VOTING WRONGS AND REMEDIAL GAPS

Today, voting rights plaintiffs largely seek injunctive relief.[1] This wasn't always the case. For most of the nation's history, the standard remedy for a voting wrong[2] was damages.[3] In the usual case, an election official would (mistakenly or intentionally) deny a voter's ballot or registration, and the voter would bring a damages action after the fact.[4] This remedial structure persisted well into the twentieth century. But beginning in the 1950s and 1960s, injunctive relief became far more common.

This Note asks why that change happened and argues that the secondary effect of this injunction-heavy system, coupled with the slow dismantling of the Voting Rights Act of 1965[5] (VRA), has been to underdeter voting wrongs. First, it traces the adoption of the action for damages, first in the states and then in federal courts. Next, it follows the rise of injunctive relief in the second half of the twentieth century. It argues that injunctive relief displaced damages because injunctions offered a more efficient remedy that allowed voting rights groups to prevent voting wrongs. The move to injunctions also followed broader trends in public law, as injunctions became the preferred form of relief in suits against officers. But today's injunction-heavy system tends to underdeter voting wrongs because of limits on the scope of injunctive relief and mismatched compliance incentives for parties subject to injunctions. Finally, this Note considers what can be done to reduce the existing remedial gap.

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[1] *See, e.g.*, Democratic Nat'l Comm. v. Reagan, 329 F. Supp. 3d 824, 832 (D. Ariz.) (seeking declaratory relief and a permanent injunction), *aff'd*, 904 F.3d 686 (9th Cir. 2018), *rev'd sub nom.* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989 (9th Cir. 2020) (en banc), *rev'd sub nom.* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021); Jacksonville Branch of the NAACP v. City of Jacksonville, 635 F. Supp. 3d 1229, 1238 (M.D. Fla. 2022) (seeking injunctive relief).

[2] This Note uses this term broadly to refer to violations of voting rights in general.

[3] *See, e.g.*, Jenkins v. Waldron, 11 Johns. 114, 191–92 (N.Y. Sup. Ct. 1814); Rail v. Potts, 27 Tenn. (8 Hum.) 225, 226 (1847); Long v. Long, 10 N.W. 875, 875 (Iowa 1881); Wiley v. Sinkler, 179 U.S. 58, 64 (1900); Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919); Lane v. Wilson, 307 U.S. 268, 269 (1939).

[4] Many early cases involved disputes over whether a prospective voter met the residency requirements to vote. *See, e.g.*, Lincoln v. Hapgood, 11 Mass. (10 Tyng) 350, 350 (1814). Later disputes involved other qualifications the state imposed on voters, like race, property ownership, or literacy. *See, e.g.*, Peavey v. Robbins, 48 N.C. (3 Jones) 339, 341–42 (1856); Mitchell v. Wright, 154 F.2d 924, 925 (5th Cir. 1946) (literacy test used to deny prospective voter's registration).

[5] 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702.

I. VOTING DAMAGES

A. English Common Law and Early Adoption

During the nineteenth century, state courts uniformly adopted a damages action for violations of voting rights. These courts split with one another on two questions: whether plaintiffs needed to show fault on the part of the official and what sort of authority election officials exercised when they determined whether an individual possessed the qualifications to vote. The majority of states required some showing of fault, but this consensus began to falter as courts considered the ministerial/judicial authority question. Issues of intent and discretion remained central to the availability of the damages remedy in state courts at the turn of the century.

The damages action for voting wrongs originated in the common law tort of misfeasance in public office.[6] This claim provided a cause of action against officials in two scenarios: First, individuals could hold officials liable when they intentionally abused their office to harm others — for example, if a voting registrar maliciously denied someone the ability to vote in an election.[7] Second, people could sue officials who exceeded the scope of their authority or acted inconsistently with the duties of their office, like a voting registrar who considered age in determining a voter's qualification but was not instructed by statute to do so.[8] In the English case of *Ashby v. White*,[9] the constables of the borough of Aylesbury denied the vote of Matthias Ashby, who lived there.[10] Ashby claimed that the denial had been malicious.[11] The Queen's Bench denied judgment for Ashby, finding that no remedy was available.[12] One justice dissented and would have allowed the action;[13] his approach eventually prevailed.[14] *Ashby* encapsulates the basic contours of the action in this period: an individual officer acted outside of the bounds of the law, and someone brought a suit to receive compensation for harm done to their individual right.

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[6] *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 311 n.14 (1986); Nixon v. Herndon, 273 U.S. 536, 540 (1927); Weckerly v. Geyer, 11 Serg. & Rawle 35, 39–40 (Pa. 1824).

[7] *See* John Murphy, *Misfeasance in Public Office: A Tort Law Misfit?*, 32 OXFORD J. LEGAL STUD. 51, 51 (2012).

[8] *See id.* at 51–52.

[9] (1703) 87 Eng. Rep. 808; 6 Mod. 45 (QB), *rev'd*, (1703) 1 Eng. Rep. 417; 1 Brown 62 (HL).

[10] *Id.* at 810, 6 Mod. at 46.

[11] *See id.*

[12] *Id.* at 810–11, 6 Mod. at 46–47; *see also* Leon Green, *Causal Relation in Legal Liability — In Tort*, 36 YALE L.J. 513, 517 (1927). Since Ashby's preferred candidates had prevailed in the election, the only injury in the case was to Ashby's voting rights. *See Ashby*, 87 Eng. Rep. at 809, 6 Mod. at 45.

[13] *See Ashby*, 87 Eng. Rep. at 813, 6 Mod. at 50 (opinion of Holt, C.J.).

[14] *See* Louis Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 14 (1963). Eventually, the House of Lords overturned the lower court's decision and entered judgment for Ashby. *See Ashby*, 1 Eng. Rep. at 418, 1 Brown at 64; *see also* Jaffe, *supra*, at 14. The decision led to a furor in the House of Commons, which produced five resolutions trying to limit the remedy's availability. *See Ashby*, 1 Eng. Rep. at 418 n.*, 1 Brown at 64 n.*.

