Redistricting Immunity

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Redistricting litigation has entered a new era. In 2020, for the first time, state legislatures completed post-census redistricting without preclearance under Section 5 of the Voting Rights Act (VRA). After Shelby County v. Holder*, plaintiffs challenging unlawful maps must rely upon private litigation alone. Meanwhile, the Supreme Court has resuscitated the* Purcell *Principle, an equitable election law doctrine that prohibits federal courts from changing election rules on the eve of a political contest. Both* Shelby County *and* Purcell *present independent problems for voting rights. But at their intersection lies perhaps the most important change in redistricting jurisprudence in half a century: redistricting immunity.*

By extending Purcell *to redistricting, the Supreme Court has invented a new blanket immunity for state legislatures to enact discriminatory districts. Without Section 5 preclearance,* Purcell *places litigants in an impossible temporal bind by denying them sufficient time to challenge illegal maps before the next election. As a result, state legislatures are incentivized to enact discriminatory redistricting schemes because legislators know those maps will be immune for at least the first election following decennial redistricting—accounting for no less than one in five federal elections.*

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This Article introduces the concept of redistricting immunity to the election law literature. New litigation data demonstrate how redistricting immunity works, what causes it, and why it poses a threat to multiracial democracy in the United States. Ultimately, redistricting immunity inverts two core institutional arrangements in our federal structure. It elevates state law over federal law, posing a basic threat to federal supremacy, and it empowers courts over Congress, raising concerns about democratic legitimacy. This Article concludes by offering solutions for courts, legislatures, and litigants. Only with the consequences of redistricting immunity in clear view can courts, legislatures, and litigants remedy this new immunity that has dangerously eroded the voting rights protections the "Court once knew to buttress all of American democracy."[1]

1. Merrill v. Milligan, 142 S. Ct. 879, 889 (2022) (mem.) (Kagan, J., dissenting).

INTRODUCTION

The right to vote lies at the heart of American democracy, and nowhere are the stakes for voting rights higher than in redistricting. The results of the 2020 redistricting cycle reveal that American redistricting has entered a new era. Since 1965, Section 5 of the Voting Rights Act (VRA) placed critical constraints on redistricting—but no longer. In 2013, *Shelby County v. Holder* freed state legislatures to draw congressional and state legislative maps without first preclearing those maps with the federal government.[2] Following that decision, civil rights organizations assembled *en masse* to challenge new districts—most commonly under Section 2 of the VRA (to combat racial vote dilution), the Equal Protection Clause (to combat intentional discrimination and racial gerrymanders), and state constitutions (to combat partisan gerrymanders).

Meanwhile, the Supreme Court extended an emergent election law doctrine—the *Purcell* Principle—to redistricting litigation.[3] The *Purcell* Principle stands for the simple proposition that federal courts should not change election rules at the last moment before an election.[4] With the first redistricting cycle of this new era now complete, the consequences have come into view.

At the intersection of *Shelby County* and *Purcell* lies perhaps the most important change in redistricting jurisprudence in half a century: redistricting immunity. Redistricting immunity shields discriminatory legislative and congressional districts from invalidation. Across the country, judges routinely found maps illegal, but in case after case, those unlawful maps remained in

2. Under Section 5 of the Voting Rights Act, jurisdictions with histories of voting discrimination were required to "preclear" changes to election rules with federal authorities before they may go into effect. *See* Voting Rights Act, 52 U.S.C. § 10301 ("Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation."). That regime was struck down in *Shelby County* for violating principles of "equal sovereignty." Shelby County v. Holder, 570 U.S. 529, 544 (2013). In particular, the court invalidated Section 4 of the VRA which set out the formula to determine which jurisdictions must seek preclearance, nullifying Section 5. *Id.* at 542.

3. *Milligan*, 142 S. Ct. at 880 (mem.) (Kavanaugh, J., concurring) (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam)).

4. *See Purcell*, 549 U.S. at 4 (reasoning that ordering an equitable remedy "[a]s an election draws closer" can increase the risk of confusion and maladministration). The term "*Purcell* Principle" was first coined by Professor Richard Hasen. *See* Richard Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. L. REV. 427, 430 (2016).

effect.[5] The reason had nothing to do with substantive law or litigation strategy. The reason was *time*. Immunity works by systematically forcing plaintiffs to litigate redistricting claims on impossibly short timelines. In the most recent redistricting cycle, courts immunized redistricting schemes in seven states: Alabama, Georgia, Louisiana, Missouri, North Dakota, Tennessee, and Washington.[6] In Alabama, a congressional map that likely violated the Voting Rights Act was nonetheless immune because it was struck down 121 days before the primary election.[7] In Louisiana, a congressional map was immune because it was struck down 156 days before the primary election.[8] Across the country, maps received immunity even when plaintiffs wasted no time to sue and lower courts expedited proceedings. Indeed, immunity has become the norm.[9] *Shelby County* and *Purcell* combine to deny plaintiffs sufficient time to secure injunctions against illegal maps, and as a result, state legislatures are free to ignore state and federal law.

Scholars have recently started to explore the shift that these developments portend for American democracy. Some scholars have criticized *Purcell* for its doctrinal shortcomings.[10] Others have noted that *Purcell* is particularly unsuited for exigent circumstances, including for pandemic conditions.[11] Popular commentators have argued that the *Purcell* Principle is not principled at all, but instead serves as a vessel for unprincipled decision-making.[12]

This Article proceeds in four Parts. Part I of this Article deepens those critiques by locating *Purcell* in the post-*Shelby County* era and finally placing redistricting at the center of the conversation. Most importantly, this Part introduces the concept of redistricting immunity to the literature. Part II offers new litigation data and analyzes case studies from Alabama, Georgia, and Wisconsin to explain its mechanics and clarify its practical consequences. Part II also explores the determinants of redistricting immunity. In particular, partisan gridlock and untimely census data create the conditions for immunity where state law fails to provide adequate structure for legislative redistricting timelines.

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5. *See, e.g.*, *Milligan*, 142 S. Ct. 879 (2023) (staying a redistricting decision on *Purcell* grounds); Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 587 F. Supp. 3d 1222, 1326–27 (N.D. Ga. 2022) (denying a redistricting injunction on *Purcell* grounds).

6. *See infra* Figure 1.

7. Robinson v. Ardoin, 605 F. Supp. 3d 759, 852–56 (M.D. La. 2022) (granting injunctive relief despite *Purcell* timing concerns), *stay granted*, 142 S. Ct. 2892 (2022) (mem.) (citing *Milligan* stay decision).

8. *Id.* Importantly, *Robinson* was not technically a *Purcell* stay. Instead, the decision was stayed pending the outcome in *Milligan*, but the effect is the same.

9. *See infra* Figure 1.

10. *See, e.g.*, Hasen, *supra* note 4, at 440 (claiming that *Purcell* is both "overdetermined and undertheorized").

11. *See, e.g.*, Wilfred U. Codrington III, Purcell *in Pandemic*, 96 N.Y.U. L. REV. 941, 970 (2021) (arguing that the pandemic should have revealed the limitations of the *Purcell* Principle).

12. *See* Strict Scrutiny, *Limiting the Inevitable Damage*, CROOKED MEDIA (Oct. 10, 2022), https://crooked.com/podcast/limiting-the-inevitable-damage/ [https://perma.cc/59TC-Z4H9] (criticizing *Purcell* for being poorly reasoned and selectively invoked).

Part III argues that redistricting immunity inverts core institutional arrangements that lie at the heart of American government: it elevates state law over federal law, and it empowers courts over Congress. Redistricting immunity inverts federal supremacy. Now, federal courts cite state law to justify denying injunctive relief under federal statutes—elevating state law above federal commands. Understood in this way, redistricting immunity assumes its place at the vanguard of a burgeoning legal movement to aggrandize the role of states and state legislatures in American elections.[13]

Redistricting immunity has quietly eroded a fundamental check against antidemocratic state legislative action by undermining Congress's ability to prevent states from running roughshod over voting rights in redistricting. That contravenes a second core precept in our democratic structure: Congress, not the federal judiciary, is best positioned to regulate the political process. As a result, state legislatures can immunize maps by delaying redistricting decisions until it is too late for voters to secure injunctive relief—ironically manufacturing the same last-minute shakeups *Purcell* was designed to avoid.

Part IV offers solutions at three institutional levels. For legislatures, this Article suggests both state and federal statutory fixes. For litigants, this Article provides guidance on the trial schedules necessary to obtain relief and highlights the importance of *Purcell* discovery. For courts, this Article reveals how redistricting immunity threatens both individual voting rights and broader democratic structures. And for courts sitting in equity, those considerations must matter. Taken together, these solutions provide an early roadmap for reform that can be leveraged in anticipation of the upcoming census—by which time redistricting immunity, if unaddressed, will worsen.

I.
THE NEW REDISTRICTING ERA

A. The Shelby County *Problem*

This new redistricting era—one marked by redistricting immunity—is the product of *Shelby County* and *Purcell*. Scholars have drawn a direct line between *Shelby County* and a rise in voter suppression.[14] Many academics have criticized

13. Take the independent state legislature theory (ISLT) as an example. Advocates for that discredited theory contend that the Elections Clause vests exclusive authority in state legislatures to regulate federal elections—all without judicial review by state courts. *See* Moore v. Harper, 600 U.S. 1, 22 (2023) (rejecting the independent state legislature theory). Voting rights advocates praised the decision in *Moore* for maintaining the status quo. *See* Press Release, Legal Def. Fund, LDF Applauds Supreme Court's Rejection of Independent State Legislature Theory (May 27, 2023), https://www.naacpldf.org/press-release/ldf-applauds-supreme-courts-rejection-of-independent-state-legislature-theory/ [https://perma.cc/PZD5-NLVA]. Both redistricting immunity and the ISLT foreclose judicial review of antidemocratic state legislative action.

14. *See* Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 5–7 (2020) (surveying state laws that suppress voting and arguing that voter suppression is a direct consequence of *Shelby County*).

Shelby County's poor reasoning and its consequences for voters—particularly for voters of color.[15] But these accounts mostly ignore redistricting, perhaps because the 2020 redistricting cycle is the first to occur since the 2013 decision. However, *Shelby County*'s fallout is particularly dire in redistricting, even relative to other forms of voter suppression. This Part provides a brief history of the VRA and its preclearance provisions to explain why this new redistricting era is different and how that matters for voters—especially minority voters—across the country.

Many consider the VRA the crowning achievement of the Civil Rights Movement and preclearance its "crown jewel."[16] Under the VRA, jurisdictions with histories of voting discrimination were required to seek permission from the federal government before changing voting rules.[17] This rule, known as preclearance, made the VRA perhaps the most effective statute of the civil rights era.[18] The rationale behind the provision was twofold: (1) preclearance stopped discrimination before it happened, and (2) it shifted the burden of enforcement to the government, rather than voters, to prove that new voting rules were nondiscriminatory.[19] Congress knew it could not anticipate all possible future forms of disenfranchisement, so preclearance was designed to address those future "ingenious" schemes of disenfranchisement when they arose.[20] For forty-eight years, the preclearance provisions largely worked to protect minority voters.[21]

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15. *See, e.g.*, Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 97–99 (2013) (describing the role of Section 5 in protecting voting rights for racial minorities); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post*-Shelby County *Contingency Strategy*, 123 YALE L.J. ONLINE 131, 131 (2013) (anticipating "rampant racial discrimination" without preclearance).

16. Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013), https://slate.com/news-and-politics/2013/06/supreme-court-and-the-voting-rights-act-goodbye-to-section-5.html [https://perma.cc/5FV9-CM9A].

17. 52 U.S.C. §§ 10301–10314 (prohibiting voting rules that have the effect of denying or abridging the right to vote); 42 U.S.C. § 1973. This federal preclearance authority requires jurisdictions to secure approval either from the Attorney General or the U.S. District Court for the District of Columbia.

18. *See* John Michael Eden, *The Case for Reauthorizing Section Five of the Voting Rights Act*, 55 DUKE L.J. 1183, 1183 (2006) (describing Section 5 as the "key provision of the most effective civil rights law ever enacted"); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 709 (2006) (identifying Section 5 as "the most powerful weapon in the civil rights arsenal").

19. Eden, *supra* note 18, at 1191 ("Rather than shifting the burdens of litigation to a complaining party [under Section 2], preclearance requires that covered jurisdictions demonstrate *ex ante* that they are in compliance with the [VRA].").

20. *See* CHRISTOPHER BEEM, THE NECESSITY OF POLITICS: RECLAIMING AMERICAN PUBLIC LIFE 239 (1999).

21. *See* Keesha M. Middlemass, *The Need to Resurrect Section 5 of the Voting Rights Act of 1965*, 28 J.C.R. & ECON. DEV. 61, 83–84 (2015) (describing "significant progress" in eradicating first-generation obstacles to voting and further progress with later amendments).

After the 2010 redistricting cycle, the Supreme Court invalidated several sections of the VRA, including the Section 5 preclearance requirement.[22] The Court invalidated the "coverage formula" in Section 4 of the VRA, which determined which jurisdictions were required to obtain preclearance.[23] Without a coverage formula, the preclearance regime became inoperative. Other portions of the VRA remained, however, including Section 2, which provided a cause of action for plaintiffs to challenge discriminatory laws through private litigation.[24]

But Section 2 is no substitute for Section 5. First, plaintiffs suing under Section 2 must actually litigate to challenge discriminatory voting rules—they cannot rely on a government administrative process to preemptively assess voting changes. Second, the legal standard under Section 2 is more challenging for plaintiffs to meet than the Section 5 preclearance standard. A voting law will survive preclearance only if the jurisdiction can demonstrate that it will not have a retrogressive effect.[25] But a voting law will survive a Section 2 challenge if a state can simply show the law does not render the political process less than "equally open" under a "totality of the circumstances" test.[26] Indeed, the Roberts Court has chipped away at this "equal openness" standard over time, making it harder for voters to satisfy.[27] Third, Section 5 stops jurisdictions from adopting discriminatory laws before they go into effect, while Section 2 claims are almost always brought after the discrimination takes place. And when plaintiffs head off these effects by seeking a preliminary injunction, the bar to establish a Section 2 violation is even higher.[28]

Congressman John Lewis described *Shelby County* as "a dagger in the very heart" of the VRA.[29] As Justice Kagan predicted, "[o]nce Section 5's strictures came off, States and localities put in place new restrictive voting laws, with

22. Shelby County v. Holder, 570 U.S. 529, 554–56 (2013).

23. *See Statutes Enforced by the Voting Section*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/vot/overview.php [http://perma.cc/Q8KL-HVYE] (Aug. 8, 2015) (noting that jurisdictions could seek preclearance either from the U.S. Department of Justice or from the U.S. District Court for the District of Columbia).

24. 52 U.S.C. § 10301.

25. 42 U.S.C. § 1973.

26. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2331–32 (2021).

27. For vote denial claims, the standard under Section 2 was made more challenging for voters in *Brnovich*, 141 S. Ct. at 2371 (Kagan, J., dissenting) (evaluating a Section 2 vote denial claim under a totality of the circumstances test and upholding provisions of Arizona law because of the purported state interests advanced by the voting restrictions—even though the law created "severe hardship" for minority voters).

28. In a preliminary injunction, a plaintiff must establish: (1) likelihood of success on the merits, (2) likelihood that the plaintiff will suffer irreparable harm absent preliminary relief, (3) that the balance of equities tips toward the plaintiffs, and (4) that an injunction is in the public interest. Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20–21 (2008) (describing the preliminary injunction standard).

29. 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, 2128 (2014). The Attorney General also described *Shelby County* as "a serious setback for voting rights." *Id.* at 2117.

foreseeably adverse effects on minority voters."[30] Texas declared it would enact voting restrictions the very day the decision was released, and "[o]ther States—Alabama, Virginia, Mississippi—fell like dominoes."[31] After *Shelby County*, state legislatures "enacted and enforced [discriminatory laws] at an alarming rate."[32] The consequences persist,[33] particularly for "the ability of poor, minority, and immigrant citizens of the United States to exercise their fundamental democratic right to participate in elections."[34]

1. Shelby County *and Redistricting*

Preclearance is critical in redistricting. Redistricting claims under the VRA and the federal Constitution are wildly time-consuming, expensive, and difficult to win—precisely the kind of litigation that preclearance was designed to avoid. As a result, the fallout from *Shelby County* is especially acute in the redistricting context because redistricting claims are different from other types of voting rights lawsuits. However, scholarly autopsies of *Shelby County* mostly overlook redistricting.[35] That omission is particularly surprising because redistricting lies at the heart of current debates about fairness in voting.

Preclearance routinely stopped illegal districts from taking effect. From 1965 to 2006, preclearance stopped almost 1,200 voting laws in covered areas from taking effect,[36] and at least thirteen redistricting schemes were rejected in

30. *Brnovich*, 141 S. Ct. at 2355 (Kagan, J., dissenting); *see generally* Ailsa Chang & Ashley Brown, *The Right To Vote: The Impact of* Shelby County v. Holder *on Voting Rights*, NPR (July 13, 2021), https://www.npr.org/2021/07/13/1015754818/the-right-to-vote-the-impact-of-shelby-county-v-holder-on-voting-rights [https://perma.cc/6CPA-S78W] (describing voter suppression bills enacted after *Shelby County*); P.R. Lockhart, *How* Shelby County v. Holder *Upended Voting Rights in America*, VOX (June 25, 2019), https://www.vox.com/policy-and-politics/2019/6/25/18701277/shelby-county-v-holder-anniversary-voting-rights-suppression-congress [https://perma.cc/8HQF-2L6G] (same).

31. *Brnovich*, 141 S. Ct. at 2355 (Kagan, J., dissenting) (citing Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2145–46 (2015)); *see also* Sarah Childress, *Court: North Carolina Voter ID Law Targeted Black Voters*, PBS (July 29, 2016), https://www.pbs.org/wgbh/frontline/article/court-north-carolina-voter-id-law-targeted-black-voters/ [https://perma.cc/RV9H-BJK4] (describing the history around the enactment of restrictive voting laws in North Carolina following *Shelby County*).

32. Lydia Hardy, *Voter Suppression Post-*Shelby*: Impacts and Issues of Voter Purge and Voter ID Laws*, 71 MERCER L. REV. 857, 858 (2020).

