PURCELL V. GONZALEZ, PRINCIPLE AND PROBLEM—NATIVE AMERICAN VOTING RIGHTS IN THE 2018 NORTH DAKOTA ELECTIONS

Election-related litigation causes much angst in today's highly partisan environment. This is especially true when the litigation is not resolved before an election occurs. When election-related litigation is still pending in the days close to an election, the courts must decide, often in the context of an application for a stay, under which set of regulations the election will proceed. The Supreme Court's decision in Purcell v. Gonzalez *signaled to lower courts that they should not change election regulations close in time to the election, but the Court failed to answer two follow-on issues that have arisen from* Purcell. *First, courts are unsettled about how close to the election is too close to change a law or regulation; second, they are unsure about how* Purcell *interacts with the* Nken *factors that otherwise govern how and when stays should be granted.*

This Comment examines this muddled area of the law through the lens of North Dakota's 2018 election cycle. Native American plaintiffs had procured a preliminary injunction against an allegedly discriminatory North Dakota election law, and the primary election proceeded under the terms of that injunction. But just six weeks before the general election, the Eighth Circuit stayed that injunction, and the Supreme Court refused to vacate that stay. The various decisions in Brakebill v. Jaeger *illustrate both the chaos that can ensue when election regulations are changed too close to an election and the reality that the Supreme Court's current processes, including its extensive use of the "shadow docket," do not facilitate the development of unified jurisprudence in the lower courts regarding the grant or denial of a stay. This Comment suggests possibilities for reform that will work to restore voter confidence in the judiciary when it settles future election-related disputes.*

TABLE OF CONTENTS

I. INTRODUCTION

It has been said that baseball is America's national pastime. But our real national pastime is politics. Nothing captures the American imagination like a big election. We learn about the candidates,[1] and we vote in the primary of our preferred political party.[2] We go to rallies and chant slogans.[3] We donate and buy campaign gear.[4] We put up yard signs,[5] participate in phone banking (and in a new modernization, "text banking"),[6] knock on doors,[7] and display bumper

1. *See, e.g.*, Jeffrey Gottfried et al., *The 2016 Presidential Campaign – A News Event That's Hard to Miss*, PEW RES. CTR. (Feb. 4, 2016), http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/.

2. *See, e.g.*, Drew DeSilver, *Turnout in This Year's U.S. House Primaries Rose Sharply, Especially on the Democratic Side*, PEW RES. CTR.: FACTTANK (Oct. 3, 2018), http://www.pewresearch.org/fact-tank/2018/10/03/turnout-in-this-years-u-s-house-primaries-rose-sharply-especially-on-the-democratic-side/.

3. *See, e.g.*, Chris Johnson, *It's Official: Mayor Pete Buttigieg Declares 2020 Presidential Campaign*, WASH. BLADE (Apr. 14, 2019, 3:24 PM), https://www.washingtonblade.com/2019/04/14/its-official-mayor-pete-buttigieg-declares-2020-presidential-campaign/; *'Yes We Did,' Obama Crowd Chants at Rally*, CNN (Nov. 5, 2008, 2:08 AM), http://www.cnn.com/2008/POLITICS/11/04/obama.celebration/.

4. *See, e.g.*, Lauren Dezenski, *A Guide to the Hottest 2020 Presidential Campaign Swag*, CNN (Apr. 5, 2019, 9:10 AM), https://www.cnn.com/2019/04/05/politics/2020-candidate-campaign-merchandise/index.html.

5. *See, e.g.*, Lane Wallace, *The Popularity and Irrelevance of Our Yard Sign Wars*, ATLANTIC (Nov. 3, 2012), https://www.theatlantic.com/national/archive/2012/11/the-popularity-and-irrelevance-of-our-lawn-sign-wars/264488/.

6. *See, e.g.*, Nathaniel Rakich & Samantha Sergi, *Inside the Field Offices of the Iowa Caucuses*, FIVETHIRTYEIGHT (Jan. 27, 2020), https://fivethirtyeight.com/features/inside-the-field-offices-of-the-iowa-caucuses/.

7. *See, e.g.*, Colin Butler, *Why Door Knocking Works: The 'Terrifying' Art of Political Canvassing*, CBC NEWS (June 3, 2018, 7:00 AM), https://www.cbc.ca/news/canada/london/ontario-election-canvassing-1.4688174.

stickers.[8] We get mad online.[9] We sometimes get mad in real life, and on rare occasions, violent.[10]

Finally, the day arrives: we vote, frequently early,[11] but only occasionally often.[12] The most partisan among us stand outside the polling precinct, passing out sample ballots and making a last-ditch effort to persuade that one voter who remains undecided even as they enter the polling place.[13] And we come together as a country on election night to watch the returns.[14] "The thrill of victory and the agony of defeat" is perhaps nowhere better illustrated than an election night campaign party.[15] If you need further proof that politics surpasses baseball, consider this: unlike baseball, elections don't get called off when there's a pandemic.

But there is one other important thing that we do before elections: we litigate. We litigate about district lines and gerrymandering.[16] We litigate about the standards for counting absentee ballots.[17] We litigate about who should be on the ballot, both

---

8. *See, e.g.*, *Bumper Stickers: A Vehicle for Political Expression*, CBS NEWS (Oct. 16, 2016, 9:37 AM), https://www.cbsnews.com/news/bumper-stickers-a-vehicle-for-political-expression/.

9. *See, e.g.*, Christopher Ingraham, *When It Comes to Politics, People Are Angry Online as Never Before*, WASH. POST (July 18, 2018, 2:29 PM), https://www.washingtonpost.com/business/2018/07/18/when-it-comes-politics-people-are-mad-online-like-never-before/.

10. *See, e.g.*, Jenna Johnson & Mary Jordan, *Trump on Rally Protestor: 'Maybe He Should Have Been Roughed Up'*, WASH. POST (Nov. 22, 2015, 3:29 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/11/22/black-activist-punched-at-donald-trump-rally-in-birmingham/.

11. *See, e.g.*, Liam Stack, *Millions Have Voted Early in the Midterms. Here's What That Means — and What It Doesn't.*, N.Y. TIMES (Oct. 23, 2018), https://www.nytimes.com/2018/10/23/us/politics/early-voting-midterms.html.

12. *See, e.g.*, Amy Gardner, *N.C. Board Declares a New Election in Contested House Race After the GOP Candidate Admitted He Was Mistaken in His Testimony*, WASH. POST (Feb. 21, 2019, 4:00 PM), https://www.washingtonpost.com/politics/candidate-says-new-congressional-election-warranted-in-north-carolina/2019/02/21/acae4482-35e0-11e9-854a-7a14d7fec96a_story.html.

13. *See, e.g.*, John Sharp, *Alabama's 'Liberal' 30-Foot Campaign-Free Restriction Outside Polling Places Could Soon Change*, AL.COM (Nov. 19, 2018), https://www.al.com/news/2018/11/alabamas-liberal-30-foot-campaign-free-restriction-outside-polling-places-could-soon-change.html.

14. *See, e.g.*, John Koblin, *Midterm Elections Deliver a Ratings Surge, with Fox News in the Lead*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/business/media/midterm-election-tv-ratings.html.

15. *Wide World of Sports* (ABC television broadcast 1978); *see also* Brian Stelter, *Jim McKay, Longtime ABC Sportscaster, Is Dead*, N.Y. TIMES (June 7, 2008, 10:55 AM), https://mediadecoder.blogs.nytimes.com/2008/06/07/jim-mckay-longtime-abc-sportscaster-is-dead/ (describing the use of the catchphrase "the thrill of victory and the agony of defeat").

16. *See, e.g.*, League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018).

17. *See, e.g.*, Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1315 (11th Cir. 2019).

in terms of qualified parties[18] and individual candidates.[19] We litigate about voter identification laws—the variety of election litigation that this Comment analyzes. Sometimes we litigate so much that the time for an election is rapidly approaching, but the courts have not been able to resolve all the litigation. Those cases clearly require an immediate, albeit temporary, resolution so that the election can proceed in an orderly fashion.[20]

A doctrine called the *Purcell* principle governs cases challenging election regulations that run up against the election date.[21] The doctrine cautions courts against changing voting regulations close to an election. While its bones can be found in previous cases, it was clearly elucidated in *Purcell v. Gonzalez*.[22] The *Purcell* principle explains many Supreme Court orders issued close to elections that could be perceived as internally inconsistent, at least from a partisan standpoint.[23]

---

18. *See, e.g.*, Libertarian Party of Ohio v. Husted, 751 F.3d 403, 405 (6th Cir. 2014).

19. *See, e.g.*, Poindexter v. Strach, 324 F. Supp. 3d 625, 627 (E.D.N.C. 2018).

20. *See, e.g.*, Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam) (noting that there are "considerations specific to election cases" and basing the ruling in part "in view of the impending election").