American state courts adopted the damages action for voting wrongs in the early 1800s but split over whether plaintiffs had to show malice — intentional wrongdoing — on the part of the defendant-officials.[15] Drawing on *Ashby*, both New York's and Massachusetts's courts recognized the availability of the action in 1814.[16] In *Jenkins v. Waldron*,[17] New York's Supreme Court of Judicature permitted a damages claim where election officials had denied a qualified voter's right to vote, but the court required a showing of express or implied malice.[18] Massachusetts, by contrast, did not demand a showing of malice in suits against officials who erroneously denied someone their right to vote.[19] Instead, when plaintiffs demonstrated fault, either through negligence or malice, the Supreme Judicial Court suggested that exemplary damages would be appropriate, both to compensate the plaintiff and to make amends for the "high and aggravated offence" against their rights.[20]

In *Lincoln v. Hapgood*,[21] Massachusetts rested its rationale for providing a remedy absent a showing of fault on the importance of voting rights and of the availability of a remedy for voting wrongs. Voting, the court explained, was a "valuable" right "secured by the constitution."[22] The court understood the injury as twofold: First, vote denial harmed the person whose vote had been denied.[23] Second, it hurt the whole community, since it meant that elected officers were not "appointed by the majority of the votes of all the qualified citizens, who choose to exercise their privilege."[24] The importance of this right demanded a remedy, even though, as the court acknowledged, it was difficult to redress the harm through damages and damages were difficult to measure.[25] Further, a person deprived of the right to vote had no other remedy: they could not bring criminal proceedings and, unlike English voters, had no alternative remedy.[26]

The New York decision, by contrast, required a showing of fault on the part of the election officials.[27] The decision in *Jenkins* relied heavily

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15 *See* Jenkins v. Waldron, 11 Johns. 114, 121 (N.Y. Sup. Ct. 1814); Lincoln v. Hapgood, 11 Mass. (10 Tyng) 350, 353 (1814).

16 *See Jenkins*, 11 Johns. at 120; *Hapgood*, 11 Mass. (10 Tyng) at 353, 357.

17 11 Johns. 114.

18 *Id.* at 120.

19 *See Hapgood*, 11 Mass. (10 Tyng) at 353, 357.

20 *Id.* at 357.

21 11 Mass. (10 Tyng) 350.

22 *Id.* at 355.

23 *Id.*

24 *Id.*

25 *See id.*

26 *See id.* at 355–57. English electors used a procedure called revision by committee. *Id.* at 357. In this period, electors voted orally, and the officer would record all votes cast, even challenged ones. *Id.* at 356–57. These votes could then be counted in the revision by committee process if it turned out the officers had mistakenly or wrongfully denied the elector's vote. *See id.* at 357.

27 *See* Jenkins v. Waldron, 11 Johns. 114, 120 (N.Y. Sup. Ct. 1814).

on English cases, reading them to require a showing of malice.[28] The court's justification emphasized the importance of protecting officers engaged in deliberative decisionmaking from suit.[29] This differed sharply from *Hapgood*, which had acknowledged the possibility that allowing the damages remedy to be available without a showing of malice might lead to an excess of suits against officers.[30] Where the *Hapgood* court found that the need for a remedy outweighed the risks of suits against officers, the *Jenkins* court came down the opposite way.[31] This split between Massachusetts and New York over the required showing of intent persisted into the mid-nineteenth century as other states followed them in adopting the action, though more states sided with Massachusetts.[32]

In the years leading up to the Civil War, state courts continued to adopt the damages action, but their reasoning began to emphasize whether election officers exercised ministerial or judicial power.[33] Judicial acts, even those taken by officials who were not nominally judges, involved discretion, requiring those officials to be shielded from liability for the good faith exercise of that discretion. By contrast, officials exercising ministerial power did not exercise discretion and so could not use a good faith defense.[34] This required state courts to focus on the statutes tasking election officials with their duties to determine whether the officers exercised judicial or ministerial power and, thus, whether plaintiffs needed to show the vote denial had been intentional.[35]

The statutes that election officials enforced often restricted the vote to white men.[36] So when judges interpreted those statutes and found that election officers exercised "discretion" to determine whether someone could vote, it often meant permitting state-backed discrimination. For example, the North Carolina Constitution of 1835 restricted the right to vote to white men.[37] In the 1850s, Jared Peavey, a biracial North

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[28] *See id.* at 120–21.

[29] *See id.* at 121.

[30] *See Hapgood*, 11 Mass. (10 Tyng.) at 357.

[31] *Jenkins*, 11 Johns. at 121.

[32] *See* Swift v. Chamberlain, 3 Conn. 537, 543 (1821); Wheeler v. Patterson, 1 N.H. 88, 90–91 (1817); Jeffries v. Ankeny, 11 Ohio 372, 374 (1842) (suits can be maintained without proof of malice, but without malice, "damages will be nominal, and small"); Osgood v. Bradley, 7 Me. 411, 421 (1831); Weckerly v. Geyer, 11 Serg. & Rawle 35, 39–40 (Pa. 1824) (malice can be inferred but need not be expressly proved in the complaint to support the action); Carter v. Harrison, 5 Blackf. 138, 139 (Ind. 1839) (per curiam); Rail v. Potts, 27 Tenn. (8 Hum.) 225, 230 (1847).

[33] *See, e.g.*, Bridge v. Oakey, 12 Rob. 638, 638–39 (La. 1846); Gordon v. Farrar, 2 Doug. 411, 415 (Mich. 1847); *Potts*, 27 Tenn. (8 Hum.) at 228–29; Bevard v. Hoffman, 18 Md. 479, 483 (1862).

[34] *See* Kendall v. Stokes, 44 U.S. (3 How.) 87, 98 (1845) (differentiating between ministerial acts, which an officer is "bound to perform," and judicial acts, which involve the officer's "duty to exercise judgment and discretion"); *see also* William Baude, Reply, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. 115, 116–19 (2022).

[35] *See, e.g.*, *Farrar*, 2 Doug. at 415; *Potts*, 27 Tenn. (8 Hum.) at 228–29; *cf.* Griffith v. Follett, 20 Barb. 620, 630 (N.Y. Gen. Term. 1855) (similar inquiry involving canal commissioner).

[36] *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 7–8 (Free Press 1998) (1935).

[37] N.C. CONST. of 1835, art. I, § 3, pt. III.

Carolinian, sued several North Carolina elections inspectors tasked with enforcing that provision.[38] Peavey argued that he was white within the meaning of the law; the election officials decided otherwise.[39] The North Carolina Supreme Court analyzed the act creating the officials' position and responsibilities and concluded that the inspectors had both ministerial and judicial powers, and that determining who was eligible to vote was a judicial task for which the inspectors could not be held liable absent a showing of bad faith.[40] In a similar case, the Michigan Supreme Court held that while other aspects of the election officer's tasks might be purely ministerial, the question of a voter's race involved the exercise of discretion and thus shielded officers from liability.[41] These cases effectively protected election officials from liability for enforcing discriminatory laws. At the same time, if election officials exercised ministerial powers when they determined qualifications like residency, then white voters still had avenues to relief available.

