.

There are a number of reasons to be skeptical of *Perez* and *Blackmoon*. At the outset, the plain text of Section 3 allows courts to retain jurisdiction in order to prevent future voting practices from having any discriminatory effects, not just to prevent intentional discrimination. If a state, acting with partisan motives, imposes a severe voting restriction that both violates due process and has racially

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180. More generally, a *Shaw*-type claim is one in which race predominates over traditional redistricting criteria, but in which there is not necessarily racial vote dilution. See *Perez v. Abbott*, 250 F. Supp. 3d 123, 217–18 (W.D. Tex. 2017) (discussing the *Shaw* line of cases); see also *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that although North Carolina’s reapportionment plan was racially neutral on its face, the resulting district shape was bizarre enough to suggest that it constituted an effort to separate voters into different districts based on race). One way this can happen is if a state uses race for beneficent reasons, such as complying with the VRA, but is not actually required to do so.

181. *Perez*, 390 F. Supp. 3d at 813. This comes from the Court’s *Shaw* line of cases concerning the creation of majority-minority districts, ostensibly to *benefit* rather than to *harm* the interests of racial minorities. See, e.g., *Shaw*, 509 U.S. at 633. In Texas’s case, the State argued that the creation of a majority-Latino district in 2013 was necessary to comply with Section 2 of the VRA. The Supreme Court disagreed, though it did not find that Texas had invidiously discriminated. See *Abbott v. Perez*, 138 S. Ct. 2305, 2334–35 (2018).

182. *Perez*, 390 F. Supp. 3d at 813–14.

183. 505 F. Supp. 2d 585, 592 (D.S.D. 2007).

184. *Id.* Interestingly, the parties agreed to preclearance by consent decree following the district court’s ruling in *Blackmoon*. No. 05-4017, slip op. at ¶ 2 (D.S.D. Dec. 4, 2007) (consent decree).

185. Crum, *supra* note 63.

186. See Travis Crum, *Requiem for a Lone Star Bail-In*, TAKE CARE BLOG (July 25, 2019), <https://takecareblog.com/blog/requiem-for-a-lone-star-bail-in> [<https://perma.cc/TZ8R-6HP6>] (arguing that the district court’s opinion “is the most reasonable and prudent interpretation of Section 3(c)”).

discriminatory effects, it does not seem “nonsensical” for a reviewing court to check whether future laws similarly have discriminatory effects.<sup>187</sup> Quite the contrary—in such a situation, the remedy is congruent with the harm.

According to the *Perez* court, Section 3(c) “aims to remedy voting changes that have the purpose and effect ‘of denying or abridging the right to vote on account of race or color.’”<sup>188</sup> But this jumbles the order of phrases in the statute—that language is located *after* the clause granting courts the power to retain jurisdiction, meaning that it defines the scope of jurisdiction rather than the kinds of violations that Section 3(c) aims to remedy. With respect to what Section 3(c) can remedy, the statute plainly reaches all “violations of the fourteenth or fifteenth amendment justifying equitable relief.”<sup>189</sup> Section 3(c)’s purpose and effect language also clearly imposes two separate conditions on a law seeking to pass through preclearance—a court must find that such a law “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color” before it can be enforced.<sup>190</sup> This is a negative requirement that new laws attempting to survive preclearance have *neither* discriminatory purpose nor effect. But the *Perez* court mistakenly inverted it, reading it as a positive requirement that Section 3(c) can only be triggered in the first place by laws with *both* discriminatory purpose and effect.

Stepping back and looking at the statute as a whole further supports the inference that Congress knew how to differentiate between remedies targeted only at intent and those also targeted at effects. Section 3(a) of the Act authorizes a reviewing court to mandate the presence of federal-election observers during state elections once it has found a Fourteenth or Fifteenth Amendment violation.<sup>191</sup> Unlike Section 3(c), however, Section 3(a) only authorizes the use of federal observers to “enforce the voting guarantees of the fourteenth or fifteenth amendment” and only authorizes their use “as part of any interlocutory order . . . [or] final judgment,” not on an ongoing basis.<sup>192</sup> These limitations make sense—sending in on-the-ground observers is arguably more invasive than judicial preclearance in that it involves direct federal involvement in election administration. It also involves monitoring by the federal executive branch rather than the courts and might accordingly be viewed as more susceptible to political abuses.

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187. *Contra Perez*, 390 F. Supp. 3d at 814.

188. *Id.* (quoting 52 U.S.C. § 10302(c) (2018)).

189. 52 U.S.C. § 10302(c) (2018).

190. *Id.*

191. *Id.* § 10302(a).

192. *Id.*



In contrast, Section 3(c) authorizes preclearance to prevent voting rules with “the effect of denying or abridging the right to vote on account of race or color, or [language status]” and allows courts to retain jurisdiction for as long as they “deem appropriate.”<sup>193</sup> The fact that the statute explicitly authorizes the use of Section 3(c) to correct for discriminatory results, not just intent, is strong evidence that Section 3(c) should be available to remedy non-intent-based violations. Moreover, the *Blackmoon* court relied heavily on a race/color/language-specific “proviso” in Section 3(a) that does not have any analogue in Section 3(c).<sup>194</sup> Despite this, the district court in *Blackmoon* ignored the differences between the two sections and cursorily concluded that the same analysis applied to both.<sup>195</sup> *Perez* then cited the *Blackmoon* court’s reasoning, which was based primarily on an analysis of Section 3(a), as if it applied equally to Section 3(c).<sup>196</sup>

The *Perez* and *Blackmoon* courts also erred in their readings of the legislative history of the VRA. When the VRA was first passed in 1965, Section 3 included only a reference to the Fifteenth Amendment, not the Fourteenth Amendment.<sup>197</sup> Then, when Congress reauthorized the Act in 1975, it inserted the Fourteenth Amendment throughout the Act, including in Section 3.<sup>198</sup> According to the 1975 Senate Report, Congress added the Fourteenth Amendment because it wanted to solidify the constitutional basis for applying the Act’s protections to language minorities in addition to racial and ethnic minorities.<sup>199</sup> Congress

193. *Id.* § 10302(c).

194. Because Section 3(a) requires the appointment of observers in some circumstances, it also contains additional language with exceptions to that requirement. Those exceptions are described in race-specific language. *See id.* § 10302(a). Section 3(c) includes neither any mandatory requirements nor any comparable exception clause. This further supports the argument that Sections 3(a) and 3(c) have different scopes and purposes. *Cf. Blackmoon v. Charles Mix Cnty.*, 505 F. Supp. 2d 585, 589 & n.1 (D.S.D. 2007). Section 3(c) does have an entirely different proviso specifying a sixty-day limit on review as part of the preclearance process, and that failure to object within sixty days is no bar to later lawsuits. 52 U.S.C. § 10302(c) (2018).

195. *Blackmoon*, 505 F. Supp. 2d at 592 (“Plaintiffs’ argument for the retention of jurisdiction fails for the same reasons as the first request for relief under § 1973a(a).”). Interestingly, despite winning in court, Charles Mix County subsequently signed a consent decree voluntarily submitting to preclearance for seventeen years. *Crum*, *supra* note 63, at 2014-15.

196. *See Perez v. Abbott*, 390 F. Supp. 3d 803, 814 (W.D. Tex. 2019).

197. Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437, 437-38.

198. Voting Rights Act of 1965 Amendments, Pub. L. No. 94-73, tit. II, §§ 205-206, 89 Stat. 400, 402 (1975).

199. S. REP. NO. 94-295, at 47-48 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 814-15 (“The Fourteenth Amendment is added as a constitutional basis for these voting-rights amendments. The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as ‘language minorities’ are members of a ‘race or color’ group protected under the Fifteenth Amendment. However, the enactment

thought the addition apt because the Fourteenth Amendment broadly prohibits the differential or arbitrary application of law, while the Fifteenth Amendment protects *only* against discrimination based on race, color, or prior status as an enslaved person.<sup>200</sup> Taking Congress’s justifications in 1975 at face value actually supports, rather than undermines, the argument that Section 3(c) reaches beyond intentional discrimination.

First, Congress was legislating with the knowledge that the Supreme Court had not extended the Equal Protection Clause to cover discrimination based directly on language status.<sup>201</sup> And since 1975, the Court has stuck to that position.<sup>202</sup> So, how could Congress have hoped Section 3(c) would reach language minorities?<sup>203</sup> The only answer that does not render the inclusion of the Fourteenth Amendment superfluous is that Congress intended Section 3(c) to reach beyond the Equal Protection Clause and encompass voting practices that were unconstitutional due to the burdens they imposed on the fundamental right to vote. That would have effectively included a host of restrictive voting laws that disproportionately burdened language minorities.

Second, the court in *Blackmoon* pointed to the 1975 Senate Report’s definition of “aggrieved person” as “any person injured by an act of discrimination.”<sup>204</sup> But, as shown above, Congress would not have expected the same constitutional tests

of the expansion amendments under the authority of the Fourteenth as well as the Fifteenth Amendment, would doubly insure the constitutional basis for the Act.”).

200. Compare U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”), with *id.* amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”).
201. See, e.g., *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (holding that English-language literacy tests are not unconstitutional on their face); *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966) (declining to overturn *Lassiter*); see also Donna F. Coltharp, Comment, *Speaking the Language of Exclusion: How Equal Protection and Fundamental Rights Analyses Permit Language Discrimination*, 28 ST. MARY’S L.J. 149, 168-69 (1996) (discussing the Court’s longstanding reluctance to apply heightened scrutiny to equal-protection challenges involving language minorities). This context is relevant because “[i]t is a commonplace of statutory interpretation that ‘Congress legislates against the backdrop of existing law.’” *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013)).
202. See *Hernandez v. New York*, 500 U.S. 352, 371-72 (1991) (plurality opinion).
203. See 52 U.S.C. § 10302 (2018) (authorizing preclearance to check for violations of “section 10303(f)(2) of this title”); *id.* § 10303(f)(2) (prohibiting discrimination against language minorities); Voting Rights Act of 1965 Amendments, Pub. L. No. 94-73, tit. II, §§ 201, 203, 206, 89 Stat. 400, 400-02 (1975) (adding sections to the VRA dealing with language minorities).
204. *Blackmoon v. Charles Mix Cnty.*, 505 F. Supp. 2d 585, 590 (D.S.D. 2007) (quoting S. REP. NO. 94-295, at 40 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 806).

to apply for race and language discrimination. Nothing in either the statutory text or the Senate Report suggests reading “injured by . . . discrimination” as incorporating the Supreme Court’s intent test from its equal-protection cases. In fact, the Court did not restrict the reach of the Equal Protection Clause to discriminatory intent until the *following year*—1976—so Congress could not have assumed such a backdrop.<sup>205</sup>

Examining the Senate Report at the paragraph level rather than as a set of isolated phrases casts further doubt on the *Blackmoon* court’s reading of the Report. The Senate Report draws an explicit contrast between the powers granted to the Attorney General *before* 1975 and the powers granted to “aggrieved persons” after 1975. While the Attorney General could only invoke Section 3 to “enforce the guarantees of the 15th Amendment” before 1975, an “aggrieved person” after 1975 could invoke Section 3 broadly “in suits brought to protect voting rights.”<sup>206</sup> The Senate Report also noted that “aggrieved person” is a “commonly used phrase which appears throughout the United States Code” and that its meaning in Section 3 is analogous to a “similar expression [] employed in the Administrative Procedure Act.”<sup>207</sup> Thus, the inclusion of “aggrieved person” did not limit Section 3 remedies but rather advanced the “sound policy to authorize private remedies to assist the process of enforcing voting rights.”<sup>208</sup> The Senate Report also cites the Supreme Court’s decision in *Trafficante v. Metro Life Insurance Co.*—a 1972 Civil Rights Act case dealing with the definition of “aggrieved person.”<sup>209</sup> As the Court explained in *Trafficante*, “aggrieved person” is “broad and inclusive,” and granted standing to “the whole community” affected by racial discrimination in housing.<sup>210</sup> This interpretation was based on the fact that the drafters of that language in the Civil Rights Act “emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered.”<sup>211</sup>

Third, the *Perez* court, in distinguishing *Shaw*-type violations from Section 3(c), explained that it was “persuaded by Defendants’ argument that a *Shaw*-type voting claim was not yet recognized by the Supreme Court when Section 3(c) was enacted.”<sup>212</sup> That contention might have been true of the particular

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205. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

206. S. REP. NO. 94-295, at 40 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 806.

207. *Id.*

208. *Id.* at 807.