21. *See* RNC v. DNC, 140 S.Ct. 1205, 1207 (2020). While this Comment was in the final editing process, the Supreme Court decided *RNC*, which imposed a stay on a district court injunction of Wisconsin law regulating absentee ballots. The district court entered the injunction five days before the election in response to the COVID-19 pandemic. *See id.* at 453. The Court's per curiam opinion held that the injunction was error under *Purcell*. *See id.* at 453–54. Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented; they would have denied the application for stay due to the extraordinary circumstances of the pandemic and the heightened potential for chaos that Supreme Court intervention could cause, especially given that the stay issued the day before the election. *See id.* at 457 (Ginsburg, J., dissenting).
Further analysis of *RNC* will occur in other articles, but two notable things jump out from this decision that would have been more fully incorporated into this Comment had time been sufficient to do so. First, the Court does not consider itself bound by the *Purcell* principle; as the per curiam opinion stated, "The Court would prefer not to do so [i.e., intervene], but when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error." *See id.* at 454; *see also* Derek T. Muller, *Justice Ginsburg Turns the "*Purcell *Principle" Upside Down in Wisconsin Primary Case*, EXCESS DEMOCRACY (Apr. 6, 2020), https://excessofdemocracy.com/blog/2020/4/justice-ginsburg-turns-the-purcell-principle-upside-down-in-wisconsin-primary-case (criticizing Justice Ginsburg's dissenting opinion as "misunderstanding" *Purcell*). This is demonstrated by the Court's grant of the stay the night before the election. *See RNC*, *supra* at 452–53. Second, according to searches of Westlaw and Lexis, *RNC* is the first time that the Supreme Court has used the phrase "*Purcell* principle." *RNC* therefore explicitly confirms the existence of the *Purcell* principle, which had previously only been theorized. *See infra* Part II.

22. 549 U.S. 1 (2006).

23. *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2015).

Such a situation arose in the 2018 midterm elections in North Dakota. There, Native Americans challenged an election regulation—a requirement to provide an identifying document with a current residential street address before being allowed to vote—and the dispute was still pending close to the election date.[24] Ultimately, the federal courts temporarily resolved the challenge in favor of the state.[25]

This Comment will argue that the various rulings issued by the federal courts in the North Dakota cases misapplied the *Purcell* principle. The courts mechanically applied the *Purcell* principle while undervaluing the reasons behind *Purcell*: protection of the fundamental right to vote, especially in the Voting Rights Act context, and the high risk of voter confusion when the rules are changed near the end of the election process. Through the lens of the North Dakota cases, this Comment will also show that the *Purcell* principle needs to be reexamined in light of existing jurisprudence around stays.

Specifically, Part II will describe the general legal background of stays, including the Supreme Court's introduction of the *Purcell* principle and applications of the principle through the 2018 elections. Part III will then turn its attention to the election in North Dakota, including the relevant election laws, federal case law, and the factual circumstances. Part IV will argue that the courts misapplied the *Purcell* principle in this context and that, at every step, the courts should have applied the *Purcell* principle with an eye toward protecting voting rights. Part V will discuss possible solutions moving forward; it will suggest a de-emphasis of *Purcell*, instead subsuming its rationale as a very important, but not dispositive, factor when weighing the public interest in the traditional test for a stay. Part V will also argue that the Supreme Court should explain itself instead of working from the "shadow docket." Finally, it will discuss possible alternatives for litigants who may be faced with an overbearing federal interpretation of *Purcell*.

II. HISTORY OF THE *PURCELL* PRINCIPLE

The *Purcell* case entered the national scene on October 5, 2006, when the Ninth Circuit Court of Appeals entered a preliminary injunction, thereby overruling a district court judge in Arizona who

24. Roey Hadar et al., *North Dakota's Native American Tribes Scrambling to Print New IDs Ahead of Midterm Elections*, ABC NEWS (Nov. 6, 2018), https://abcnews.go.com/Politics/north-dakotas-native-american-tribes-scrambling-print-ids/story?id=58999039.

25. The challenges have been settled on favorable terms to the Native American plaintiffs. *See* Al Jaeger, Spirit Lake Nation & Standing Rock Sioux Tribe, *Secretary of State and North Dakota Tribes Agree to Settle Voter ID Lawsuit*, CAMPAIGN LEGAL CTR., https://campaignlegal.org/press-releases/secretary-state-and-north-dakota-tribes-agree-settle-voter-id-lawsuit (last visited May 7, 2020).

had denied the injunction the previous month.[26] The injunction was sought by Native Americans who were challenging a voter identification requirement, and it arrived thirty-three days, or not quite five weeks, before the November 7, 2006 election.[27]

But in a *per curiam* ruling, the Supreme Court vacated the injunction.[28] The Court explained that "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[29] The Court also noted that there are "considerations specific to election cases,"[30] not only "voter confusion" but also "the necessity for clear guidance" for election administrators.[31] Although the Court did not explicitly state its holding in these terms, the case is regarded to stand for the proposition that when the time for an election draws near, courts should hesitate before making changes to election regulations.[32]

In many ways, this is a commonsense doctrine. Candidates and campaigns need certainty, so they can know that the rules of the game will not change and can finalize their strategies. Voters need certainty, so they can adequately research the candidates and issues to reach an informed judgment. Election administrators need certainty, so they can focus on running the election and not be distracted by having to monitor an appellate court. There must be some cut-off point at which everyone agrees to freeze the rules; if something goes terribly wrong, postelection remedies are available.[33] But the *Purcell* principle has created many more questions. When should courts begin to invoke the *Purcell* principle? Should *Purcell* be applied in all election cases, including those where the *Purcell* status quo seems counter to how the case will eventually be decided? And broadly, how does *Purcell* fit with jurisprudence surrounding stays in nonelection cases?

The Supreme Court's later jurisprudence on the issue has not shed much light on the answers to these questions; in fact, it has only confused it further. The *Purcell* principle was apparently first so named by election law scholar Richard Hasen after the Court issued four seemingly contradictory orders in the run-up to the 2014 elections.

---

26. *Purcell*, 549 U.S. at 3.
27. *Id.*
28. *Id.* at 2.
29. *Id.* at 4–5.
30. *Id.*
31. *Id.*
32. *See* Hasen, *supra* note 23, at 428.
33. *See, e.g.*, Colin Campbell, *Five NC Towns to Hold 2015 Elections Again*, NEWS & OBSERVER (Raleigh, N.C.) (Jan. 20, 2016, 7:22 PM), https://www.newsobserver.com/news/politics-government/state-politics/article55722610.html.

The first order related to an Ohio law that eliminated a one-week period, colloquially known as "Golden Week," during which voters could simultaneously register to vote and cast their ballot.[34] The district court held on September 4, 2014, that the law violated the Voting Rights Act, and the Sixth Circuit affirmed.[35] But on September 29, 2014, the five more conservative Justices of the Supreme Court entered a stay over the noted dissent—but no opinion—of the four more liberal Justices.[36] The second order related to a North Carolina law that, inter alia, cut back on early voting opportunities.[37] The Fourth Circuit held on October 3, 2014, that the law violated the Voting Rights Act, but on October 8, 2014, the Supreme Court entered a stay.[38] This time, Justice Ginsburg, joined by Justice Sotomayor, wrote a full dissent.[39]

The third order rejected the Seventh Circuit's stay of a district court order holding that the Voting Rights Act prohibited enforcement of Wisconsin's voter identification law.[40] The Seventh Circuit's stay, which would have allowed enforcement of the law, was issued September 12, 2014, but the Supreme Court vacated it on October 9, 2014, over the dissent of Justice Alito, joined by Justices Scalia and Thomas.[41] Finally, the fourth order affirmed the Fifth Circuit's stay of a district court order holding that the Voting Rights Act prohibited enforcement of Texas's voter identification law.[42] The district court entered its order on October 9, 2014, the Fifth Circuit stayed that order on October 14, 2014, and the Supreme Court affirmed the stay on October 18, 2014.[43] Here again, Justice Ginsburg wrote a dissent, joined by Justices Kagan and Sotomayor.[44]

These orders could not be explained by partisanship, nor could they be explained by a general disapproval of certain types of election regulations. For example, the Court allowed Texas to implement its voter identification law, but not Wisconsin. According to Hasen's theory, *Purcell* was the common thread that governed these four cases. In each case, the Supreme Court rejected the late changes.

Therefore, in February 2016, when the Court was faced with a request for a stay of a district court order declaring North Carolina's congressional districts unconstitutional while absentee voting had

---

34. *See* Hasen, *supra* note 23, at 447.
35. *See id.* at 447–48.
36. Husted v. Ohio State Conference of the NAACP, 573 U.S. 988, 988–89 (2014).
37. *See* Hasen, *supra* note 23, at 448–49.
38. North Carolina v. League of Women Voters of N.C., 574 U.S. 927, 927 (2014).
39. *Id.* at 927–28 (Ginsburg, J., dissenting).
40. *See* Hasen, *supra* note 23, at 450–52.
41. Frank v. Walker, 574 U.S. 929, 929 (2014).
42. *See* Hasen, *supra* note 23, at 452–53.
43. Veasey v. Perry, 71 F. Supp. 3d 627, 627 (S.D. Tex.), *stayed*, 769 F.3d 890, 890 (5th Cir.), *application to vacate stay denied*, 574 U.S. 951, 951 (2014).
44. *Veasey*, 574 U.S. at 951 (Ginsburg, J., dissenting).

already started in the primary, Hasen predicted that the *Purcell* principle would require the Court to step in and issue the stay.[45] After all, the election was already in progress under the old lines. Instead, the Supreme Court *did not* issue a stay[46]—and while the primary was held as scheduled, its results were nullified, and North Carolinians voted in a second congressional primary held three months after the first.[47]

2016 was mostly a quiet year for the *Purcell* principle, although the Ninth Circuit ordered one change very late in the election process, which was promptly vacated by the Supreme Court.[48] This lack of activity may be because lower courts adapted to the *Purcell* principle. For example, a panel of the Fourth Circuit that invalidated various parts of North Carolina's election laws specifically attempted to inoculate its decision by explaining why *Purcell* would not apply.[49] Highlighting the representations of state election administrators, the panel explained that it had issued its decision before any critical deadlines and with enough time to ensure that all precinct officials were properly trained.[50] Despite the panel's precautions, the four conservative Justices would have stayed the panel's ruling at least in part, Justice Thomas in whole.[51] The votes to grant the stay seem inconsistent with the *Purcell* principle jurisprudence established in 2014.