33. Voter purge rates are one example. Across the country, voter purge rates are higher in jurisdictions formerly subject to preclearance (9.8 percent) than in previously uncovered jurisdictions (6.8 percent). *See* Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 1, 2019), https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds [https://perma.cc/55SP-QP26] (evaluating data since 2013).

34. Hardy, *supra* note 32, at 858.

35. *But see* Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359 (2022) (canvassing redistricting decisions in the 2010s); Richard Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365 (2015) (discussing the intersection of race and party in post-*Shelby County* racial gerrymandering claims in Alabama). The reason is because *Shelby County* was decided after the 2010 redistricting cycle. Until now, the full measure of *Shelby County*'s consequences for redistricting were unknown.

36. *See* Shelby County v. Holder, 570 U.S. 529, 571 (2013) (Ginsburg, J., dissenting).

just the three years before *Shelby County*.[37] That number understates the importance of Section 5 because the Justice Department rarely issued formal objections to redistricting changes. Instead, the Justice Department would review submissions and signal to jurisdictions when particular changes would be rejected, causing the jurisdiction to withdraw their proposals.[38] From 1982 to 2005, scholars identified 388 redistricting schemes withdrawn or altered (but not formally rejected) as a result of preclearance.[39] This usually happened through a "More Information Request" (MIR)—a procedure for federal authorities to request additional information about the voting change—after which jurisdictions commonly withdrew the proposed law rather than provide more information.[40] Perhaps most importantly, preclearance created a critical deterrent effect and discouraged states from proposing unlawful maps in the first place.[41] In short, preclearance worked.

To understand why preclearance is critical to ensure fair maps, consider three of the most common redistricting claims: (1) racial vote dilution under the VRA, (2) racial gerrymandering under the federal Constitution, and (3) political gerrymandering under state constitutions.[42] The underlying doctrine reveals the gauntlet that plaintiffs must run to prevail on any of these causes of action.

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37. For the period following the 2010 census, see *Instances Where DOJ Preclearance Was Denied to Proposed Redistricting Plans*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/instances-where-doj-preclearance-was-denied-proposed-redistricting-plans [https://perma.cc/BA8Y-QXSC] (listing thirteen examples of proposed redistricting at the county and municipal level where federal authorities denied preclearance and including the relevant objection letters). The numbers were similar in the preceding redistricting cycle. *See* Payton McCrary, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 314 (2006) (showing that in the post-2000 Census redistricting cycle, the Attorney General denied approval to only fifteen districting plans using the retrogression standard).

38. *See* Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 47 (Ana Henderson ed., 2006) (describing methods through which the DOJ could stop changes without formally objecting).

39. Quantitative analyses of redistricting changes submitted to the Justice Department included wholesale redistricting plans and other related voting changes such as rerouting voting precinct boundaries. *See id*. at 64.

40. Scholars note that "there is considerable variation in the kinds of voting changes impacted by MIRs, compared to that of objections," but redistricting "also resulted in similarly high MIR-induced outcomes, including . . . 198 redistricting changes." *Id*.

41. *See* MARK A. POSNER, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, *in* RACE AND REDISTRICTING IN THE 1990S 80, 94–96 (Bernard Grofman ed., 1998) (describing the "strong deterrent effect" of Section 5).

42. This discussion omits one-person-one-vote claims under the Equal Protection Clause, but those claims share many of the same structural features and similarly involve extensive records. *See* Baker v. Carr, 369 U.S. 186 (1962) (validating equal population challenges under the Equal Protection Clause); Reynolds v. Sims, 377 U.S. 533 (1964) (same). In the modern era, redistricting litigation under *Baker* more commonly centers on eliminating minor population deviations. *See* Luis Fuentes-Rohwer, Baker*'s Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1353 (2002) (arguing bans on small population deviations amount to an

First, racial vote dilution claims require plaintiffs to proffer an immense volume of evidence.[43] Under Section 2, voting processes or procedures may not "have the effect of denying or abridging the right to vote on account of race."[44] This prohibits "packing" and "cracking" voters into districts that prevent minority voters from electing candidates of their choice.[45] Since 1986, the *Gingles* test for "racial vote dilution" has involved three preconditions: (1) Plaintiffs must show that the minority group is sufficiently numerous and compact to constitute a majority in an additional majority-minority district, (2) Plaintiffs must show the minority group is politically cohesive, and (3) Plaintiffs must prove the majority votes sufficiently as a bloc to defeat minority-preferred candidates.[46] In practice, Plaintiffs must proffer alternative districts by relying on demographers and map drawers to meet their burden. If the three *Gingles* preconditions are met, Plaintiffs must then establish that the political process itself is "unequal[ly] open" under the totality of the circumstances.[47] Under *Gingles*, courts assess "equal openness" by looking to nine specific factors—commonly referred to as the Senate Factors—spanning a range of social, political, and economic conditions designed to evince discrimination in the political process.[48] The Senate Factors include histories of voting discrimination; racial appeals in campaigns; and racial disparities in health, wealth, and employment, as well as other factors.[49] The claim is deeply fact-intensive and, as a result, takes considerable time to litigate.

Second, racial gerrymandering claims are likewise difficult to litigate quickly.[50] Substantively, racial gerrymandering claims (also called *Shaw* claims) involve a two-step inquiry.[51] To prevail, Plaintiffs must prove that race was the predominant factor in placing "a significant number of voters within or without

"inflexible straightjacket"). Some advocates may attempt to remedy other more challenging issues, including partisan gerrymandering and race discrimination, through *Baker*.

43. *See* Thornburg v. Gingles, 478 U.S. 30, 31–32 (1986) (describing the elements of a racial vote dilution claim).

44. 52 U.S.C. § 10301.

45. "Packed" districts contain far more minority voters than necessary for minority voters to elect a candidate of their choice; "cracked" districts contain slightly too few minority voters—who are spread across multiple districts—such that that no single district contains a sufficiently large minority population for voters of color to elect a candidate of their choice. *See* Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (Aug. 10, 2021), https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained [https://perma.cc/L5Q9-3HTQ].

46. 478 U.S. at 49–51.

47. *Id.*

48. These "Senate Factors" comprised part of the Senate Report accompanying the 2006 reauthorization of the VRA. The Senate Factors are designed to guide judges in evaluating whether districts are not "equally open" under the totality of the circumstances and are therefore racially dilutive. *See Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/section-2-voting-rights-act [https://perma.cc/J6R9-77Z6] (describing the Senate Factors).

49. *Id.*

50. *See, e.g.*, Cooper v. Harris, 581 U.S. 285 (2017); Alexander v. S.C. State Conf. of the NAACP, 143 S. Ct. 2456 (2023) (mem.) (considering racial gerrymandering claim after *Milligan*).

51. *See Cooper*, 581 U.S. at 290–91 (citing Shaw v. Reno, 509 U.S. 630 (1993)).

a particular district."[52] Here, Plaintiffs may rely on direct or circumstantial evidence of legislative intent.[53] The test for predominance involves extensive discovery into the legislative process, alternative districting proposals, and state demographics.[54] Next, if race did predominate, strict scrutiny applies and the government must prove that the use of race was narrowly tailored to satisfy a compelling interest, such as compliance with the VRA.[55] Both standards are harder for plaintiffs to meet than Section 5 retrogression.

Plaintiffs may also raise intentional racial discrimination claims against redistricting plans under the Equal Protection Clause.[56] These claims ask whether a facially race-neutral law was motivated at least in part because of a discriminatory motive.[57] These claims involve similarly "sensitive" inquiries into discriminatory intent under *Arlington Heights* that consider the historical background of the challenged decision; the specific sequence of events leading up to the challenged decision; departures from normal procedural sequence; the legislative history of the decision; and, of course, the disproportionate impact of the official action—whether it bears more heavily on one race than another.[58] Like *Shaw* claims, intent claims require extensive evidence from the legislative record and are notoriously difficult to litigate.

Third, partisan gerrymandering claims are equally intensive to litigate. The Supreme Court declared partisan gerrymandering claims nonjusticiable in federal court just before the 2020 redistricting cycle.[59] As a result, advocates looked instead to state constitutions. While partisan gerrymandering suits predate the 2020 cycle,[60] the new redistricting era has featured a comparative tidal wave of gerrymandering lawsuits.[61] True, preclearance under the VRA

52. *Id.* (citation omitted).

53. *Id.* at 1464.

54. *See* Bethune-Hill v. Va. State Bd. of Elections, 580 U.S. 178, 191 (2017).

55. *Id.*

56. *See, e.g.*, Greater Birmingham Ministries v. Sec'y of State for Ala., 992 F.3d 1299, 1321 (11th Cir. 2021) (considering an intentional discrimination claim); N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214–15 (4th Cir. 2016) (same).

57. *See McCrory*, 831 F.3d at 220.

58. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977) (describing the non-exhaustive list of factors considered to evince intentional discrimination).

59. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (finding claims that congressional districting plans drawn to favor one political party over another present political questions beyond the reach of the federal courts).

60. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 109 (1986) (rejecting an early partisan gerrymandering claim on the merits but finding it justiciable under the Equal Protection Clause); Vieth v. Jubelirer, 541 U.S. 267 (2004). In *Vieth*, a fractured opinion authored by Justice Scalia held that partisan gerrymandering claims are nonjusticiable. 541 U.S. at 306. However, the Court opined that claims could be justiciable if litigants could proffer a sufficiently clear and workable standard for federal courts to assess partisan vote dilution. *Id.* at 306, 312 (Kennedy, J., concurring). This left the door open to future challenges until, fourteen years later in *Rucho v. Common Cause*, the Court finally held partisan gerrymandering claims nonjusticiable. *See Rucho*, 139 S. Ct. at 2495–96, 2506–07.

61. *See Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST. (Dec. 20, 2021), https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0

screened for discrimination "on account of race" and not partisanship,[62] but racial and partisan motivations are difficult to disentangle in practice.[63] States also have different standards to assess partisan gerrymandering under their respective laws.[64] But the litigation burdens on plaintiffs and lengthy remedial processes that accompany liability are similar.

Two typical examples of redistricting cases—each with an "extremely extensive record"—demonstrate the burden inherent in redistricting litigation.[65] In Alabama, a vote dilution claim involved a seven-day preliminary injunction hearing, seventeen witnesses, eleven illustrative maps, and a 2,000-page transcript—culminating in a decision over 225 pages.[66] In Texas, a racial gerrymandering claim involved 1,300 docket entries, 10,000 transcript pages, and 3,000 exhibits.[67] And why does this matter? Because under Section 2, voters rather than the federal government shoulder the heavy burden of litigation—and that burden is uniquely heavy in redistricting. Redistricting claims are notoriously complex and time-consuming to litigate, making the absence of preclearance after *Shelby County* especially problematic.[68] What's more, voters must run this gauntlet fast enough to secure relief before the election is too close at hand. Against that backdrop, *Purcell* becomes fatal.

[https://perma.cc/9VPB-UML3] (cataloguing redistricting litigation and describing a significant increase in state partisan gerrymandering litigation in the 2020 redistricting cycle relative to 2010).

62. 52 U.S.C. § 10301 (prohibiting discrimination in voting "on account of race or color").

63. *See* Sara Tofighbakhsh, *Racial Gerrymandering after* Rucho v. Common Cause*: Untangling Race and Party*, 120 COLUM. L. REV. 1885 (2020) (describing the challenge courts face when disentangling racial and partisan motivations in redistricting).

64. *Compare* Harper v. Hall, 384 N.C. 292 (2023) (North Carolina) (holding partisan gerrymandering claims nonjusticiable), *with* N.Y. CONST. art. III, § 4(c)(5) (New York) (commanding that "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties").

65. Milligan v. Merrill, 582 F. Supp. 3d 924, 935 (N.D. Ala. 2022).

66. *See id.* at 935–36.

67. *See* Perez v. Abbott, 253 F. Supp. 3d 864, 974 (W.D. Tex. 2017) (Smith, J., dissenting) (involving racial gerrymandering claim). The dissent lamented: "[O]ver 1300 docket entries, including pleadings, lengthy post-trial briefs, reply briefs, supplemental briefs, proposed fact findings, proposed conclusions of law, argument summaries, and Powerpoint presentations from each of the parties in this case (the post-trial briefs and proposed fact findings and conclusions of law from just two of the many parties—Plaintiff Latino Redistricting Task Force and Intervenor United States—total[ed] over 1,000 pages); over 10,000 pages of transcripts (including 6,850 pages of transcripts from the trials in this case, not including the interim plan proceedings or any other hearings, thirteen agreed lay witness depositions entered into evidence totaling almost 1,800 pages, and twelve agreed expert witness depositions entered into evidence totaling almost 1,400 pages); approximately 3,000 exhibits, many of which [were] hundreds of pages long and include[d] numerous lengthy reports, supplemental reports, and rebuttal reports from the twenty-one expert witnesses in this case; as well as numerous disputed proposed deposition excerpts and offers of proof. The relevant case law contain[ed] too many pages to count."

68. *See* J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 433 (2000) (noting a "lack of clarity, coupled with a lack of consensus in the lower courts about how to interpret Supreme Court decisions and the Voting Rights Act" would lead to expensive and time-consuming litigation).

B. The Purcell *Problem*

The *Purcell* Principle is a doctrine of secret and shifting deadlines. Since 2006, it has been an emergent feature in the election law canon but is new to redistricting.[69] The Supreme Court applied *Purcell* in a redistricting case for the first time in 2022.[70] Without preclearance, this deadline doctrine has transformed into a source of virtually insurmountable immunity in redistricting. This Part provides background on *Purcell* and its confused logic and argues that the *Purcell* Principle is unsuited for the modern redistricting era. Ultimately, *Purcell* is an unreasoned departure from current stay jurisprudence—an already undisciplined field of law—and when invoked on the shadow docket, becomes another "empty vessel for unprincipled decision-making."[71] In combination with *Shelby County*, *Purcell* undermines institutional checks on antidemocratic state legislative action. Redistricting immunity is proof of that structural threat.

The history of *Purcell* is a story about the relationship between courts, Congress, and elections. *Purcell v. Gonzalez* involved a challenge to Proposition 200, an Arizona ballot initiative that required proof of citizenship to register to vote and imposed ID requirements on Election Day voters.[72] Plaintiffs alleged that the requirements violated Section 2 of the Voting Rights Act.[73] Plaintiffs sued six months before the November 2006 election and lost in the trial court that September.[74] The Ninth Circuit then *granted* an injunction on October 5, stopping enforcement of Proposition 200 pending appeal. The Supreme Court stayed the Ninth Circuit's order on October 20, allowing Proposition 200 to go into effect, but it did not reach the merits.[75]

Why let Proposition 200 go into effect without reaching the merits? The Supreme Court claimed that when ruling "just weeks before an election," it was "required to weigh . . . considerations specific to election cases."[76] In particular, the Court hypothesized that court orders "can themselves result in voter confusion" and "incentiv[ize voters] to remain away from the polls."[77] Finding

69. *But see* Diaz v. Silver, 932 F. Supp. 462 (E.D.N.Y. 1996) (denying a preliminary injunction to plaintiffs challenging a congressional districting scheme on the grounds that doing so would harm the public interest at least in part because of proximity to the election).

70. *See* Merrill v. Milligan, 142 S. Ct. 879, 880–82 (2022) (Kavanaugh, J., concurring). No other Supreme Court cases directly citing *Purcell* in the redistricting context could be identified.

71. *See* Codrington, *supra* note 11, at 941.

72. Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam) (considering a claim under Section 2).

73. *Id.*

74. The district court denied the preliminary injunction without issuing findings of fact or conclusions of law. *Id.* at 3.

75. *Id.* (noting Election Day was set for November 7, 2006).

76. *Id.* at 3, 4–5 (noting it must weigh those factors in addition to the traditional injunction considerations).

77. *Id.* at 5 (noting that "as an election draws closer, that risk will increase"). Then the Court faulted the Ninth Circuit for not giving "deference to the discretion of the District Court," which denied the preliminary injunction without reasoning, noting that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements." *Id.*

that the "imminence of the election" undermined the ability of courts to provide "clear guidance" to the state, the Court allowed the election to proceed without an injunction "of necessity."[78] Ever since, the *Purcell* Principle has come to stand for a simple proposition: federal courts should not intervene and change election rules at the last minute.

Formally, the *Purcell* Principle cautions federal courts against interfering with elections,[79] but its logic applies with equal force to state judicial decisions. Indeed, state courts have used *Purcell*'s logic to immunize maps when plaintiffs bring claims under state constitutions.[80] And state constitutional claims are often brought in federal court.[81] It makes little difference to a map drawer if immunity is conferred by a federal court or a state court.[82]

Ultimately, *Purcell* is not fit for this moment. The principle was divined from specific circumstances that predate the modern redistricting era. In particular, Proposition 200 was subject to federal preclearance.[83] What's more, the law actually received preclearance. Common sense suggests that Proposition 200 did not strike the court as especially pernicious. After all, the Department of Justice greenlighted it. And voter ID laws had not yet received widespread scrutiny as a tool of voter suppression.[84] Further, the plaintiffs in *Purcell* had no need to rush to court, precisely because Section 5 was still in effect. Indeed, they waited *two years* to sue. And substantively, the Section 2 vote denial claim at

78. *Id.* at 5–6.

79. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (refusing to formally limit state judicial authority to remedy state constitutional violations and discussing *Purcell*); Moore v. Harper, 142 S. Ct. 1089, 1089 (2022) (mem.) (Kavanaugh, J., concurring) (denying stay application of North Carolina Supreme Court decision overturning districts on state constitutional grounds).

80. *See, e.g.*, Harkenrider v. Hochul, 197 N.E.3d 437, 454–55, 454 n.16 (N.Y. 2022) (refusing to apply the *Purcell* Principle itself but still applying the logic of *Purcell* to state court adjudications of state constitutional provisions).