209. 409 U.S. 205, 211 (1972).

210. *Id.* at 209, 211.

211. *Id.* at 210 (citing *Hearings Before the Subcomm. on Hous. and Urb. Aff. of the S. Comm. on Banking and Currency on S. 1358, S. 2114, and S. 2280*, 90th Cong., 1st Sess. (1967)).

212. *Perez v. Abbott*, 390 F. Supp. 3d 803, 814 n.8 (W.D. Tex. 2019).

claim in *Perez*, but it is far from true for all voting claims not based on discriminatory intent. In both 1965, when Section 3(c) was enacted, and 1975, when the Fourteenth Amendment was added to it, the Supreme Court had already invalidated voting restrictions on due-process and liberty grounds.<sup>213</sup> Conversely, the Supreme Court had not yet held that discriminatory intent was required for unconstitutional racial discrimination, either in general<sup>214</sup> or specifically in the voting context.<sup>215</sup>

Fourth, the broader legislative history of the 1975 amendments shows that various members of Congress anticipated that Section 3(c) would apply to violations of the Due Process Clause and reach conduct other than intentional discrimination. For example, during hearings, the staff of the House Subcommittee on Civil Rights and Constitutional Rights noted that including the Fourteenth Amendment would allow the Attorney General to “enforce[e] one person, one vote rules” when granting preclearance.<sup>216</sup> Opponents of the 1975 amendments also argued that it would substantially expand the Attorney General’s powers, stating that “the 14th amendment . . . , as you know, is near limitless in scope by reason of subjects covered by the ‘due process’ and ‘equal protection’ clauses of the amendment.”<sup>217</sup> Accordingly, opponents argued that “[i]t is difficult to imagine any subject appropriate for State legislation which could not, at will of Congress, be made subject to prior approval procedures.”<sup>218</sup> Prominent supporters of the amendments also accepted that inclusion of the Fourteenth Amendment would grant the Attorney General expansive preclearance powers. Senator Bayh explained:

The addition of the 14th amendment in [Section 3] would allow the Attorney General, when in his judgment substantial evidence exists that any State or political subdivision is denying or abridging the right of any citizen to vote, to bring suit and seek to have certain provisions of the act apply in such State or political subdivision. In this sense, section 3 of the act would be nationwide in scope and appropriately more universal in its

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213. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). These decisions later became the basis for the balancing test in *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

214. That decision came in 1976, one year *after* Congress added the Fourteenth Amendment to Section 3(c). See *Washington v. Davis*, 426 U.S. 229 (1976).

215. That decision came in 1980. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

216. *Extension of the Voting Rights Act: Hearing on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civ. and Const. Rts. of the H. Comm. on the Judiciary*, 94th Cong. 944 (1975).

217. 129 CONG. REC. S24778 (daily ed. July 24, 1975) (statement of Sen. James B. Allen).

218. *Id.*

coverage to insure that the Attorney General could take such steps as he deemed necessary to prevent the denial or abridgement of the right to vote of any citizen anywhere in the United States.<sup>219</sup>

As these quotes show, Congress likely recognized that, though the protection of language minorities might have motivated it to include the Fourteenth Amendment, the text it used was even broader than that. Thus, even if a court believed that the legislative history of the 1975 amendments should cabin Section 3's scope, that history does not support the discriminatory-purpose requirement that the district courts in Texas and South Dakota imposed.

Finally, both *Perez* and *Blackmoon* involved noninvidious state conduct.<sup>220</sup> Because those courts did not see the violations as morally wrong—that is, they saw the violations as *malum prohibitum* rather than *malum in se*—they were understandably reluctant to impose the harsh medicine of preclearance. Yet the mere absence of *racial* intent does not mean that the government acts in a benign manner when it violates fundamental rights. Although there is no formal-intent prong in *Anderson-Burdick* cases, courts can and do still find evidence of improper state action in cases involving facially race-neutral voting restrictions. Indeed, as the Supreme Court noted in *Crawford* and the Tenth Circuit affirmed in *Fish v. Schwab*, vote-denial laws can be “invidious” even if they do not involve manifest intent to discriminate on the basis of race.<sup>221</sup> A finding of invidious suppression of a fundamental right might make courts more comfortable with imposing the serious bail-in remedy.

#### B. Section 3 Applies When Courts Issue Declaratory Judgments, Not Only Injunctions

Although courts have thus far only imposed preclearance after issuing injunctions,<sup>222</sup> the text of Section 3 allows a court to do so following any “violations

219. 129 CONG. REC. S9111 (daily ed. Apr. 7, 1975) (statement of Sen. Birch Bayh).

220. *Blackmoon* involved a malapportionment challenge under the Equal Protection Clause. *Blackmoon v. Charles Mix Cnty.*, 505 F. Supp. 2d 585, 589–90 (D.S.D. 2007).

221. *Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020) (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008)).

222. The only adversarial proceedings to impose preclearance were all based on injunctions. See *Jeffers v. Clinton*, 730 F. Supp. 196, 198 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991) (“The defendants will be enjoined from giving any further force or effect to that plan.”); *NAACP v. Gadsden Cnty. Sch. Bd.*, 589 F. Supp. 953, 959 (N.D. Fla. 1984) (“Defendant School Board of Gadsden County, Florida and its members individually and in their official capacities be and they are hereby enjoined . . . .”); *Allen v. City of Evergreen*, No. 13-0107, 2014 WL 12607819, at \*1 (S.D. Ala. Jan. 13, 2014) (“[T]his Court [] enjoined the . . . election . . . redistricting plan

of the fourteenth or fifteenth amendment justifying equitable relief.”<sup>223</sup> Accordingly, a key question is what “equitable relief” encompasses.

This question matters because the logic of *Purcell* bars only last-minute injunctions, not declaratory judgments, since the latter do not alter election procedures or force states to take any immediate action.<sup>224</sup> Moreover, the strategy outlined here accords with *Purcell*’s underlying goals. Courts can abstain from resolving disputes before Election Day, but the disputes themselves may still undermine confidence in the integrity of the electoral process.<sup>225</sup> Conversely, quickly and cleanly disposing of cases before Election Day would promote confidence and avoid discouraging participation.<sup>226</sup>

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and . . . system of determining voter eligibility . . . .”); *Patino v. City of Pasadena*, No. H-14-3241, 2017 WL 10242075, at \*1-2 (S.D. Tex. Jan. 16, 2017) (“The plaintiffs are entitled to a permanent injunction . . . . Under 52 U.S.C. § 10302(c), the court retains jurisdiction for six years.”); *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 19-cv-01821, 2019 WL 7500528, at \*3 (N.D. Ala. Dec. 16, 2019) (“[D]efendants have been charged with implementing or enforcing the actions enjoined by this order . . . .”); *League of Women Voters of Fla., Inc. v. Lee*, No. 21-cv-186, 2022 WL 969538, at \*53 (N.D. Fla. Mar. 31, 2022), *stayed pending appeal sub nom.* *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363 (11th Cir. 2022) (“Defendants are . . . enjoined from enforcing [the challenged provisions].”).

223. 52 U.S.C. § 10302(c) (2018).

224. In the recent Florida preclearance case, the Eleventh Circuit stayed both the district court’s injunction and the preclearance remedy based on *Purcell*. The Eleventh Circuit did not, however, formally stay or vacate the district court’s declaratory judgments. This raises the question of whether the Eleventh Circuit might instead have stayed the injunctions but left the bail-in remedy intact based on the declaratory judgments. Plaintiffs did not raise this argument in their motion to oppose a stay, so we do not know how the court would have handled it. See *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363 (11th Cir. 2022); *League Plaintiffs-Appellees’ Opposition to Appellants’ Time-Sensitive Motion for Stay Pending Appeal* at 10, 21-22, *League of Women Voters of Fla., Inc. v. Lee*, No. 22-11143 (11th Cir. Apr 21, 2022) (arguing that bail-in and preclearance are “important issues, but they are not part of the *League* Plaintiffs’ case,” and that *Purcell* was inapplicable primarily because defendants had not raised it sufficiently at the trial level).

225. See Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561, 562 (2021) (describing how election litigation “can . . . undermine confidence in elections or add needless complexity to election law around election time”); Hasen, *supra* note 104, at 152 (criticizing Muller’s solutions, but noting that “Muller and I agree that if there is to be litigation, filing it earlier rather than later is better for both the legitimacy of the courts and the electoral process”); see also Richard L. Hasen, *As Voter Rights Cases Churn Through Courts, Rights Are Uncertain. But Confusion Is Guaranteed.*, WASH. POST (Aug. 11, 2016, 7:00 AM EST), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/11/the-latest-court-victories-for-voter-rights-may-not-mean-much-in-november> [<https://perma.cc/TV6Y-9UWN>] (arguing that a proliferation of legal challenges can itself lead to confusion and undermine voter confidence).

226. Muller, *supra* note 225, at 574; see also Douglas Hess, *Declining Confidence in Election Results May Be Depressing Voter Turnout*, LONDON SCH. ECON. & POL. SCI. (Jan. 4, 2019), <https://>

The combination of issuing a declaratory judgment before an election and imposing Section 3 preclearance after the election is a good, if not perfect, balance. It allows courts to step in and signal that states will be punished for violating constitutional rights—because states do not want to be subject to the burdens of preclearance down the road—but it does not throw a wrench in the gear of election machinery at the last minute.<sup>227</sup> Indeed, for a state to face *any* immediate consequences for acting contrary to a court’s declaratory judgment, plaintiffs would need to bring a separate suit for an injunction. And like any other injunction brought close to an election, this would be barred by *Purcell*. Accordingly, *Purcell* acts as a backstop ensuring that a declaratory judgment would not act as a “quasi-injunction” like it can in some other contexts.<sup>228</sup> Of course, in an ideal world, it would be best for courts to strike down an unconstitutional law immediately. But because *Purcell* prevents that best-case outcome, a declaratory judgment that lays the groundwork for preclearance is the next best option.

It is admittedly odd to imagine a state holding an election under rules that a court has already found to be unconstitutional. But that is exactly what the *Purcell* Principle already requires. Once a district court declares an election law unconstitutional, *Purcell* instructs appellate courts to *stay* the district court’s injunction until after the election but does not require appellate courts to *reverse* the district court’s substantive findings. This requirement explains why the Supreme Court did not reach the merits in the majority of 2020 cases where it issued stays of lower-court injunctions.<sup>229</sup> In a situation like that, there is still a standing federal-court opinion stating that an election will be conducted with unconstitutional procedures. *Purcell* merely eliminates the remedy. Were *Purcell* primarily concerned with avoiding the appearance of impropriety before an election, it would require reversing lower-court decisions rather than simply staying remedies. Moreover, if even declaratory relief were barred, then there would truly be nothing that voters could do to challenge unconstitutional laws that are passed close to an election.