B. The Damages Remedy in Federal Court

Almost all voting rights damages cases were brought in state courts in the pre–Civil War period, but some began to arise in federal court after Reconstruction with the enactment of the Reconstruction Amendments and legislation to enforce them. This section first catalogs the early federal law voting cases and then examines the role that damages actions played in early federal voting rights litigation challenging grandfather clauses and white primaries. Unlike state law cases, federal damages actions dealt more with defining the underlying right than with clarifying when remedies were available. They expanded voting rights, but in so doing conceived of voting rights as individual rights, rather than group rights, limiting the scope of remedies available for voting wrongs.

1. Early Federal Cases. — The dearth of federal court voting rights cases before the 1860s can be explained by the fact that the contours of voting rights, like other constitutional rights, were mostly decided in state courts in the first century of the United States.[42] But the combination of several factors, including a shift toward understanding

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[38] *See* Peavey v. Robbins, 48 N.C. (3 Jones) 339, 340–41 (1856) (quoting N.C. REV. CODE ch. 52, § 10 (1854)); N.C. CONST. of 1835, art. I, § 3, pt. III.

[39] *See Peavey*, 48 N.C. (3 Jones) at 341–42.

[40] *See id.* at 341.

[41] *See* Gordon v. Farrar, 2 Doug. 411, 415 (Mich. 1847).

[42] *See* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 14–15 (2015). State courts functioned as the presumptive courts in the antebellum period, since there was no statutory arising-under jurisdiction. *See* David R. Dow, *Is the "Arising Under" Jurisdictional Grant in Article III Self-Executing?*, 25 WM. & MARY BILL RTS. J. 1, 1 (2016); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 913 (1984). In addition, the state tort suits discussed above would not have been possible under diversity jurisdiction, since the parties mostly would have been citizens of the same state.

constitutional torts as raising federal questions, the expansion of federal question jurisdiction, and the greater reach of the federal government, meant that federal-law causes of action became more common in general after the Civil War.[43]

In the 1870s and 1880s, plaintiffs began bringing suits in federal courts, first seeking fines under the Enforcement Act of 1870,[44] and then leveraging the Fourteenth and Fifteenth Amendments. The Enforcement Act authorized fines or criminal penalties against election officials who conditioned the qualification of voting on "race, color, or previous condition of servitude" and persons who used "force, bribery, threats, intimidation, or other unlawful means" to keep people from voting or becoming qualified to vote in an election.[45]

Courts interpreting the Enforcement Act drew on state law approaches to official immunity and damages suits, influencing the remedies available to injured parties under the Act. In *McKay v. Campbell*,[46] an 1870 case brought in the Circuit Court for the District of Oregon, one judge interpreted the Act to require plaintiffs to plead specific facts tending to show that the officer had denied the right to vote because of race, color, or previous condition of servitude — merely pleading that one's vote had been mistakenly denied was insufficient.[47] This mimicked the requirements of the New York line of cases, which required plaintiffs to allege more than just a wrongful vote denial to state a claim. And in *Seeley v. Koox*,[48] a case brought against a poll superintendent in Georgia, the court also imported the intent requirement from state law actions.[49] It found that Congress could not have meant to impose fines or imprisonment for good faith errors[50] and, relying on several state law cases, emphasized that public officers in general could not be sued for damages when they, like the poll superintendent, exercised judicial or discretionary powers and made a mistake.[51] By importing these more

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[43] *See* Huq, *supra* note 42, at 14–15; Gunther, *supra* note 42, at 913; Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331).

[44] Ch. 114, 16 Stat. 140.

[45] *Id.* §§ 2, 4.

[46] 16 F. Cas. 157 (C.C.D. Or. 1870) (No. 8,839).

[47] *See id.* at 160.

[48] 21 F. Cas. 1014 (C.C.S.D. Ga. 1874) (No. 12,630).

[49] *See id.* at 1015. *Seeley* focused on section four of the Enforcement Act, which provided criminal and civil penalties against persons who used "force, bribery, threats, intimidation, or other unlawful means" to keep people from voting or becoming qualified to vote in an election. Enforcement Act of 1870, ch. 114, § 4, 16 Stat. 140, 141.

[50] *See Seeley*, 21 F. Cas. at 1015.

[51] *See id.* at 1016 (citing Harman v. Tappenden (1801) 102 Eng. Rep. 214, 1 East 555; Jenkins v. Waldron, 11 Johns. 114 (N.Y. Sup. Ct. 1814); Wilson v. Mayor of New York, 1 Denio 595 (N.Y. Sup. Ct. 1845); Weaver v. Devendorf, 3 Denio 117 (N.Y. Sup. Ct. 1846); Griffith v. Follett, 20 Barb. 620 (N.Y. Gen. Term. 1855); Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845)). The court cited four cases from New York and one from England for this proposition. The only federal case cited, *Kendall v. Stokes*, concerned a suit arising out of a contract dispute between a prior postmaster

restrictive standards, federal courts limited when plaintiffs could win relief under the Act.

2. Grandfather Clauses, The Right to Vote, and Giles. — With voting cases becoming more common, the federal courts began to define the limits of voting rights and remedies. First, in 1900 and 1902, white plaintiffs in *Wiley v. Sinkler*[52] and *Swafford v. Templeton*[53] used the federal question statute to bring damages actions to vindicate the right to vote, grounded in the Federal Constitution.[54] Neither case attempted to classify the officials as ministerial or judicial, and neither dealt with the question of the officials' intent. Rather, *Wiley* focused on whether the right to vote was a federal constitutional right that would permit a federal court to exercise its jurisdiction.[55] In answering that question only, the Supreme Court skirted "the difficulty of subjecting election officers to an action for damages for refusing a vote which the statute under which they are appointed forbids them to receive."[56] *Swafford* considered whether the federal district court had jurisdiction over the voting claim asserted by the plaintiff, which involved the alleged violation of a state law.[57] Both times, the Court concluded that federal courts could exercise jurisdiction over damages actions brought to vindicate constitutional rights.[58]

The following year, the Court jeopardized the availability of relief for the vindication of political rights. Alabama had ratified a new constitution in 1901, which contained a grandfather clause that would disenfranchise Black voters, part of white backlash against the gains made by Black southerners during Reconstruction.[59] In *Giles v. Harris*,[60] Jackson W. Giles, a Black Alabamian, sought an injunction ordering Montgomery County's board of registrars to register him and other

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general and the plaintiffs. *See Kendall,* 44 U.S. (3 How.) at 94–95. But contract claims against the government have long been a sticky subject in sovereign immunity, and this case preceded the federal government's waiver of sovereign immunity in some contract suits with the creation of the Court of Claims in 1855. *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1564–65 (1992).