81. State constitutional claims are often brought alongside federal claims in federal court under federal question jurisdiction. However, *Pullman* abstention, *Pennhurst* sovereign immunity, and discretion to decline supplemental jurisdiction sometimes prevent federal judges from deciding state constitutional issues. *See* Michael T. Morley, *Litigating Imperfect Solutions: State Constitutional Claims in Federal Court*, 35 CONST. COMMENT. 401, 425 (2020) (reviewing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)) (stating that *Pullman* abstention and *Pennhurst* sovereign immunity are judicially created doctrines that require resolving state law claims in state court).

82. *See infra* Part III. Removal and abstention doctrine, among other considerations, make federal courts the primary forum for contemporary redistricting litigation.

83. *Purcell*, 549 U.S. at 3 (noting the Justice Department precleared the Arizona law on May 6, 2005). The preclearance regime was struck down in *Shelby County* for violating principles of "equal sovereignty." In particular, the court invalidated Section 4's formula used to determine which jurisdictions must comply with preclearance, nullifying the preclearance process under Section 5 of the VRA. Shelby County v. Holder, 570 U.S. 529, 554–56 (2013).

84. *See* David M. Faherty, *The Post*-Crawford *Rise in Voter ID Laws: A Solution Still in Search of a Problem*, 88 ME. L. REV. 269, 278–85 (2013) (describing the voter ID as a form of voter suppression that emerged in earnest well after 2006).

issue in *Purcell* is an easier matter to litigate compared to a statewide redistricting claim. Now, of course, the rule applies across the board.

1. The Unprincipled Principle

Purcell emerged as a species of stay jurisprudence—a body of law already notorious for its loose standards[85]—and only further muddied the waters. Sometimes *Purcell* operates as a categorical rule. Other times it slots into existing legal frameworks, and when it does, courts cite it in inconsistent places. More concerning, courts disagree about the basic justification for the doctrine, and when courts do give reasons for applying *Purcell*, those reasons mostly ignore the touchstone of all stay jurisprudence: the consequences for the parties on the ground.[86] This Part argues that *Purcell*'s position within stay jurisprudence creates needless confusion and results in inconsistent decisions.

Purcell is typically invoked in one of two circumstances. The first involves stay applications, either to a trial or appellate court. The second involves preliminary injunctions. Courts disagree about whether to analyze *Purcell* under the rubric of a traditional stay decision—that is, as part of the stay analysis that *follows* a preliminary injunction—or whether to inject *Purcell* into the preliminary injunction decision itself. Critically, these approaches involve different legal standards.[87]

First, stay applications. In general, a lower court may stay its own injunction or a higher court may stay a lower court injunction (both pending appeal). The rule, established in *Hilton v. Braunskill*, is well settled.[88] When determining whether to stay an injunctive order,[89] federal courts consider four factors: (1) whether the movant has demonstrated a likelihood of success on the merits; (2) whether the movant is likely to suffer irreparable harm without a stay; (3) whether the balance of hardship to the parties favors issuing a stay; and (4) the public interest.[90] Note that the test is slightly different at the Supreme Court,[91] where the movant must demonstrate four factors: (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant

85. *See* Portia Pedro, *Stays*, 106 CALIF. L. REV. 870, 892 (2018) (arguing stay rules are flexible).

86. *See id.* at 875–82 (describing the stakes of stay determinations).

87. *Cf. infra* Part I.B.2 (discussing the legal standard for stays and preliminary injunctions).

88. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Nken v. Holder, 556 U.S. 418, 434 (2009) (applying the well-settled four-factor *Braunskill* test).

89. Damages orders operate under a different procedure. FED. R. CIV. P. 62(a), (d).

90. *See Braunskill*, 481 U.S. at 776; *see also* Hasen, *supra* note 4, at 433. These are similar but not identical to the preliminary injunction factors. Occasionally, the court quarrels over the precise contours of the doctrine, but those disputes typically center which prong to emphasize. *See* Planned Parenthood v. Abbott, 571 U.S. 1061, 1061 (2013) (mem.) (describing, for example, Justice Scalia's focus on error in the lower court with Justice Breyer's focus on irreparable injury).

91. For stays pending certiorari, relief "is appropriate only in those extraordinary cases" where the moving party "is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; (3) a likelihood that irreparable harm will result from the denial of a stay; and (4) in close cases, that the balance of the equities favors the movant.[92] Only the Supreme Court considers the odds of the full court granting certiorari, and it balances relative harms in "close case[s]."[93] The standard for vacating stays is similar, but there, the Supreme Court emphasizes deference to the lower court.[94]

Purcell deviates from this rule.[95] It is not merely an application of the traditional *Braunskill* balancing test.[96] Instead, it asks, will this injunction take place too close to Election Day? If so, the injunction is stayed. The Supreme Court adopted this approach in Alabama when it held that in elections, the "traditional test for a stay *does not apply*."[97] This categorical approach does not seriously evaluate the underlying facts or merits of the claim.[98] Instead, the Court treats proximity to an election as a threshold matter, not as one factor to balance among many.

Beyond stays, *Purcell* is also invoked in underlying preliminary injunctions (PIs). Instead of considering proximity to an election when deciding whether to stay an injunction, lower courts consider it when deciding whether to issue an injunction at all. The preliminary injunction and stay postures "differ[] significantly" but "federal courts treat [them] similarly."[99]

To secure a PI, plaintiffs must establish (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable harm absent preliminary relief; (3) the balance of equities favors the plaintiff; and (4) an injunction is in the public interest.[100] In both stays and PIs, the "first two factors of the traditional standard are the most critical."[101] The first is the likelihood of success on the

92. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (citing Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers)); *Rostker*, 448 U.S. at 1308 (Brennan, J., in chambers); *see* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES 872, 898–99 (10th ed. 2013) (describing the analysis at the Supreme Court).

93. *Rostker*, 448 U.S. at 1308 (Brennan, J., in chambers).

94. *See* W. Airlines, Inc. v. Int'l Bhd. of Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (emphasizing deference).

95. *See* Hasen, *supra* note 4, at 430 (describing the process to grant and vacate stays and issue injunctions).

96. *See* Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

97. Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (emphasis added) (suggesting a categorial application).

98. *See* Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam) (failing to engage with the merits).

99. Pedro, *supra* note 85, at 889.

100. *See* Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20–21 (2008) (describing the preliminary injunction standard).

101. Nken v. Holder, 556 U.S. 418, 434 (2009); Barber v. Bryant, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken*, 556 U.S. at 434).

merits, where the movant must show more than "mere possibility" of success.[102] The second is irreparable injury, where the movant must show irreparable injury pending appeal, and courts find "irreparable harm" when other remedies like compensatory relief are insufficient.[103] The third factor balances harms among the parties,[104] while the fourth considers the impact on the public interest.[105] The fourth factor is where courts often consider broader election administration.[106]

Purcell also deviates from the preliminary injunction rule.[107] It is not merely an application of the traditional PI factors because, again, *Purcell* asks, will this injunction issue too close to Election Day? If so, courts often deny the PI. For example, a court in Washington considered *Purcell* separately from the PI test.[108] This categorical approach does not evaluate the underlying facts or merits in the way that the PI test requires. Rather, the court treats proximity to an election as a threshold matter.

By contrast, other courts reject that categorical approach and apply the traditional four-factor test. But when courts apply the test, they are confused about where to locate *Purcell* in the analysis. This is especially true in redistricting. In Georgia, a federal district court considered *Purcell* under the balance of equities to the parties out of concern for defendant states' interests.[109] The same in Arkansas.[110] However, in North Dakota, a district court focused on the balance of equities, noting that a remedy was "unworkable without significant cost, confusion, and hardship" (but not mentioning whose

102. Pedro, *supra* note 85, at 888 (noting that courts routinely treat the first two factors as most important); *Nken*, 556 U.S. at 434 ("It is not enough that the chance of success on the merits simply be 'better than negligible'" and "more than a mere 'possibility' of relief is required.").

103. *See*, *e.g.*, Reynolds v. Int'l Amateur Athletic Fed'n, 505 U.S. 1301, 1302 (1992) (Stevens, J.) (granting a stay in a PI, noting "the incomparable importance of winning a gold medal in the Olympic Games" means "a pecuniary award is not an adequate substitute").

104. Holtzman v. Schlesinger, 414 U.S. 1304, 1308–09 (1973) (Marshall, J., in chambers); *see also* Bush v. Gore, 531 U.S. 1046, 1047–48 (2000) (mem.) (Stevens, J., dissenting); SHAPIRO ET AL., *supra* note 92, at 900 ("Even if the applicant can demonstrate irreparable injury, that harm must be balanced against the injury to other parties.").

105. *See Nken*, 556 U.S. at 434 (characterizing the inquiry as identifying "where the public interest lies" (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987))).

106. *See, e.g.*, Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (finding a public interest in avoiding voter confusion).

107. *See* Hasen, *supra* note 4, at 430 (describing the process of granting and vacating stays and issuing injunctions).

108. Palmer v. Hobbs, No. C22-5035RSL, 2022 WL 1102196, at *2 (W.D. Wash. Apr. 13, 2022) (denying motion for preliminary injunction and noting that the court must consider *Purcell* separately from the injunctive considerations).

109. Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 587 F. Supp. 3d 1222, 1240, 1324–26 (N.D. Ga. 2022) ("[A]lthough this Court applies the traditional test employed by the Eleventh Circuit for determining whether a preliminary injunction should issue, it is cognizant of the proposed standard set forth [in Alabama]."). The court mostly discusses the state interests and notes that *Purcell* may affect the public interest.

110. Ark. United v. Thurston, No. 5:20-CV-5193, 2020 WL 6472651, at *4–5 (W.D. Ark. Nov. 3, 2020).

hardship).[111] In Missouri, a district court did not specify where in the analysis *Purcell* should fall.[112] Of course, no matter where *Purcell* falls within the traditional test, when it functionally confers categorical immunity, that balancing is not balancing at all. At best, the Court only considers half of the equation. It prioritizes how late-breaking injunctions impact the state but not how unlawful maps subvert democracy.

The inconsistent doctrinal framework is the first problem, but the second is that the principle lacks a clear underlying justification. After all, why is a last-minute injunction problematic? In *Purcell*, the Supreme Court claimed that late-breaking injunctions risk voter confusion.[113] But other decisions citing *Purcell* were not concerned with voters at all. For example, in *Milligan*, the Court opined that late-breaking injunctions scramble election administration and inconvenience candidates—not voters.[114] The confused reasoning reflects the confused doctrine. Theoretically, voter and candidate confusion stemming from a PI go to the public interest considerations (the fourth factor). On the other hand, state capacity to comply with a last-minute order goes to the balance of the equities (the third factor). Because courts cannot universally discern why delay matters, they cannot settle on where to slot election delay within the law. Confusion begets confusion.

Finally, "deference" under *Purcell* has become one-directional. The Supreme Court emphasized deference to lower courts when it stayed the Ninth Circuit order in *Purcell*, thereby reinstating the trial court's decision to deny relief.[115] In contrast, appellate courts have not often deferred when reviewing lower court decisions to issue injunctions. [116] Deference should cut both ways: reviewing courts should defer to lower courts when they issue injunctions on the same terms as when they deny them.

Courts applying *Purcell* overlook its most important consequence: how it traps voters in an unlawful election system. At stake in redistricting is the "opportunity for equal participation of all voters," and "that opportunity can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[117] Scholars have argued that "[i]n general, the Court overstate[s] voter confusion . . . vis-à-vis other democratic legitimacy concerns."[118] As this Article

111. Walen v. Burgum, No. 1:22-cv-31, 2022 WL 1688746, *5 (D.N.D. May 26, 2022) (finding the "balance of the equities prevents the Court from modifying the procedures by which the election is conducted" and citing *Purcell*).

112. Berry v. Ashcroft, No. 4:22-CV-00465, 2022 WL 2643504, at *2–3 (E.D. Mo. July 8, 2022).

113. Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006).

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

115. *Purcell*, 549 U.S. at 5 (vacating the Ninth Circuit order and stating, "It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court").

116. *See, e.g.*, *Milligan*, 142 S. Ct. at 880 (not discussing deference to the trial court).

117. Rucho v. Common Cause, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting) (quotations omitted) (citing Reynolds v. Sims, 377 U.S. 533, 555, 566 (1964)).

118. *See* Codrington, *supra* note 11, at 953.

makes clear, redistricting immunity has substantive and severe consequences for American democracy.

2. The Shadow Principle

Beyond the substantive consequences, the procedural problems with *Purcell* are worse still. The Supreme Court handles *Purcell* decisions on the shadow docket—that is, without briefing, without argument, and often without explanation.[119] The Court uses the shadow docket for "procedural matters, such as scheduling and issuing injunctions," sometimes even releasing decisions in the middle of the night.[120] "These rulings come both literally and figuratively in the shadows" due to their "unpredictable timing, . . . lack of transparency, and . . . usual inscrutability."[121] Shadow docket decisions are becoming more common[122] and generating greater scrutiny.[123] And as Justice Kagan lamented, "every day [they] become[] more unreasoned, inconsistent and impossible to defend."[124]

Consider the mechanics. Under the rules,[125] litigants must first request a stay from a lower court, and further requests go to the appropriate circuit Justice.[126] Acting alone, that Justice can grant or deny the application for a stay, vacate a stay, or refer the stay application to the full Court.[127] The Justice may

119. Professor Steve Vladeck quantified the use of the shadow docket. He tallied the emergency orders issued by the Roberts Court by term and found that, in recent years, shadow docket decisions increased nearly three-fold. *See Texas' Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing before the Sen. Comm. on the Judiciary*, 117th Cong. 5–6 & tbl.1 (2021) [hereinafter *Sen. Judiciary Comm. Hearing*] (statement of Stephen I. Vladeck, Professor, Univ. of Tex. Sch. of L.), https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [https://perma.cc/4RYA-TTF2].

120. Harry Isaiah Black & Alicia Bannon, *The Supreme Court "Shadow Docket,"* BRENNAN CTR. FOR JUST. (July 19, 2022), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket [https://perma.cc/A4BR-GPVL].

121. *Sen. Judiciary Comm. Hearing*, *supra* note 119, at 2–3 (statement of Stephen I. Vladeck).

122. *Id.*; David Leonhardt, *Rulings Without Explanations*, N.Y. TIMES (Sept. 3, 2021) https://www.nytimes.com/2021/09/03/briefing/scotus-shadow-docket-texas-abortion-law.html [https://perma.cc/PZ8D-TRNL] (arguing that the Supreme Court's six Republican-appointed Justices are driving the growth of the shadow docket).

123. Stephen I. Vladeck, *Roberts Has Lost Control of the Supreme Court*, N.Y. TIMES (Apr. 13, 2022), https://www.nytimes.com/2022/04/13/opinion/john-roberts-supreme-court.html [https://perma.cc/TMV3-LNW4] (describing "strident dissents" from the Court's liberal Justices on the growth of the shadow docket).

124. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

125. "The Court's formal rules describe only the mechanics of seeking stays and other emergency relief and not the substantive standards of review or any requirement of an explanation." Hasen, *supra* note 4, at 430.

126. *See* SUP. CT. R. 21 ("Motions to the Court"); SUP. CT. R. 22 ("Applications to Individual Justices"); SUP. CT. R. 23 ("Stays"); SHAPIRO ET AL., *supra* note 92, at 872.

127. *See* SUP. CT. R. 23(1); 28 U.S.C. § 2101(f); All Writs Act, 28 U.S.C. § 1651(a); *see also* Nken v. Holder, 556 U.S. 418, 426 (2009) (noting that the All Writs Act authorizes federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); SUP. CT. R. 22(5) ("A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination."); Pedro, *supra* note 85, at 884–85. The circuit

do the same even if a matter is only pending review in a court of appeals and not a writ of certiorari.[128] If referred to the full Court, the Justices decide by a majority vote. If denied, the movant can renew the stay application by applying to another Justice,[129] but this practice is disfavored and the full Court almost never grants renewed applications.[130] Critically, the Justices decide stays without argument.[131] Individual Justices "typically consider stay determinations to be 'in-chambers' work," although they "very rarely write in-chambers opinions."[132]

The process is not much better at the circuit level. There, a losing party must move for a stay,[133] and the party losing the stay determination can appeal or submit a new stay request to the court of appeals.[134] A panel of appellate judges considers the issue *de novo* and decides by majority vote.[135] In the same way, this process occurs without oral argument and typically ends without a reasoned decision.[136] This opacity and subjectivity has compelled some scholars to label stay applications as "lawless" in a way that "allows the federal appellate system's tail to wag the dog."[137]

The process also results in inconsistent decisions. In 2022 alone, courts adopted wildly different timelines when assessing how close is too close to an election to issue an injunction. In *Purcell*, 33 days was too close to the Arizona election.[138] But "too close" to the election meant 81 days in Arkansas,[139] 82 days

Justice approach is designed to prevent "justice shopping." Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1172–73 (2008).

128. *See* SUP. CT. R. 23; SHAPIRO ET AL., *supra* note 92, at 881–82.

129. Gonen, *supra* note 127, at 1176–77.

130. *Id.* at 1177; *see also* SHAPIRO ET AL., *supra* note 92, at 873–74, 876 ("The general policy is to refer the renewed application to the full Court for action unless time does not permit."); *id.* at 892 ("[I]t is also the present practice for the Justice to whom a resubmission has been transmitted to refer the application to the entire Court for action."). Even so, "Almost uniformly the reapplications have been denied." *Id.*

131. SHAPIRO ET AL., *supra* note 92, at 876 (noting that the last hearing on a stay was in 1980).

132. Pedro, *supra* note 85, at 886.

133. FED. R. APP. P. 8(a)(1). Parties may not apply to stay a lower court's injunctive order to the Supreme Court without first applying for a stay to the lower court, except in the most extraordinary circumstances. SUP. CT. R. 23; *see also* FED. R. CIV. P. 62(c) (governing requests for civil stays of judgments pending appeal in federal district courts).

134. FED. R. APP. P. 8(a)(2)(A).

135. FED. R. APP. P. 8(a)(2)(D) (providing for review by the panel or "in an exceptional case" by a single judge when "time requirements make [the panel procedure] impracticable"); *see, e.g.*, Frank v. Walker, 766 F.3d 755, 756 (7th Cir. 2014) (mem.) (considering a motion for a stay of a district court's order *de novo* because it did not consider the lower court opinion).

136. *See* FED. R. APP. P. 8(a)(2)(D).