So, does “equitable relief” in Section 3 encompass declaratory judgments? It is worth making two initial points before explaining in depth why the answer is

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blogs.lse.ac.uk/usappblog/2019/01/04/declining-confidence-in-election-results-may-be-depressing-voter-turnout [https://perma.cc/ZQ8P-MVL6] (presenting research that declining voter confidence is associated with diminishing turnout in U.S. elections).

227. Josh Blackman, *Declaratory Judgment as a Quasi-Injunction*, LAW & LIBERTY (Mar. 25, 2014), <https://lawliberty.org/declaratory-judgment-as-a-quasi-injunction> [https://perma.cc/K29D-G3SC].

228. *Cf. id.* (arguing that declaratory judgments might have effects similar to those of an injunction if given res judicata effect in later proceedings to secure such an injunction).

229. For example, *Democratic National Committee v. Bostelmann*, 451 F. Supp. 3d 952 (W.D. Wis. 2020), was stayed by *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020).

yes. First, although there is real scholarly disagreement on how best to characterize declaratory judgments, the Supreme Court has long described them as equitable and has issued holdings on that basis.<sup>230</sup> Thus, whatever the merits of scholarly arguments against the Court's choices, the weight of authority is clear. Second, at least one lower court has considered the question and determined that Section 3 relief can be based on a declaratory judgment alone,<sup>231</sup> and another has characterized declaratory judgments as equitable in the context of Section 3.<sup>232</sup>

Substantively, the key question is one of statutory meaning rather than a philosophical inquiry into the essential nature of declaratory judgments. Although the latter may illuminate the former, it cannot be determinative on its own. With respect to statutory meaning, the best evidence indicates that “equitable relief” encompasses declaratory judgments. The legislative history of the Declaratory Judgment Act indicates that Congress saw the Act as extending a

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230. *E.g.*, *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 7 (2012) (“Petitioners sought equitable relief in the form of a declaratory judgment . . . .”); *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 155 (1967) (“[T]he declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed.”), *abrogated on other grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977); *Eccles v. Peoples Bank*, 333 U.S. 426, 431 (1948) (“A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.”); *United States v. Mitchell*, 463 U.S. 206, 227 (1983) (describing “declaratory, injunctive, or mandamus relief” as “prospective equitable remedies”); *United States v. King*, 395 U.S. 1, 3 (1969) (holding that a declaratory judgment is “essentially equitable relief of a kind that the Court of Claims . . . does not have the power to grant”); *Richardson v. Morris*, 409 U.S. 464, 465 (1973) (*per curiam*) (holding that the Tucker Act does not authorize injunctive or declaratory relief because “the Court of Claims has no power to grant equitable relief”); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300 (1943) (calling a declaratory judgment “essentially an equitable cause of action,” and explaining that “[t]he Declaratory Judgments Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles” but rather “only provided a new form of procedure for the adjudication of rights in conformity to those principles”); *see also* *Sossamon v. Texas*, 563 U.S. 277, 298 (2011) (Sotomayor, J., dissenting) (describing the Religious Land Use and Institutionalized Persons Act's provisions for injunctive or declaratory relief as “equitable”); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–61 (2011) (noting that Federal Rule of Civil Procedure 23 “stems from equity practice” and covers “injunctive or declaratory relief”).

231. *Veasey v. Abbott*, 265 F. Supp. 3d 684, 689 (S.D. Tex. 2017), *rev'd in part*, 888 F.3d 792 (5th Cir. 2018) (“The request for declaratory relief . . . is [] an appropriate foundation for the consideration of Section 3 relief.”). Unfortunately, the court in *Veasey* never fully considered imposing Section 3 relief—it kept ordering but delaying a full hearing on the matter—and so this brief aside is not particularly persuasive authority. *See infra* notes 284–300 (providing a full account of the *Veasey* litigation).

232. The district court in *Jeffers v. Clinton* stated in passing that “equitable relief in the nature of an injunction or a declaratory judgment would clearly be justified,” implicitly supporting the same conclusion, but did not explicitly consider whether Section 3 relief could be based on a declaratory judgment alone. 740 F. Supp. 585, 600 (E.D. Ark. 1990).



classically equitable cause of action.<sup>233</sup> Congress has also passed a number of other statutes that explicitly refer to declaratory relief as “equitable.”<sup>234</sup> Such statutes run the gamut of substantive areas, governing matters such as judicial review of immigration-removal orders, disputes between franchisors and franchisees, collection of taxes and fees from telecommunications providers, and more. There is no indication that the election-law context is an exception from this general pattern. In the context of the Employee Retirement Income Security Act,<sup>235</sup> federal courts have agreed, interpreting the phrase “appropriate equitable relief” to include declaratory relief.<sup>236</sup> And the Supreme Court has held that

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233. The Senate Report on the Act explained that “the majority of the *equity* cases now coming up in England are proceedings for declaratory judgments,” and that “the English practice [was] necessarily of greatest interest” to the committee. *See* S. REP. NO. 1005, at 4 (1934) (emphasis added). Although the report, based on a memorandum from then-Professor Edwin Borchard, acknowledged that declaratory judgments were “neither distinctly in law nor in equity, but *sui generis*,” it nonetheless explained that “the Supreme Court could probably at any time make rules *under its equity power*” to govern the procedures for declaratory relief. *Id.* at 6 (emphasis added). Even more forcefully, the Senate Report explained:

The equitable actions for the removal of clouds from title, the action by a person in possession for the statutory period against a person claiming under a record title to have the latter’s title declared void, actions impressing a trust on the legal title, actions to declare written instruments null, actions to construe wills, statutes authorizing judgments proving the tenor of lost instruments or proving the validity, when contested, of instruments to be recorded, and other illustrations that will readily occur to the lawyer are all cases in which declaratory judgments are rendered under other names.

*Id.* at 4-5. The Act, according to the Senate, would do “nothing novel” and would “simply extend declaratory relief to other cases.” *Id.* at 5. Though less explicit, the House Report on the Act similarly acknowledged the greater historical prevalence of declaratory-judgment actions in courts of equity, explaining that the Act was intended “to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts.” H.R. REP. NO. 1264, at 2 (1934).

234. *See, e.g.*, 8 U.S.C. § 1252(e)(1)(A) (2018) (“[E]nter declaratory, injunctive, or other equitable relief.”); 15 U.S.C. § 2805(b)(1) (2018) (“[T]he court shall grant such equitable relief as the court determines is necessary . . . including declaratory judgment . . . .”); 47 U.S.C. § 1510(d) (2018) (describing civil actions for “equitable relief” including “declaratory judgments”); 42 U.S.C. § 2000e-5(g) (2018) (describing “equitable relief” broadly, then using “declaratory relief” and “injunctive relief” to specify subsets). Congress has also, at times, named equitable and declaratory relief separately, but has never allowed one while disallowing the other. *See, e.g.*, 15 U.S.C. § 1691e(c) (2018) (describing actions for “equitable and declaratory relief”); 10 U.S.C. § 987(f)(5)(A)(iii) (2018) (describing “equitable or declaratory relief”).

235. 29 U.S.C. § 1132(a)(3) (2018).

236. Although the Supreme Court has not explicitly addressed whether the Employee Retirement Income Security Act permits declaratory judgments, the only circuit court to address the question has so held, and the Supreme Court thereafter declined to disagree. *See* *Dakotas & W.*

where Congress has prohibited injunctions, it has also implicitly prohibited declaratory relief.<sup>237</sup> These facts, taken together, strongly support the claim that Section 3 encompasses declaratory relief and not only injunctions.

With respect to the history of declaratory judgments, the picture is a bit more complex, but it still supports the underlying point that declaratory judgments should be considered equitable in this context. Though the modern declaratory judgment is grounded in the Declaratory Judgment Act,<sup>238</sup> “the procedure is not really novel, for, without mentioning its identifying name as declaratory relief, it has long been used by courts of equity; the statute is, in effect, merely a direction to use a long-existing and often exerted power.”<sup>239</sup> Long before there was anything known as a “declaratory judgment,” there were “always equitable actions which were primarily declaratory.”<sup>240</sup> The Supreme Court has agreed with this account, explaining that declaratory judgments were not created whole cloth by legislatures but were instead consistent with the Court’s longstanding practice of granting a “determination of the legal rights which were the subject of controversy” without an “injunction or other relief.”<sup>241</sup>

Today, the separate systems of law and equity have been replaced by just “one form of action” – the “civil action” – and the same courts are empowered to hear suits regardless of whether they were traditionally cognizable in law or equity.<sup>242</sup> Thus, notwithstanding its “historical source in equity procedure,”<sup>243</sup> it is true that modern courts have “steadfastly refused” to hold that declaratory relief is

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Minn. Elec. Indus. Health & Welfare Fund v. First Agency, Inc., 865 F.3d 1098, 1102-03 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 1296 (2018).

237. See *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (“[B]ecause there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief . . . while permitting them to seek another.”).
238. 28 U.S.C § 2201 (2018); see also Richard W. Bourne & John A. Lynch Jr., *Merger of Law and Equity Under the Revised Maryland Rules: Does It Threaten Trial by Jury?*, 14 U. BALT. L. REV. 1, 47 (1984) (“The modern declaratory judgment action was unknown at common law.”).
239. Edwin M. Borchard, *The Uniform Declaratory Judgments Act*, 18 MINN. L. REV. 239, 246 (1934) [hereinafter Borchard, *The Uniform Declaratory Judgments Act*]; see also EDWIN BORCHARD, *DECLARATORY JUDGMENTS* 178 (1934) (describing declaratory judgments as “born under equitable auspices and having preponderantly equitable affiliations”).
240. Bourne & Lynch, *supra* note 238, at 47 n.297. The Senate was aware of this history when it passed the Declaratory Judgment Act, likely because it was briefed on the matter by Professor Borchard. See *supra* note 233 and accompanying text.
241. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 263 (1933).
242. FED. R. CIV. P. 2. See generally Charles W. Joiner & Ray A. Geddes, *The Union of Law and Equity: A Prerequisite to Procedural Revision*, 55 MICH. L. REV. 1059 (1957) (discussing how the distinctions between law and equity are abolished).
243. Borchard, *The Uniform Declaratory Judgments Act*, *supra* note 239, at 246.

“essentially equitable” in all cases.<sup>244</sup> This accords with the view of remedies scholars that the modern declaratory judgment is “neither essentially equitable nor legal in character, but . . . special and sui generis, applicable in any court.”<sup>245</sup>

Today, whether an action is “legal” or “equitable” in a given context depends on why one is asking the question. In many ways, declaratory judgments have an undeniably equitable character. They are flexible and individualized, in contrast to the fixed, limited nature of the paradigmatic legal remedy—money damages.<sup>246</sup> And unlike damages, they are wholly discretionary—courts are never required to entertain an action for a declaratory judgment under the Declaratory Judgment Act, and district-court decisions about whether to refuse such a suit are reviewed on appeal for abuse of discretion.<sup>247</sup> A number of the major doctrines of equity, such as abstention<sup>248</sup> and equitable defenses like unconscionability and laches,<sup>249</sup> apply to declaratory judgments, though some do not.<sup>250</sup> Finally, when a declaratory judgment forms the basis for a subsequent exercise of equitable power—like if a court were to impose Section 3 preclearance based on a declaratory judgment—the declaratory judgment’s equitable character is clearest.<sup>251</sup>

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244. Bourne & Lynch, *supra* note 238, at 47 n.297.

245. Borchard, *The Uniform Declaratory Judgments Act*, *supra* note 239, at 247. Note, though, that there is no third category of remedies that is neither legal nor equitable in the federal courts. U.S. CONST. art. III, § 2, cl. 1 (extending the judicial power to those cases arising in “Law and Equity”).