52 179 U.S. 58 (1900).

53 185 U.S. 487 (1902).

54 *See Wiley*, 179 U.S. at 64–65; *Swafford*, 185 U.S. at 493; *see also* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1125 (1969); Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 81 (1992).

55 *See Wiley*, 179 U.S. at 61–62.

56 *Id.* at 66–67.

57 *See Swafford*, 185 U.S. at 492–93.

58 *See Wiley*, 179 U.S. at 64–65; *Swafford*, 185 U.S. at 492–94.

59 *See* ALA. CONST. of 1901, art. VIII, §§ 177–178, 180–182; William H. Stewart, *The Tortured History of Efforts to Revise the Alabama Constitution of 1901*, 53 ALA. L. REV. 295, 295–97 (2001); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 30 (2004); Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 21, 21–22 (Chandler Davidson & Bernard Grofman eds., 1994).

60 189 U.S. 475 (1903).

Black Alabamians to vote despite Alabama's suffrage restrictions.[61] The Court denied injunctive relief on the grounds that equity did not "embrace[] a remedy for political wrongs."[62] It emphasized that the only relief to be had was on an individual level.[63]

These conclusions jeopardized the prospect of using damages actions to challenge state laws passed in violation of the Constitution despite the fact that white plaintiffs had been able to use the damages vehicle to vindicate violations of their rights just years prior, in *Swafford* and *Wiley*.[64] *Giles*'s reasoning suggested that political rights were nonjusticiable broadly, not just in equitable actions, and that relief for political wrongs — which involve wrongs done to groups, not just individuals — would properly be found in the political branches.[65] The Court mitigated the effects of this ruling with a pair of decisions invalidating grandfather clauses in Oklahoma and Maryland in 1915, one of which involved a suit for damages,[66] but the effect was still such that it was not until *Nixon v. Herndon*[67] in 1927 that the Court finally settled the question of whether damages actions were available to vindicate voting rights.[68]

3. The White Primary Cases. — The white primary cases clarified the availability and nature of damages claims to redress voting wrongs through the Fourteenth Amendment. White primaries, in which political parties restricted primary participation to white voters, were one of many tactics that states used to disfranchise Black voters after Reconstruction.[69] But white primaries presented a difficult question for federal courts. In many states, the white primary operated "by party rule, not by state statute," creating doubt as to whether the Fourteenth Amendment reached the discrimination, since the Court had interpreted the Amendment to require state action.[70] While the result in these cases,

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61 *See id.* at 482.

62 *Id.* at 486.

63 *See id.* at 488. The *Giles* Court suggested that a damages remedy remained available to plaintiffs, but Giles did not prevail on remand. *See* KLARMAN, *supra* note 59, at 36.

64 *See* Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 626 (2007); KLARMAN, *supra* note 59, at 36–37; Richard H. Pildes, *Keeping Legal History Meaningful*, 19 CONST. COMMENT. 645, 646–52 (2002).

65 *See Giles*, 189 U.S. at 488; Charles, *supra* note 64, at 626. Justice Holmes also warned that an injunction faced two other problems: If the Court found that the law violated the Constitution, it could not then enroll Giles under the challenged statutory scheme. *Giles*, 189 U.S. at 486. The Court also read *Hans v. Louisiana*, 134 U.S. 1 (1890), to preclude a suit or injunction against Alabama. *Giles,* 189 U.S. at 487–88.

66 *See* Guinn v. United States, 238 U.S. 347 (1915); Myers v. Anderson, 238 U.S. 368 (1915).

67 273 U.S. 536 (1927).

68 *See id.* at 540 ("That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, and has been recognized by this Court." (citation omitted)).

69 *See* KLARMAN, *supra* note 59, at 30–31, 85–86.

70 *See* Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 57–58 (2001).

which clarified the availability of a damages remedy for voting wrongs and eventually prohibited white primaries, marked an important step forward in providing liability, they also demonstrated some of the limits of damages actions.[71]

The first case, *Nixon v. Herndon*, challenged an extreme practice: Texas, unlike other states, required white primaries by statute.[72] The Fourteenth Amendment's application was clearer, since state action was hard to miss, but this limited the ruling's impact.[73] The Court, in a brief opinion, concluded that Texas's law "obvious[ly]" violated the Fourteenth Amendment, but spent about a third of the opinion reaffirming the availability of a damages remedy in cases involving political rights.[74] Justice Holmes, *Giles*'s author, tried to square the outcome in *Nixon* with *Giles*, which had jeopardized the justiciability of voting rights. He explained that while both cases involved political rights, plaintiffs could still recover for individual harm to those rights in a suit for damages, even if "the subject-matter of the suit [was] political."[75] The Court thus resolved some of the questions remaining after *Giles*.[76] Following *Nixon*, the Court confronted discriminatory practices where state action was more attenuated.[77] Each case used a damages action as the vehicle to challenge the voting wrong. Eventually, in *Smith v. Allwright*,[78] the Court struck down the party-run white primary.[79] In these cases, too, questions of intent and the nature of the election official's duties remained absent.

The white primary cases took several decades to have a meaningful impact on Black voter registration,[80] but they made some progress from a remedial perspective. First, the cases clarified and reaffirmed the availability of a damages action to remedy harm to political rights like

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71 *See* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 116–17 (1976); KLARMAN, *supra* note 59, at 55; *cf.* GLORIA J. BROWNE-MARSHALL, THE VOTING RIGHTS WAR 109, 119 (2016) (describing push for legislative action to eliminate the poll tax).

72 *See* TEX. REV. CIV. STAT. art. 3107 (West 1925), *repealed by* Election Code of the State of Texas, 1951 Tex. Gen. Laws 1097; Klarman, *supra* note 70, at 57–58. The NAACP challenged Texas's law both because its litigators thought they had high odds of success and because the issue implicated an important Fifteenth Amendment right. *See* LAWSON, *supra* note 71, at 25–26. The Court never reached the Fifteenth Amendment question because it found the Fourteenth Amendment violation to be so "direct and obvious [an] infringement." *Nixon*, 273 U.S. at 541.