In 2018, the *Purcell* principle may have been used to stay a ruling that restored Michigan's straight-ticket ballot device. The district court had enjoined the law that removed the straight-ticket option on August 1, 2018, but the Sixth Circuit granted a stay on September 5, 2018 (thereby causing the ballots to be printed without the straight-ticket option).[52] The Supreme Court affirmed that stay two days

---

45. *See* Rick Hasen, *Did the Supreme Court Kill the* 'Purcell *Principle' for Election Litigation? Maybe, Maybe Not*, ELECTION L. BLOG (Feb. 20, 2016, 1:26 PM), https://electionlawblog.org/?p=80165.

46. *See id.*

47. *See* Colin Campbell, *Six Things to Know About North Carolina's Unusual June Primary*, NEWS & OBSERVER (Raleigh, N.C.) (May 27, 2016, 3:27 PM), https://www.newsobserver.com/news/politics-government/state-politics/article80360517.html.

48. *See* Chris Geidner, *The Supreme Court Basically Told Judges to Stop Messing with Voting Laws Before the Election*, BUZZFEED NEWS (Nov. 5, 2016, 2:04 PM), https://www.buzzfeednews.com/article/chrisgeidner/supreme-court-attempts-to-slow-flood-of-last-minute-election.

49. *See* N.C. State Conference of the NAACP v. McCrory, No. 16-1468, slip op. at 7 (4th Cir. Aug. 4, 2016), http://pdfserver.amlaw.com/nlj/NC_voter_ca4_20160804.pdf (denying state defendants' motion to recall and stay the mandate of the opinion at 831 F.3d 204, which enjoined various provisions of North Carolina election law).

50. *See id.*

51. North Carolina v. N.C. State Conference of the NAACP, 137 S. Ct. 27, 27–28 (2016).

52. Mich. State A. Philip Randolph Inst. v. Johnson, 749 F. App'x 342, 344, 354 (2018).

later, over the noted dissent of Justices Ginsburg and Sotomayor.[53] Because the Supreme Court issued no opinion on the matter, and the Sixth Circuit's majority opinion did not mention *Purcell* at all, observers were left to wonder about the rationale. Did the Supreme Court not step in because a change on September 5 was acceptable, within the circuit court's discretion? Or did it not step in because the district court's change on August 1 was too late and thus, the circuit court acted properly under *Purcell* by reverting to the status quo?

The foregoing smattering of cases makes clear that it is difficult to find the rhyme or reason involved in the decision to grant or deny an election-related stay. In 2009, the Supreme Court restated the factors that a lower court should consider when deciding a stay in *Nken v. Holder*:[54]

> [A] court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[55]

But it seems the courts are not applying these factors consistently. "The variability of stay determinations is not within the normal range of outcomes that we would expect from typical discretionary determinations. Instead, the factors that courts use are arbitrary and vary unpredictably."[56]

One reason that courts find it difficult to apply the *Nken* factors is that the Supreme Court decides stay applications upon what has become known as the "shadow docket."[57] These decisions come out on the order list, usually without a majority opinion, leaving the parties and the public in the dark about why the majority decided the stay application as it did; sometimes, there may be a concurrence or dissent that could shed light on the majority's thought process.[58] One scholar describes the shadow docket as a "law-free zone."[59] In other words, there is a justified perception that federal jurisprudence around stays is perhaps governed by judicial whim—even before the *Purcell* wild card comes into play in election cases. When lower courts

53. Mich. State A. Philip Randolph Inst. v. Johnson, 139 S. Ct. 50, 50 (2018).
54. 556 U.S. 418 (2009).
55. *Id.* at 426.
56. Portia Pedro, *Stays*, 106 CALIF. L. REV. 869, 873 (2018).
57. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 19 (2015) (discussing the implications of the lack of transparency of the Supreme Court's shadow docket).
58. *See* Pedro, *supra* note 56, at 873 & n.17.
59. *Id.* at 873.

are faced with these tough and often momentous decisions, the precedent is all over the board.[60]

Because these cases are decided on the shadow docket, no one other than the Justices and their clerks can know how the *Nken* factors are being weighed. How are the *Nken* factors balanced against each other? Does one play a larger role than the others? And no one can know how *Purcell* is being considered in this mix. Perhaps election cases are *sui generis*, and *Nken* does not apply; *Purcell* would simply supersede *Nken* in the election context. Maybe *Purcell* operates as a fifth *Nken* factor. Without opinions and clear guidance from the Supreme Court on this topic, there can be no certainty as to when a stay is appropriate—no certainty for litigants and no certainty for lower courts who must decide in the first instance. And there is even less certainty in election cases because of the looming presence of *Purcell*.

Against this chaotic backdrop, Part III now turns to the situation facing Native Americans, citizens of North Dakota, seeking to exercise the franchise in their 2018 election for United States Senate.

III. NORTH DAKOTA IN 2018

A. The Voting Rights Act

The right to vote is a fundamental right.[61] And the Fifteenth Amendment was enacted to protect that right from being arbitrarily denied or abridged based on race or color.[62] But as former Confederate states were readmitted to the Union and Reconstruction gave way to white hegemony, the Fifteenth Amendment's promises proved to be illusory; African Americans were once again disenfranchised by segregation and Jim Crow.[63] Against this backdrop, the Civil Rights Movement came into being. The clash

60. *See id.* at 874. Recent examples of momentous decisions regarding stays outside the election context include rejection of Roy Moore's resistance to the *Obergefell* decision, as well as abortion rights, transgender bathroom policies, numerous last-minute stays of execution, and the first iterations of the Trump travel ban. *See id.* at 872 & nn.3–7 & 10.

61. *See, e.g.*, McDonald v. Bd. of Election Comm'rs of Chi., 394 U.S. 802, 806–07 (1969) ("[W]e are dealing generally with an alleged infringement of a basic, fundamental right.").

62. *See* United States v. Reese, 92 U.S. 214, 217 (1875) ("The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude.").

63. *See, e.g.*, *The Grandfather Clause*, N.Y. TIMES (June 23, 1915), https://timesmachine.nytimes.com/timesmachine/1915/06/23/100163232.pdf; Rebecca Onion, *Take the Impossible "Literacy" Test Louisiana Gave Black Voters in the 1960s*, SLATE (June 28, 2013, 12:30 PM), https://slate.com/human-interest/2013/06/voting-rights-and-the-supreme-court-the-impossible-literacy-test-louisiana-used-to-give-black-voters.html.

between African American reformers and white resistance reached a boiling point on Bloody Sunday, March 7, 1965, when the Edmund Pettus Bridge in Selma, Alabama, ran red with the blood of civil rights demonstrators.[64]

Forced into action, President Lyndon B. Johnson pushed through the Voting Rights Act of 1965.[65] The Voting Rights Act had many salutary provisions, including a prohibition on literacy tests as a prerequisite for voter registration and a "preclearance" requirement that mandated certain Southern states to submit any changes in their election laws to the Department of Justice for approval before those changes could go into effect.[66] It also banned the use of discriminatory election procedures that would deny someone the right to vote based on their race.[67] Although the Voting Rights Act was certainly spurred on by the Civil Rights Movement and brutality against African Americans, its plain text applies to any racial or ethnic group,[68] including Native Americans.[69]

But in *City of Mobile v. Bolden*,[70] the Supreme Court held that the nondiscrimination provision of the Voting Rights Act outlawed only purposeful racial or ethnic discrimination. The Court held that the relevant section of the Voting Rights Act, Section 2, was simply coextensive with the Fifteenth Amendment.[71] The Court then cited a plethora of case law to make the point that the Fifteenth Amendment prohibited only purposeful discrimination.[72] Therefore, Congress amended the law to include a "results" test. The act, as currently amended, states: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of

64. *See* Roy Reed, *Alabama Police Use Gas and Clubs to Rout Negroes*, N.Y. TIMES (Mar. 8, 1965), https://www.nytimes.com/1965/03/08/archives/alabama-police-use-gas-and-clubs-to-rout-negroes-57-are-injured-at.html.

65. *See Voting Rights Act Media Kit*, LBJ PRESIDENTIAL LIBR. (June 25, 2013), http://www.lbjlibrary.org/press/voting-rights-act-media-kit.

66. *See* KEVIN J. COLEMAN, CONG. RES. SERV., R43626, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 14 (2015).

67. *See id.* at 13.

68. *See* United States v. Brown, 494 F. Supp. 2d 440, 444, 444 n.3 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009) ("This is an atypical Section 2 case in a number of ways, principal among which is the fact that the case involves alleged discrimination against white voters. Yet Section 2 provides no less protection to white voters than any other class of voters.").

69. *See* Bone Shirt v. Hazeltine, 461 F.3d 1011, 1016–17 (8th Cir. 2007); Old Person v. Cooney, 230 F.3d 1113, 1120 (9th Cir. 2000); *see also Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0 (last updated Sept. 9, 2019) (collecting cases of Section 2 enforcement for various ethnicities and language minorities).