246. See, e.g., DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 79-80 (1991); Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1434 (2015) (categorizing declaratory judgments as equitable remedies due to courts’ unfettered discretion to refuse to hear suits for declaratory relief).

247. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) (“[D]istrict courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites.”); see also Rendleman, *supra* note 246, at 1434 (“Courts understand this text ‘to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.’” (quoting *Wilton*, 515 U.S. at 286)); Daniel Mach, Note, *Rules Without Reason: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 HARV. ENV’T L. REV. 205, 216-18 (2011) (describing how courts’ equitable discretion plays a central role in determining when declaratory relief is appropriate in National Environmental Policy Act litigation).

248. E.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (applying equitable abstention doctrines to declaratory judgments).

249. E.g., *Abbott Lab’s v. Gardner*, 387 U.S. 136, 155 (1967), *abrogated on other grounds by* *Califano v. Sanders*, 430 U.S. 99 (1977) (explaining that the defense of laches, along with the other “equitable defenses,” apply to declaratory judgments).

250. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 561-62 (2016).

251. See Rendleman, *supra* note 246, at 1434.

One way in which declaratory-judgment actions do differ from traditional equity practice is that there is, at least sometimes, a right to a jury trial.<sup>252</sup> That right only exists, however, when the underlying dispute is legal in nature. For example, in *Beacon Theatres, Inc. v. Westover*, the Supreme Court was faced with an antitrust dispute between two theater companies.<sup>253</sup> Beacon threatened to sue Fox for allegedly monopolistic contracts, and Fox preemptively countersued for a declaratory judgment that its practices were lawful. Beacon demanded a jury trial, and the Court agreed. Reasoning that the underlying dispute was legal in nature because it was an action for money damages, the Court determined that “if Beacon would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first.”<sup>254</sup> Commentators have parsed this rule as making the right to a jury trial depend on the preexisting rights of the parties in the absence of a declaratory judgment.<sup>255</sup> A party cannot subvert the right to a jury trial in a contract dispute by seeking a declaratory judgment that no damages are owed, nor can a defendant insist on a jury trial merely because plaintiffs have asked for both injunctive and declaratory relief.<sup>256</sup> It is not the presence of the request for declaratory relief itself but the presence of an action for damages alongside declaratory relief that allows invocation of the Seventh Amendment.<sup>257</sup> Accordingly, an election-law dispute in which the ordinary remedy would be an injunction does not become legal in nature if plaintiffs ask for a declaratory judgment, too.

The most prominent scholar to argue that declaratory judgments are not equitable is Samuel L. Bray.<sup>258</sup> According to Bray, while it is “not easy to classify” declaratory judgments,<sup>259</sup> they lack several distinctive characteristics of equitable remedies, such as the requirement that there be no adequate remedy at law and

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252. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). At common law, only actions in courts of law, not equity, came with such a right. *Id.* at 507.

253. *Id.* at 501-02.

254. *Id.* at 504.

255. *Bourne & Lynch*, *supra* note 238, at 47-48 (“These cases hold that a declaratory judgment will be characterized as legal if, but only if, it appears from the facts that legal type relief would be possible at the time of the lawsuit.”).

256. *Id.* at 48.

257. *Id.*

258. Bray, *supra* note 250, at 561. For other scholars who have touched the topic, see, for example, Cortney E. Lollar, *Reviving Criminal Equity*, 71 ALA. L. REV. 311, 330 n.114 (2019), which briefly notes in passing that declaratory judgments are not equitable, and Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126, 149 n.194 (2017), which cites Bray for the proposition that declaratory judgments are not equitable.

259. Bray, *supra* note 250, at 542.

the ability to lead to contempt sanctions.<sup>260</sup> Bray also notes that declaratory judgments are not usually used to manage the behavior of parties,<sup>261</sup> though that characterization is debatable in the election-law context. Thus, Bray concludes that “the best view at present is that the declaratory judgment is not an equitable remedy.”<sup>262</sup>

Independent of the substantive arguments pointing the other way, the main issue with Bray’s position is that it is a contrarian one, at odds with decades of Supreme Court precedent describing declaratory judgments as equitable.<sup>263</sup> Even those Justices who are most insistent on holding a strict line between law and equity, such as Justice Thomas, describe declaratory judgments as equitable in contemporary cases.<sup>264</sup> Bray is aware of this, arguing explicitly that “the Court has . . . misdescribed the declaratory judgment . . . as [an] equitable remed[y].”<sup>265</sup> This puts Bray in the company of other eminent legal historians who have alleged errors in the Supreme Court’s equity historiography.<sup>266</sup> The bottom line, though, is that the Court disagrees.<sup>267</sup> If the Court was unwilling

260. *Id.* at 561.

261. *Id.* at 562. Another way to interpret this, though, is that declaratory judgments are equitable remedies for which Congress has overridden some of the classical features of equity jurisprudence via the Declaratory Judgment Act. See *Steffel v. Thompson*, 415 U.S. 452, 471-72 (1974) (“[E]ngrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress’ intent to make declaratory relief available in cases where an injunction would be inappropriate.”).

262. Bray, *supra* note 250, at 562.

263. See *supra* note 230 and accompanying text. As another example, Bray equivocates on whether equitable defenses apply to declaratory relief, *supra* note 250, at 561, but the Supreme Court has forcefully held that they do. See *Abbott Lab’s v. Gardner*, 387 U.S. 136, 155 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

264. Compare *Elgin v. Dep’t of the Treasury*, 567 U.S. 1, 7 (2012) (Thomas, J.) (describing declaratory judgments as equitable relief), with *Liu v. SEC*, 140 S. Ct. 1936, 1950 (2020) (Thomas, J., dissenting) (arguing that disgorgement cannot be equitable because it is a “creation of the 20th century”).

265. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1046 (2015).

266. See John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1353-54 (2003) (arguing that restitution is legal, not equitable); see also Bray, *supra* note 265, at 1045 (“As other scholars have noted, that is a clear mistake: for centuries mandamus has been a legal remedy.”).

267. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 248 (1993) (“[T]he text of ERISA leaves no doubt that Congress intended ‘equitable relief’ to include only those types of relief that were typically available in equity, such as injunction, mandamus, and restitution.”); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (finding the same); *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011) (reaffirming the holding of *Mertens*, including its description of mandamus as equitable).

to reverse course in the context of mandamus, for which the “mistake” is clearest,<sup>268</sup> why would it reverse course for declaratory judgments?

In the end, even Bray acknowledges that it might not make much difference whether the scholars or the Court are truly right about the historical question. The fact that the Seventh Amendment grants a right to jury trials in suits at law and that Congress uses “equitable relief” in statutes forces the Court to draw a line somewhere. The most important concern, then, is that the line be parsimonious and stable.<sup>269</sup> Even if interpreting declaratory judgments as equitable “is not good history”<sup>270</sup> or the “best view,”<sup>271</sup> it is what the Court has chosen and what Congress assumes when it legislates. It is clearly not so erroneous as to justify rejecting such longstanding precedent.

Finally, even if a formal declaratory judgment could not lead to Section 3 preclearance, courts would be free, in their traditional equitable capacity, to do essentially the same thing: issue a ruling clarifying the parties’ rights and obligations in an election-law case – without relying on the Declaratory Judgment Act at all.<sup>272</sup> Thus, though the most straightforward solution is to find that declaratory judgments are equitable, even failure on this count would not doom the litigation strategy laid out in this Note.

268. Bray, *supra* note 265, at 1045 n.282 (collecting evidence).

269. *See id.* at 1019-20.

270. *See id.* at 1020.

271. Bray, *supra* note 250, at 562.

272. *See supra* notes 238-241 and accompanying text. Although a court might also try to dodge *Purcell* by issuing a delayed injunction that only goes into effect after the relevant election, there are three problems with such an approach. First, it is not clear that such an injunction would be valid based on the standard test for when a court can grant an injunction. That test requires a finding of irreparable harm to the party requesting the injunction – assessed at the present moment – and that both the balance of equities and the public interest weigh in favor of action. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A deferred injunction would not solve any irreparable harm occurring prior to the election, which means that the balance of equities and public interest would weigh against granting the injunction. At least one circuit court has invalidated such a deferred injunction in part on the grounds that the deferral illustrated the lack of irreparable harm. *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312, 1340 (Fed. Cir. 2012). Second, *ActiveVideo* illustrates the *form* that such a deferred injunction would likely take – namely, a permanent injunction followed by a temporary stay. *Id.* at 1318-19. The stay would mean that, prior to the election, the injunction would never go into effect, there would be no declaratory relief granted, and Section 3 would be inapplicable. In fact, this is what already happens when a higher court stays a lower court’s injunction based on *Purcell*. Third, because the granting of equitable relief is always a discretionary determination based on weighing the equities at a given time, a court likely cannot formally bind itself to impose an injunction in the future. That is, if the state removes the offending law after the election, there would be nothing left to enjoin, and the deferred injunction would disappear without ever having been imposed. Finally, even if the granting

### III. A MODEL FOR VOTING-RIGHTS LITIGATION IN THE FUTURE

Advocates and courts should thus adjust their approaches to constitutional voting-rights cases. Regardless of whether they win injunctions, advocates should press for declaratory relief, and courts, given the increasing reach of *Purcell*, should recognize that injunctions are no longer sufficient on their own. If *Purcell* then ends up barring injunctive relief, advocates should ask for, and courts should impose, Section 3 preclearance based on declaratory relief alone.

#### A. Two Examples: *People First of Alabama v. Merrill* and *Veasey v. Abbott*

To illustrate how this strategy would work in practice, it is helpful to use concrete examples. *People First of Alabama v. Merrill* involved a challenge to Alabama's witness requirements for absentee ballots during the height of the COVID-19 pandemic.<sup>273</sup> Such requirements forced high-risk individuals to have unnecessary interpersonal contact and even forced some to choose between obeying the governor's emergency orders and voting.<sup>274</sup> The plaintiffs won their constitutional challenge to the law in the district court, but the Supreme Court quickly issued a summary stay of the district court's injunction.<sup>275</sup> Though the Court did not explain its reasoning, the stay came alongside several other decisions granting a stay of an injunction in which a concurring Justice cited *Purcell* as a rationale.<sup>276</sup> And subsequently, members of the Court have clarified that at least some of the Justices understood the stay in *People First* as an application of

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court somehow got around these roadblocks, the resulting injunction would then have essentially the same effect as a declaratory judgment—that is, it would do nothing but announce the court's determination that there had been unconstitutional conduct. Given the theoretical and practical difficulties with this route, there is no good reason to prefer a deferred injunction over a declaratory judgment.

273. *People First of Ala. v. Merrill* (*People First I*), 467 F. Supp. 3d 1179, 1193 (N.D. Ala. 2020). One argument against using this example—or really any example involving COVID restrictions—is that failing to grant accommodations during an emergency is not retrogression, and thus would not be reached by Section 3. No court appears to have considered this argument, however, and there are persuasive arguments on the other side. Namely, if the status quo entails a certain degree of access to polling places, and conditions on the ground change, failing to adjust regulations to maintain the same degree of access might well be considered backsliding.

274. *Id.* at 1196.

275. *Merrill v. People First of Ala.* (*People First III*), 141 S. Ct. 190, 190 (2020) (mem.).

276. *E.g.*, *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (mem.) (Kavanaugh, J., concurring).

the *Purcell* Principle.<sup>277</sup> There is no indication that the Court saw itself as reversing the lower court’s findings of unconstitutionality.<sup>278</sup>

Following the election, the parties agreed to dismiss their claims voluntarily as moot.<sup>279</sup> This dismissal makes sense—the case was an as-applied constitutional challenge predicated on the emergency conditions during the pandemic.<sup>280</sup> Those conditions changed, mooted the case. But the underlying constitutional violation still occurred—Alabama merely escaped accountability due to its favorable timing.