73 *See* Klarman, *supra* note 70, at 58.

74 *See Nixon*, 273 U.S. at 539–41.

75 *See id.* at 540; Charles, *supra* note 64, at 626–27.

76 *See* Love, *supra* note 54, at 81.

77 *See* Nixon v. Condon, 286 U.S. 73 (1932) (state statute vested the power to determine voter qualifications for primaries in political parties); Grovey v. Townsend, 295 U.S. 45 (1935) (party restricted primary to white voters in the absence of a state statute); Smith v. Allwright, 321 U.S. 649 (1944) (same).

78 321 U.S. 649.

79 *See id.* at 664–66.

80 *See* KLARMAN, *supra* note 59, at 158, 237, 239.

voting rights.[81] Even as they did so, they put forward a narrow conception of voting rights as involving harm to the individual voter, though substantive outcomes in cases wrought benefits on a group level by defining the boundaries of voting rights. This created a path to relief for Black voters but kept the door to injunctions closed.

The cases also established that damages actions could be brought to vindicate voting rights via the Fourteenth Amendment, not just the Fifteenth[82] — and that voting damages were available not only to white voters.[83] Significantly, they departed from state law damages actions that had used the ministerial/judicial distinction to avoid providing damages remedies to Black voters.[84]

Finally, damages actions could be used to clarify rights, making southern officials "more susceptible to legal sanctions."[85] The Court's white primary decisions encouraged Black voters to sue election and party officials.[86] They also gave the NAACP greater leverage to push federal officials to bring criminal prosecutions against local officials as the Court defined the constitutional violation, though the Attorney General was reluctant to do so.[87]

But the white primary litigation also demonstrated the downsides of a damages-only system of remedies. First, to find a plaintiff who had experienced individualized harm, organizations had to wait until after someone's vote was denied to sue — they couldn't prevent the enforcement of discriminatory laws. Second, the litigation engendered a piecemeal approach that required a multiplicity of suits over decades to define the scope of one area of voting rights. And litigation was expensive. While the NAACP and other organizations developed a greater presence in the South and became better funded over the course of the interwar period, the cost of litigation — both in terms of dollars and in

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[81] *See* Love, *supra* note 54, at 81. The courts recognized the availability of general damages but left the amount up to the jury. *See id.* at 82.

[82] *But see* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1544 & n.70 (1972) (arguing that the damages actions were legislatively based in the Civil Rights Act of 1871). Regardless of their source, the power of a federal court to infer a damages remedy for constitutional wrongs has little effect on the argument that this Note advances, particularly given the Court's present hostility to judicially inferred remedies more broadly. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001) (denying availability of inferred equitable remedy for enforcement of the Medicaid Act); Egbert v. Boule, 142 S. Ct. 1793 (2022) (denying *Bivens* action against a Border Patrol officer for Fourth Amendment excessive force and First Amendment retaliation claims).

[83] *Wiley* and *Swafford* both involved white plaintiffs and grounded their holdings in the Electors Clause of Article I, rather than the Fourteenth Amendment. *See* Wiley v. Sinkler, 179 U.S. 58, 63 (1900) (pointing to recognition by *Ex parte Yarbrough*, 110 U.S. 651 (1884), of the right to vote as grounded, in part, in the Electors Clause); Swafford v. Templeton, 185 U.S. 487, 492 (1902) (same).

[84] *See, e.g.*, Peavey v. Robbins, 48 N.C. (3 Jones) 339, 341 (1856).

[85] Klarman, *supra* note 70, at 105.

[86] *See id.* at 105–06.

[87] *See* LAWSON, *supra* note 71, at 47; KLARMAN, *supra* note 59, at 239, 251.

risk to lives — limited the cases that could be brought and the relief that could be won.[88]

II. INJUNCTIONS TO PREVENT VOTING WRONGS

In the second half of the twentieth century, injunctions became the primary remedy sought in voting cases. This Part first traces the rise of injunctive relief during the 1950s and 1960s. It then asks why injunctions became more common in voting cases and argues that the rise of injunctions was due to three interrelated causes: (1) new opportunities for plaintiffs to seek injunctions to protect rights that had already been defined in damages actions, (2) the greater remedial efficacy of injunctions, and (3) a broader shift in remedial preferences for injunctions in suits against government officials.

A. The Rise of Injunctive Relief

In the twenty or so years between *Smith* and the VRA, voting plaintiffs started to seek injunctions in two main scenarios: first, to enforce rights defined in earlier cases, and second, where plaintiffs could successfully show that harms were pervasive and widespread.

The first set of cases took antidiscrimination rights recognized in earlier damages suits and sought injunctions to prevent violations of those rights.[89] *Giles* posed a problem for plaintiffs seeking injunctions to prevent voting wrongs. Even if plaintiffs could vindicate political rights in damages actions, *Giles* barred injunctions to enforce political rights.[90] But in 1932, the Court narrowed *Giles*'s reach in *Lane v. Wilson*.[91] Though the plaintiff sought damages, rather than an injunction, the Court took the opportunity to try to differentiate between vote denial cases, like *Giles*, and voting discrimination cases.[92] In the Court's view, vote denial claims could only be redressed through damages, not equitable remedies, while discrimination cases were actionable in law and equity under a precursor to 42 U.S.C. § 1983.[93] Later plaintiffs, under this logic, could get around *Giles* by defining the right at issue as an individual right to be free from discrimination enforceable via § 1983,

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[88] *See* KLARMAN, *supra* note 59, at 86, 101–02, 240; LAWSON, *supra* note 71, at 25–26.

[89] *See, e.g.*, Baskin v. Brown, 174 F.2d 391, 392 (4th Cir. 1949) (seeking an injunction to enforce *Smith*).

[90] *See* Giles v. Harris, 189 U.S. 475, 486 (1903).

[91] 307 U.S. 268 (1939).

[92] *See id.* at 273. This distinction may well have been after-the-fact justification, as the distinction between vote denial and voting discrimination seems slippery. One way to understand the difference is that vote denial cases like *Giles* involved improper denial of the right to vote under an otherwise-valid statute, whereas a voting discrimination case like *Nixon* challenged the underlying law as invalid. *See* Nixon v. Herndon, 273 U.S. 536, 540 (1927); *Giles*, 189 U.S. at 486–88.