137. Pedro, *supra* note 85, at 928.

138. Purcell v. Gonzalez, 549 U.S. at 4–6 (involving photo ID).

139. Ark. United v. Thurston, No. 5:20-CV-5193, 2020 WL 6472651, at *5 (W.D. Ark. Nov. 3, 2020) (involving voter assistance rules).

in Georgia,[140] and 145 days in Florida.[141] The same inconsistency shows up in redistricting. In Alabama, 106 days was too close.[142] But the Supreme Court did not stay injunctions against maps in North Carolina—issued in February of an election year despite a mid-March primary[143]—or in Virginia—issued in January of an election year despite a mid-June primary.[144] In short, inconsistent decisions abound.[145]

Ultimately, *Purcell* is unfit for this moment and poses structural problems for democracy. First, *Purcell* should be understood as a product of its facts: a case involving plaintiff delay, a sparse factual record, and a popular ballot initiative that had already survived preclearance. That case sharply departs from the redistricting challenges brought urgently and routinely across the United States after 2020. Second, *Purcell* should be understood as a product of its time: a time before the modern redistricting era, when preclearance stopped the most egregious redistricting schemes. Combined, *Shelby County* and *Purcell* produce enormous practical consequences that pose structural problems for American democracy.

II.
REDISTRICTING IMMUNITY

Redistricting immunity—perhaps the most important development in redistricting litigation in half a century—lies at the intersection of *Purcell* and *Shelby County*. Part II introduces redistricting immunity to the election law literature and explains how it materialized in the 2020 redistricting cycle. Redistricting immunity works by imposing time barriers that prevent plaintiffs from stopping unlawful redistricting schemes. Case studies from Alabama, Georgia, and Wisconsin illustrate how redistricting immunity functions in individual lawsuits, and suggest that state legislators are aware of this phenomenon and poised to capitalize on it. Finally, Part II proffers reasons for redistricting delay. Across the country, most states lack rigid redistricting timelines. As a result, partisan standoffs and untimely census data push back

140. *In re* Georgia Senate Bill 202, 622 F. Supp. 3d 1312 (N.D. Ga. 2022) (involving line warming). Line warming refers to providing things like water and food to voters waiting in to vote. *Line Warming*, DICTIONARY.COM (Nov. 3, 2022), https://www.dictionary.com/e/politics/line-warming/ [https://perma.cc/25JL-N5LD].

141. League of Women Voters of Fla. v. Fla. Sec'y of State, 32 F.4th 1363, 1371–75 (11th Cir. 2022) (involving line warming).

142. *See* Alabama case study, *infra* Part II.B.1.

143. *See* Harris v. McCrory, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *stay denied*, 577 U.S. 1129 (2016).

144. *See* Personhuballah v. Alcorn, 155 F. Supp. 3d 552 (E.D. Va. 2016), *stay denied*, 577 U.S. 1125 (2016).

145. Caroline Sullivan, *The Purcell Principle's Big Year*, DEMOCRACY DOCKET (Dec. 19, 2022), https://www.democracydocket.com/analysis/the-purcell-principles-big-year/ [https://perma.cc/28VH-F5K7] (arguing that *Purcell* is now a "cheap way" for courts to reverse lower courts on partisan grounds).

legislative redistricting until maps are insulated from legal challenge. If left uncorrected, redistricting immunity is rife for exploitation following the 2030 census.

A. Redistricting Immunity After 2020

New litigation data provide a snapshot of redistricting across the country.[146] Following the 2020 redistricting cycle, at least seventy-three cases challenged legislative or congressional maps across twenty-seven states.[147] Across the country, *Shelby County* and *Purcell* completely foreclosed relief in seven states,[148] including Alabama, Georgia, Louisiana, Missouri, North Dakota, Tennessee, and Washington.[149] In Congress, redistricting immunity shielded the legislative districts of fifty-five representatives.[150] But its effect is even bigger. Even without a court order citing *Purcell*, it seems reasonable to speculate that plaintiffs may have waited until the next election to sue or refrained from suing at all. Likewise, even without citing *Purcell*, courts may have denied relief out of fear for the consequences for election administration.

Data from 2020 show many courts immunized maps well over 100 days before the primary election. In fact, 121 days was too close in Tennessee, 112 days was too close in Washington, and 156 day*s* was too close in Louisiana. On average, courts immunized maps 91 days before the election.[151]

Plaintiffs wasted precious little time before suing. Often, plaintiffs filed complaints immediately—sometimes on the very day maps were enacted. On average, when the Court invoked *Purcell*, only 21 days had elapsed between the

146. This includes litigation filed after decennial redistricting began, but before November 8, 2022. Some lawsuits were filed after that date. *See, e.g.*, Complaint for Declaratory Judgment and Injunctive Relief, Miss. State Conf. of the NAACP v. State Bd. of Election Comm'rs, No. 3:22-cv-734-DPJ-FKB (S.D. Miss. Dec. 20, 2022) (challenging state legislative maps under the VRA). Cases filed after the general election are excluded here. However, redistricting immunity may have caused plaintiffs to wait to sue until after 2022.

147. Of those states, seventeen encountered partisan gerrymandering claims. Eighteen encountered some form of race discrimination claim. Of those eighteen, thirteen defended racial vote dilution claims under Section 2, thirteen defended *Shaw* claims, and nine defended intentional discrimination claims. Many states faced multiple claims simultaneously. For a picture of this litigation, see BRENNAN CTR. FOR JUST., *supra* note 61.

148. *See infra* Figure 1. *See also* Ally Mutnick, *Judges Take Over Drawing Dozens of House Districts—And Throw Dems a Bone*, POLITICO (Feb. 4, 2022), https://www.politico.com/news/2022/02/04/judges-take-over-redistricting-states-00005500 [https://perma.cc/6AC7-J3K8] (noting "state and federal courts will direct the drawing of some 75 congressional districts in at least seven states").

149. *See infra* Figure 1.

150. Alabama (seven); Georgia (fourteen); Louisiana (six); Missouri (eight); North Dakota (one); Tennessee (nine); Washington (ten). *See Apportionment of Seats in the U.S. House of Representatives and Average Population per Seat: 1910 to 2020*, U.S. DEP'T OF COM., https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-data-table.pdf [https://perma.cc/NH3D-B3B7].

151. This is the average time from decision to primary across Alabama, Georgia, Louisiana, Missouri, North Dakota, Tennessee, and Washington.

time maps were enacted and when plaintiffs filed suit.[152] Without North Dakota, that average shrinks below 9 days. In Georgia, Louisiana, and Washington, no time had elapsed between lawmakers enacting maps and plaintiffs filing suit.[153]

Courts decided these redistricting cases on incredibly compressed timelines, leaving little room for further acceleration. Recall that redistricting litigation is especially rigorous—often involving immense factual records. Nonetheless, when courts found elections were too close at hand, they issued decisions an average of just 84 days after a complaint was filed.[154] That is fast, but many courts moved even faster. Figure 1 captures these data.[155]

Figure 1

	Maps enacted	Complaint filed	Trial court decision	Primary date	Days to sue	Maps to decision	Decision to primary
AL[156]	11/4/21	11/15/21	1/24/22—PI stayed	5/24/22	11 days	82 days	121 days
GA[157]	12/30/21	12/30/21	2/28/22—no PI	5/24/22	0 days	61 days	86 days
LA[158]	3/30/22	3/30/22	6/6/22—PI stayed	11/8/22	0 days	69 days	156 days
MO[159]	5/18/22	5/27/22	7/8/22—no PI	8/2/22	9 days	52 days	26 days
ND[160]	11/11/21	2/16/22	5/26/22—no PI	6/14/22	98 days	197 days	20 days
TN[161]	2/7/22	3/11/22	4/6/22—no PI	8/4/22	33 days	59 days	121 days
WA[162]	2/8/22	1/19/22	4/13/22—no PI	8/2/22	0 days	65 days	112 days

Immunity begets immunity. In *Milligan*, the Supreme Court stayed a PI of an Alabama map that likely violated federal law because of proximity to

152. This is the average time from map enactment to complaint filing across Alabama, Georgia, Louisiana, Missouri, North Dakota, Tennessee, and Washington.

153. For example, plaintiffs filed before maps were enacted and later amended their complaints, or sued on the same day. *See infra* Figure 1.

154. This is the average time from complaint to initial decision across Alabama (70 days), Georgia (60 days), Louisiana (68 days), Missouri (42 days), North Dakota (99 days), Tennessee (26 days), and Washington (84 days). *See* Figure 1.

155. A note on methodology: The data below capture the day that maps were enacted, complaints filed, injunctions issued, and primary elections held—permitting inferences about the length of time litigants need to avoid immunity. Where a higher court later reversed or stayed an injunction, the timing of the initial injunction remains the relevant benchmark (because at that point the remedial process had begun). Further, this treats the "deadline" for *Purcell* as the primary election date. While other deadlines are relevant (e.g., candidate filing), other deadlines vary by state and are often flexible. Thus, the primary election date is the most appropriate comparator.

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

157. Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 587 F. Supp. 3d 1222, 1235, 1321 (N.D. Ga. 2022).

158. Robinson v. Ardoin, 605 F. Supp. 3d 759, 768, 852–56 (M.D. La. 2022) (granting injunctive relief despite *Purcell*).

159. Berry v. Ashcroft, No. 4:22-CV-00465, 2022 WL 2643504, at *1–3 (E.D. Mo. July 8, 2022) (dismissing the claim and citing *Purcell*).

160. Walen v. Burgum, No. 1:22-cv-31, 2022 WL 1688746, at *1–2 (D.N.D. May 26, 2022).

161. Moore v. Lee, 644 S.W.3d 59, 62, 65 (Tenn. 2022) (citing *Purcell*).

162. Palmer v. Hobbs, No. C22-5035RSL, 2022 WL 1102196 (W.D. Wash. Apr. 13, 2022) (denying motion for preliminary injunction and citing *Purcell*).

candidate filing deadlines and the primary election.[163] Then a federal district court in Georgia cited *Milligan*: "Although . . . not controlling, this Court would be remiss if it ignored [the Supreme Court's] conclusions."[164] Then a Tennessee court cited the Georgia district court: it claimed moving the candidate qualifying date to "any other date later in the election cycle, will . . . compromise the ability to timely and accurately prepare for the upcoming elections."[165] Similarly in Missouri, a trial court noted that its timeline was shorter than *Milligan*'s, and at that point, "Missouri's primary elections [were] in less than one month and multiple key deadlines [had] already passed."[166] All of these decisions invoked *Purcell* and immunized maps, even though plaintiffs proved a likelihood of success on the merits and irreparable harm.[167]

B. Case Studies

Litigation schedules across three case studies in Alabama, Georgia, and Wisconsin reveal that courts ruled on redistricting challenges as quickly as possible, but their best was not fast enough. In Alabama and Georgia, litigation timelines were highly compressed despite the fact that racial vote dilution and racial gerrymandering claims are notoriously difficult to litigate. But voters could not escape the trap of immunity.

1. Alabama

Alabama provides a clear example of the unforgiving and unrealistic timelines in this new era of redistricting immunity.

Black voters in Alabama brought racial gerrymandering and VRA Section 2 claims against Alabama's congressional map in 2021.[168] Plaintiffs moved at breakneck speed, suing a mere 11 days after the state legislature enacted the 2021 map. The parties exchanged an enormous amount of discovery,[169] completed one thousand pages of briefing,[170] and litigated a seven-day hearing that involved seventeen witnesses and eleven illustrative maps, generating a two-thousand-

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

164. Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 587 F. Supp. 3d 1222, 1239–40 (N.D. Ga. 2022).

165. *Moore*, 644 S.W.3d at 65 (cleaned up).

166. Berry v. Ashcroft, No. 4:22-CV-00465, 2022 WL 2643504, at *3 (E.D. Mo. July 8, 2022).

167. *See, e.g.*, *Raffensperger*, 587 F. Supp. 3d at 1320 (finding a likelihood of success on the merits of plaintiffs' Section 2 claim and irreparable harm).

168. While 27 percent of Alabama's population is Black, only one of seven districts was majority-minority under the redistricting law. *See* Caster v. Merrill, No. 2:21-cv-1536-AMM, 2022 WL 264819, at *1, *4 (N.D. Ala. Jan. 24, 2022) (raising both statutory and constitutional claims). "[L]ess than one-third of Alabama's Black population resides in a majority-Black district, while 92 percent of Alabama's non-Hispanic white population resides in a majority-white district." *Id.* at *39.

169. Singleton v. Merrill, 582 F. Supp. 3d 924, 942 (N.D. Ala. 2022).

170. *Id.* at 936 (noting that briefs in the litigation totaled four hundred pre-hearing and six hundred post-hearing pages).

page transcript.[171] The court released a unanimous 125-page decision just 12 days later.[172] From beginning to end, only 70 days had elapsed. The district court released its decision 121 days before the primary election. It then directed the Alabama legislature to pass a remedial map within 14 days—or else the court would retain a special master to do so.[173] Just 4 days before that deadline, the Supreme Court stayed the preliminary injunction on the shadow docket.[174] Accordingly, Black Alabamians were unable to sustain a preliminary injunction for the 2022 election—and forced to vote under maps that were likely unlawful—because, according to the Supreme Court, 121 days from injunction to election is not enough time.[175] *Figure 2* provides a timeline.

Figure 2

Alabama redistricting litigation timeline	
Alabama receives census data[176]	Aug. 12, 2021
Legislature begins redistricting process[177]	Oct. 29, 2021
Alabama enacts congressional map[178]	Nov. 4, 2021
Plaintiffs file complaint[179]	Nov. 15, 2021
Plaintiffs win PI on expedited schedule[180]	Jan. 24, 2022
Supreme Court stays the preliminary injunction	Feb. 7, 2022
Court-imposed deadline for new maps (stayed)	Feb. 11, 2022
Primary early voting begins (absentee only)[181]	Mar. 30, 2022

171. *Id.*

172. The seven-day hearing started on January 4, 2022, and concluded January 12. The order was released on January 24. *Id.* at 943.

173. *Caster*, 2022 WL 2643504, at *3; *see also id.* at *82 ("[W]hen a federal court finds that a redistricting plan violates federal law . . . whenever practicable, '[the court should] afford a reasonable opportunity for the legislature to . . . adopt[] a substitute measure.'") (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539–40 (1978)).

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

175. *See id.* at 880–81 (Kavanaugh, J., concurring).

176. *2020 Census Redistricting Data Files Press Kit*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/newsroom/press-kits/2021/2020-census-redistricting.html [https://perma.cc/VW4N-486Y] (describing date of data release).

177. *See Milligan*, 142 S. Ct. at 888 (Kagan, J., dissenting). This date for the start of Alabama's redistricting process is a conservative estimate—meaning the earliest possible date—because the legislature began considering maps within less than a week of November 4, 2022 (election day). *See* Mary Sell, *Lawmakers Begin Special Session on Redistricting*, ALA. DAILY NEWS (Oct. 29, 2021), https://aldailynews.com/lawmakers-begin-special-session-on-redistricting/ [https://perma.cc/8AYJ-2KR7].

178. Greg Giroux, *Alabama Governor Signs New Congressional Map Favoring GOP*, BLOOMBERG GOV'T (Nov. 4, 2021), https://about.bgov.com/news/alabama-legislature-approves-new-congressional-district-map/ [https://perma.cc/5ZJ8-M223]. For the text of the bill, see H.B. 1, 2021 Leg., 2d Special Sess. (Ala. 2021) (codified at ALA. CODE § 17-14-70 (2021)).

179. As the district court noted in its preliminary injunction order, plaintiffs "commenced their lawsuits within hours or days of the enactment of the Plan." Caster v. Merrill, No. 2:21-cv-1536-AMM, 2022 WL 264819, at *79 (N.D. Ala. Jan. 24, 2022).

180. The court expedited proceedings. The State requested the only motion to delay, which the court denied. *Id.*

181. The state has leeway to modify this date. *Id.* at *53.

Primary election day[182]	May 24, 2022
Primary runoff day	June 21, 2022
General election day[183]	Nov. 8, 2022
Complaint → preliminary injunction (PI)	70 days
PI → start of primary absentee voting	66 days
PI → primary election day	121 days

It is unclear how the litigation could have moved more quickly. Plaintiffs evaluated the districts, identified infirmities, proposed new districts, and proffered facts relevant to the nine Senate factors—factors that span all manner of historical and contemporary social conditions—in just 11 days.[184] Moreover, the district court consolidated related claims and adopted an expedited schedule. In fact, Alabama made the only motion to delay, which the court denied.[185] Further, it is hard to imagine that the court could have written its 125-page decision any more quickly.[186] In short, everything went right for the plaintiffs to obtain relief quickly—leaving 121 days before the primary election. But this was not quick enough: according to the Supreme Court, 121 days from injunction to primary election is too close.[187]

As a matter of common sense, that 121-day timeline strains credulity. And even if credible, plaintiffs face an impossible task. Discriminatory districts are immune, rights are without remedy, and Black Alabamians are without representation.

2. Georgia

Georgia voters also brought racial vote dilution challenges against congressional and state legislative districts, but despite moving at breakneck pace, *Purcell* created an impossible obstacle.[188] Plaintiffs sued immediately after the legislature enacted the maps and litigated the preliminary injunction on a

182. *See* ALA. CODE § 17-13-3(a) (2022). Alabama effectively established a deadline of January 28, 2022, for candidates to qualify with major political parties to participate in the primaries. *See* ALA. CODE § 17-13-5(a) (2022).

183. *Alabama Votes, Upcoming Elections*, ALA. SEC'Y OF STATE, https://www.sos.alabama.gov/alabama-votes/voter/upcoming-elections [https://perma.cc/98FP-5Y8J].

184. *See supra* Figure 2 (citing *Caster*, 2022 WL 264819).

185. Merrill v. Milligan, 142 S. Ct. 879, 887 (2022) (mem.) (Kagan, J., dissenting) (describing the district court's expedited timeline); Singleton v. Merrill, 582 F. Supp. 3d 924, 941 (N.D. Ala. 2022) (describing the court's claim consolidation).