70. 446 U.S. 55 (1980).

71. *Id.* at 60–61.

72. *Id.* at 62–65.

race. . . ."[73] The amendment made clear Congress's intent that mere disparate racial or ethnic impact, whether intentional or unintentional, could be remedied by the courts. Under current Section 2 jurisprudence, "liability ensues if an electoral policy (1) has a disparate racial impact that (2) is attributable to the policy's interaction with discriminatory conditions."[74] And the courts have used this revitalized Section 2 to strike down myriad voting regulations that create a disparate result.[75]

One such example of successful Section 2 litigation is *Johnson v. Halifax County*.[76] In this case, nineteen African American voters challenged their county's method of electing county commissioners as creating a discriminatory result.[77] The court was careful to note that the defendants in the suit had produced evidence indicating that the method of election was not intended to be discriminatory.[78] But the court explained that Section 2 did not require a discriminatory intent—merely a discriminatory effect.[79] After reviewing the statistics and expert testimony, as well as the state's history of racial discrimination, the court found that there was indeed a discriminatory effect and held for the African American voters.[80]

B. North Dakota's Voter Identification Law

North Dakota is unique among the fifty states because it does not require any form of voter registration.[81] Before voter identification statutes were implemented, a prospective voter needed only to present herself at the polling place on Election Day in order to cast a ballot.[82] Some have asserted that this lax system provides an avenue for citizens of other states to vote in North Dakota's elections, thereby

---

73. 52 U.S.C. § 10301(a) (2018).

74. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1570 (2019). The second prong of the test essentially requires that the disparate impact be traced back to some discriminatory event; given the wealth gap caused by systemic, legalized racial discrimination, this prong is easily satisfied in a voter identification case. *See id.* at 1569–70.

75. *See* Kareem Crayton, *Introduction to the Reports*, 17 S. CAL. REV. L. & SOC. JUST. 65, 75–76 (2007). Over seven hundred pages of that volume of the *Southern California Review of Law and Social Justice* are dedicated to voting rights in key jurisdictions and references to successful Section 2 suits are scattered throughout. *See, e.g.*, Anita S. Earls et al., *Voting Rights in North Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 577, 587–88 (2008).

76. 594 F. Supp. 161 (E.D.N.C. 1984).

77. *See id.* at 162.

78. *See id.* at 164.

79. *See id.*

80. *See id.* at 169–71.

81. Alvin A. Jaeger, *North Dakota....The Only State Without Voter Registration*, N.D. SEC'Y STATE: ELECTIONS UNIT, http://www.congressweb.com/assets/VoterRegPDF/REG_North%20Dakota.pdf (last visited May 7, 2020).

82. *See id.*

tampering with the true results.[83] Against this backdrop, the North Dakota legislature implemented a voter identification law in 2013[84] and revised it in 2015.[85] The law required, inter alia, prospective voters to present an identifying document with a current residential street address.[86] While other states have encountered constitutional trouble with voter identification statutes, that trouble has often surfaced in the context of photographic identification.[87] Perhaps in an attempt to avoid that problem, the North Dakota legislature did not require a photograph, merely a current residential street address.

Identification requirements generally are not a severe burden on the fundamental right to vote.[88] But it happens that this particular requirement in North Dakota created a disparate impact on the sizable Native American population of North Dakota.[89] Many Native American reservations simply do not have residential street addresses, so a significant number of Native Americans did not have an identifying document that would satisfy the voter identification statute.[90] Therefore, in January 2016, some affected Native Americans sued in North Dakota federal court under Section 2 of the Voting Rights Act, alleging, inter alia, that the North Dakota statute was unconstitutional because it had the result of limiting Native

---

83. *See* Max Grossfeld, *Dozens of People Voted with False Addresses Committing Voter Fraud*, KYFR-TV (July 20, 2017, 7:57 PM), https://www.kfyrtv.com/content/news/Dozens-of-people-voted-with-false-addresses-committing-voter-fraud-435701893.html; Jill Schramm, *Jaeger Says No Way to Know If There Is Voter Fraud Now*, BISMARCK TRIB. (Sept. 11, 2017), https://bismarcktribune.com/news/state-and-regional/jaeger-says-no-way-to-know-if-there-is-voter/article_195d52bd-ad18-57f9-91a8-d0d147ef0fa5.html. *Contra* Jaeger, *supra* note 81 (contending that North Dakota does not have "widespread problems with non-citizens voting").

84. *See* Act of Apr. 18, 2013, ch. 167, § 5, 2013 N.D. Laws 596, 598–99 (previously codified at N.D. CENT. CODE § 16.1-05-07).

85. *See* Act of Apr. 23, 2015, ch. 157, § 2, 2015 N.D. Laws 687, 688 (previously codified at N.D. CENT. CODE § 16.1-05-07).

86. *See id.*

87. *See, e.g.*, Summer Ballentine, *Missouri Judge Clarifies Ruling on Voter ID Law*, ASSOCIATED PRESS, Oct. 23, 2018, https://www.apnews.com/165ee3841edd4e76b0fe979abb7ed901; Josh Gerstein, *Court Strikes Down North Carolina Voter ID Law*, POLITICO (July 29, 2016, 4:09 PM), https://www.politico.com/story/2016/07/court-strikes-down-north-carolina-voter-id-law-226438; Vann R. Newkirk II, *A Court Strikes Down Texas's Voter ID Law for the Fifth Time*, ATLANTIC (Aug. 24, 2017), https://www.theatlantic.com/politics/archive/2017/08/a-court-strikes-down-texass-voter-id-law-for-the-fifth-time/537792/.

88. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 198 (2008) (controlling opinion of Stevens, J.); *id.* at 209 (Scalia, J., concurring).

89. *See generally* First Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 186–310, Brakebill v. Jaeger, No. 1:16-cv-8, 2018 WL 1612190 (D.N.D. filed Dec. 27, 2017) (pleading disparate impact allegations).

90. *Id.* at ¶ 236.

Americans' access to the polls while not similarly limiting access for other ethnicities.[91]

C. The Brakebill *Litigation*

The Native American plaintiffs successfully obtained a preliminary injunction against the requirement from U.S. District Court Judge Daniel Hovland in their suit, *Brakebill v. Jaeger*.[92] After the 2016 election, the legislature amended the law, ostensibly to address the injunction. But the new version of the law still required North Dakotans to present a form of identification with a current residential street address.[93] In response, those same plaintiffs filed an amended complaint,[94] and Judge Hovland again enjoined enforcement of the law.[95] The 2018 primary elections were conducted pursuant to the terms of that preliminary injunction.[96]

But roughly six weeks before the general election, which included a hotly contested race for United States Senate, a panel of the Eighth Circuit Court of Appeals stayed Judge Hovland's injunction by a 2-1 vote, upsetting the expectations of North Dakota's Native American community. According to Judge Steven Colloton, who wrote for the panel majority, there were significant questions about standing; without standing, there is not a justiciable "case or controversy" for the federal courts to decide.[97] The panel majority also noted that the district court was very concerned about citizens of North Dakota "who do[] not have a 'current residential street address' . . . never be[ing] qualified to vote."[98] But "[n]o plaintiff in this case" had that problem; they all had residential addresses,[99] and only one plaintiff failed to possess identification with his current residential street address.[100]

Although that particular plaintiff had standing as to his own situation, there was still an issue regarding whether injury to one voter could justify a statewide injunction: "Even assuming that a plaintiff can show that an election statute imposes 'excessively burdensome requirements' on *some* voters, that showing does not

---

91. Complaint for Declaratory and Injunctive Relief at ¶¶ 1–2, Brakebill v. Jaeger, No. 1:16-cv-8, 2016 WL 7118548 (D.N.D. filed Jan. 20, 2016).

92. Brakebill v. Jaeger, No. 1:16-cv-8, 2016 WL 7118548, at *13 (D.N.D. Aug. 1, 2016).

93. *See* N.D. CENT. CODE § 16.1-01-04.1(2)(b) (2017).

94. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 89, at ¶¶ 1–2.

95. Brakebill v. Jaeger, No. 1:16-cv-8, 2018 WL 1612190, at *7 (D.N.D. Apr. 3, 2018).

96. Brakebill v. Jaeger, 139 S. Ct. 10, 10–11 (2018) (denying application to vacate stay) (Ginsburg, J., dissenting) ("The risk of voter confusion appears severe here because the injunction against requiring residential-address identification was in force during the primary election . . . .").

97. Brakebill v. Jaeger, 905 F.3d 553, 557–58 (8th Cir. 2018).

98. *Id.* at 561.