[93] *See, e.g.*, *Lane*, 307 U.S. at 273 (quoting *Giles*, 189 U.S. at 485; Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983)).

rather than a vote denial claim that involved political rights unenforceable in equity but vindicable at law.[94]

Second, plaintiffs could maintain actions in equity when they could demonstrate widespread patterns of discrimination by officials.[95] Traditionally, courts of equity would not issue injunctive relief when there was an adequate remedy at law.[96] Courts were more likely to find legal remedies inadequate in situations that threatened to produce a multiplicity of suits, commonly where "harmful conduct that promises to be continuing makes it unnecessary to bring a series of damage actions which would be both wasteful of judicial resources and burdensome to the plaintiff."[97] In this vein, early voting cases granting injunctions sometimes involved evidence of repeated discrimination that made injunctions the more attractive remedy: instead of forcing every person who had their vote denied to bring suit against each official, the court could issue an injunction that could, in theory, prevent that conduct in the future.[98] This suggests that judges were more likely to grant injunctions if plaintiffs could frame their injuries in ways that evoked the policy concerns underlying equitable relief.

Toward the end of this period, it became common to see courts referring to violations of voting and other constitutional rights as irreparable, another hallmark of equitable relief.[99] But as early as the 1940s, voting rights attorneys made the case that Black voters excluded by the white primary would suffer irreparable injury.[100] At least one court agreed, granting a temporary restraining order.[101] The fact that federal courts mostly did not question the inadequacy of the legal remedy could be a product of the difficulty of measuring harm to voting rights.[102] Once parties and courts could get around *Giles*, injunctions may have been a more comfortable remedy to order.

By the 1970s and 1980s, injunctions had almost entirely displaced damages. Some plaintiffs still sought damages, but these cases tended to involve pro se plaintiffs, disgruntled losers of elections, or jail voting.[103] During this period, immunities began to reappear: in cases where

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[94] *See id.* at 272–74.

[95] *See* Byrd v. Brice, 104 F. Supp. 442, 442–43 (W.D. La. 1952).

[96] *Developments in the Law — Injunctions*, 78 HARV. L. REV. 994, 997 (1965); *see also* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689, 691 (1990) (arguing that the irreparable injury rule no longer guides choice of remedies).

[97] *Developments in the Law — Injunctions*, *supra* note 96, at 1001.

[98] *See Byrd*, 104 F. Supp. at 443.

[99] *See Developments in the Law — Injunctions*, *supra* note 96, at 1007.

[100] *See, e.g.*, Complaint at 6, Brown v. Baskin, 78 F. Supp. 933 (E.D.S.C. 1948) (No. 1964).

[101] *See* Temporary Restraining Order and Rule to Show Cause for Preliminary Injunction at 4–5, *Baskin*, 78 F. Supp. 933 (No. 1964).

[102] *See, e.g.*, Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919); Wiley v. Sinkler, 179 U.S. 58, 65 (1900).

[103] *See, e.g.*, Briscoe v. Kusper, 435 F.2d 1046, 1048 (7th Cir. 1970) (disgruntled candidates' claims barred by official immunity); Tex. Supporters of Workers World Party Presidential Candidates v. Strake, 511 F. Supp. 149, 152 (S.D. Tex. 1981) (pro se plaintiffs, jail voting).

plaintiffs *did* seek damages, they were usually rebuffed on grounds that the defendants enjoyed the protection of either official or sovereign immunity.[104] At the same time, injunctions began to extend to injuries that involved something resembling group harm. The early antidiscrimination injunctions can be understood as preventive injunctions to stop a multiplicity of individual harms, like the application of discriminatory voter registration statutes, from occurring.[105] They aggregated individual claims to bring about what was effectively groupwide relief.[106] Later suits for injunctions, such as VRA Section 2 vote dilution claims or constitutional racial gerrymandering claims, involved implicit consideration of group harms and rendered relief on the group level.[107]

As a result of these changes, it has become common today for judges confronting voting wrongs to describe the injury that plaintiffs have experienced as "irreparable,"[108] meaning that injunctive relief, rather than damages, has become the default remedial form. Damages actions are relegated to the rare vote denial or, even more rare, voter intimidation case.[109]

B. Why Injunctions?

First, the turn to injunctions can be understood in part as a process in which damages actions helped define rights that could be enforced through injunctions. A comparison of the white primary cases and apportionment cases illustrates this process. In the white primary cases, suits for damages defined the scope of rights, and plaintiffs began to seek injunctions afterward to enforce those rights.[110] By contrast, in an early apportionment case, plaintiffs sought an injunction, arguing that the unequal distribution of Black and white voters between voting units

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104 *See, e.g.*, *Briscoe*, 435 F.2d at 1057–58; Olagues v. Russoniello, 770 F.2d 791, 805–06 (9th Cir. 1985); Kimble v. Willis, No. 02-2984, 2004 WL 1305328, at *2 (D. Md. June 10, 2004); Muntaqim v. Coombe, 366 F.3d 102, 129 (2d Cir. 2004), *vacated on other grounds*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam). *But see* Taylor v. Howe, 225 F.3d 993, 1012 (8th Cir. 2000) (finding that qualified immunity did not protect defendants who had engaged in racial discrimination in a vote denial case, since "[t]he right to be free from racial discrimination in matters of voting has long been clearly established").

105 *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671 (2001).

106 *See id.*

107 *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 631 (2002); Gerken, *supra* note 105, at 1666–67, 1681.

108 *See, e.g.*, League of United Latin Am. Citizens v. Abbott, 601 F. Supp. 3d 147, 182 (W.D. Tex. 2022).

109 *See, e.g.*, *Taylor*, 225 F.3d at 1012 (award of damages in case involving intentional race discrimination resulting in vote denial); Isabel v. Reagan, No. 18-03217, 2019 WL 5684195, at *5 (D. Ariz. Nov. 1, 2019) (denying § 1983 action in vote denial case); Cook v. Randolph County, 573 F.3d 1143, 1155 (11th Cir. 2009) (denying damages claim under Section 5 of the VRA); *Kimble*, 2004 WL 1305328, at *1 (seeking damages in reapportionment claim); Decision and Order at 110, Nat'l Coal. on Black Civic Participation v. Wohl, No. 20-cv-08668 (S.D.N.Y. Mar. 8, 2023) (voter intimidation).