186. The seven-day hearing started on January 4, 2022, and concluded January 12. The order was released on January 24. *Id.* at 943 (granting preliminary injunction twelve days after the hearing).

187. *See Milligan*, 142 S. Ct. at 880–81.

188. Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 587 F. Supp. 3d 1222, 1235 (N.D. Ga. 2022).

compressed timeline.[189] And these plaintiffs prevailed. In Georgia, 33 percent of the voting-age population is Black, but only two of fourteen districts were majority-minority under the new scheme.[190] Legislative districts were diluted by a similar margin.[191] Like in Alabama, Black voters in Georgia proved that the map likely violated federal law,[192] but the map remained in place—immune from challenge for the 2022 election.

Figure 3

Georgia redistricting litigation timeline	
Legislature submits congressional plans to Governor	Nov. 30, 2021
Governor enacts state legislative and congressional map	Dec. 30, 2021
Plaintiffs file complaint (congressional)	Dec. 30, 2021 and Jan. 7, 2022
Plaintiffs file complaint (state legislature)	Dec. 30, 2021 and Jan. 11, 2022
Preliminary injunction hearing (expedited schedule)[193]	Feb. 7–14, 2022
Supreme Court stays Alabama map in *Milligan*	Feb. 7, 2022
Plaintiffs denied preliminary injunction[194]	Feb. 28, 2022
Primary early voting begins	May 2, 2022
Absentee ballots for overseas voters (postmark deadline)	May 9, 2022
Primary election day[195]	May 24, 2022
Primary runoff day	June 21, 2022
General election day	Nov. 8, 2022
Complaint → preliminary injunction decision	48 days
PI decision → start of primary absentee voting	63 days
PI decision → primary election day	85 days

This time, the Georgia district court looked to the Supreme Court's stay decision in Alabama, and although not binding, the Court found the analogous

189. *Id.*

190. This is an increase since 2010. In 2010, the Black population was 31.53 percent and during the following decade, the Black population increased to over 33 percent—an increase of almost half a million people. During the same time, Georgia's white population shrank. *Id*. at 1253–55.

191. *Id.* at 1293–94 (finding a likely Section 2 violation for state legislative districts under the *Gingles* preconditions and the Senate Factors).

192. Plaintiffs brought claims against state legislative and congressional maps. In particular, the final two complaints challenging the congressional maps were filed with the court on January 7 and January 11, less than two weeks after the new redistricting plans were signed into law. *Id*. at 1235.

193. *Raffensperger*, 587 F. Supp. 3d at 1237.

194. *Id.* at 1327.

195. *Id.* at 1321 ("[T]he election timeline is tight in a normal year, but it is even more challenging this year because of the delayed release of the 2020 Census data and an earlier-than-usual general primary, currently scheduled for May 24, 2022.").

Purcell timeline highly persuasive.[196] Unlike in Alabama, the Georgia court did not adopt a categorial approach to *Purcell* but instead applied "the traditional test . . . for determining whether a preliminary injunction should issue."[197] *Purcell* fell under the balancing harms and public interest factors, but the only factor cutting against issuing the preliminary injunction was timing—plaintiffs won on the merits and proved the possibility of irreparable harm.[198]

Defendants raised *Purcell* arguments by pointing to minor election-related deadlines as evidence that new maps would impose complex technical burdens.[199] For example, Georgia cited the earliest date candidates may circulate nominating petitions as an important deadline.[200] Georgia argued that moving the candidate qualifying date was possible but "risk[ed] the accuracy of the primary" because new maps require "building ballot combinations, proofing draft ballots, and preparing ballots for printing."[201] The state complained that election workers had already completed some of those tasks,[202] and starting again would waste their efforts.[203] Defendants also gesticulated toward "voter confidence" and concluded that new maps would cause "massive upheaval."[204] As support, Georgia cited poll worker availability, electrical power needs, and the fact that "churches have often scheduled Vacation Bible School around the planned election dates."[205] Those arguments proved persuasive.[206]

Georgia reveals three lessons about *Purcell* and redistricting immunity. First, courts pay attention to *Purcell* decisions elsewhere, even if those decisions

196. *See id.* at 1239–40 ("Although . . . not controlling, this Court would be remiss if it ignored [the Supreme Court's] conclusions. First, even dicta from the Supreme Court carries strong persuasive value. . . . Second, although the Supreme Court did not . . . explain[] its reasoning . . . it is cognizant of the proposed standard . . . and that the State of Georgia has already begun the process of preparing for elections to take place. . . .").

197. *Id.* at 1240.

198. *See id.* at 1233–34 ("[T]he Court finds that while the plaintiffs have shown that they are likely to ultimately prove that certain aspects of the State's redistricting plans are unlawful, preliminary injunctive relief is not in the public's interest because changes to the redistricting maps at this point in the 2022 election schedule are likely to substantially disrupt the election process.").

199. *Id.* at 1323 (arguing that adopting new legislative maps would require assigning voters to new districts, printing precinct cards, and proofing ballots).

200. *See* GA. CODE ANN. § 21-2-170(e) (2023) (noting that the earliest date to circulate a nominating petition for the 2022 General Election was January 13, 2022); *see also Raffensperger*, 587 F. Supp. 3d at 1321–22 (noting the deadline for setting polling places outside precinct boundaries was February 23, 2022).

201. *Raffensperger*, 587 F. Supp. 3d at 1325.

202. *Id.* at 1239–40.

203. For example, local election officials had already begun "updating street segments in Georgia's voter registration database." *Id*. at 1322 (lamenting "evidence that it took Fulton County four weeks to update its street segments"). Further, "Once a county has entered the data-entry/redistricting module, the county registrar is prevented from engaging in normal activity in the voter registration system, such as adding new voters." *Id*. As a result "[c]ounty registrars generally need several weeks to complete the reallocation process for voters in their particular counties." *Id*.

204. *Id.* at 1323.

205. *Id.* at 1324.

206. *Id.*

are not precedential. In this respect, redistricting immunity is not the isolated product of a particular state's calendaring. It is a reality that proliferates across jurisdictions. Second, courts benefit from adversarial litigation where voters can interrogate state defendants' *Purcell* arguments. Third, adversarial litigation can exacerbate redistricting immunity and incentivize problematic behavior. In particular, defendants know that complicating election administration or inventing artificial cutoffs can insulate maps from challenge. Thus, *Purcell* litigation creates another pathway for states to immunize otherwise illegal maps.

3. Wisconsin and Selective Immunity

Wisconsin reveals another problem: selective immunity. Before Wisconsin, redistricting immunity was only used to stop voters from remedying discriminatory districts. Wisconsin was the opposite: the legislature had added a majority-minority district but when opponents sued shortly before the election, the U.S. Supreme Court struck down the new map. Thus, the Court stopped a map that would have remedied race discrimination from going into effect for the 2022 midterms. This time, immunity was nowhere to be found.

Curiously, the Wisconsin timeline approximates the timeline in Alabama. In November 2021, the Wisconsin legislature came to an impasse on redistricting and kicked the issue to the Wisconsin Supreme Court. The court selected a map that would have added a Black-majority district on March 3, 2022, when the primary was 159 days away.[207] Twenty days later, the U.S. Supreme Court overturned the Wisconsin map in a shadow docket decision and ordered new districts because, the Court speculated, Wisconsin may have impermissibly considered race when creating the additional majority-minority district.[208] The Supreme Court saw no *Purcell* issue when striking down a map designed to create fair political power for Black voters, even though the primary election was a mere 139 days away.

The Supreme Court's methodology adds even more inconsistency to the *Purcell* analysis. In Wisconsin, the Supreme Court calculated the time from the injunction to the primary election (August 9). But in Alabama, the Supreme Court calculated the time from the injunction to the start of absentee balloting—a far earlier date in both Alabama and Wisconsin.[209] So what happens when we compare timelines apples to apples? In Wisconsin, the primary election was 139 days away from the injunction—just 18 days longer than in Alabama (and shorter

207. Patrick Marley, *Wisconsin Supreme Court Picks Democratic Gov. Tony Evers' Maps in Redistricting Fight*, MILWAUKEE J. SENTINEL (Mar. 23, 2022), https://www.jsonline.com/story/news/politics/2022/03/03/wisconsin-supreme-courts-picks-evers-maps-redistricting-fight/9363175002/ [https://perma.cc/FT4T-45FM].

208. Wis. Legislature v. Wis. Elections Comm'n, 595 U.S. 398, 401 (2022) (per curiam).

209. The Wisconsin start of early voting was July 26, and the beginning of absentee balloting is even earlier. *See Deadlines for the August 9, 2022 Partisan Primary*, MYVOTE WIS., https://web.archive.org/web/20220725063115/https://myvote.wi.gov/en-us/Voter-Deadlines (providing dates regarding absentee balloting).

than in Louisiana).[210] Given the time discrepancy, it makes little sense for the result in Wisconsin to be different. Selectivity does not mitigate the problem of redistricting immunity. It exacerbates it.

C. Drivers of Delay as Determinants of Immunity

Redistricting delay drives redistricting immunity.[211] *Shelby County* and *Purcell* ensure that when a state delays its redistricting timeline near an election, those maps become immune—no matter the reason for delay. This Part dissects three primary reasons for delay: state statutory design, legislative gridlock, and the census. The upshot is that most states have leeway to push back redistricting calendars as they wish, while legislative gridlock and untimely census data slow the redistricting process further. Under the status quo, states have both the ability and incentive to delay redistricting as a means to escape liability. These drivers of delay are both structural and circumstantial; disentangling them is critical to identify where and how legislative interventions can prevent immunity.

1. State Timelines and Statutory Design

Most states have wide discretion under their laws to set their own redistricting timelines.[212] Some states have statutory and constitutional rules that impose meaningful constraints on redistricting timelines, but most states do not. Instead legislators, courts, and federal agencies make decisions that impact when maps are enacted, largely unconstrained by state law. This Part analyzes how state law makes jurisdictions more or less vulnerable to redistricting immunity.[213]

Only nine states impose firm redistricting deadlines.[214] These states are Colorado, Connecticut, Iowa, Maine, Michigan, Montana, Ohio, Oregon, and Washington. Only Washington, which takes an idiosyncratic approach to redistricting deadlines,[215] encountered *Purcell* problems in 2020. This is telling: when states create rigid structures to discipline the redistricting process, voters retain the ability to enjoin unlawful maps.

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210. *Id.*

211. The last states to complete redistricting were New Hampshire, Florida, and Missouri. Arkansas and New York were also late to complete the redistricting process, and those maps were ultimately challenged in court. Christian Wade, *Democrats Challenge New Hampshire Redistricting Changes*, CTR. SQUARE (May 10, 2022), https://www.thecentersquare.com/new_hampshire/democrats-challenge-new-hampshire-redistricting-changes/article_f2d6e6ec-d062-11ec-bcd6-23565edd87b9.html [https://perma.cc/PX63-CYT5].

212. *See infra* Appendix A: State Redistricting Timelines (available upon request).

213. *See State Redistricting Timelines*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 29, 2021), https://web.archive.org/web/20211130191342/https://www.ncsl.org/research/redistricting/state-redistricting-deadlines637224581.aspx (collecting deadlines).

214. *See infra* Appendix A: State Redistricting Timelines (available upon request).

215. The timeline here involves recommendations from a state redistricting commission that are subject to legislative approval. *See* WASH. CONST. art. II, § 43; WASH. REV. CODE § 44.05.100 (2019) (adopting timelines).

Thirty-one states have no guidance regarding timelines for redistricting.[216] These states include Alabama, Georgia, Louisiana, Missouri, North Dakota, and Tennessee—all of which encountered redistricting immunity challenges in 2020. Again, this is telling: when states lack deadlines, legislatures are free to delay redistricting to secure immunity for new maps.

The other ten states have redistricting deadlines somewhere in the middle—flexible in some respects and rigid in others.[217] Some states require proposals by a certain date, but do not impose cutoffs for legislative action. Others adopt soft timelines where deadlines are attached to easily moveable dates.[218] For example, New York takes a hybrid approach in which an independent commission must submit redistricting plans to the state legislature by January 1. If the legislature rejects that plan, then the commission may submit a revision by February 28. If the legislature again demurs, there is no deadline for the state to enact maps.[219] The takeaway is that most states have leeway to slow-walk map drawing.

2. Legislative Gridlock

One common reason for delay is a breakdown in the legislative process, often as a result of partisan standoffs that usually occur in divided government.[220] Consider two scenarios: one in which the legislature passes maps after substantial back-and-forth (whether due to partisan divides or other reasons), and another in which the legislative process breaks down entirely. In both scenarios, the process wastes critical time.

First, legislatures sometimes enact maps after much partisan back-and-forth. For example, the Missouri legislature delayed redistricting in 2022 because of a partisan standoff that only resolved after the candidate filing deadline in late May.[221] That delay was sufficient to immunize Missouri's maps, even though plaintiffs sued almost immediately.[222] In Louisiana, a Democratic Governor

216. *See infra* Appendix A: State Redistricting Timelines (available upon request).

217. *Id.*

218. *Id.*

219. NY CONST. art. III, § 5-b (codifying a process and timeline for the commission and state legislature to adopt, reject, and amend redistricting schemes).

220. *See* Ally Mutnick & Gary Fineout, *Why Redistricting Has Stalled in 4 Unfinished States*, POLITICO (Mar. 28, 2022), www.politico.com/news/2022/03/28/redistricting-stalled-fl-la-mo-nh-00020723 [https://perma.cc/V5MM-8SRG] (citing impasses and describing Florida, Louisiana, Missouri, and New Hampshire which were the last four states to redistrict).

221. Jason Hancock, *Missouri House Rejects Senate's Congressional Map, Asks Again for Conference Committee*, MO. INDEP. (Mar. 31, 2022); Press Release, Off. of the Governor, Governor Parson Approves Missouri's Congressional District Boundaries (May 18, 2022), https://governor.mo.gov/press-releases/archive/governor-parson-approves-missouris-congressional-district-boundaries [https://perma.cc/9FU5-U52T].

222. After previously suing over the impasse, plaintiffs filed an amended complaint on May 27. First Amended Complaint for Declaratory and Injunctive Relief, Berry v. Ashcroft, No. 4:22-CV-00465 (E.D. Mo. Apr. 22, 2022). The First Amended Complaint alleges that the congressional map is racially discriminatory and packs Black voters into one congressional district. Citing *Purcell*, the court dismissed

threatened to veto a congressional map passed by the Republican-controlled legislature unless it included a second majority-Black Congressional district. The legislature refused, and the Governor vetoed the map on March 9.[223] Several weeks later, on March 30, the legislature overrode the Governor's veto.[224] Importantly, by the time the legislature reconvened, lawmakers knew about neighboring litigation: they had heard extensive testimony about Section 2 compliance after the preliminary injunction on Section 2 grounds in Alabama.[225] The Louisiana legislature also knew that Alabama's map had been stayed. Consequently, Louisiana enacted its own map—also without a second majority-minority district—and immunity followed.[226]

Delays due to legislative gridlock are not only the result of divided government. In Florida, Republican Governor Ron DeSantis delayed redistricting by vetoing maps he viewed as insufficiently advantageous for Republicans[227] even though they were passed by a Republican-controlled legislature.[228] Following the March 29 veto, the legislature eventually capitulated and enacted new districts on April 22 (prompting sit-ins by Black legislators).[229] Less than one week later, voters brought suit and secured a

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the amended complaint on July 8. Berry v. Ashcroft, No. 4:22-CV-00465, 2022 WL 2643504, at *2–3 (E.D. Mo. July 8, 2022).

223. *See* Complaint for Injunctive and Declaratory Relief at 2, Galmon v. Ardoin, No. 3:22cv00214, 2022 WL 987721 (M.D. La. 2022) (quoting the Governor in the complaint as saying the map "is simply not fair to the people of Louisiana and does not meet the standards set forth in the federal Voting Rights Act").

224. *See* Wesley Muller & Greg Larose, *Louisiana Legislature Overrides Gov. Edwards' Veto of Congressional Map*, LA. ILLUMINATOR (Mar. 30, 2022), https://lailluminator.com/2022/03/30/louisiana-legislature-overrides-gov-edwards-veto-of-congressional-map// [https://perma.cc/5CST-779V].

225. *See* Letter from Legal Def. Fund to La. State Senate Senate & Governmental Affs. Comm. & La. House of Representatives House & Governmental Affs. Comm. (Feb. 4, 2022), https://www.naacpldf.org/wp-content/uploads/2022.2.4-Letter-in-Opposition-to-HB1-SB5-SB20.pdf [https://perma.cc/3Y5X-JQBU]; *see also* Complaint for Declaratory Judgment and Injunctive Relief at 21–23, Nairne v. Ardoin, No. 3:22-cv-00178-SDD-SDJ (M.D. La. Mar. 14, 2022) (describing testimony to this effect in a complaint).

226. *See* Robinson v. Ardoin, 605 F. Supp. 3d 759, 852–56 (M.D. La. 2022) (granting injunctive relief despite *Purcell* where candidate qualifying did not begin for six weeks and the primary was over 150 days away). In this litigation, the PI was issued on June 6, and the Court ordered the legislature to enact a replacement map by June 20. The legislature failed to do so, and the Court was tasked with implementing a new map. However, the Supreme Court stayed that decision on June 28 as a result of litigation in Alabama concerning the VRA (and the Alabama litigation itself was stayed due to *Purcell*). *See* Ardoin v. Robinson, 142 S. Ct. 2892, 2892 (2022) (mem.).

227. *See* Brendan Farrington, *Florida Gov. DeSantis Vetoes Republican-Drawn Congressional Maps*, PBS (Mar. 29, 2022), https://www.pbs.org/newshour/politics/florida-gov-desantis-vetoes-republican-drawn-congressional-maps [https://perma.cc/4CJJ-DMV6].