99. *Id.*

100. *Id.* at 557.

justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters."[101] At the same time, however, the panel was explicit that the "courthouse doors remain open" to "any resident of North Dakota [who] lacks a current residential street address and is denied an opportunity to vote on that basis."[102]

In dissent, Judge Jane Kelly would have denied North Dakota's request for a stay. In her view, all six plaintiffs had standing because maintaining and presenting identification as a precondition to voting was sufficient for injury-in-fact.[103] And she pointed to specific findings of fact by the district court that pointed to substantial burdens on Native American voters.[104] According to unrebutted evidence, nearly 5000 Native Americans did not have the necessary documentation in order to vote.[105] She also pointed to some degree of confusion within the North Dakota government itself about whether fees should be charged for state-issued identification cards, ostensibly free under the law.[106] Those facts, among others, led Judge Kelly to conclude that North Dakota would not win on the merits of the case, the most important of the *Nken* factors.[107]

But aside from the merits of the case, Judge Kelly also pointed to *Purcell*.[108] She noted that absentee voting was to begin within just a few days, and she contended that "grant[ing] a stay now fails to properly weight the unique 'considerations specific to election cases' that apply when a party seeks to upset the status quo 'just weeks before an election.'"[109] Interestingly, Judge Kelly did not point to voter confusion when discussing *Purcell*, but rather suggested that the stay could lead to confusion among the workers at the individual precincts.[110] Far better, it seemed to her, to simply keep the current injunction in place rather than retrain the poll workers, who would then be risking the possibility of the district court entering individual relief for many voters and creating election day chaos.[111] In other words, Judge Kelly was concerned that similarly situated voters might not be treated similarly if one had received individual relief and the other had not, which would be a nightmare for precinct workers to administrate.[112]

---

101. *Id.* at 558 (quoting Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 202 (2008) (controlling opinion of Stevens, J.)).
102. *Id.* at 561.
103. *Id.* (Kelly, J., dissenting).
104. *Id.* at 563.
105. *Id.*
106. *Id.* at 562.
107. *Id.*
108. *Id.* at 564.
109. *Id.* (quoting Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam)).
110. *Id.* at 564–65.
111. *Id.*
112. *See id.*

After the Eighth Circuit entered the stay, the plaintiffs' attorneys made what may have been the fateful choice to apply for review in the Supreme Court. That application to vacate the stay ate up precious time that could have been used to find plaintiffs to whom "the courthouse doors remain[ed] open" and file a new suit before it was too late.[113] Instead of finding new plaintiffs and going back before Judge Hovland, who had previously proven friendly to the Section 2 argument, the plaintiffs' attorneys chose to put their faith in finding five justices on an eight-member Supreme Court[114] who would vacate the Eighth Circuit's stay. Their gamble failed.

Over a dissent written by Justice Ginsburg and joined by Justice Kagan, the Supreme Court declined to review the Eighth Circuit's dissolution of the injunction.[115] But like so many other cases involving stays, there was no majority opinion. Because this was a shadow docket case, the only insight into the Court's decision is Justice Ginsburg's dissent. The other Justices' thoughts remain unknown.

In her dissent, Justice Ginsburg pointed to *Purcell*. As in *Purcell*, the plaintiffs in *Brakebill* were Native Americans challenging a voter identification requirement.[116] In *Brakebill*, the Eighth Circuit's stay of the injunction was entered on September 24, 2018, only forty-three days before the election and just ten days more than in *Purcell*.[117] And Justice Ginsburg directly quoted the Court's language in *Purcell* to explain why the Eighth Circuit's stay was inappropriate: "last-minute '[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.'"[118]

Justice Ginsburg noted that the Eighth Circuit's stay would result in a change of law between the primary and general elections; even "[r]easonable voters may well assume that the IDs allowing them to vote in the primary election would remain valid in the general election."[119] Further, she chastised the panel for "overlook[ing] specific factfinding by the district court."[120] The district court had found that thousands upon thousands of people did not have appropriate identification, including 18,000 who did not have the "supplemental documentation sufficient to permit them to vote

113. *Id.* at 561.

114. Justice Kavanaugh had not yet been confirmed when the Court ruled in *Brakebill*, so the Court was operating with only eight members.

115. Brakebill v. Jaeger, 139 S. Ct. 10, 10–11 (2018) (denying application to vacate stay) (Ginsburg, J., dissenting).

116. *Id.* Of course, the difference is that in *Purcell*, the district court judge had denied the injunction, while in *Brakebill*, the district court judge granted it.

117. *Id.*

118. *Id.* (quoting Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam)).

119. *Id.*

120. *Id.*

without a qualifying ID."[121] In short, the Eighth Circuit's stay issued six weeks before the election created a "real risk of grand-scale voter confusion."[122] While Supreme Court intervention would also "disrupt[] the status quo," any confusion would be borne by election administrators, presumably trained professionals who could handle the situation with aplomb, as opposed to voters, who might discover "at the polling place that they cannot vote because their formerly valid ID is now insufficient."[123]

D. The Consequences

When the Supreme Court refused to vacate the stay, there were only twenty-eight days before Election Day. With just four weeks before the election, tribal governments rushed to create identification documents that would satisfy the law's demands.[124] Although street addresses had not been publicly assigned, it turned out that local emergency management officials in each county had a system for assigning street addresses to assist first responders in locating and arriving to emergencies.[125] Tribal governments leveraged that system to assign street addresses to tribe members, with varying degrees of cooperation from county governments.[126] According to a media report, one machine melted under the stress of such rapid production of the identification documents,[127] and a crowdfunding campaign generated over $500,000 in donations to support the tribal efforts.[128]

There were nonetheless obstacles. Justice Ginsburg was correct in her prediction of "grand-scale voter confusion." One voter, Terry Yellow Fat, contacted his county's emergency management department to be assigned a street address, only to be given the address of a nearby bar.[129] Aside from the specter of a sick practical joke implicating stereotypes surrounding Native Americans and alcohol, Mr. Yellow Fat could have been subject to criminal penalties had he attempted to vote with an address he knew was incorrect.[130] In Sioux County, the sheriff responsible for assigning addresses seemed to make himself scarce during this crucial four-week

---

121. *Id.*
122. *Id.*
123. *Id.*
124. Maggie Astor, *In North Dakota, Native Americans Try to Turn an ID Law to Their Advantage*, N.Y. TIMES (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/us/politics/north-dakota-voter-id.html.
125. *See id.*
126. *See id.*
127. *Id.*
128. *Contribute to Help Expand and Protect Voting Rights for Native Americans*, ACTBLUE, https://secure.actblue.com/donate/dkndnativevote (last visited May 7, 2020).
129. Astor, *supra* note 124.
130. *Id.*

period.[131] Other miscommunications arose about the ink color in which absentee ballots were required to be completed; the state's website required black, but the county election administrator required blue.[132] Eventually, the state made clear that either color was acceptable,[133] but such conflicting requirements recall Jim Crow literacy tests. The most infamous may be the one administered in Louisiana—far too long to complete in the time allotted, with the questions susceptible to multiple interpretations.[134] Any way the prospective African American voter answered, there was always a reason to reject them; here, for any color ink that the prospective Native American voter used, there would have been a policy to justify rejecting their ballot.

These entirely predictable obstacles serve as proof of the commonsense wisdom expounded in *Purcell*. When election regulations are changed in the middle of the game—especially near Election Day itself—chaos will ensue. The intransigence of the sheriff of Sioux County would have never been an issue had the Eighth Circuit not arguably violated *Purcell* and had the Supreme Court not approved of the circuit court's ruling. Resources that campaigns and activists could have allocated differently were instead poured into North Dakota to compensate for the late change in law. Whatever the difficulties that exist and questions that arise in implementing *Purcell*, there can be no doubt that it is a commonsense rule, and that the chaos created by the Eighth Circuit's late decision and the Supreme Court's failure to step in was entirely avoidable.

E. The Spirit Lake Tribe *Litigation*

Meanwhile, new plaintiffs who unquestionably had standing, including Mr. Yellow Fat, were located and renewed the claims in the district court, bringing a new suit called *Spirit Lake Tribe v. Jaeger*.[135] These plaintiffs sought either another broad injunction against application of the law or, at the very least, relief for themselves. Because of their particular circumstances, these plaintiffs were unquestionably entitled to some form of relief ensuring they could vote in the general election. In a short, bizarre opinion—that some observers, however, characterized as predictable[136]—Judge

131. *Id.*
132. *Id.*
133. *Id.*
134. *See* Onion, *supra* note 63. Questions on the Louisiana "literacy" "test" included: "Spell backwards, forwards" and "Write right from the left to the right as you see it spelled here." *See id.*
135. No. 1:18-cv-222, 2018 WL 5722665 (D.N.D. Nov. 1, 2018).
136. *See* Mark Joseph Stern, *Federal Judge Allows North Dakota Republicans to Block Native Americans from Voting*, SLATE (Nov. 1, 2018, 4:12 PM), https://slate.com/news-and-politics/2018/11/federal-judge-lets-north-dakota-republicans-block-native-americans-from-voting.html; *see also* Rick Hasen, *Federal District Court, Citing* Purcell *Principle, Rejects New Relief in North*

Hovland, the very same judge who had originally enjoined the law, castigated his superiors on the Eighth Circuit for dissolving that injunction. He called "[t]he litany of problems identified in this new lawsuit [] clearly predictable and certain to occur."[137] The allegations, he said, were "great cause for concern."[138]

Yet, having expressed his distaste for the higher courts' rulings, he then declined to order any relief before the election, not merely refusing to enjoin the law as a whole, but also failing to even consider the individual plaintiffs' claims.[139] Judge Hovland cited the *Purcell* line of cases, reasoning that it was too close to the election for relief and the risk of confusion among election officials outweighed the new plaintiffs' claims.[140] He also noted that he was the only active district court judge in North Dakota and his attention was occupied by a two-week-long trial.[141] And while he noted his own crowded docket, his order completely disregarded the pronouncement of the Eighth Circuit that the "courthouse doors remain open" to plaintiffs who could demonstrate that the residential address requirement was a personal obstacle. Fortunately, given the clear entitlement to individual relief and the Eighth Circuit's previous statement, the *Spirit Lake Tribe* plaintiffs were able to agree on a stipulation with the state allowing them to vote in the election.[142] Judge Hovland signed off on the stipulation, and the plaintiffs received their individual relief.[143]

Observers were nonetheless appalled by the implications of the *Spirit Lake Tribe* decision. When combined with another decision that rested on *Purcell*, this time affecting Hispanic voters in Dodge City, Kansas, it seemed as though courts were rejecting credible claims for relief based on a mechanical application of *Purcell*.[144] In both cases, the district court judges professed concern about the effects of the election regulations on minority voters, but they also both apparently thought that *Purcell* represented a kind of superprecedent, incapable of being factually distinguished from the

---

Dakota Residential Address for Voting Case, ELECTION L. BLOG (Nov. 1, 2018, 12:38 PM), https://electionlawblog.org/?p=101873.