110 *See* Smith v. Allwright, 321 U.S. 649, 650, 663–65 (1944) (suit for damages); Baskin v. Brown, 174 F.2d 391, 394 (4th Cir. 1949) (suit for injunction to enforce *Smith*).

violated the Equal Protection Clause.[111] The court denied relief, explaining that plaintiffs had showed no individual harms, but rather had asserted generalized, group harms "common to all voters in their unit."[112] It took another decade for the Supreme Court to acknowledge that gerrymandering Black voters out of political subdivisions caused harm redressable in equity,[113] and achieving this result required litigants to "carefully construct[]" their claims as individual harms.[114]

Second, injunctions became more common both because they were more efficient for achieving structural change and because of advocacy by civil rights organizations. Injunctions meant that plaintiffs did not always have to wait for a law to be enforced to sue. The ability to seek preenforcement relief is crucial in the voting context, where elections are rarely rerun.[115] A damages-only system meant that plaintiffs had to wait until an official inflicted a voting wrong and then file a suit for damages, hoping for a legal ruling that might prevent that harm in future elections.[116] Injunctions could prevent harm, not just to an individual plaintiff, but to everyone at risk of experiencing the same harm.

Further, a private cause of action for injunctive relief also put power in the hands of civil rights organizations. During the 1940s and 1950s, the NAACP pressured the Department of Justice (DOJ) to prosecute state election officials.[117] DOJ remained unresponsive even in the face of decisions like *Smith* that clarified the constitutional violations at issue.[118] Civil rights organizations responded by pushing for expanded remedial powers, first for the federal government to use civil suits,[119] and then, in the run-up to the VRA, greater federal control over the registration process.[120] Despite the warnings by some that injunctions and "case-by-case determinations" were insufficient to defeat southern resistance,[121] Congress ultimately opted to provide a citizen-suit provision in the Act, which let individuals, not just the federal government, seek injunctions for violation of the VRA's provisions.[122]

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111 *See* South v. Peters, 89 F. Supp. 672, 673–74 (N.D. Ga. 1950) (per curiam).

112 *Id.* at 678.

113 *See* Gomillion v. Lightfoot, 364 U.S. 339, 346–48 (1960).

114 *See* Issacharoff, *supra* note 107, at 607.

115 *See* Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 284 (2007).

116 *Cf.* N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15, 51 (M.D.N.C. 2019) (quoting League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014)) (discussing the limited power of courts to repair injuries to voting rights after elections take place), *rev'd sub nom.* N.C. State Conf. of NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020).

117 *See* KLARMAN, *supra* note 59, at 251.

118 *See id.* at 250–51; LAWSON, *supra* note 71, at 47, 116–17.

119 *See Hearings on S. 26884, S. 2719, S. 2783, S. 2814, S. 2722, S. 2785, S. 2535 Before the S. Comm. on Rules & Admin.*, 86th Cong., 2d Sess. 120–21 (1960) (testimony of Joseph L. Rauh Jr.) [hereinafter Rauh Testimony].

120 *See* Olagues v. Russoniello, 770 F.2d 791, 804–05 (9th Cir. 1985).

121 *See* Rauh Testimony, *supra* note 119, at 128.

122 *See* 52 U.S.C. § 10303(a)(1); Allen v. State Bd. of Elections, 393 U.S. 544, 555–57 (1969).

Finally, the shift towards injunctive relief occurred within a broader trend in remedies, in which federal courts became more willing to grant injunctions, rather than damages, in suits against government officers.[123] *Ex parte Young*,[124] decided five years after *Giles*, allowed plaintiffs to circumvent sovereign immunity to enforce federal constitutional and statutory law against officials.[125] Injunctions against the state became a more common tool to seek prospective relief in the middle of the twentieth century,[126] though voting plaintiffs sought injunctions against state officials before their popularization as a tool for affirmative relief in the 1970s.[127] While federal courts became more willing to grant injunctions, judges imposed limits on damages remedies through the expansion of qualified immunity in § 1983 actions and by making it harder for plaintiffs to get damages for constitutional violations at all.[128]

III. VOTING WRONGS AND REMEDIAL GAPS

This Part begins by thinking through how to evaluate remedial efficacy. It then argues that the present injunction-heavy remedial scheme underdeters voting wrongs, just as the damages-only system it replaced did. It concludes by offering two explanations for this remedial shortfall.

A. Evaluating Remedial Efficacy

The law of remedies centers the rightful position of parties when trying to determine how to fix or prevent wrongdoing.[129] Damages look backward to a harm already done and try to translate that harm into financial compensation, while injunctions order parties to repair or prevent harm. In the civil rights context, injunctions have fallen into

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123 *See* EMILY SHERWIN & SAMUEL BRAY, AMES, CHAFEE, AND RE ON REMEDIES 959 (3d ed. 2020); Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1317 (2023); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292 (1976) (suggesting that money damages, rather than equitable relief, might soon become the "extraordinary" remedy in public law litigation).

124 209 U.S. 123 (1908).

125 *See* Fallon, *supra* note 123, at 1315.

126 *See* John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 1008–09 (2008) (arguing that, up until *Edelman v. Jordan*, 415 U.S. 651 (1974), *Young* was used mostly in the antisuit context to prevent enforcement actions by state officials).

127 *See, e.g.*, Baskin v. Brown, 174 F.2d 391, 393 (4th Cir. 1949) (affirming grant of injunction by district court); Mitchell v. Wright, 154 F.2d 924, 925 (5th Cir. 1946); Elmore v. Rice, 72 F. Supp. 516, 528 (E.D.S.C. 1947) (granting injunction in white primary case); Dean v. Thomas, 93 F. Supp. 129, 130 (E.D. La. 1950); Byrd v. Brice, 104 F. Supp. 442, 443 (W.D. La. 1952); Sellers v. Wilson, 123 F. Supp. 917, 918 (M.D. Ala. 1954).

128 *See, e.g.*, Carey v. Piphus, 435 U.S. 247 (1978) (requiring plaintiffs to show harm in addition to due process violations to get substantial damages); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309 (1986) (extending *Carey* to substantive rights).