228. *See Florida Gov. DeSantis Vetoes New Congressional Maps*, AP NEWS (Mar. 29, 2022), https://apnews.com/article/florida-ron-desantis-legislature-constitutions-congress-cd1ef3443eacd90a8ed9a379290e53cc [https://perma.cc/DQ7A-5HA3]. But note that Gov. DeSantis argued that any consideration of race, even if done to increase Black voting power, violates the Fourteenth Amendment. His alternative map would have reduced the number of majority-minority districts. *Id.*

229. *See* Greg Allen, *Gov. DeSantis Takes Over Congressional Redistricting in Florida*, NPR (Apr. 12, 2022), https://www.npr.org/transcripts/1092414662 [https://perma.cc/77G9-BJ35]; *see also*

preliminary injunction.[230] The injunction was stayed (and the stay was vacated and reinstated).[231] Eventually, the Florida Supreme Court declined to overturn the maps,[232] but it was already too late: the districts had become immune.[233]

Second, the legislative process can break down entirely. Where state legislatures fail to redistrict, voters can initiate "impasse litigation" to ensure districts are enacted before the next election[234] by requesting that the judiciary adopt a redistricting plan.[235] The Supreme Court has long endorsed non-legislative map-drawing in these scenarios.[236] Impasse litigation is a common feature of modern redistricting. For example, plaintiffs filed impasse litigation in Louisiana before the legislature eventually reached a resolution and mooted the case.[237] In Missouri, delay prompted a Republican congressional candidate to file impasse litigation, which was later mooted after legislative action.[238] In Florida, plaintiffs filed suit after Governor DeSantis vetoed the first iteration of redistricting maps, and that suit was mooted after the legislature finalized its plan.[239] In this respect, impasse litigation occasionally triggers political action but does so only after critical time has elapsed.

Karen Duffin, *The Dilemma of Florida's District 5*, NPR (June 15, 2018), https://www.npr.org/2018/06/15/620230355/the-dilemma-of-floridas-district-5 [https://perma.cc/EN9E-M97F]; Colby Itkowitz, *New District Map Sanctioned by DeSantis Passes After Protest by Black Legislators*, WASH. POST (Apr. 21, 2022), https://www.washingtonpost.com/politics/2022/04/21/des-santis-redistricting-black-lawmaker-protest/ [https://perma.cc/8TK3-JFKN]; Gary Fineout, *DeSantis Signs New Congressional Map into Law as Groups Sue Over Redistricting*, POLITICO (Apr. 22, 2022), https://www.politico.com/news/2022/04/22/florida-quickly-sued-over-new-map-that-gives-big-wins-to-republicans-00027203 [https://perma.cc/EEJ4-WY9H].

230. First Amended Complaint for Declaratory and Injunctive Relief, Common Cause Fla. v. DeSantis, No. 4:22-cv-109-AW-MAF (N.D. Fla. Apr. 29, 2022), (alleging the maps are unconstitutional, filed on April 29, one week after the Governor signed maps into law).

231. Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc., 339 So.3d 1070, 1073–74 (Fla. Dist. Ct. App. 2022) (quashing vacatur of the lower court decision and reinstating a stay of the preliminary injunction).

232. *See* Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd, 340 So.3d 475, 475 (Fla. 2022) (declining to take the case); *see also* Sam Levine, *Florida Supreme Court Declines to Rule Gerrymandered Voting Map Unconstitutional*, GUARDIAN (June 3, 2022), https://www.theguardian.com/us-news/2022/jun/03/florida-supreme-court-map-unconstitutional [https://perma.cc/RR8Y-TZDA].

233. On timeline, note that election administrators were required to send vote-by-mail ballots to Florida residents by July 9, 2022. *See Election Dates*, FLA. SEC'Y OF STATE, https://dos.myflorida.com/elections/for-voters/election-dates/ [https://perma.cc/G8LQ-7FMP].

234. *See Impasse Litigation: When Politicians Can't Agree on New Maps*, DEMOCRACY DOCKET (Oct. 5, 2021), https://www.democracydocket.com/analysis/impasse-litigation-when-politicians-cant-agree-on-new-maps/ [https://perma.cc/3L4G-VGTP].

235. *See* Growe v. Emison, 507 U.S. 25, 36–37 (1993).

236. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 736–37, 752–53 (1973) (approving a "politically fair" redistricting plan enacted by a bipartisan commission of judges, as provided for by state law, when the state legislature failed to enact a plan).

237. *Louisiana Impasse Litigation (Bullman)*, DEMOCRACY DOCKET, https://www.democracydocket.com/cases/louisiana-impasse-litigation/ [https://perma.cc/G7E9-BHEY].

238. *See Missouri Impasse Litigation (Berry I)*, DEMOCRACY DOCKET, https://www.democracydocket.com/cases/missouri-impasse-litigation-berry/ [https://perma.cc/5CCM-VTT4].

239. Jena Doyle, *Florida Voters File Impasse Lawsuit with Support of National Redistricting Foundation*, NAT'L REDISTRICTING FOUND. (Mar. 11, 2022), https://redistrictingfoundation.org/news/

Litigation cannot always overcome the delay wrought by partisan standoffs. After litigation, legislatures usually take the first pass at remedial maps; courts do not typically start by appointing a special master to enact remedial districts.[240] This institutional choreography has a pro-democratic valence, but it produces further delay. For instance, on February 4, 2022, the North Carolina Supreme Court invalidated congressional and legislative maps and ordered the legislature to enact new districts.[241] Only weeks later, a trial court approved some (but not all) of those remedial maps.[242] What matters is that litigation is time-consuming and delay raises the specter of immunity.

3. Census Data Delay

The census impacts redistricting timelines because untimely data can delay redistricting decisions.[243] States are at liberty to choose how they incorporate national census data into their redistricting processes. Indeed, not all states use census data in the same way. Twenty-three states explicitly require the use of census data for legislative or congressional redistricting.[244] Twenty states do not explicitly identify a source of data, but likely rely on census data nonetheless.[245] And seven states allow other, non-census data sources, depending on the circumstances.[246] The takeaway is clear: states retain flexibility to plan for untimely census data in order to facilitate timely map-drawing.

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florida-voters-file-impasse-lawsuit-with-support-of-national-redistricting-foundation [https://perma.cc/5QWF-EXCQ].

240. It is safe to assume that courts themselves do not enact maps that violate federal law—or at least, courts do not draw maps that they would later find illegal if challenged. When a federal court finds that a redistricting plan violates federal law, the Supreme Court has repeatedly held that "[redistricting] is a legislative task," and so "whenever practicable [the court should] afford a reasonable opportunity for the legislature to . . . adopt[] a substitute measure." Singleton v. Merrill, 582 F. Supp. 3d 924, 1032 (N.D. Ala. 2022) (citing *Wise*, 437 U.S. at 539–40).

241. Harper v. Hall (*Harper I*), 868 S.E.2d 499, 559 (N.C. 2022) (finding partisan gerrymandering claims justiciable and invalidating districting schemes under several state constitutional provisions).

242. Harper v. Hall (*Harper II*), 881 S.E.2d 156, 162 (N.C. 2022). The state Supreme Court decision remanded the maps back to the trial court to oversee *another* new set of maps. *Id.*

243. *See Singleton*, 582 F. Supp. 3d at 944.

244. *See Redistricting and Use of Census Data*, NAT'L CONF. OF STATE LEGISLATURES (May 26, 2021), https://www.ncsl.org/redistricting-and-census/redistricting-and-use-of-census-data/maptype/tile#undefined [https://perma.cc/C49K-APPQ] (showing twenty-three states explicitly require census data to redistrict). These states are Alaska, Arizona, Colorado, Delaware, Florida, Hawai'i, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, Nebraska, New Jersey, New Mexico, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Virginia, Washington, and Wyoming. *Id.*

245. *Id.* (showing twenty states do not expressly identify a data source). These states are Alaska, California, Connecticut, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Pennsylvania, Texas, Vermont, West Virginia, Wisconsin, and Rhode Island. *Id.*

246. *Id.* (showing seven states allow for other non-census data sources depending on circumstances). These states are Alabama, Maine, Nevada, New Hampshire, New York, Ohio, and South Carolina. *Id.*

The 2020 redistricting cycle underscored the importance of timely census data in the redistricting process. The Census Bureau is required to release a "decennial census of [the] population" on the first day of April every ten years.[247] However, in 2021, the Census Bureau missed its statutory deadline due to the COVID pandemic.[248] Consequently, many states started redistricting in late summer, rather than early spring. Statutory flexibility may help states reapportion quickly in the event of exigencies that delay the release of census data.

Moreover, census results—both in substance and timing—are susceptible to political gamesmanship.[249] For example, President Trump unsuccessfully attempted to add a census citizenship question before the 2020 census.[250] Litigation exposed that this effort was undertaken to obtain a political advantage by discouraging responses from immigrant communities.[251] Ironically, Trump administration officials cited compliance with the Voting Rights Act as pretext to justify the citizenship question.[252] Although unsuccessful, this effort inflicted lasting damage: the census lost its appearance of neutrality. Instead, it was merely another tool to achieve partisan outcomes—one that could just as easily be weaponized in pursuit of redistricting immunity without statutory safeguards.

247. 13 U.S.C. § 141(a); *see also* U.S. CONST. art. I, § 2, cl. 3 (empowering Congress to carry out the census "in such Manner as they shall by Law direct").

248. The Bureau released preliminary information to all states about four months late and later released full information on September 16. *Decennial Census P.L. 94-171 Redistricting Data*, U.S. CENSUS BUREAU (Sept. 16, 2021), https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files.html [https://perma.cc/97UC-83RK]. The preliminary data, sometimes called "legacy format redistricting data," were released on August 12, 2021. *Id.*

249. While it is difficult to imagine a less controversial governmental function than the census, many argue that the census has never been apolitical. *See, e.g.*, Shom Mazumder, *The Census Has Always Been Political. Especially When It Comes to Race, Ethnicity, and National Origin.*, WASH. POST (Mar. 30, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/30/the-census-has-always-been-political-especially-when-it-comes-to-race-ethnicity-and-national-origin/ [https://perma.cc/KU8J-MBRD] (discussing the historical politicization of the census and, specifically, the political questions raised by the 2020 Census); *Census, Like the Postal Service, Has Been Politicized in an Election Year*, L.A. TIMES (Aug. 29, 2020), https://www.latimes.com/world-nation/story/2020-08-29/census-like-post-office-politicized-in-election-year [https://perma.cc/JJQ2-H6D9] (same).

250. Dep't of Com. v. New York, 139 S. Ct. 2551, 2562–64, 2575–76 (2019) (assessing the validity of a census citizenship question under the Administrative Procedure Act and explaining the Department's pretextual justification for the question); *see also* Andrew Prokop, *Trump's Census Citizenship Question Fiasco, Explained*, VOX (Jul. 11, 2019), https://www.vox.com/2019/7/11/20689015/census-citizenship-question-trump-executive-order [https://perma.cc/XWQ8-HHGW] (explaining that the Trump administration abandoned its effort following its loss in the courts).

251. *See Dep't of Com.*, 139 S. Ct. at 2575–76 (describing the stated justification of VRA compliance as pretext for a political objective).

252. *See id.* at 2562 (explaining that Secretary Ross stated that he was acting at the request of the DOJ for purposes of enforcing the VRA).

III.
IMMUNITY AS INSTITUTIONAL INVERSION

Redistricting immunity inverts two core institutional arrangements: it elevates state law over federal law, and it empowers courts over Congress. These institutional inversions contravene core precepts in our federal structure. First, redistricting immunity departs from the constitutional baseline wherein Congress is supreme over federal elections. Instead, state law proves dispositive over redistricting, posing a threat to basic federal supremacy. Second, redistricting immunity elevates courts over Congress. Under *Shelby County* and *Purcell*, federal courts sitting in equity effectively nullify congressional commands. With institutional arrangements inverted, state legislatures are free to delay redistricting decisions to secure immunity—ironically manufacturing the same last-minute changes that *Purcell* was designed to avoid.

A. State over Federal Law

At base, redistricting immunity involves state legislative independence from—and supremacy over—federal law.[253] Recently, scholarly attention has focused on legislative independence from judicial review, and most prominently the independent state legislature theory. Redistricting immunity certainly fits within a broader rubric of state legislative aggrandizement.[254] However, it represents an even more fundamental departure from core tenets of vertical federalism because redistricting immunity undermines Congress and its capacity to safeguard voting rights.

1. Immunity, Congress, and Vertical Federalism

To begin, redistricting immunity represents a sharp departure from the constitutional baseline wherein Congress has broad power to regulate federal elections. Under Article I, Congress "may at any time by Law make or alter" regulations regarding the "Times, Places and Manner" of federal elections.[255] Congress routinely legislates under this authority. The National Voter Registration Act (NVRA) eased voter registration nationwide, imposed language

253. This analysis is concerned with the ways in which redistricting immunity interacts with the political branches of government. Governors belong to the political branches and raise similar federalism concerns as state legislatures, while state redistricting commissions raise slightly different concerns and fall outside the scope of this Article.

254. The clearest example of that project is the independent state legislature theory. *See, e.g.*, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020) [hereinafter *ISL, Federal Elections, and State Constitutions*] (describing the ISLT, its doctrinal foundations, and history); Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021) [hereinafter *ISL Doctrine*] (same); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022) (discussing an emergent state legislative aggrandizement with respect to election law).

255. Elections Clause, U.S. CONST. art. I, § 4.

access provisions, and curtailed the most egregious forms of voter purges.[256] Likewise, the Help America Vote Act (HAVA) created a federal agency to serve as a clearinghouse for election administration information, provided money to replace outdated voting systems, and created minimum standards for states in several areas of election administration.[257] Congress's authority extends well beyond the powers enumerated in Article I. Several constitutional amendments, including the Fourteenth,[258] Fifteenth,[259] Seventeenth,[260] Nineteenth,[261] Twenty-Fourth,[262] and Twenty-Sixth[263] Amendments, cement the federal role in elections. The most important laws that Congress has passed in this realm—indeed, some of the most important pieces of legislation in our country's history—were enacted pursuant to the broad powers granted to Congress in the Reconstruction Amendments.[264] Congress, in short, provides a critical check on state legislatures administering elections.

Congress has the authority to regulate the timing of elections, so it follows that Congress can decide how long before Election Day a remedy may be imposed. Redistricting immunity upsets this Congressional prerogative by preventing acts of Congress from being enforced. Clearly, redistricting immunity is not a formal or express limit on congressional power because the text of Article I does not limit congressional authority to authorize injunctive relief shortly before an election. In fact, Article I does the opposite. The Elections Clause authorizes Congress to regulate the time of federal elections.[265] Most scholarship focuses on Congressional regulation of the manner of federal elections—the provision giving rise to HAVA and the NVRA[266]—and not Congress's

256. National Voter Registration Act, 52 U.S.C. §§ 20501–20511; *see The National Voter Registration Act of 1993*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/national-voter-registration-act-1993-nvra [https://perma.cc/LHB7-E39Y].

257. Help America Vote Act, 52 U.S.C. §§ 20901–21145. *See The Help America Vote Act of 2002*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/help-america-vote-act-2002 [https://perma.cc/R3Q3-GLUB].

258. U.S. CONST. amend. XIV (providing for due process of law).

259. *Id.* amend. XV (providing that 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").

260. *Id.* amend. XVII (providing for popular election of U.S. Senators).

261. *Id.* amend. XIX (providing that "[t]he right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of sex").

262. *Id.* amend. XXIV (prohibiting the poll tax in federal elections).

263. *Id.* amend. XXVI (extending the vote to those eighteen or older and prohibiting denial or abridgment of the right to vote "on account of age").

264. *Id.* amends. XIII, XIV, XV (the Reconstruction Amendments).

265. "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." *Id.* art. I, § 4, cl. 1.

266. *See* Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 836 (6th Cir. 1997) ("Congress enacted the [NVRA] under the authority granted it in [the Elections Clause]."); *see* Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 569 (6th Cir. 2004) (evaluating the constitutionality of HAVA).

enumerated authority to regulate electoral calendaring.[267] This textual "time" hook is important because if Congress can regulate the timing of elections, it also has the authority to determine the duration between when remedies are imposed and Election Day.[268]

Further, Article I empowers Congress to enact time, place, and manner regulations "*at any time*."[269] This constitutional proviso is unique. Nowhere else does the Constitution expressly grant Congress power to legislate "at any time." Perhaps this is because the Founders assumed that express grants of power could be invoked whenever Congress saw fit. Particularly in the electoral context, Congress has the ability to proscribe election rules and legislate remedies without time constraints: it may authorize election changes at the last minute or any other minute of its choosing. When courts are called to enforce congressional acts, federal courts exercise their discretion precisely when congressional power over the timing of remedies is at its zenith.

These provisions understate congressional authority. Consider the "penumbra" view of congressional power.[270] Most scholars agree that the Elections Clause and the Reconstruction Amendments provide separate bases of authority for Congress to regulate elections. In other words, legislation is understood to be rooted in one source of constitutional authority or in another.[271] However, these multiple bases of authority might be read as additive, with Congress deriving its authority from multiple provisions simultaneously. For example, Professor Franita Tolson argues that Congress has yet-untapped authority to regulate elections at the intersection of multiple constitutional provisions, and that this authority could undergird new legislation to safeguard American democracy.[272] The canonical example of this approach is privacy

267. *See, e.g.*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (2010) (describing place and manner regulations); Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317 (2019) (same); Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79 (2016) (same).

268. Courts may distinguish a species of stay jurisprudence that stops private litigants from securing injunctions on the eve of an election from one that stops Congress itself from exercising its constitutional prerogative. However, this is not a tenable distinction because Congress commonly provides private causes of action, *see, e.g.*, 52 U.S.C. § 10301 (providing a private cause of action). Indeed, courts do not make this distinction under existing stay doctrine.

269. U.S. CONST. art. I, § 4, cl. 1.

270. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (describing a rights "penumbra" created by specific guarantees of the First, Third, Fourth, Fifth, and Ninth Amendments).

271. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536–38 (2012) (analyzing whether Congress has the power to enact healthcare legislation pursuant to the Commerce Clause or, in the alternative, the taxing power); United States v. Morrison, 529 U.S. 598, 617–19 (2000) (analyzing whether Congress has power to enact the Violence Against Women Act pursuant to the Commerce Clause or, in the alternative, the Fourteenth Amendment).