Today, Alabama is back to the same playbook. Not only did a district court invalidate its redistricting maps as racial vote dilution,<sup>281</sup> but the state also passed HB 194, criminalizing voter-registration and education groups from accepting private donations.<sup>282</sup> Advocates have described the law as an attempt to suppress the registration of marginalized groups.<sup>283</sup> Had advocates pressed for a declaratory judgment of unconstitutionality in 2020 and secured Section 3 preclearance, efforts by Alabama to curtail the vote would now need to make it through the district court before going into effect. Importantly, the court would have been able to reject laws like HB 194 simply for their discriminatory *results* and would not have needed to prove an entirely new constitutional violation to defeat each new attempt at vote denial. The result might have been a very different electoral environment for Alabama voters in November 2022.

The protracted litigation around Texas’s voter-ID laws is another example of where failing to secure preclearance early allowed the State to play cat-and-mouse with advocates. In 2014, just days before the November elections, plaintiffs won a district-court determination that Texas’s SB 14 “was enacted with a

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

278. *People First III*, 141 S. Ct. at 190. The Eleventh Circuit had previously denied an emergency stay. *People First of Ala. v. Sec’y of State (People First II)*, 815 F. App’x 505, 505 (11th Cir. 2020) (mem.).

279. *People First of Ala. v. Merrill (People First IV)*, No. 20-12184, 2020 WL 5543717, at \*1 (11th Cir. July 17, 2020).

280. *People First of Ala. v. Merrill (People First I)*, 467 F. Supp. 3d 1179, 1206 (N.D. Ala. 2020).

281. As explained above, Section 3 would not have helped in this case. See *supra* Section II.A.

282. See Sara Lang, *How HB 194 Could Impact Alabamians’ Access to Voting Resources*, CRIMSON WHITE (Mar. 30, 2022), <https://thecrimsonwhite.com/97864/news/how-hb-194-could-impact-alabamians-access-to-voting-resources> [<https://perma.cc/J2WW-SB77>].

283. See *Voter Suppression Bill (2022)*, ACLU ALA. (Mar. 10, 2022), <https://www.aclualabama.org/en/legislation/voter-suppression-bill-2022> [<https://perma.cc/WV9Z-NXUK>]; Mike Cason, *League of Women Voters Says Alabama Bill Would Suppress Voter Outreach Efforts*, AL.COM (Mar. 8, 2022, 8:05 PM), <https://www.al.com/news/2022/03/league-of-women-voters-says-alabama-bill-would-suppress-voter-outreach-efforts.html> [<https://perma.cc/PY65-NGKT>] (describing the bill as one that would criminalize collaboration between election officials and third parties, creating a chilling effect on voter outreach and registration drives).



discriminatory purpose” and that it placed an unconstitutional burden on the right to vote.<sup>284</sup> They also asked the court to bail in Texas under Section 3, but the court initially determined that a permanent injunction was “sufficient.”<sup>285</sup> The court did order a separate status conference to fully consider the Section 3 request;<sup>286</sup> because the election was so close, however, the Fifth Circuit stayed the district court’s injunction based on *Purcell*, effectively cutting off the Section 3 proceedings as well.<sup>287</sup> As a result, the 2014 elections took place under a statute that had been adjudged unconstitutional.

After the 2014 elections, the Fifth Circuit took a year and a half to issue a full opinion, ultimately deciding in July 2016 that, while there was potentially sufficient evidence of discriminatory intent in the record, evidentiary infirmities in the district court’s initial ruling required a remand.<sup>288</sup> Because the 2016 election was then imminent, however, the Fifth Circuit again invoked *Purcell*. It ordered the district court to create an “interim” remedy for SB 14’s discriminatory effects but to wait until after the election to issue new findings on its discriminatory purpose.<sup>289</sup> Another election came and went.<sup>290</sup>

After the 2016 election, Texas enacted a new law—SB 5—that adopted features of the district court’s “interim” remedy<sup>291</sup> but still contained harsh voter-ID provisions.<sup>292</sup> The district court again determined that it had a discriminatory purpose and violated the Constitution. This time, the court placed the burden of

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284. *Veasey v. Perry (Veasey I)*, 71 F. Supp. 3d 627, 707 (S.D. Tex. 2014). The district court reaffirmed this finding after the Fifth Circuit invalidated some of the evidence it had relied on. *Veasey v. Abbott (Veasey IV)*, 249 F. Supp. 3d 868, 875-76 (S.D. Tex. 2017).

285. *Veasey I*, 71 F. Supp. 3d at 707.

286. *Id.* (“By subsequent order, the Court will set a status conference to address the procedures to be followed for considering Plaintiffs’ request for relief under Section 3(c) . . .”).

287. *Veasey v. Perry (Veasey II)*, 769 F.3d 890, 893-96 (5th Cir. 2014).

288. *Veasey v. Abbott (Veasey III)*, 830 F.3d 216, 234 (5th Cir. 2016).

289. *Id.* at 242-43 (explaining that it was “unnecessary for the district court to undertake this task [of issuing new discriminatory-purpose findings] until after the November 2016 election”).

290. The Fifth Circuit did order the district court to fashion an “interim remedy” for its discriminatory-results findings prior to the 2016 election, but this was explicitly not related to the issue of discriminatory purpose. *Id.*

291. Jim Malewitz, *Texas Republicans Pitch New Voter ID Law*, TEX. TRIB. (Feb. 21, 2017), <https://www.texastribune.org/2017/02/21/texas-republicans-pitch-new-voter-id-law> [https://perma.cc/SDZ5-DUXJ].

292. Rebecca Feldhaus Adams, *Texas Voter ID Law Stands for Midterm Elections, Court Rules*, NPR (Apr. 28, 2018, 11:05 AM ET), <https://www.npr.org/2018/04/28/606730179/texas-voter-id-law-stands-for-midterm-elections-court-rules> [https://perma.cc/VQ66-WGGT] (describing the harsh nature of SB 5 once enacted).

*disproving* discriminatory intent on the State since SB 5 was “built upon the ‘architecture’ of SB 14,”<sup>293</sup> and “[t]o require the Private Plaintiffs to bear the burden on every legislative remedy that might be passed would present Plaintiffs with a ‘moving target,’ preventing any final resolution of this case.”<sup>294</sup> The district court indicated a continued interest in exploring Section 3 relief but again determined that an injunction was sufficient and reserved the Section 3 issue “for later briefing and decision.”<sup>295</sup>

The Fifth Circuit stepped in and reversed, holding that the district court could no longer rely on the discriminatory purpose of SB 14 and that advocates now bore the burden of proving anew that SB 5 had a discriminatory purpose.<sup>296</sup> The Section 3 hearing never took place. Again, the State prevailed due to advantageous timing and the difficulty of getting an adverse ruling to stick through multiple election cycles. Another election took place under what was likely an unconstitutional statute.<sup>297</sup>

What can we learn from this Kafkaesque dance? First, the district court was right that as long as plaintiffs bear the burden of taking down each new iteration of an unconstitutional law, the game is stacked against them. That is the whole point of preclearance – once a state has unconstitutionally burdened the right to vote, it should not be allowed to do so again without at least jumping through some hoops. Yet despite realizing this, the district court failed to subject Texas to Section 3 preclearance at any point in its consideration of SB 14 and SB 5, despite plaintiffs consistently asking the court to do so.

How might things have transpired differently? Back in 2014, when the Fifth Circuit stayed the district court’s very first injunction, the court should have pushed forward with an evidentiary hearing on Section 3 based solely on a grant of declaratory relief. Doing so would have been consistent with the Fifth Circuit’s equitable determination, based on *Purcell*, that the hour was too late to enjoin SB 14 before the 2014 elections. The district court could have then retained jurisdiction and required Texas to preclear any variations on SB 14 – like SB 5. Because Texas would have been subject to preclearance after the 2014 election, the Fifth Circuit could not have stymied plaintiffs by waiting until 2016 to review the district court’s findings. Had it waited, plaintiffs would have been delighted. That means that even if the Fifth Circuit had reversed based on the evidentiary

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<sup>293</sup>. *Veasey v. Abbott (Veasey V)*, 265 F. Supp. 3d 684, 691 n.10 (S.D. Tex. 2017).

<sup>294</sup>. *Id.* at 691 n.9.

<sup>295</sup>. *Id.* at 688.

<sup>296</sup>. *Veasey v. Abbott (Veasey VI)*, 888 F.3d 792, 801-02 (5th Cir. 2018).

<sup>297</sup>. *Id.* at 807 (Graves, J., concurring in part and dissenting in part) (calling SB 5 “merely [the] adorned alter ego” of SB 14, and observing astutely that “[a] hog in a silk waistcoat is still a hog”).

errors made by the district court, there would have been ample time to correct those errors before the 2016 elections. By imposing preclearance on Texas from the start, the court could have removed the State's incentive to delay and drag out litigation and would have improved plaintiffs' chances of reaching a final resolution on the merits.

If Section 3 preclearance had ultimately survived appellate review, Texas would have had to prove that each new voter-ID law it sought to enforce after 2014 had no discriminatory effects. This might have precluded enforcement of SB 5,<sup>298</sup> which is still imposing disproportionate burdens on Black and Latino voters today.<sup>299</sup> Similarly, depending on the scope of jurisdiction retained, preclearance might also have prevented Texas from continuing to attack voting rights in other ways, such as SB 1, which restricts the ease of voting by mail in the state.<sup>300</sup>

### B. Practical Considerations

How effective would this strategy be? The first question is whether courts will find the requisite constitutional violations. Although the outcomes will depend on the nature of the laws being challenged and how well legislatures conceal illicit motives, one lesson from 2020 is that even facially neutral laws that place large, unjustified burdens on voters can fall to due-process challenges.<sup>301</sup> In addition, much of courts' historical unwillingness to reach constitutional questions can be chalked up to the doctrine of constitutional avoidance<sup>302</sup> because if plaintiffs make successful VRA Section 2 claims, those are sufficient to support an injunction on their own.<sup>303</sup> Were plaintiffs to ask for an independent form of relief—Section 3 preclearance—that can be based *only* on constitutional findings, courts would be unable to dismiss constitutional questions based on avoidance. Finally, given the increasingly egregious nature of the laws being challenged and the legislative histories that birthed them, judges may simply be

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298. *Cf. id.* at 802 (majority opinion) (faulting the district court for placing the burden of proof on the State).

299. *See Adams, supra* note 292.

300. *See supra* notes 40-45 and accompanying text.

301. *E.g., Middleton v. Andino*, 488 F. Supp. 3d 261, 297 (D.S.C. 2020); *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1214 (N.D. Ala. 2020).

302. *See supra* notes 78 & 123; *cf. Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (outlining circumstances where courts should refrain from reaching constitutional questions when unnecessary to resolve the issues before them).

303. *See supra* note 78.

more willing to find proof of impermissible racial purpose.<sup>304</sup> Importantly, it would be a mistake to assume that no inroads can be made with courts on matters of access to the polls simply because those courts have been unfavorable with respect to redistricting challenges.