137. *Spirit Lake Tribe*, 2018 WL 5722665, at *1.

138. *Id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. Stipulation Regarding Individual Plaintiffs' Eligibility to Vote in November 2018 General Election, *Spirit Lake Tribe v. Jaeger*, 2018 WL 5722665 (No. 18-cv-00222), ECF No. 34.

143. Order Adopting Stipulation, *Spirit Lake Tribe v. Jaeger*, 2018 WL 5722665 (No. 18-cv-00222), ECF No. 35.

144. *See* Richard L. Hasen, *Judges Are Telling Minority Voters They're Probably Being Disenfranchised, but It's Too Late to Do Anything About It*, SLATE (Nov. 2, 2018, 3:57 PM), https://slate.com/news-and-politics/2018/11/dodge-city-ruling-polling-place-closed.html.

circumstances directly before the courts in question.[145] Both the North Dakota and Kansas courts followed *Purcell* robotically despite the substantial risk of voter confusion and disenfranchisement.[146] In a nonelection context, the courts would have certainly considered the four *Nken* factors, or the similar factors relevant to a temporary restraining order, as appropriate. But here, it seemed that *Purcell* trumped all other considerations.

F. The Aftermath

Overall, Native American turnout was significantly higher than usual for a midterm election, as tribal governments more or less successfully provided documentation to tribe members and the apparent disenfranchisement spurred many Native Americans to vote.[147] In that respect, *Purcell*'s prediction that there would be "incentive to remain away from the polls" due to voter confusion was fortunately incorrect.

But it was only incorrect because of the massive effort of voting rights advocates and the tribes themselves to ensure that everyone who was entitled to vote could vote. North Dakota is a small state in terms of population, and the Native American population is only a fraction of the state's overall population. Thus, it was feasible to raise the money necessary to ensure voting rights were protected. That may not be possible in more heavily populated areas. Additionally, this was a high-profile election, and the national political momentum was for Democrats, the party of choice for most Native Americans. Thus, Democrats across the country who were aware of the situation were able to contribute to the crowdfunding campaign and raise further awareness of the Native American plight. Both of these factors worked to counteract voter confusion and drive up Native American turnout, but they may not be present in other elections.

In any event, the cases of Mr. Yellow Fat and his coplaintiffs in *Spirit Lake Tribe* indicate that there were still plenty of perfectly avoidable hiccups in the run-up to the election. And the crowdfunded dollars that went toward rectifying the situation in North Dakota may have been diverted from other election activities. $500,000 of Democratic money directed to Florida instead of North Dakota could have tipped the scales in that state's Senate race, in which a recount was required to establish that the Republican candidate had won.[148]

---

145. *See id.*

146. *See id.*

147. Maggie Astor, *Meet the Native American Woman Who Beat the Sponsor of North Dakota's ID Law*, N.Y. TIMES (Nov. 13, 2018), https://www.nytimes.com/2018/11/13/us/politics/north-dakota-ruth-buffalo.html.

148. *See* Jessica Taylor, *Republican Rick Scott Wins Florida Senate Seat over Incumbent Bill Nelson*, NPR (Nov. 18, 2018, 2:09 PM), https://www.npr.org/2018/11/18/668704045/republican-rick-scott-wins-florida-senate-race-as-recount-comes-to-an-end.

Part IV will take a closer look at the outcomes in *Brakebill* and *Spirit Lake Tribe*, while also examining ways in which the *Purcell* principle is insufficient to decide cases and discussing the lack of clarity for lower courts on the topic of stays.

IV. *PURCELL*—PRINCIPLE OR PROBLEM?

While Native Americans were indeed energized to vote by the allegedly discriminatory law, it should never have gone into effect. With just six weeks before the election, it was improper for the Eighth Circuit to institute a stay. Four weeks out from the election, it was improper for the Supreme Court to *not* vacate that stay. And while perhaps the district court's rejection of the request for a broad temporary restraining order was appropriate, it was still improper for the district court to reject the second set of plaintiffs' requests for individual relief.

The history of *Purcell* principle cases, while muddled, indicates that judicial changes to election regulations should not be made within six weeks of the election, as the Eighth Circuit did in this case. Further, *Purcell* itself involved the Supreme Court vacating an order of a circuit court roughly four weeks from an election; the Court's failure to act in the *Brakebill* case raises questions about stare decisis and, to some observers, partisanship.[149] Finally, two wrongs do not make a right: while *Purcell* may counsel against the district court issuing a sweeping temporary restraining order a week before the election, it should not have discarded the Eighth Circuit's admonition that the "courthouse doors remain open" to individual plaintiffs affected by the law. Nothing in *Purcell* prevents a court from granting individual relief when appropriate. But one could also argue that, in

149. *See* Ashoka Mukpo, *Supreme Court Enables Mass Disenfranchisement of North Dakota's Native Americans*, ACLU (Oct. 12, 2018, 5:00 PM), https://www.aclu.org/blog/voting-rights/supreme-court-enables-mass-disenfranchisement-north-dakotas-native-americans; John Nichols, *Will North Dakota's Discriminatory Voter-ID Law Cost Democrats the Senate?*, NATION (Oct. 15, 2018), https://www.thenation.com/article/will-north-dakotas-discriminatory-voter-id-law-cost-democrats-the-senate/ (alleging that "the Supreme Court just put its thumb on [Republican Senate Leader] Mitch McConnell's side of the scale"). The perception that the judicial branch is simply another partisan branch of government seeking only to impose personal policy preferences has become so severe that the phrase "stare decisis is for suckers" has not simply entered the legal lexicon but also appeared in an opinion of a federal judge. *See* Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., No. 18-60302, 2020 WL 1026927, at *8 (5th Cir. Mar. 3, 2020) (Smith, J., dissenting), *vacated and reh'g en banc granted*, 2020 WL 1465910 (5th Cir. Mar. 20, 2020); Leah Litman (@leahlitman), TWITTER (Mar. 23, 2020, 1:57 PM), https://twitter.com/LeahLitman/status/1242148584071540736 ("Justice Thomas writes separately in Allen v. Cooper to reject the idea that stare decisis demands a 'special justification' before overrruling [sic] precedent because what? STARE DECISIS IS FOR SUCKERS."). Litman is an assistant professor of law at the University of Michigan.

this instance, three wrongs do make a right. Had Judge Hovland enjoined the law again, it would have been faithful to the original intent of *Purcell*: that the election status quo should not be lightly disturbed in the run-up to an election.[150]

Start with the Eighth Circuit. Roughly six weeks before the hotly contested general election for United States Senate, not to mention every other important race on the ballot, it issued a stay of a district court injunction that had been in place since April. The panel majority admitted that "the Supreme Court sometimes frowns on changes in election procedure when they come too close to an election."[151] *Purcell* is one example of such a frown, and the timing of *Purcell* should have been instructive to the panel. But despite the rapidly approaching election, the panel chose instead to anchor themselves to the beginning of September: "there is no universal rule that forbids a stay after Labor Day."[152] In other words, the panel thought that it was acceptable to change an election regulation after Labor Day. Notably, Labor Day is nine weeks before Election Day; the panel's characterization of its decision in terms of Labor Day is an interesting choice, considering that fully one-third of the period from Labor Day to Election Day had already passed.

While the panel's words were literally true, precedent also makes clear that there is no universal rule that court-ordered election law changes six weeks before an election will ultimately be upheld by the high court. For example, in *Frank v. Walker*,[153] the Supreme Court stayed the Seventh Circuit's order allowing enforcement of a previously enjoined Wisconsin voter identification law. That order was entered seven weeks before the November election.[154] Clearly, six weeks is at least within the zone of danger in which a circuit court's stay might get rejected by the Supreme Court as violative of the *Purcell* principle. Even more saliently, in *Husted v. Ohio State Conference of the NAACP*,[155] the Supreme Court vacated a district court's order against an Ohio election regulation, an order that the Sixth Circuit had affirmed. When did that district court rule? September 4, 2014, the week of Labor Day—that holiday so important to the Eighth Circuit—and exactly two months before Election Day.[156]

On the other hand, the Sixth Circuit's 2018 decision relating to the Michigan straight-ticket device came down during the week of

150. Realistically, this is a moot point: The Eighth Circuit would certainly have stayed any sweeping order issued by Judge Hovland, using *Purcell* as its scapegoat. So perhaps discretion was the better part of valor, at least as to the request for a temporary restraining order against the law as a whole.

151. Brakebill v. Jaeger, 905 F.3d 553, 560 (8th Cir. 2018).

152. *Id.*

153. 574 U.S. 929 (2014).