272. *See* FRANITA TOLSON, IN CONGRESS WE TRUST? ENFORCING VOTING RIGHTS FROM THE FOUNDING TO THE JIM CROW ERA (forthcoming 2024). For an overview of recent efforts to pass voting rights legislation, see Peter Stevenson, *How is the John Lewis Voting Rights Act Different from H.R. 1?*, WASH. POST (June 8, 2021), https://www.washingtonpost.com/politics/2021/06/08/how-is-john-lewis-voting-rights-act-different-hr-1/ [https://perma.cc/BAT4-V9YL].

jurisprudence. There, the additive nature of several provisions gives rise to a federal "right to privacy" not otherwise expressed in the text.[273] Likewise, in elections, multiple sources of constitutional authority could be read cumulatively to form a penumbra of congressional power.[274] The soundness of this approach is not the point. What matters is that federal intervention in elections is an important component of American constitutional text and tradition that checks state legislatures. Against that backdrop, redistricting immunity is anomalous.

2. Federal Supremacy

Redistricting immunity threatens federal supremacy.[275] In the new redistricting era, courts cite state laws to justify denying injunctive relief under federal statutes—elevating state law above federal commands. These state laws often exist at the sub-constitutional level,[276] comprised of state statutes and administrative rules, often enacted for convenience.[277] However, they provide the basis for federal courts to immunize maps.

Redistricting immunity inverts federal supremacy even though Congress may formally preempt state law. Congressional time, place, and manner regulations could supersede state election law as a matter of vertical federalism.[278] But practically, Congress is not in the business of enacting regulations governing the minutiae of elections. Instead, the United States maintains an ethos of decentralized election administration.[279] "The United States runs its elections unlike any other country in the world. Responsibility for elections is entrusted to local officials"[280] and "power and

273. *See Griswold*, 381 U.S. at 484 (describing a right to privacy).

274. *See* TOLSON, *supra* note 272 (arguing that even absent this additive reading, the congressional prerogative to intervene in federal elections is strong).

275. *See* Supremacy Clause, U.S. CONST. art. IV, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

276. *See, e.g.*, Palmer v. Hobbs, No. C22-5035RSL, 2022 WL 1102196, at *3 (W.D. Wash. Apr. 13, 2022) (citing state statutory deadlines for county officials to revise precinct boundaries and mail ballots).

277. To be sure, these decisions may be practically important, but they are not legally mandatory. *See, e.g.*, Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 587 F. Supp. 3d 1222, 1325 (N.D. Ga. 2022) (citing decisions by local election officials regarding polling locations).

278. Elections Clause, U.S. CONST. art. I, § 4 (granting Congress the ability to regulate with respect to federal elections).

279. *See* Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 127 (2009) ("Although HAVA and prior laws include some national requirements, our election system remains decentralized to a greater degree than any other democracy, with considerable authority vested in thousands of local election officials scattered across the country.").

280. ROBERT F. BAUER, BENJAMIN L. GINSBERG, BRIAN BRITTON, JOE ECHEVARRIA, TREY GRAYSON, LARRY LOMAX, MICHELE COLEMAN MAYES, ANN MCGEEHAN, TAMMY PATRICK, & CHRISTOPHER THOMAS, PRESIDENTIAL COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION

discretion . . . remain[] substantial."[281] Decentralization exists in part through the dual track of American elections where state governments retain exclusive control over state elections—for example, by regulating candidate filing deadlines, registration deadlines, primary dates, and Election Day for non-federal offices.[282] When Congress acts, it targets the most pervasive sins—including racial discrimination in voting.[283] But redistricting immunity usurps congressional authority to protect key civil and political rights, undermining core tenets of vertical federalism.

Purcell has also elevated state authority in other areas of election law beyond redistricting. Consider the COVID-19 pandemic, during which the doctrine likewise undercut the efficacy of voting rights protections.[284] In crisis conditions, the doctrine hamstrung courts in enforcing federal law with respect to absentee voting, ballot submission timelines, and even felon voting.[285] Here, again, state legislatures filled the void. Naturally, federal safeguards are often tested shortly before elections, and courts are regularly tasked with providing injunctive relief pursuant to federal statutes in the lead-up to an election. Late-breaking injunctions are a feature—not a bug—of the electoral landscape. That is the world Congress made, and it is the arrangement that redistricting immunity subverts.

3. Immunity and the Independent State Legislature Theory

Redistricting immunity fits within a broader rubric of state legislative aggrandizement.[286] The crusade for the unconstrained state legislature found a champion in the independent state legislature theory (ISLT). That theory was first advanced in Justice Rehnquist's concurrence in *Bush v. Gore*[287] and gained momentum on the coattails of conservative scholars and activists attempting to neuter state constitutional provisions viewed as obstacles to Republican political

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ADMINISTRATION 1 (2014), https://www.eac.gov/sites/default/files/eac_assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf [https://perma.cc/LG2N-ZW7J].

281. ALEC C. EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 2 (2009).

282. *See* Richard Briffault, *Election Law Localism*, 100 N.C. L. REV. 1421, 1423 (2022) (noting this role is often considered election "housekeeping").

283. *See* Voting Rights Act, 52 U.S.C. § 10301 (outlawing discrimination on account of race).

284. *See* Codrington, *supra* note 11, at 970 (describing how the pandemic exacerbated *Purcell* problems and undercut safeguards to voting).

285. *See id.* at 971, 974–76.

286. *See generally* Smith, *supra* note 254 (discussing an emergent state legislative aggrandizement with respect to election law).

287. *See* Bush v. Gore, 531 U.S. 98, 115 (2000) (Rehnquist, J., concurring) ("[Overturning a decision of a state court] does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court . . . would be to abdicate our responsibility to enforce the explicit requirements of Article II.").

power.[288] That movement culminated in *Moore v. Harper*—the first case to test this theory explicitly in the Supreme Court. In that case, Republicans in North Carolina invoked the ISLT as a shield against liability under state law for diluting the voting power of minority voters and Democrats.[289] Scholars and the public have also trained their sights on the theory.[290]

The basic argument went like this: under the Elections Clause, state legislatures may regulate the "Times, Places and Manner" of federal elections, and Congress "may at any time by Law make or alter" those regulations.[291] Therefore, North Carolina argued, the Elections Clause prohibits state courts from exercising judicial review of legislative decisions regarding federal elections because, after all, state courts are not state "legislatures."[292] This literal reading would empower state legislatures alone to adopt time, place, and manner regulations—subject to congressional override—and would accord no role for state constitutions or state courts to police redistricting.[293]

In *Moore v. Harper*, the Supreme Court rejected that approach.[294] Indeed, state courts and state constitutions play a fundamental role in protecting our democratic institutions, as they have since the country's founding.[295] And, as a structural matter, state legislatures themselves are "entit[ies] created and constrained by . . . state constitution[s]."[296] Scholarship has revolved around whether neutered state courts would jeopardize the separation of powers and erode voting rights.[297] But this public debate elides the fact that a more insidious form of state legislative aggrandizement—one unchecked by Congress—is already upon us.

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288. Ethan Herenstein & Thomas Wolf, *The "Independent State Legislature Theory," Explained*, BRENNAN CTR. FOR JUST. (June 27, 2023), https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained [https://perma.cc/C75Y-S7RA] (describing the origin of the theory).

289. *Id.*; Moore v. Harper, 600 U.S. 1, 19–22 (2023).

290. *See, e.g.*, Morley, *ISL, Federal Elections, and State Constitutions*, *supra* note 254, at 13–14; Morley, *ISL Doctrine*, *supra* note 254, at 505.

291. *See Moore*, 600 U.S. at 2 (quoting Elections Clause, U.S. CONST. art. I, § 4).

292. *Id.* at 18.

293. *See id.* at 26.

294. *Id.* at 22.

295. *See, e.g.*, Franita Tolson, *The "Independent" State Legislature in Republican Theory*, 10 TEX. A&M L. REV. 549, 564–65 (2023) (citing evidence).

296. *See* Vikram D. Amar & Akhil Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 19.

297. The ISLT has sparked reams of commentary. *See, e.g.*, Adam Liptak, *Supreme Court Seems Split Over Case That Could Transform Federal Elections*, N.Y. TIMES (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/us/supreme-court-federal-elections.html. [https://perma.cc/MRW9-Q93B]; Adam Liptak, *Top State Judges Make a Rare Plea in a Momentous Supreme Court Election Case*, N.Y. TIMES (Sept. 26, 2022), https://www.nytimes.com/2022/09/26/us/politics/supreme-court-state-legislatures-elections.html [https://perma.cc/XRL9-69DS]; Hansi Lo Wang, *The Supreme Court Is Weighing a Theory That Could Upend Elections. Here's How*, NPR (Jan. 22, 2023), https://www.npr.org/2023/01/22/1143086690/supreme-court-independent-state-legislature-theory-moore-v-harper [https://perma.cc/CV43-YWZZ].

Following *Moore v. Harper,* redistricting immunity is emerging as a new form of state legislative independence. In some respects, redistricting immunity poses a more severe threat than even the most strident versions of ISLT, which always presupposed Congress's ability to supersede time, place, and manner regulations adopted by states. By contrast, redistricting immunity renders Congress powerless to enforce democracy-protecting laws against state action. In this respect, immunity is a striking departure from the norms of federal supremacy and judicial review. This denigration of congressional power inverts core tenets of vertical federalism and risks leaving voting rights in the lurch. An adequate rejoinder must involve concerted scholarly and public attention.

B. Courts over Congress

Redistricting immunity is not just about inverting power as a matter of vertical federalism. It also shifts power horizontally. If the first inversion is state over federal law—and the attendant threat to federal supremacy that flows from an aggrandized state legislature—the second is the elevation of courts over Congress. This judicial supremacy raises fundamental concerns about democratic governance and accountability. Both federal and state courts are relevant on this score, and both mediate the institutional inversions that result from redistricting immunity.

1. Immunity in Federal and State Courts

What is the role of federal and state courts relative to legislatures regarding redistricting immunity? Federal courts invented redistricting immunity, so can state courts provide recourse? Does the manner in which federal courts immunize districts foreclose effective legislative intervention? The answers to these questions are more complex.

As an initial matter, "The United States Supreme Court in *Growe* made clear that federal courts and state courts have concurrent jurisdiction to entertain challenges to redistricting plans," so both are open to redistricting claims.[298]

To understand the interplay between state and federal courts, consider a standard federal claim under the Constitution or VRA. Litigants who originate those claims in federal court face the prospect of immunity. However, it is no solution to originate federal claims in state court either. That is because defendants can simply remove federal claims from state to federal court.[299] Accordingly, removal jurisdiction provides a pathway for state defendants to avail themselves of immunity[300]—at least until Congress eliminates removal jurisdiction for redistricting claims. Only a small number of plaintiffs elected to

298. Thompson v. Smith, 52 F. Supp. 2d 1364, 1368 (M.D. Ala. 1999) (citing Growe v. Emison, 507 U.S. 25, 32 (1993)).

299. *See* 28 U.S.C. § 1441(a) (providing for removal of civil actions to federal court where district courts have original jurisdiction).

300. *See id.* (providing for removal).

originate their redistricting claims in state court during the 2020 redistricting cycle.[301]

Increasingly, state law plays an important role in checking state legislatures' redistricting decisions.[302] Indeed, after *Rucho*, scholars have pointed to untested state constitutional provisions as emerging vehicles for redistricting challenges.[303] However, when bringing both state and federal claims in a single action, voters still face a choice about where to file suit.[304] However, three doctrines rooted in federalism principles conspire to reproduce and reinforce immunity for state claims brought in federal court: *Erie*, certification, and abstention.

First, under *Erie*, federal courts apply federal procedural rules,[305] including the rules for stays and preliminary injunctions.[306] *Erie* appears to create an immunity problem for voters bringing state claims in federal court because litigation timing, at least on its face, is a product of procedural rules. However, state lawmakers could circumvent *Erie* by casting reform to redistricting timelines in substantive terms. Accordingly, states could eliminate the specter of immunity through careful legislative drafting, even for plaintiffs who find themselves in federal court following removal.[307]

Second, certification makes it more onerous for litigants to achieve timely remedies when raising both state and federal claims. When federal courts certify issues of state law back to state courts, that process takes precious time. In fact, the doctrine of certification acknowledges that it often causes further delay.[308] This feature of federal litigation likewise frustrates voters' efforts to secure injunctions far enough ahead of upcoming elections.

Third, abstention creates another barrier for plaintiffs seeking timely resolution of state claims raised in federal court.[309] *Pullman* and *Burford* abstention are particularly demanding. Under *Pullman* abstention, federal courts

301. *See* BRENNAN CTR. FOR JUST., *supra* note 61 (describing the origin of claims).

302. *See* Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1356–57 (describing "institutional, substantive, and jurisdictional" reasons why state courts are well positioned to adjudicate state law claims and counter some types of election subversion).

303. *Id.*; *see also* Common Cause v. Rucho, 139 S. Ct. 2484, 2524 (2019) (Kagan, J., dissenting) (arguing that state courts might prove a bulwark against partisan gerrymandering).

304. This assumes that federal courts would exercise supplemental jurisdiction to hear state law claims brought by voters, but supplemental jurisdiction is discretionary. *See* 28 U.S.C. § 1367 (providing for supplemental subject matter jurisdiction over state claims in federal court at the court's discretion).

305. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (establishing that federal courts hearing state law claims apply state substantive law and federal procedural law).

306. *See* FED. R. CIV. P. 65(a) (preliminary injunctions); FED. R. CIV. P. 65(b) (temporary restraining orders).

307. *See infra* Part IV ("Solutions").

308. *See, e.g.*, United States v. Defreitas, 29 F.4th 135, 141–43 (3d Cir. 2022) (describing considerations for certification).

309. Abstention refers to the various doctrines under which federal courts abstain from deciding questions of state law.

defer to "state court resolution of underlying issues of state law"[310] when two elements are met: (1) the case presents an unsettled question of state law, and (2) that state law question is dispositive or would alter the constitutional question.[311] *Pullman* is grounded in traditions of constitutional avoidance.[312] But deferring under *Pullman* is discretionary, so the doctrine does not act as a categorical bar to concurrent jurisdiction. In fact, some federal courts refused to defer to state adjudications in redistricting before *Purcell*. In *Wesch*, the Eleventh Circuit held that when "a state court, through no fault of the district court, will not develop a redistricting plan in time for an upcoming election . . . a federal district court [may] develop a redistricting plan."[313] *Wesch* preceded both *Purcell* and *Shelby County*, so in the modern redistricting era, *Pullman* abstention could frustrate plaintiffs seeking timely relief in federal court raising issues of state law.

Redistricting litigation also implicates *Burford* abstention,[314] which would further postpone a decision on the merits. That doctrine "require[s] federal courts to resist disrupting the customary procedures of state law" and "is based on considerations of federalism and comity."[315] Under *Burford*, federal courts may abstain if the case "presents difficult questions of state law bearing on policy problems of substantial public import" or if "adjudication in a federal forum would disrupt state efforts to establish a coherent policy," as election cases often do.[316] But under *Burford*, federal courts can simply postpone decisions on the merits (rather than dismiss the claim). Accordingly, "it may be more appropriate to refer to *Burford* abstention . . . as *Burford* 'deferral.'"[317]

Narrowly, these three doctrines provide a cautionary tale for time-pressured litigants contemplating redistricting challenges under both federal and state law. Indeed, plaintiffs may opt to bifurcate state and federal claims and litigate on

310. Harman v. Forssenius, 380 U.S. 528, 534 (1965).

311. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500–01 (1941).

312. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1190 (5th ed. 2016). The purpose of *Pullman* is to "avoid unnecessary friction in federal-state functions, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Id.* at 1191 (quoting Siegel v. LePore, 234 F.3d 1163, 1174 (11th Cir. 2000)).

313. Wesch v. Folsom, 6 F.3d 1465, 1473 (11th Cir. 1993) (citing Growe v. Emison, 507 U.S. 25 (1993)).

314. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943).

315. ISSACHAROFF ET AL., *supra* note 312, at 1189. Others describe the justification for the doctrine differently. *See* Lewis Yelin, Burford *Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871, 1881 (1999). Yelin argues this form of abstention is justified when "(1) a state has created a complex regulatory system on a matter of substantial importance to the state, (2) there exist no federal interests in the matter that override the state interests, and (3) the state legislature has made the state courts integral to the administrative scheme by delegating to them broad discretion so that they may participate in the development of regulatory policy."

316. *See Siegel*, 234 F.3d at 1173 (noting that abstention doctrines should not provide a barrier to federal oversight of election law).

317. *See In re* Universe Life Ins. Co., 35 F. Supp. 2d 1297, 1299 n.3 (D. Kan. 1999) (discussing the doctrine and revealing how courts have blurred the line between *Pullman* and *Burford* abstention).

parallel tracks—at least until states devise statutory schemes that address immunity in both substantive and procedural terms.

Broadly, these doctrines confirm that state courts are poorly positioned to remedy the erosion of federal voting rights protections—and the attendant threat to federal supremacy—that redistricting immunity represents. When federal courts abstain under *Pullman* or *Burford*, litigation takes even longer than it otherwise might, risking immunity. Likewise, delay resulting from certification reproduces the same redistricting immunity that flows from federal courts invoking *Purcell*. Abstention and certification just repackage immunity.

What to make of the role of state and federal courts? The doctrinal threads that produce and reinforce redistricting immunity (removal, certification, and abstention) all nod toward judicial modesty, but immunity is really a form of judicial aggrandizement. Superficially, courts immunizing maps appear modest under *Purcell* because federal courts should not wreak havoc near Election Day; modest under *Pullman* because federal courts should avoid constitutional questions; and modest under *Burford* because federal courts should defer to state courts. But the consequence is far from modest. Federal courts immunize laws of their choosing and on their own volition. As Professor Wilfred Codrington puts it, *Purcell* "introduced an empty vessel for unprincipled decisions and inconsistent rulings."[318]

Selective stay jurisprudence is not new.[319] Indeed, the Court used scheduling to immunize certain claims—on both the shadow and merits dockets—and thereby deny remedies to plaintiffs claiming federal rights.[320] At base, that jurisprudence is not motivated by a commitment to judicial modesty but is wielded as a tool to effect substantive outcomes.