What about the Supreme Court’s 2008 decision in *Crawford v. Marion County Election Board*, which upheld the constitutionality of Indiana’s photographic voter-ID law?<sup>305</sup> In *Crawford*, the Court characterized the case against Indiana’s law as particularly weak. For example, “the State offers free photo identification,” “the availability of the right to cast a provisional ballot provides an adequate remedy,” “the evidence in the record [did] not provide . . . the number of registered voters without photo identification,” and no deponents “expressed a personal inability to vote under [the photo ID law].”<sup>306</sup> These mitigating factors meant that the State’s legitimate interest in preventing voter fraud was “sufficiently weighty to justify the limitation.”<sup>307</sup>

So, does *Crawford* mean that *Anderson-Burdick* is a dead-letter moving forward? There are reasons to think not, particularly now. First, courts have already distinguished stronger challenges to vote-denial laws from the facts in *Crawford*. For example, in upholding a district court’s injunction of Kansas’s DPOC law in 2020, the Tenth Circuit highlighted ways that both the law and the trial-court record differed from *Crawford*. In that case, *Fish v. Schwab*, the Tenth Circuit explained:

[B]ased on an extensive record, the district court here concluded that the Kansas Secretary of State actually denied approximately thirty thousand would-be voters’ registration applications in his implementation of the DPOC requirement, while, in *Crawford*, the scant evidence before the Court left it with the unenviable task of attempting to estimate the magnitude of the burden on voting rights, largely from untested extra-record sources.<sup>308</sup>

Moreover, the Kansas law did not include a provisional-ballot option as a safety valve for voters who lacked DPOC, meaning that eligible voters “could show up to vote but be turned away without a backup option for them to cast

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304. *E.g.*, *League of Women Voters of Fla., Inc. v. Lee*, No. 21-cv-186, 2022 WL 969538, at \*36-48 (N.D. Fla. Mar. 31, 2022), *stayed pending appeal sub nom.* *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363 (11th Cir. 2022).

305. 553 U.S. 181, 204 (2008).

306. *Id.* at 186, 197-98, 200, 201.

307. *Id.* at 190 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

308. *Fish v. Schwab*, 957 F.3d 1105, 1128 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 965 (2020).

votes.”<sup>309</sup> The court also highlighted Kansas’s “byzantine” procedures for obtaining DPOC and contrasted them with Indiana’s straightforward method for obtaining photo identification at a state DMV.<sup>310</sup>

With respect to the State’s interest in preventing voter fraud, the Tenth Circuit was similarly skeptical. Although the court “agree[d] with the Secretary that Kansas’s interest in counting only the votes of eligible voters is legitimate in the abstract,” it did not see evidence “on this record . . . that such an interest made it necessary to burden voters’ rights here.”<sup>311</sup> It explained the district court’s findings that there was “essentially no evidence that the integrity of Kansas’s electoral process had been threatened, that the registration of ineligible voters had caused voter rolls to be inaccurate, or that voter fraud had occurred,” and that “at most, 67 noncitizens registered or attempted to register in Kansas over the last 19 years.”<sup>312</sup> And, adding salt to the State’s wound, the court pointed to obvious errors in the State’s voter-registration database to demonstrate that “it is quite likely that much of this evidence of noncitizen registration is explained by administrative error.”<sup>313</sup>

On one hand, Kansas’s loss might merely reflect the luck of the draw, with advocates securing favorable judges to hear their case.<sup>314</sup> Similarly, the case might reflect unusually poor lawyering on the part of the State—the Kansas Secretary of State was actually sanctioned by the district court for a “pattern and practice . . . of flaunting disclosure and discovery rules that are designed to prevent prejudice and surprise at trial.”<sup>315</sup> On the other hand, the State appealed the Tenth Circuit’s ruling to the Supreme Court—already at that point controlled by a conservative majority—which refused to intervene and noted no dissents.<sup>316</sup>

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309. *Id.* at 1129.

310. *Id.* at 1130. Of note, in *Crawford*, the State provided alternative documentation options for individuals with difficulty obtaining or locating a birth certificate. *Crawford*, 533 U.S. at 199 n.18.

311. *Fish*, 957 F.3d at 1133.

312. *Id.* at 1134 (quoting *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1108 (D. Kan. 2018)).

313. *Id.*

314. Two of the Tenth Circuit judges—Judge Briscoe and Judge McKay—were appointed by Democratic presidents, and the third—Judge Holmes—is hardly a staunch conservative despite being appointed by George W. Bush. Holmes was a member of one of the first appellate panels to rule in favor of same-sex marriage. *Bishop v. Smith*, 760 F.3d 1070, 1113-14 (10th Cir. 2014).

315. *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1118 (D. Kan. 2018).

316. Although Justice Gorsuch was recused from considering the State’s petition for certiorari, *Schwab v. Fish*, 141 S. Ct. 965, 965 (2020) (mem.), Court practice requires only four votes to grant such a petition, meaning that none of the four liberal members of the Court at that time would have needed to sign on.

And Kansas's DPOC law appears to have been less burdensome than harsher laws like Arizona's HB 2492.

In addition, since the Tenth Circuit's ruling in 2020, federal courts across the country have demonstrated a marked willingness to reject specious allegations of voter fraud and illegal voting.<sup>317</sup> When *Crawford* was decided in 2008, the nation had seen nothing like the Trump Administration's sustained effort to discredit the 2020 election and spread disingenuous lies about the prevalence of voter fraud. When confronted with exceptionally burdensome state laws justified by exaggerated and unsubstantiated fears of voter fraud, some of these same judges may express justified skepticism. Because the *Anderson-Burdick* balancing inquiry requires evaluating the strength of the state interest in preventing fraud—as applied to the particular voting restrictions being challenged<sup>318</sup>—judicial skepticism of voting conspiracy theories should weigh against states that invoke them.

Having found a constitutional violation, would courts grant preclearance? First, because the statute instructs that such courts “shall retain jurisdiction for such period as it may deem appropriate,”<sup>319</sup> they must at least consider the extent to which preclearance is an appropriate remedy.<sup>320</sup> One court has also suggested—without formally deciding—that “shall retain” might even oblige courts to impose preclearance once they have found constitutional violations and granted equitable relief.<sup>321</sup> It is more likely, though, that courts will exercise their discretion in determining when preclearance is justified.<sup>322</sup> Ultimately, because there is no appellate precedent clarifying when preclearance is appropriate in the

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317. See Rosalind S. Helderman & Elise Viebeck, ‘The Last Wall’: How Dozens of Judges Across the Political Spectrum Rejected Trump’s Efforts to Overturn the Election, WASH. POST (Dec. 12, 2020, 2:12 PM EST), [https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8\\_story.html](https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html) [https://perma.cc/N2WB-6EJB].

318. *Fish*, 957 F.3d at 1133.

319. 52 U.S.C. § 10302(c) (2018).

320. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (interpreting “shall” as “creat[ing] an obligation impervious to judicial discretion”).

321. *League of Women Voters of Fla., Inc. v. Lee*, No. 21-cv-186, 2022 WL 969538, at \*105 (N.D. Fla. Mar. 31, 2022), *stayed pending appeal sub nom.* *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363 (11th Cir. 2022).

322. *Id.* (“[I]t is standard doctrine that statutes stating that courts ‘shall’ grant equitable relief upon the occurrence of a certain state of affairs are not literally construed.” (quoting *Jeffers v. Clinton*, 740 F. Supp. 585, 600 (E.D. Ark. 1990))).

absence of an injunction,<sup>323</sup> legal advocates will be forging new doctrinal paths.<sup>324</sup>

Here, the new world of *Purcell* should work in plaintiffs' favor. When injunctions were available, it was easier for courts to conclude that preclearance was "not necessary" to fix the problems it had found.<sup>325</sup> Once jurisdictions amended laws, courts could then wash their hands and claim that there was no longer an "equitable basis" for imposing preclearance.<sup>326</sup> In a world where an unconstitutional law cannot be enjoined, courts may well think about this problem differently. Of course, it is impossible for advocates to know without trying, and unfortunately, there are likely to be more than enough opportunities to try in the coming years.

What degree of jurisdiction would courts retain under Section 3 preclearance? Because preclearance must be "appropriate" in the court's judgment, it cannot be entirely unlimited in scope.<sup>327</sup> The narrowest option would be to make sure that the same—or substantially similar—laws are not passed again after having been held unconstitutional.<sup>328</sup> A broader but still-tailored option would be to preclear any laws that threaten to produce the same effects as an unconstitutional law, such as suppressing votes from particular communities or burdening particular methods of voting.<sup>329</sup> Regardless of which path courts choose, preclearance would be beneficial. At a minimum, preclearance would help prevent

323. In *North Carolina State Conference of the NAACP v. McCrory*, the court declined to bail in North Carolina, but its only explanation for doing so was that it had also issued an injunction, and further equitable relief was unnecessary. In the absence of an injunction, or if there were a risk that an injunction would be barred by *Purcell*, it is not clear that *McCrory* would come out the same way on the bail-in question. 831 F.3d 204, 241 (4th Cir. 2016).

324. *League of Women Voters of Fla., Inc.*, 2022 WL 969538, at \*105 (calling *Jeffers* "[t]he only case to devote substantial analysis to section 3(c)").

325. *McCrory*, 831 F.3d at 241.

326. *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018).

327. *E.g.*, *League of Women Voters of Fla., Inc.*, 2022 WL 969538, at \*107, *stayed pending appeal sub nom.* *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022); see *infra* Section III.C (discussing the importance of tailoring preclearance in order to avoid constitutional challenges).

328. This was the model in *Jeffers*, where the court retained jurisdiction only with respect to future majority-vote requirements. *Jeffers*, 740 F. Supp. at 601 (majority opinion). The court did note, however, that "[i]t would perhaps be within our discretion to impose statutory preclearance on a broader basis, but . . . we have chosen not to, at least for the time being." *Id.* at 602 (emphasis added).

329. This is analogous to the district court's order in *Allen v. City of Evergreen*, No. 13-cv-0107, 2014 WL 12607819, at \*1 (S.D. Ala. Jan. 13, 2014). Although plaintiffs had only brought a redistricting challenge, the court nonetheless retained jurisdiction over both future redistricting plans and "any change in the standards for determining which voters are eligible to participate in the City of Evergreen's municipal elections." *Id.* at \*2.

states like Texas from becoming repeat offenders, passing similar voting restrictions over and over again. As states pass increasingly broad voting restrictions, the scope of tailored preclearance can expand as well. And the threat of preclearance, which is costly and deprives governments of control over their own elections, might deter misconduct in the first place.

Finally, will preclearance be upheld on appeal? As with the previous questions, this likely depends in large part on how egregious the conduct is that is being challenged—preclearance is more likely to survive in a case like *Fish v. Schwab*<sup>330</sup> than in a case like *Brnovich v. Democratic National Committee*.<sup>331</sup> In addition, framing challenges around the fundamental right to vote might actually help persuade courts that have been hostile to claims of intentional racial discrimination. For example, the Florida district court’s grant of preclearance that was recently stayed by the Eleventh Circuit was based entirely on findings of intentional racial discrimination, eliciting skepticism on review.<sup>332</sup> In rejecting the lower court’s findings, the Circuit emphasized the presumption of legislative “good faith”—something that would not apply to an *Anderson-Burdick* claim.<sup>333</sup> None of this is to say that the Eleventh Circuit is a favorable forum for voting-rights plaintiffs. However, if necessary, arguments can be packaged in a way that might appeal more intuitively to conservative judges and Justices.

### C. Constitutional Considerations

Even if courts are willing to grant Section 3 preclearance, are such grants likely to withstand constitutional challenges? Here, current doctrine supports Section 3’s constitutionality. Other work has already developed a full-throated defense of the pocket trigger,<sup>334</sup> which this Note reiterates here to stave off any potential chilling effect.<sup>335</sup>

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330. 957 F.3d 1105 (10th Cir. 2020).

331. 141 S. Ct. 2321 (2021).

332. *League of Women Voters of Fla., Inc.*, 32 F.4th at 1373.

333. *Id.* The Eleventh Circuit was actually more willing to entertain the district court’s findings of unconstitutional vagueness and overbreadth than of intentional discrimination (though those ultimately fell, too). *Id.* at 1374.