154. Frank v. Walker, 766 F.3d 755, 756 (7th Cir. 2014).

155. 573 U.S. 988 (2014).

156. Ohio State Conference of the NAACP v. Husted, 43 F. Supp. 3d 808, 808 (S.D. Ohio 2014).

Labor Day, and the Supreme Court refused to vacate that stay.[157] Perhaps the rule we can discern from synthesizing the Court's decision in the Ohio case with its decision in the Michigan case is this: changes or orders issued two days after Labor Day will survive, but on the third day, the Supreme Court might vacate the order and resurrect the old regulation.

That synthesis is facetious, to be sure, but it illustrates the difficulty that courts have had in applying the *Purcell* principle. There are no clear guidelines about how close to an election a district court may intervene. Similarly, there are no clear guidelines about how long an appeals court may consider an issue before the *Purcell* principle dictates that it must leave a lower court's order untouched. Of course, if the Supreme Court believes that a Court of Appeals got a *Purcell*-type case wrong, its reversal of the appeals court will be even closer in time to the election, heightening even more the risk of voter confusion that *Purcell* warned of in the first place.

Leaving aside the timing issue, not all violations of voting rights are equally serious. Consider hypothetical Town A that imposed a poll tax as a requirement for voting seven weeks before a federal election.[158] That poll tax would be obviously unconstitutional under the Twenty-fourth Amendment.[159] But it might take two weeks for all the pleadings to come together before a court could strike it down. Surely the *Purcell* principle would not prohibit the court from doing so, even though it might cause voter confusion. But if *Purcell* were applied strictly, it would simply be too close to the election for a court to order a change.[160]

Meanwhile, consider hypothetical Town B that, simultaneously to Town A's poll tax, moved a polling place two blocks down the street, and a minority group believes that the move will have a discriminatory result under Section 2 of the Voting Rights Act. While moving a polling place seven weeks before an election is likely not best practice, it is not clearly unconstitutional in the way that the poll tax would be. And the burden on the affected voters is likely minor. In this case, the risk of further confusion (i.e., voter whiplash about the location of the polling place) would likely outweigh the other considerations, so *Purcell* would suggest that the court decline to order relief.

This hypothetical illustrates that *Purcell* is a rough tool. On its own, it is incapable of a nuanced distinction between the clearly unconstitutional and the marginal. It is a bright-line rule drawn with

157. Mich. State A. Philip Randolph Inst. v. Johnson, 139 S. Ct. 50, 50 (2018) (denying application to vacate stay).

158. The following hypothetical is loosely borrowed from Hasen, *supra* note 23, at 441–42.

159. U.S. CONST. amend. XXIV, § 1; *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding poll taxes as requirements to vote in state and local elections unconstitutional under the Equal Protection Clause).

160. *See* Hasen, *supra* note 23, at 444.

the precision of Jackson Pollock. One leading election law scholar described predicting *Purcell* principle cases as "guess work."[161] This scattershot field of precedent arises because these matters are often decided on the Court's shadow docket, where there are usually no majority opinions to provide clear guidance.[162] In order to get a grasp on the Court's thought process, lower courts and the parties before them (not to mention observers and future litigants) are left to divine the judicial will from statements respecting denials of certiorari or similar writings that come attached to the Court's order lists.[163] So when trial courts are faced with these hypercharged election cases, in an atmosphere in which partisan rancor is at its highest, and equipped with the fuzziest of guidance, inconsistent rulings are only natural. When judicial philosophy and ideology are considered, the situation becomes even murkier.

When judges make apparently inconsistent rulings, it can erode public confidence in the judiciary. This is especially so when those rulings line up with apparent partisan biases. Although scholars know that 5-to-4 decisions along partisan lines are the exception rather than the rule, those decisions are the most highly publicized to the average voter.[164] Given the need for clear guidance from the Supreme Court and also recognizing that both unconscious bias and judicial ideology will likely tilt election cases into that highly publicized, 5-to-4 category,[165] how can courts proceed in a manner that remains faithful to *Purcell*'s commonsense principle of limiting sudden, confusing changes before Election Day, but also recognizes that *Purcell* has limited value in many circumstances? Part V will make suggestions about how the court system should proceed in this sphere, both for future litigants and for the courts themselves.

V. POSSIBLE SOLUTIONS TO THE *PURCELL* PROBLEM

First and foremost, the Supreme Court should step in and provide clarity. The rampant confusion among lower courts and litigants illustrates that the current model of handling election-related litigation is broken. This Comment humbly proposes two ideas for and to the Court. First, the Court should explicitly de-emphasize *Purcell*. Second, the Court should follow the example of many lower courts, both state and federal, and explain its shadow docket decisions.

---

161. *See* Hasen, *supra* note 45.

162. *See id.*; *see also supra* note 60 and accompanying text.

163. *See* Hasen, *supra* note 45.

164. *See* Sarah Turberville & Anthony Marcum, *Those 5-to-4 Decisions on the Supreme Court? 9 to 0 Is Far More Common.*, WASH. POST (June 28, 2018, 6:00 AM), https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/.

165. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000) (deciding, effectively, the 2000 Presidential election in a 5-to-4 decision that fell along expected ideological lines).

The specter of *Purcell* looms large over election-related litigation, and for good reason. It does serve a purpose: it encapsulates the commonsense idea that election regulations should not be changed close to an election. But as mentioned above, *Purcell* is a blunt tool. The *Nken* factors, on the other hand, allow a court to consider all the circumstances. When a court can weigh the likelihood of success on the merits, and irreparable harm, it can more effectively judge the situation to see if a stay is warranted.

This, of course, is not to suggest that the considerations embodied in *Purcell* are irrelevant. After all, the fourth *Nken* factor is the public interest. The legitimate, commonsense need for predictability promoted by *Purcell* should be a heavy component in the public interest analysis.[166] Concerns about voter confusion, election administrator and poll-worker confusion, and general trust in the electoral process fall squarely within the context of determining where the public interest lies. If the Supreme Court were to clearly explain that the *Nken* factors do govern in election cases and that the *Purcell* principle is simply an important part of the public interest factor, it would help both lower courts and litigants know what to expect in the run-up to an election.

The Court could conceivably say the opposite, of course—it could say that *Purcell* supersedes *Nken*. Perhaps the Court intended this interpretation when it spoke in *RNC v. DNC*,[167] explicitly referencing *Purcell* but not *Nken*.[168] Or it could say that the special considerations relating to elections are to be balanced with *Nken*, as a fifth factor. But regardless of the ultimate decision, lower courts and litigants (not to mention the public) need clarity to maintain their

166. *See* Hasen, *supra* note 23, at 444 ("Special considerations related to elections should be one, but not a dominating factor."); Michael T. Morley, Election Emergencies at the Supreme Court 3–4 (Apr. 7, 2020) (unpublished document linked to in *Election Law Blog* post), https://electionlawblog.org/wp-content/uploads/morley-rnc-dnc.docx.

167. 140 S.Ct. 1205, 1207 (2020).

168. *Id.* at 453–54; *see also* Morley, *supra* note 166, at 1 ("Moreover, the ruling confirms that the Court will enforce the *Purcell* Principle on a categorical basis, presumptively reversing election-related injunctions that lower courts issue too close to an election rather than applying the traditional equitable factors governing stays."). If the Supreme Court intended to abrogate *Nken* in the election context, it should have clearly stated that. Of course, the problem with using *RNC* as a guidepost for lower courts is that the 2020 Wisconsin spring general election was very unusual. Ordinarily, no lower court would attempt to change election regulations five days before the election; the unique circumstances of the district court's injunction limits the probative value of *RNC*. In any event, the issue that this Comment takes with the current state of affairs is not so much about the rule that the Court will (hopefully) eventually announce but rather that the Court's announcements, to this point, have not clearly stated a rule. *See* Muller, *supra* note 21 (writing, after the decision in *RNC*, that "[i]t would be nice if the Court articulated better standards than [those which] *Purcell* provides . . . .").

trust that the judicial process is not just another forum for partisan politics.

The need for clarity leads to the second possible idea for the Court. The Court should take some time to explain its shadow docket rulings. In our legal system, the law develops not merely through statutes, but through the pronouncements of courts. But when courts simply make a pronouncement without rationale, the lower courts are left to flounder about how to apply the new precedent. They may wonder if the ruling is even precedential at all. As one scholar put it, "[I]t is difficult for lower courts to follow the Supreme Court's lead without an explanation of where they are being led."[169]

The Court could continue to handle stay requests in the same time frame that it currently does. Indeed, in many cases this would be necessary, because waiting too long before granting a stay could effectively deny the stay.[170] But instead of a terse order granting or denying the stay, it could add one sentence more: perhaps, as one district judge in a similar situation wrote, "The Court will explain the full rationale for reaching this result in the opinion that will issue shortly."[171] This would have the added benefit of allowing all the Justices to fully air their thoughts and theories, and while they would be unable to change their minds, locked in to a result, they could write the best opinion possible for that result. In any event, the Justices cannot change their minds after the grant or denial issues now, so they would be no worse off than they currently are.

Meanwhile, without the need to wait on a dissenting Justice to finish writing their dissent, the grant or denial of relief could perhaps come a few days earlier. The time that Justice Ginsburg took to write her dissenting opinion in *Brakebill* could have been instead used by the plaintiffs' attorneys in responding to the Eighth Circuit's concerns and more quickly coming back before Judge Hovland. Perhaps they could have come back to ask for relief before he started his two-week trial. Instead, they had to wait for the Supreme Court to make its pronouncement, which cost them valuable days.