2. Immunity and Political Process Theory

This legislative subversion is particularly insidious in redistricting because it runs up against perhaps the most canonical precept in the law of democracy: John Hart Ely's political process theory.[321] That theory "took as its foundation the famous footnote four in *United States v. Carolene Products*" which called for "more exacting judicial scrutiny" when a law "restricts those political

318. Codrington, *supra* note 11, at 941.

319. Recent abortion jurisprudence is another example of how selective calendaring and stays can nullify federal rights. On September 1, 2021, the Supreme Court permitted a Texas law criminalizing abortion to go into effect because it raised "novel" questions of procedure. Adam Liptak, *Supreme Court Allows Challenge to Texas Abortion Law but Leaves It in Effect*, N.Y. TIMES (Dec. 10, 2021), https://www.nytimes.com/2021/12/10/us/politics/texas-abortion-supreme-court.html [https://perma.cc/7W8U-SYRW]. The Court then remanded the case to the Fifth Circuit, which in turn certified a question to the Texas Supreme Court. Although the Supreme Court waited to overturn *Roe v. Wade* until June in *Dobbs*, the right to an abortion had been dead letter since September. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (eliminating a constitutional right to an abortion).

320. Liptak, *supra* note 319.

321. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105–34 (1980).

processes which can ordinarily be expected to bring about repeal of undesirable legislation."[322] In other words, courts should be particularly skeptical of legislatures engaging in antidemocratic lawmaking because the political branches cannot be trusted to police themselves.[323] In any other context, courts defer to the political branches—after all, legislatures are the most democratically accountable organ of government. But when legislatures entrench their own power or enact laws that curtail democratic participation, the justification for judicial deference evaporates.[324]

The corollary to political process theory is just as important: when legislatures (here, Congress) engage in pro-democratic lawmaking (as it did with the VRA), courts should not stand in the way. That corollary is especially relevant for redistricting immunity. Scholars note how difficult it is for legislatures to expand the franchise.[325] While "[t]he legislature is often described as the true majoritarian branch," often legislatures are "outright countermajoritarian institutions."[326] "The combination of . . . districting scheme[s], geographic clustering, and extreme gerrymandering means that state legislatures are recurrently controlled by the state's minority party" and engage in lawmaking designed to curtail voting access to retrench minority control.[327] The same is true for Congress.

The political history of the Voting Rights Act provides a cautionary tale. In the decade before *Shelby County*, Congress appeared vigorously committed to pro-democratic election oversight. In 2006, it reauthorized the VRA by an overwhelming margin of 98–0 in the Senate and 390–33 in the House.[328] Overconfident in Congress, the Supreme Court then violated this cardinal law of political process theory when it invalidated the preclearance regime.[329] At the time, some commentators argued the decision was motivated by a belief that judicial decisions undermining the VRA would be met with protective

322. Luke P. McLoughlin, *The Elysian Foundations of Election Law*, 82 TEMP. L. REV. 89, 90, 90 n.4 (2009) (quoting United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938)).

323. *See id.*

324. *See* Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 304 (2016) (arguing "difficult topics . . . are best left for Congress, the accountable lawmaking branch of government, to decide" rather than courts).

325. *See* McLoughlin, *supra* note 322, at 103 (collecting examples of countermajoritarian and suppressive actions).

326. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1733, 1735 (2021).

327. *See id.* at 1733, 1761–62.

328. *See* Carl Hulse, *By a Vote of 98–0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES (July 21, 2006), https://www.nytimes.com/2006/07/21/washington/21vote.html [https://perma.cc/R4Y8-3NP7]; *see also* Sarah A. Binder, *Reading Congressional Tea Leaves from the 2006 Renewal of the Voting Rights Act*, BROOKINGS INST. (July 1, 2013), https://www.brookings.edu/articles/reading-congressional-tea-leaves-from-the-2006-renewal-of-the-voting-rights-act/ [https://perma.cc/V85V-3SWC] (challenging the bipartisan support narrative).

329. *See* Shelby County v. Holder, 570 U.S. 529, 557 (2013) ("Congress may draft another formula based on current conditions.").

lawmaking from Congress.[330] As proof, commentators cited *City of Mobile v. Bolden*. In *Bolden*, the Supreme Court required a showing of intentional discrimination under Section 2,[331] prompting Congress to reject that interpretation and reinstate an effects test.[332] But after *Shelby County*, successful legislative responses never came.[333]

In short, the Court struck down the type of democracy-enhancing legislation that self-interested politicians are least likely to pass. And in this charged political moment, those judicial decisions are unlikely to prompt legislative action. The political history of the Voting Rights Act represents a reversion to the core prediction of political process theory, and that is why redistricting immunity and the congressional abrogation that flows from it are so insidious. In its wake, that immunity will embolden state legislatures.

IV.
SOLUTIONS

Redistricting immunity is a fixable problem. The most compelling solution is also the most obvious: courts should rethink their approach to *Purcell* when exercising equitable discretion. Toward that end, this Part places the consequences of redistricting immunity into stark perspective. It also offers another doctrinal path forward, borrowing from traditional impasse litigation frameworks. In addition, legislative solutions hold promise at both the federal and state level. Finally, individual litigants can mitigate the worst consequences and possibly avoid immunity altogether by engaging in robust discovery regarding state election administration timelines.

A. Doctrinal Inversion and Impasse

Redistricting immunity poses so grave a problem that a more complete doctrinal reimagination is necessary. As an initial matter, the consequences of redistricting immunity should matter to courts because stay jurisprudence is equitable. Despite the confusion inherent in flexible stay rules, courts have reached some consensus, including on the point that denying relief on *Purcell*

330. *See, e.g.*, Susan Sullivan Lagon, *Will Congress Restore the Voting Rights Act?*, GOV'T AFFS. INST. AT GEORGETOWN UNIV. (June 26, 2014), https://gai.georgetown.edu/will-congress-restore-the-voting-rights-act/ [https://perma.cc/TR8J-7EU2]. Senator Leahy, Representative Sensenbrenner, and Representative Conyers heeded the Court's advice and introduced a new coverage formula after *Shelby County* but got nowhere. *Id*.

331. *See* City of Mobile v. Bolden, 446 U.S. 55, 55–56 (1980); *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/section-2-voting-rights-act [https://perma.cc/J6R9-77Z6].

332. *See* U.S. DEP'T OF JUST., *supra* note 331 (describing the history of congressional action and amendments to the VRA following *Bolden*).

333. Even with President Biden's emphasis on democracy and voting rights, Congress has so far failed to reinstate core voting rights protections. *See* Erin B. Logan, *John Lewis Voting Rights Bill Fails in Senate amid Rise of GOP-Led State Restrictions*, L.A. TIMES (Nov. 3, 2021), https://www.latimes.com/politics/story/2021-11-03/john-lewis-voting-rights-bill-fails-in-senate-amid-cascade-of-gop-led-state-restrictions [https://perma.cc/D7PQ-L2XL].

grounds is only appropriate after weighing the impact on all parties and accounting for the public interest. Accordingly, a partial fix is for litigants to clarify the stakes of redistricting immunity. However, even fidelity to the existing stay framework does not eliminate the possibility that judges can manipulate flexible tests to achieve particular outcomes. Accordingly, the modern redistricting era requires a new framework.

Consider a simple inversion of *Purcell* in which courts must intervene early enough to protect judicial review. Under the status quo, *Purcell* counsels against judicial intervention when elections are too imminent for a remedy. Under the inverse, courts would assuredly intervene early enough that state legislatures could not insulate maps from review. This approach does not ask courts to close their eyes to election administration; it simply asks them to respond to time constraints with preemption rather than passivity. This inverted *Purcell* Principle extends the logic of traditional impasse litigation wherein courts assume jurisdiction over map-drawing when state legislatures will not pass a map at all.[334] Here, courts could do the same and assume jurisdiction when legislatures do not pass districts with sufficient time to stress-test their legality. In other words, the threshold for jurisdiction should not be whether the legislature will enact maps in time for the election (as with impasse), but instead whether there is sufficient time for judicial review and remediation if those maps are unlawful. In this respect, an inverted *Purcell* Principle expands the time horizon upon which litigants might pursue litigation.

This doctrinal inversion would work by ensuring that at least the trial court could weigh in on the merits—and have a shot at issuing an injunction that takes effect—even if full appellate review is not practicable in the first instance. Under the status quo, impasse litigation "does not require appellate review of the [judicial] plan prior to the election" because doing so "would ignore the reality that States must often redistrict in the most exigent circumstances."[335] However, appellate review of judicial remedies is far less democratically imperative than the availability of at least some review of legislative action. One shot at an injunction in the trial court—without a practical chance for timely appeal by either party—would be a marked improvement. That is because courts are far less likely to adopt unconstitutional remedial maps—and far more likely to abide by federal law—than are state legislatures. As John Hart Ely explains, courts are best positioned to check countermajoritarian legislatures. Indeed, courts occupy an institutional position best equipped to provide a bulwark against antidemocratic lawmaking.[336]

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334. *See* Growe v. Emison, 507 U.S. 25, 35 (1993) (noting the law "requires only that the state agencies adopt a constitutional plan within ample time to be utilized in the upcoming election" (cleaned up)).

335. *Id.* (noting "the improbability of completing judicial review before the necessary deadline for a new redistricting scheme").

336. *See* McLoughlin, *supra* note 322, at 101–02 (describing the role of courts with respect to elections under political process theory).

It is important to say a word about a world without *Purcell*. Eliminating or inverting *Purcell* would not mean courts shut their eyes to the adverse consequences of eleventh-hour election intervention. Nor would eliminating *Purcell* require a destabilizing reimagination of the court's stay jurisprudence. Instead, courts could adopt new presumptions in favor of intervention that mirror existing models in impasse litigation. Or courts could simply apply traditional stay principles and balance equities in the elections context like they do in any other. Either way, states undergoing redistricting would proceed under the shadow of liability.

B. Legislative Fixes

At the federal level, Congress has at least two options. *First*, Congress could mandate state redistricting deadlines.[337] If legislatures fail to act before that deadline, Congress could supply a judicial remedy where courts enact remedial maps—ensuring that legislatures cannot escape liability through delay. State law already provides a blueprint. Indeed, states with clear statutory deadlines for redistricting processes did not encounter immunity problems in 2020.[338] Federally-mandated redistricting deadlines should not encounter problems with justiciability because courts already engage in redistricting as a remedial measure (and have no problem administering those decisions). Further, federal timelines would inject additional certainty into the redistricting process.

Second, Congress could directly legislate fixes for *Shelby County* and *Purcell*. The proposed John R. Lewis Voting Rights Advancement Act does both: it introduces a new preclearance regime that would apply to redistricting, and it overturns *Purcell* by limiting the grounds for equitable relief, stay, and vacatur and by establishing a presumptive safe-harbor.[339] The bill notes that "proximity of the action to an election shall not be a valid reason to deny such relief."[340] "Where equitable relief is sought either within 30 days of the adoption or reasonable public notice of the challenged policy or practice, or more than 45 days before the date of an election to which the relief being sought will apply, proximity to the election will be presumed not to constitute a harm to the public

337. Congressional action under the Elections Clause is confined to federal elections. *See* Elections Clause, U.S. CONST. art. I, § 4, cl. 1. But in practice, federal regulations also structure state elections because states avoid splitting election administration into two distinct systems. And even if legislatures decoupled redistricting decisions at the state and federal level, federal elections would not encounter the immunity problem.

338. *Cf. supra* Figure 1 (listing states encountering immunity); *supra* Part II.C.1 (listing states with rigid redistricting timelines).

339. *See* John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021); *The John Lewis Voting Rights Advancement Act*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/john-lewis-voting-rights-advancement-act [https://perma.cc/4Q7T-URAK] (describing a preclearance regime).

340. John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. § 11(b) (2021) ("Grounds for Equitable Relief").

interest or a burden on the party opposing relief."[341] Importantly, this proposal still permits courts to consider the public interest and preserves some equitable discretion.[342]

Perhaps the most promising—and undertheorized—domain of reform exists at the state level. Most simply, states can adopt earlier redistricting timelines. Some states already have relatively early timelines under statutory and constitutional provisions.[343] Constitutional amendments provide more robust protection from antidemocratic state legislative maneuvering than does normal legislation.[344] And even if Congress mandates timely redistricting, state legislatures could go further.

State voting rights acts are emerging and important vehicles for state-level reform. Several states are on the precipice of adopting voting rights acts that contend with *Purcell* in new ways.[345] For example, the New York Voting Rights Act, which took effect in June 2022, addresses *Purcell* directly: if a plaintiff seeks preliminary relief and shows a likelihood of success on the merits, the court shall "implement an appropriate remedy" if doing so is "possible."[346] These state legislative fixes would dramatically improve the prospect of securing injunctive relief in state court.

States could also prevent delay by codifying into their laws a preference against certification or abstention when, under the circumstances, they risk immunity. However, federal courts considering state law claims apply federal procedural rules to substantive issues of state law, so an important question becomes whether state voting rights acts that address *Purcell* are sufficiently substantive to evade *Erie* problems in federal court.[347]

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341. *See id.* § 11(b)(2) ("Presumptive Safe Harbor"). In addition to providing a new framework for a court when deciding whether to preemptively grant or deny relief, the Act also extends this to decisions to issue stays or vacatur of federal claims involving voting rights. *Id.* at § 11(c).

342. Congress may amend preexisting legal standards, as here, but it may not prescribe rules of decision or instruct courts how to apply those standards. *See* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438–39 (1992); Bank Markazi v. Peterson, 578 U.S. 212, 248 (2016). Congressional fixes to *Purcell* would not contravene the boundary between legislative and judicial power because it would alter the legal standard itself.

343. *See infra* Appendix A: State Redistricting Timelines (available upon request).

344. Ballot initiatives provide a lawmaking forum less susceptible to antidemocratic legislative action. *See generally* Tom Pryor, *A More Perfect Union? Democracy In the Age of Ballot Initiatives*, 97 MINN. L. REV. 1549 (2013) (canvassing views on pro-democracy valence of citizen ballot initiatives compared to representative democracy).

345. *See, e.g.*, Jason Edison, *Gov. Ned Lamont Signs CT Voting Rights Act Into Law*, CT MIRROR (June 12, 2023), https://ctmirror.org/2023/06/12/ct-voting-rights-act-law-elections/ [https://perma.cc/48GH-GFUN].

346. *See* John R. Lewis Voting Rights Act of New York, N.Y. ELEC. LAW § 17-216 (McKinney 2023) ("Expedited judicial proceedings and preliminary relief"). The law says claims "brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference." *Id.* Even so, some statutory provisions—including what is meant by "possible"—remain indeterminate and are subject to interpretation by courts.

347. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (establishing that federal courts hearing state law claims apply state substantive law and federal procedural law).

This Article shows that redistricting immunity has substantive stakes. By leaving in place unlawful maps, immunity produces substantively deleterious outcomes for voting rights and harms minority voters. While future scholarship can push judges to understand this immunity in substantive terms, state law can also make progress toward this end. In particular, lawmakers should expressly describe the purpose of provisions that govern the timing of injunctive relief. Further, legislators should build legislative records through committee reports and floor debates that explain the purpose of state laws designed to circumvent immunity. In this light, federal and state courts will more likely understand that calendaring decisions have substantive valence. Legislation that expressly states that it is designed to avoid immunity would be more likely to achieve its goal in both federal and state court. At a minimum, state law could eliminate immunity in state court—permitting voters to bifurcate state and federal claims, prevent removal, and ensure that if a state remedy is *possible*, they secure it.

C. Litigant Discovery

Absent judicial or legislative intervention, plaintiffs can blunt the effects of redistricting immunity by changing litigation strategies. Two critical insights flow from this Article. First, this Article reveals that litigants may lack sufficient time to sue as early as 150 days before the primary election date.[348] Litigants should use these data to proceed on timelines that comport with even the most restrictive applications of *Purcell*. And these data should rebut ripeness challenges to relatively early impasse suits. Plaintiffs already sue while legislatures are in the throes of redistricting without encountering ripeness problems, and these data provide concrete guidance for courts to expand the timeframe in which they entertain similar claims.

Second, voters should seek discovery on *Purcell* issues to tie defendants to sufficiently early deadlines. Courts, in turn, can bind parties to schedules that allow enough time for remedial maps. Impasse litigation is a promising vehicle for this form of discovery. Instead of filing suit post-enactment (and seeking *Purcell* discovery when time is already short), voters can interrogate *Purcell* issues beforehand. Pre-enactment discovery is a powerful solution because of the incentives it creates. In impasse, states argue that the legislature has plenty of time to finish its work and enact maps (claiming that time is no problem). In contrast, states defending against preliminary injunctions post-enactment take the opposite position. There, defendants claim that injunctions should be stayed because the state lacks time to implement a remedy.[349] That conflict presents an

348. *See supra* Part II.A ("Redistricting Immunity After 2020").

349. *See, e.g.*, Robinson v. Ardoin, 605 F. Supp. 3d 759, 854 (M.D. La. 2022), *stay granted*, 142 S. Ct. 2892 (2022) (mem.) ("Legislative Intervenors were attempting to demonstrate that judicial intervention to resolve the impasse on redistricting was not necessary, and in that context, they painted a very different picture than the one they paint for this Court" regarding *Purcell* concerns on a preliminary injunction posture.).

opportunity to reimagine discovery strategy. Early *Purcell* discovery would force the state to justify its assertions that late-breaking injunctions would frustrate election administration or harm the public interest. By proceeding with *Purcell* discovery before the legislature adopts maps, voters stand a better chance of circumventing the prohibitive time demands that plague post-enactment litigation.

CONCLUSION

Redistricting immunity raises new and serious concerns for American democracy. The twin problems of *Shelby County* and *Purcell* immunize state legislative decisions from liability and undercut core democratic safeguards—safeguards that protect the political process by barring discrimination on account of race and party. In so doing, redistricting immunity has aggrandized state legislatures, inverted federal supremacy, and distorted the role of courts. If not addressed, the problem will get worse. Only with the consequences of redistricting immunity in clear view can courts, legislatures, and litigants remedy this new phenomenon that has eroded the voting rights protections once known to "buttress all of American democracy."[350]

350. Merrill v. Milligan, 142 S. Ct. 879, 889 (2022) (mem.) (Kagan, J., dissenting).