334. *See supra* note 131.

335. *See* Reid J. Epstein, Patricia Mazzei & Nick Corasaniti, *Judge Rules Parts of Florida Voting Law Are Unconstitutional*, N.Y. TIMES (Mar. 31, 2022), <https://www.nytimes.com/2022/03/31/us/politics/florida-voting-law.html> [<https://perma.cc/67PM-8BST>] (“There’s a lurking fear that the same court that decided *Shelby County* might decide that [Section 3] bail-in is unconstitutional.”).



The first possible argument against the constitutionality of Section 3 is based on the Supreme Court's decision in *Shelby County*.<sup>336</sup> But the precise course that the Court took to effectively invalidating Section 5 of the VRA makes it unlikely that the same arguments apply to Section 3. In *Shelby County*, the court invalidated Section 4(b) of the VRA, not Section 5 itself.<sup>337</sup> Section 5 of the Act required all "covered jurisdictions" to preclear changes to their voting laws with DOJ.<sup>338</sup> Section 4(b) provided the "coverage formula" that determined which jurisdictions were so covered.<sup>339</sup> Despite reauthorizing Section 5 multiple times, including most recently in 2006, Congress had never actually updated the formula determining which jurisdictions were subject to preclearance.<sup>340</sup> And although the Act does provide a mechanism by which jurisdictions can "bail out" of coverage,<sup>341</sup> the majority in *Shelby* implicitly determined that the bailout provision was an insufficient safeguard.<sup>342</sup> Because the coverage formula had not evolved, the majority held that it did not "make[] sense in light of current conditions" and could no longer "rely simply on the past."<sup>343</sup> In doing so, the Court emphasized that forty years had passed without any update of the coverage formula—it was thus based on "40-year-old facts having no logical relation to the present day."<sup>344</sup> Only one member of the Court—Justice Thomas—wanted to invalidate Section 5 wholesale.<sup>345</sup>

The Court's arguments from *Shelby* about Sections 4 and 5 do not apply to Section 3.<sup>346</sup> First, Section 3 does not look to ancient history at all but rather empowers a court that just found evidence of a constitutional violation to impose preclearance based on current conditions. Second, Section 3 creates a threshold for the severity of such violations, requiring that a court issue equitable relief based on a constitutional violation, ensuring that preclearance will not be based on trivial or inconclusive harms. Third, Section 3 does not create permanent pre-

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336. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

337. *Id.* at 557.

338. 52 U.S.C. § 10304 (2018).

339. *Id.* § 10303(b).

340. *Shelby Cnty.*, 570 U.S. at 538-39.

341. 52 U.S.C. § 10303(a) (2018).

342. *Contra Shelby Cnty.*, 570 U.S. at 579 (Ginsburg, J., dissenting) (arguing that, based on the legislative history, Congress had believed bailout to be a sufficient mechanism by which the VRA's coverage could evolve over time).

343. *Id.* at 553.

344. *Id.* at 554.

345. *Id.* at 557 (Thomas, J., concurring).

346. See Olds, *supra* note 131, at 2194.

clearance or require courts to impose preclearance for a fixed period of time. Instead, it authorizes courts to impose preclearance “for such period as it may deem appropriate,” providing judges with the flexibility to tailor the remedy to actual conditions on the ground.<sup>347</sup>

Accordingly, the only court to seriously treat the question of Section 3’s constitutionality concluded that *Shelby* has no bearing.<sup>348</sup> Although that court’s decision was appealed and stayed, the Eleventh Circuit made no mention of Section 3’s general constitutionality.<sup>349</sup> And none of the other examples of courts adversely imposing Section 3 preclearance were challenged on constitutional grounds.<sup>350</sup>

Another challenge to Section 3 might be based on the Supreme Court’s opinion in *City of Boerne v. Flores*, which held that Section 5 of the Fourteenth Amendment only grants Congress the power to impose “congruen[t]” and “proportional[.]” remedies for violations of that Amendment.<sup>351</sup> *Boerne* involved the Religious Freedom and Restoration Act (RFRA), which prohibited all state laws that substantially burdened religious exercise without being necessitated by a compelling government interest.<sup>352</sup> Congress invoked Section 5 of the Fourteenth Amendment, which grants it the power to “enforce, by appropriate legislation, the provisions of [the Amendment].”<sup>353</sup> In invalidating RFRA, the Court held that Congress had overstepped its limited powers because RFRA could not reasonably be described as remedial with respect to any actual violations of the right to free exercise.<sup>354</sup> In so holding, the Court explicitly compared RFRA to the VRA, noting that RFRA’s legislative history was devoid of any findings of

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347. 52 U.S.C. § 10302(c) (2018).

348. See *League of Women Voters of Fla., Inc. v. Lee*, No. 21-cv-186, 2022 WL 969538, at \*104 (N.D. Fla. Mar. 31, 2022), *stayed pending appeal sub nom.* *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363 (11th Cir. 2022) (“[S]ection 3(c) does not raise the same constitutional concerns that animated the Court in *Shelby County*. Unlike section 4, section 3(c) does not sort jurisdictions into categories based on their long-past history of discrimination . . . . Put another way, rather than rely ‘on decades-old data relevant to decades-old problems’ section 3(c) relies on the most up-to-date data possible.” (quoting *Shelby Cnty.*, 570 U.S. at 553)).

349. *League of Women Voters of Fla., Inc.*, 32 F.4th at 1374-75.

350. See *supra* note 125. That said, just one of these decisions involved imposing preclearance on an entire state, so of course, the others are not perfect parallels.

351. 521 U.S. 507, 520 (1997); see *Crum*, *supra* note 63, at 2024-27 (arguing that Section 3 should survive under *Boerne*); *Wiley*, *supra* note 116, at 2131 (same).

352. *Boerne*, 521 U.S. at 515-16 (noting that the Religious Freedom and Restoration Act had legislatively mandated that state laws burdening religion pass strict scrutiny).

353. U.S. CONST. amend. XIV, § 5.

354. *Boerne*, 521 U.S. at 530-31.

discrimination that could be used to justify the broad reach of its remedial measures.<sup>355</sup>

In contrast, Section 3 *only* applies after a court has found a constitutional violation. Section 3 is also much more limited and properly tailored than the means used in either RFRA or in Sections 4 and 5 of the VRA, as a court must ensure that the scope of preclearance is “appropriate” in light of the predicate constitutional violation, and cannot impose preclearance indefinitely.<sup>356</sup> This is a proportionate remedy for either intentional discrimination or a violation of the fundamental right to vote. In the latter case, courts can ensure that the remedy is also congruent by making explicit findings that the predicate constitutional violation had discriminatory effects based on race or language status before imposing preclearance to prevent such effects in the future. Because the law effectively requires that courts, in their discretion, find “congruence and proportionality” before applying Section 3 to bail in a jurisdiction, *Boerne*’s test is satisfied.<sup>357</sup>

If all else fails, the government might defend the limited application of Section 3 to federal congressional elections based on Article I’s Elections Clause. According to Article I, Section 4, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”<sup>358</sup> This means that, in one court’s words, “Congress gets the final word” regarding how states run such elections.<sup>359</sup>

Although the Elections Clause is generally understood to cover only federal congressional elections, this limitation may be less constricting than it seems. As Franita Tolson has argued, the Elections Clause could be invoked alongside the Reconstruction Amendments as a source of authority for the VRA.<sup>360</sup> Specifically, the Elections Clause establishes a baseline norm that “Congress [has] final

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355. *Id.*

356. 52 U.S.C. § 10302(c) (2018).

357. *Boerne*, 521 U.S. at 520.

358. U.S. CONST. art. I, § 4, cl. 1.

359. *League of Women Voters of Fla., Inc. v. Lee*, No. 21-cv-186, 2022 WL 969538, at \*106 (N.D. Fla. Mar. 31, 2022), *stayed pending appeal sub nom.* *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363 (11th Cir. 2022); *see also* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat) 304, 343 (1816) (“[C]ongress ha[s] a right to revise, amend, or supercede the [election] laws which may be passed by state legislatures.”).

360. *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1197–98 (2012) (“The Elections Clause, when combined with Congress’s ability to enforce the mandates of the Fourteenth and Fifteenth Amendments, provides ample constitutional justification for the VRA.” (footnote omitted)).

policymaking authority over federal elections,” and “the Fourteenth and Fifteenth Amendments extend this authority to state elections.”<sup>361</sup> In addition, the interdependence between state and federal elections can directly legitimize federal management of state-election regulations.<sup>362</sup> For example, when a state law “affects turnout and participation in federal elections,” such as a “documentary proof-of-citizenship requirement[,]” it should “fall within the limited instances in which Congress can reach [state] voter qualifications under the [Elections] Clause.”<sup>363</sup>

Moreover, even when there is no necessary interaction between state and federal elections, states still often intermingle state- and federal-election machinery to promote convenience and reduce administrative costs.<sup>364</sup> Thus, regulations that extend only to federal elections can still have a significant, albeit indirect, impact on the way states run their own elections. Proof-of-citizenship requirements are one example. In 2013, the Supreme Court held that the National Voter Registration Act prevented Arizona from rejecting federal voter-registration forms that lacked documentary evidence of citizenship, though Arizona could lawfully enforce such a requirement for its own registration forms.<sup>365</sup> In so holding, the majority rejected Justice Alito’s argument that requiring states to bifurcate their electoral processes would be so costly that it would effectively force states to comply with federal-election procedures.<sup>366</sup> In a practical sense, though, Alito’s predictions came true. Since 2013, both Alabama and Georgia enacted proof-of-citizenship requirements but chose not to enforce them due to the cost of maintaining separate state- and federal-voter rolls.<sup>367</sup> Yet, the Court has never

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361. *Id.* at 1201.

362. See Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 *YALE L.J.F.* 171, 175 (2019).

363. *Id.* at 178-79.

364. See Kirsten Nussbaumer, *The Election Law Connection and U.S. Federalism*, 43 *PUBLIUS* 392, 415 (2013).

365. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 12 (2013).

366. *Id.* at 41 (Alito, J., dissenting) (“As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections.”).

367. See Rebecca Beitsch, ‘Proof of Citizenship’ Voting Laws May Surge Under Trump, PEW CHARITABLE TRS. (Nov. 16, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/16/proof-of-citizenship-voting-laws-may-surge-under-trump> [https://perma.cc/EZ2W-3SGD]. During the Trump Administration, the Election Assistance Commission granted Alabama, Georgia, and Kansas’s requests to include state-specific instructions to provide documentary proof of citizenship alongside their versions of the uniform federal voter-registration form. A district court in 2021 found that this move violated the

held that regulation of federal congressional elections exceeds the scope of the Elections Clause because it might practically affect state elections as well.

Professor Tolson is not the only scholar to highlight the Elections Clause as a neglected source of authority for the VRA. In the leadup to *Shelby County v. Holder*, Professor Daniel Tokaji argued that the Elections Clause “authorizes many—though not all—applications of the VRA’s preclearance requirements” and that advocates would be remiss not to invoke it in defense of the Act.<sup>368</sup> Because “Shelby County administer[ed] federal elections as well as state and local elections . . . [t]he Elections Clause [would have been] therefore a sufficient basis upon which to reject Shelby County’s facial challenge.”<sup>369</sup> As Tokaji noted, Shelby County’s facial challenge to the VRA would fail if the Elections Clause justified its application to federal elections, though “a covered jurisdiction might [still] challenge the statute’s application to state or local redistricting plans.”<sup>370</sup> Unfortunately, because the government never raised these arguments in its briefs in *Shelby*, we do not know for sure how the Court would have disposed of them.<sup>371</sup>

What about the fact that Congress in 1965 explicitly justified the VRA as an exercise of its Fifteenth Amendment enforcement powers?<sup>372</sup> As Tokaji explained in 2013, “[I]t’s irrelevant whether Congress explicitly claimed the Elections Clause as a source of authority.”<sup>373</sup> The Court has “long held [that] . . . ‘the question of [the] constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.’”<sup>374</sup> The Court recently affirmed this principle when it upheld provisions of the Affordable Care Act based on justifications that were not invoked contemporaneously by the enacting Congress.<sup>375</sup>

Whether justified under the Reconstruction Amendments or the Elections Clause, it is unlikely that vesting the federal government’s enforcement power in

Administrative Procedure Act. See *League of Women Voters of the U.S. v. Harrington*, 560 F. Supp. 3d 177, 182, 185 (D.D.C. 2021).