Another benefit of post hoc opinions would be transparency. Even now, neither the litigants nor the public knows the true result of the Supreme Court's vote in *Brakebill*. Perhaps one or two other Justices actually voted to reverse the Eighth Circuit, but for whatever reason chose not to cosign Justice Ginsburg's dissent.[172] This inconsistency would not be unheard of: in a recent challenge to the Affordable Care Act's contraception rules, the Supreme Court had occasion to issue two injunctions that had essentially the same

169. Baude, *supra* note 57, at 14.

170. *See id.* at 15–16.

171. *See* Hasen, *supra* note 23, at 461 n.132.

172. *See* Baude, *supra* note 57, at 14 (quoting Justice Ginsburg's public comment that "when a stay is denied, it doesn't mean we are in fact unanimous").

effect.[173] Although all four liberal Justices dissented from at least one of the injunctions, only Justice Sotomayor dissented from both.[174] Observers were left to wonder if Justices Ginsburg, Breyer, and Kagan saw something different between the two injunctions.[175] Greater transparency would allow future litigants to have a more clear-eyed view of the playing field and would also "serve[] to hold the individual judge accountable"[176] "to develop a principled jurisprudence and to adhere to it consistently."[177]

The lower courts announce post hoc opinions regularly, especially when time is of the essence, as it often is in *Purcell*-type cases.[178] For example, the Eleventh Circuit recently issued a post hoc opinion explaining its decision to decline a stay in an absentee ballot case.[179] And the Supreme Court itself has issued post hoc opinions in the past, including on election-related issues.[180] If the Court revived its prior practice of issuing post hoc opinions instead of rushing its reasoning, it could bolster its legitimacy and perhaps avoid decisions that garner political criticism.[181]

But what if the Court does not provide clarity? Some litigants may be able to avoid the *Purcell* problem altogether by going into state courts and using state law remedies for election-related issues. Claims based on state constitutions are enjoying a renaissance in both the election law world and across the law generally. For example, aggrieved Pennsylvania voters went into state court with claims based on their state constitution to obtain a ruling striking down Pennsylvania's congressional districts as gerrymandered.[182] Similarly, a North Carolina state trial court has held that its state constitution prohibits partisan gerrymandering.[183] In fact, every

---

173. *See id.* at 15.

174. *See id.*

175. *See id.*

176. *See id.* at 17 (quoting Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990)).

177. *See id.* (quoting Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 832 (1982)).

178. *See* Hasen, *supra* note 23, at 461, 461 nn.131–33.

179. Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1315 (11th Cir. 2019) (explaining, in February 2019, the reasons for the November 2018 denial of a stay).

180. *See* Ray v. Blair, 343 U.S. 214, 216 (1952) ("On account of the limited time before the primary election date, this Court . . . handed down a *per curiam* decision . . . stating summarily our conclusion on the federal constitutional issue . . . . This opinion is to supplement that statement.").

181. *See* Hasen, *supra* note 23, at 462 (highlighting the reflections of Justices O'Connor and Kennedy on the aftermath of *Bush v. Gore*).

182. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018).

183. Common Cause v. Lewis, No. 18 CVS 14001, 2019 WL 4569584, at *135 (N.C. Super. Ct. [Wake], Sept. 3, 2019). The defendants, Republican legislative leaders, elected not to appeal the trial court's holding, thereby allowing the decision to stand as final. *See* Samuel Gilleran, *"This Case Is Not Close": Three-*

state in the union has some form of an equal protection clause that litigants, especially minority voters, might use to obtain state court relief.[184] Indeed, many states, including North Dakota, have election-specific clauses in their constitutions that might provide the basis for state court relief.[185]

Such relief would not be reviewable by the Supreme Court, as it would be based on solely state law grounds.[186] Therefore, litigants would be able to sidestep the *Purcell* jurisprudence in favor of a cleaner state court rule. Indeed, Judge Jeffrey Sutton of the Sixth Circuit recently published a book encouraging litigants to look to their state constitutions for relief, noting that "[a] loss in the U.S. Supreme Court under the U.S. Constitution need not foreshadow a loss in a State High Court under a comparable guarantee in the state constitution."[187] Justice Kavanaugh directly referred to Judge Sutton's point during oral argument in a recent First Amendment case, intimating that the plaintiff could have avoided confusing federal Establishment Clause jurisprudence by choosing to go into state court instead.[188]

To be clear, this strategy likely would not have worked for the plaintiffs in North Dakota, not least because North Dakota is almost

---

Judge Panel Enjoins Use of 2017 North Carolina Legislative Maps as Partisan Gerrymanders, WAKE FOREST L. REV.: CURRENT ISSUES BLOG (Sept. 4, 2019), http://wakeforestlawreview.com/2019/09/this-case-is-not-close-three-judge-panel-enjoins-use-of-2017-north-carolina-legislative-maps-as-partisan-gerrymanders/.

184. Samuel S.-H. Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 227 (2019).

185. *See* N.D. CONST. art. IV, § 2, para. 2 ("The legislative assembly shall guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates."); *see also* Wang et al., *supra* note 184, at 235 (listing states with election-related clauses in their constitutions).

186. *See* Wang et al., *supra* note 184, at 225. Notably, in *RNC*, the Supreme Court apparently waited for the Wisconsin Supreme Court to act on a pending case before staying the district court's injunction, illustrating that if the state court had agreed to postpone the election, the Supreme Court would not have intervened to apply *Purcell*. *See* Molly Beck & Patrick Marley, *Wisconsin Justices Block Tony Evers' Order to Shut Down Election, U.S. Supreme Court Restricts Absentee Voting*, MILWAUKEE J. SENTINEL (Apr. 10, 2020, 4:51 PM), https://www.jsonline.com/story/news/politics/elections/2020/04/06/tony-evers-issues-order-shutting-down-tuesdays-election/2954626001/ (noting that the Supreme Court acted "[a] little over an hour" after the state court ruled).

187. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 9 (2018).

188. Transcript of Oral Argument at 84, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (No. 17-1717), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1717_7l48.pdf ("I think the Constitution tilts toward liberty in its structure. . . . [T]here are lots of avenues for you to . . . change [your] approach here. The Maryland legislature could say no more. The Maryland constitution, as Judge Sutton would remind us, could, or the Maryland courts could prohibit it.").

unique among the fifty states in providing that a supermajority of its supreme court must vote affirmatively in order to invalidate a statute.[189] But just because it may not have worked for the *Brakebill* plaintiffs does not mean that other litigants across the United States should not pursue state law claims to avoid the *Purcell* problem. After all, a state law claim worked for the Pennsylvania and North Carolina plaintiffs.[190] As Judge Sutton noted, just as a basketball player would obviously take both of their free throw shots, plaintiffs should take both of their shots as well, litigating under both the federal constitution and the applicable state constitution.[191]

VI. CONCLUSION: *PURCELL* GOING FORWARD

According to the Constitution, we will continue to have elections, and the litigation surrounding elections will also likely continue unabated. But unless the jurisprudence around election-related stays is clarified, the lower courts will continue to be confused and subject to catcalls of partisan bias. North Dakota in 2018 is a perfect illustration of the chaos that can ensue when courts interfere with election regulations too close to the election. On the other hand, refusing to interfere with some election regulations may itself lead to disenfranchisement.

This Comment has proposed that the Supreme Court should protect voting rights and work to restore faith in our democratic processes simply by explaining further how lower courts should handle requests for stays and injunctions in the sensitive election context. It is perhaps inevitable that sometimes the rules will change in the middle of the electoral game. But lower courts, litigants, election administrators, candidates, and citizens all deserve certainty about how and when the rules might change. If the Court provides that certainty, it will be a step in the right direction toward a restored faith that our judiciary's pastime is not politics, but baseball: calling balls and strikes in a nonpartisan fashion.

Samuel D. Gilleran[*]

---

189. N.D. CONST. art VI, § 4 ("[T]he supreme court shall not declare a legislative enactment unconstitutional unless at least four of the [five] members of the court so decide."). Nebraska is the only other state that requires a supermajority of its justices to invalidate a statute. *See* Eugene Volokh, *Supermajority Required for Finding of Unconstitutionality*, REASON: VOLOKH CONSPIRACY (Feb. 5, 2018, 1:08 PM), https://reason.com/volokh/2018/02/05/supermajority-required-for-finding-of-un.

190. *See supra* text accompanying notes 182–83.

191. *See* SUTTON, *supra* note 187, at 7–10.

* J.D. Candidate 2020, Wake Forest University School of Law; B.A. 2011, Washington and Lee University. This Comment would not have been possible without the support of so many family, friends, and mentors. A few of them include my grandmother, Allene Hall, who sparked my interest in both baseball and the political process; Dr. Shane Lynch, who modeled passion for his craft and

facilitated my closest friendships; and Prof. Meghan Boone, who helped me acquire personal jurisdiction over self-doubt. Thanks to Gilbert Smolenski for key feedback during the drafting phase, as well as Nick Pappayliou, Ryan Dibilio, and the entire *Wake Forest Law Review* staff for their assistance throughout the editing process. Finally, and foremost, to my wonderful and forbearing husband, Aubrey: you have put up with many late nights not only while I was writing and editing this Comment but also through all of law school. *Ruth* 1:16.