368. Daniel Tokaji, *Shelby County v. Holder: Don’t Forget the Elections Clause*, SCOTUSBLOG (Feb. 13, 2013, 11:43 AM), <https://www.scotusblog.com/2013/02/shelby-county-v-holder-dont-forget-the-elections-clause> [<https://perma.cc/7DGL-8KTT>].

369. *Id.*

370. *Id.*

371. *Id.*

372. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. In its 1975 reauthorization, Congress expanded the justification for the Act to include its Fourteenth Amendment enforcement powers as well. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400.

373. Tokaji, *supra* note 368.

374. *Id.* (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

375. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012).

the courts would constitute an impermissible congressional delegation of power under the Supreme Court’s nondelegation doctrine. The Court has twice accepted the argument that delegating authority over electoral redistricting to independent commissions is consistent with the powers of state legislatures.<sup>376</sup> And, though the Court has not confronted a federal law providing for independent redistricting commissions, it has indicated in dicta that such a law would be permissible.<sup>377</sup>

Congress’s ability to delegate authority to impose preclearance to the courts follows a fortiori from these cases. Rather than delegating complete control to sui generis governmental bodies, Section 3 is a congressional regulation of election procedures that is implemented by means of federal courts’ traditional equitable discretion. Thus, it is appropriately described as within Congress’s power to “pass statutes that delegate some discretion to those who administer the laws.”<sup>378</sup> It is also consistent with the “role for the courts” that the Court has carved out since it is based on a clearly administrable standard that falls within the traditional competency of the judiciary.<sup>379</sup> Namely, it asks courts to find and remedy violations of the Constitution, not to engage in an endless and arbitrary process of balancing the interests of political parties.<sup>380</sup>

Is Section 3 preclearance a race-conscious remedy that offends the Equal Protection Clause if imposed without a finding of intentional racial discrimination? No, for several reasons. First, tailored preclearance to avoid racially discriminatory effects is nothing like race-based affirmative action—it does not require the state to allocate any resources or benefits on the basis of race, or to remedy preexisting racial disparities. Instead, it only prevents states from acting in ways that create *new* burdens on racial or language minorities.<sup>381</sup> This makes it more similar to the discriminatory-effects liability found in Section 2 of the

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376. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 793 (2015); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507-08 (2019).

377. *Rucho*, 139 S. Ct. at 2508.

378. *Ariz. State Legis.*, 576 U.S. at 845 (Roberts, C.J., dissenting).

379. *Rucho*, 139 S. Ct. at 2495-96.

380. *Cf. id.* at 2499 (bemoaning the lack of a “standard that can reliably differentiate unconstitutional from ‘constitutional political gerrymandering’” (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999))).

381. For example, refraining from imposing a DPOC requirement that imposes new burdens on Spanish-language speakers is very different from affirmatively weighing race when allocating college-admissions spots or jobs.

VRA, which the Court has upheld as constitutional and does not require intentional discrimination.<sup>382</sup> Second, if Section 3 were unconstitutional merely because it incentivizes states to evaluate their voting laws for discriminatory effects, then all disparate-impact liability would be unconstitutional. Although some scholars have advanced such extreme arguments,<sup>383</sup> the Supreme Court has never followed them.<sup>384</sup> Even those Justices who have questioned the constitutionality of disparate-impact liability have done so not because it prohibits actions that impose targeted burdens on minorities – as preclearance would do – but because it might affirmatively require “‘remedial’ race-based actions.”<sup>385</sup> Third, because the scope of preclearance is left to the discretion of district courts, and because the text of Section 3 requires that the remedy be tailored and appropriate, judges can and should be careful to avoid explicitly or implicitly requiring states to consider race in an improper way when designing their voting policies.

Finally, recall that Section 3 allows courts to preclear election procedures for discriminatory effects on *either* racial or language minorities,<sup>386</sup> and that most of the recent forms of vote denial, such as voter ID and DPOC requirements, have negative effects on *both* racial and language minorities.<sup>387</sup> Because language minorities are not covered by heightened scrutiny under the Equal Protection Clause,<sup>388</sup> there is no constitutional objection to disparate-impact liability in that context. That means, even in the worst-case scenario where the Supreme Court eliminates all disparate-impact liability based on race, district courts could still administer preclearance based on language status and achieve most, if not all, of the beneficial outcomes described in this Note.

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382. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2341 (2021) (explaining that Section 2 does not require proof of facial discrimination or discriminatory intent). Although the Court in *Brnovich* construed Section 2 narrowly, it did so based on statutory interpretation, not the Equal Protection Clause. *Id.* at 2340-42.

383. See Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 83 (making such an argument in the context of Title VII).

384. See, e.g., *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540-41 (2015) (reaffirming the constitutionality of disparate-impact liability). A full treatment of the constitutionality of disparate-impact liability is unfortunately beyond the scope of this Note.

385. *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

386. See *supra* note 112 and accompanying text.

387. See *supra* notes 54-57 and accompanying text.

388. See *supra* notes 201-202 and accompanying text.

#### D. Strategic Considerations

Assuming that everything this Note has argued is wrong, what risks do advocates assume by trying? In the context of voting rights, this is hardly a trivial question. Bad cases can induce appellate courts to make bad law, as scholars have argued was the case in *Brnovich v. Democratic National Committee*.<sup>389</sup> There, advocates brought a relatively weak vote-denial case under Section 2 of the VRA, then doubled down twice after receiving unfavorable results in the district court and before a panel of the Ninth Circuit.<sup>390</sup> Scholars called *Brnovich* an overreach and noted that the case was unusually partisan in “pit[ting] the two major political parties against each other” rather than the “typical case, in which a voting-rights group representing minority voters sues a state or locality for engaging in electoral discrimination.”<sup>391</sup> This kind of “aggressiveness” in the face of both bad facts and judicial losses risks needlessly creating “bad” law,<sup>392</sup> as *Brnovich* ultimately did for Section 2 of the VRA.<sup>393</sup>

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389. 141 S. Ct. 2321 (2021).

390. See Richard L. Hasen, *A Partisan Battle in an Overreach of a Case*, SCOTUSBLOG (Feb. 22, 2021, 8:41 AM), <https://www.scotusblog.com/2021/02/a-partisan-battle-in-an-overreach-of-a-case> [<https://perma.cc/RR5S-C4A6>]. Plaintiffs first appealed, then petitioned for rehearing en banc by the Ninth Circuit after losing before the initial panel. See Petition for Rehearing En Banc at 2, *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (No. 20-16301). By the time the case reached the Supreme Court, Biden had assumed the presidency, but the Department of Justice stuck to the Trump Administration’s conclusion that Arizona’s laws did not violate Section 2. See Letter from Edwin S. Kneedler, Deputy Solic. Gen., U.S. Dep’t of Just., to Scott S. Harris, Clerk, U.S. Sup. Ct. (Feb. 16, 2021) (on file with U.S. Supreme Court), <https://bit.ly/3AlkwAW> [<https://perma.cc/5ZDE-YDDL>].

391. Hasen, *supra* note 390; see also Michael C. Dorf, *What Was/Is at Stake in Brnovich?*, DORF ON L. (July 1, 2021), <http://www.dorfonlaw.org/2021/07/what-was-at-stake-in-brnovich.html> [<https://perma.cc/7DAD-UWW8>] (calling the actual restrictions challenged in *Brnovich* “small potatoes” but noting that the Court’s opinion was likely to have dramatic ramifications for Section 2 in future cases); Derek T. Muller, *Brnovich v. DNC: Election Litigation Migrates from Federal Courts to the Political Process*, 2021 CATO SUP. CT. REV. 217, 217 (explaining that *Brnovich* “began as one of these efforts by a political party to litigate relatively minor issues of state election administration”).

392. See, e.g., Hasen, *supra* note 390 (arguing that “[t]he Democratic Party’s aggressiveness in using Section 2 in this case . . . provided an opportunity for the state’s Republican Party, its Republican attorney general and the Trump administration . . . to suggest various ways to read Section 2 as applied to vote denial claims in very stingy ways”).

393. See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court’s Voting-Rights Decision Was Worse Than People Think*, ATLANTIC (July 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330> [<https://perma.cc/WYB5-PLWF>] (outlining problems with the law after the Court’s decision in *Brnovich*).



Although proceeding cautiously is always wise, the strategy proposed in this Note is a relatively safe one. First, Section 3 is a remedy rather than an independent cause of action—it is irrelevant until advocates demonstrate a constitutional violation. This distinction helps ensure that the cases where Section 3 is relevant in the first place are already the strongest cases that voting-rights advocates can bring, rather than creative extensions of statutory causes of action as under Section 2.

Second, applying Section 3 to *vote-denial* cases involves less risk than pursuing aggressive strategies in the context of *vote dilution*. Fights over redistricting have an inextricably partisan character.<sup>394</sup> And although racial gerrymandering is impermissible, partisan gerrymandering is not.<sup>395</sup> Because of this, advocates have implicitly, and at times explicitly, treated the prohibition on racial gerrymandering as a “means to police at least some forms of partisan gerrymandering.”<sup>396</sup> Not only may this entice some plaintiffs to push the boundaries of existing vote-dilution doctrine, but it may make courts hesitant to intervene in what they view as political clashes unsuited for judicial resolution. Vote-denial litigation, however, is less obviously partisan in nature, particularly as the laws being challenged are becoming bolder and harsher. It is notable that the only recent example of the Supreme Court stepping in to overturn a judgment finding vote denial was *Brnovich*, and there are other recent examples of the Court accepting stronger vote-denial judgments.<sup>397</sup>

Finally, the benefits of restraint must be balanced against the costs. To the extent that Section 3 can help stem the coming tide of vote denial, it should be at least considered as a component of advocates’ toolkit. It makes sense to start slow and build momentum by focusing on the strongest cases. But rejecting the strategy whole cloth makes as little sense as would rejecting Section 2 entirely just because *Brnovich* was an unusually weak case.

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394. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019) (“[P]olitics and political considerations are inseparable from districting and apportionment.” (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973))).

395. *Id.* at 2502.

396. Michael C. Li, *The Surprise Return and Transformation of Racial Gerrymandering*, 94 N.Y.U. L. REV. ONLINE 315, 315 (2019).

397. *E.g.*, *Fish v. Schwab*, 957 F.3d 1105, 1128, 1144 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 965 (2020).

## **CONCLUSION**

Voting-rights lawyers stand at a crossroads. With many of their traditional tools weakened in recent years and now facing a wave of hostile legislation, Section 3 offers new and timely benefits. This Note has argued that two fundamental misperceptions about the scope of Section 3 preclearance have artificially constrained its use in protecting voting rights. Having recognized and corrected those misperceptions, voting-rights lawyers should make Section 3 preclearance a core component of constitutional cases they bring moving forward, particularly when such litigation occurs close to an election. Doing so will not only help deter voting-rights violations but will also ensure that states that pass unconstitutional laws cannot become repeat offenders down the road.