129 *See* DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 324 (5th ed. 2018); Margaret Jane Radin, Essay, *Compensation and Commensurability*, 43 DUKE L.J. 56, 58–59 (1993).

three categories: preventive, structural, and reparative injunctions.[130] Injunctions in voting cases tend to fall somewhere between preventive and structural injunctions.[131] Injunctions in racial gerrymandering cases, though, differ from classic examples of structural litigation, like prison reform and school desegregation, because they are necessarily time limited by the cycles of the decennial census. At their most basic, these injunctions attempt to keep plaintiffs in their rightful position by protecting them from experiencing harm at the hands of the government. Injunctions deter future wrongdoing mostly through the threat of contempt.[132] Damages deter future wrongdoing, albeit imperfectly,[133] by imposing a cost on wrongdoers.[134]

Many have discussed what an ideal relationship between rights and remedies would look like, particularly in constitutional torts,[135] and this Note does not aim to reproduce their work. One way to evaluate constitutional remedies, though perhaps not a very exciting one, is to evaluate whether the remedial scheme at least achieves compliance with the rule of law — meaning that government officials tend to follow not just the injunction in a specific case, but the rule of law it announces.[136] Consider the white primary. If a judge enjoined Texas from enforcing its white primary statute, then the remedial goal would be not just that Texas complies with the order, but also that Texas would not try to

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[130] *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 7 (1978). Preventive injunctions seek to prevent future acts; reparative injunctions to repair past harm; and structural injunctions to reorganize an institution, commonly schools or prisons. *See id.*; Abram Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 46 (1982) (discussing characteristics of structural injunctions).

[131] Consider an injunction enforcing the Fourteenth Amendment to prevent the enforcement of a discriminatory voter ID law. That injunction would be a preventive injunction: it goes no further than preventing a set of future acts. But gerrymandering injunctions veer toward the structural because the court retains an ongoing involvement supervising the subsequent maps that a legislature passes, at times for years. *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 640–41, 668–69 (1982).

[132] *See* Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971, 986 (1980).

[133] *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 355–56 (2000).

[134] *See* John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 105–06 (1999); James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 399 (2003); Radin, *supra* note 129, at 58.

[135] *See, e.g.*, Jeffries, *supra* note 134, at 88; Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1793 (1991); Chayes, *supra* note 130, at 46; FISS, *supra* note 130, at 47. *See generally* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (arguing that remedies shape the nature of underlying rights, "their application to the real world, . . . their scope, shape, and very existence," *id.* at 858).

[136] *See* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 938 (2019). There is some incongruity with importing this standard from compensatory damages, which are backward looking, to preventive injunctions, which are more forward looking. But a rule-of-law scheme would at least get closer to the goal of preventing irreparable injuries, which by their nature are imperfectly remedied through money damages.

circumvent it by passing a new law that let political parties set rules for participation in party primaries to perpetuate discrimination.

This forward-looking perspective might seem dissonant with the law of injunctions. Courts exercising their equitable powers generally do not grant relief broader than what they determine necessary to redress the injury.[137] In redistricting cases, for example, the Supreme Court has overturned decisions that have approved remedial plans that went further than remedying the unconstitutional districts.[138] But even if an injunction can only cure the discrete constitutional violation, the remedial system can aim at larger goals than curing one violation.[139] The law of damages demonstrates this: it tries to set a price for wrongful action to compensate victims of harm and deter future wrongdoers. If deterrence of wrongdoing is a valid goal, and the system of remedies not only results in continued rights violations but also results in attempts to circumvent the rule of law, the present scheme must fall short of the remedial goal in some way.[140]

B. Underdeterring Voting Wrongs

If injunctions effectively produce adherence to the rule of law, then one would not expect to see a government commit the same rights violation again and again. Yet, at least in the voting context, governments routinely commit similar violations, even where a court has enjoined the original wrong. Take a recent set of cases out of Montana. In 2017, the Montana legislature proposed the Ballot Interference Prevention Act[141] (BIPA) for legislative referendum,[142] and voters approved it in 2018.[143] BIPA would limit the number of ballots that could be collected, purportedly to curb voter fraud.[144] But ballot collection serves a vital role for members of Native American tribes living on reservations in Montana, who experience difficulty accessing transportation to go to a polling place or post office, or whose addresses frequently change.[145] Plaintiffs challenged the law under Montana's constitution.[146] In 2020,

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137 *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 92 (1995); Brown v. Plata, 563 U.S. 493, 502 (2011); *Developments in the Law — Injunctions*, *supra* note 96, at 1007.

138 *See, e.g.*, Perry v. Perez, 565 U.S. 388, 396 (2012) (per curiam); *see also* Personhuballah v. Alcorn, 155 F. Supp. 3d 552, 563 (E.D. Va. 2016).

139 *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 589 (1983).

140 *See* Fallon, *supra* note 136, at 938; Levinson, *supra* note 135, at 874, 887–89.

141 MONT. CODE ANN. § 13-35-703 (West 2018).

142 Court's Findings of Fact, Conclusions of Law and Order at 25, 28, W. Native Voice v. Stapleton, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020).

143 Amy Beth Hanson, *Judge Blocks Law that Prevented Absentee Ballot Collection*, AP NEWS (May 20, 2020, 4:28 PM), https://apnews.com/article/39f227e84f75df9b65f349cfed8ff4f0 [https://perma.cc/3FVU-9DG5].

144 *See* Court's Findings of Fact, Conclusions of Law and Order, *supra* note 142, at 28.

145 *See* Complaint at 2–3, *Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020).

146 *See id.* at 2.

they won a permanent injunction.[147] The following year, the legislature passed a law virtually identical to BIPA.[148] A similar group of plaintiffs again prevailed on a permanent injunction.[149]

The repeat-offender problem also appears in redistricting, whether it takes the form of repeated gerrymanders across redistricting cycles or remedial maps that perpetuate the original violation.[150] One recent, high-profile example of remedial resistance comes from the aftermath of last Term's decision in *Allen v. Milligan*.[151] In the 2020 redistricting cycle, Alabama only drew one district that gave Black voters the opportunity to elect the candidate of their choice, which plaintiffs argued violated Section 2 of the VRA because Alabama could have drawn a second opportunity district.[152] The Supreme Court agreed[153] and vacated its stay of the district court's order to redistrict in compliance with Section 2.[154] In a special legislative session, the Alabama legislature drew yet another map with only one majority-Black district,[155] despite the three-judge panel's previous guidance that a map that remedied the violation would require "two districts in which Black voters either comprise a voting-age majority or something quite close to it."[156] Plaintiffs challenged the legislature's remedial map, arguing it failed to cure the Section 2 violation and did not create a second opportunity district.[157] The panel agreed, and the Court denied Alabama's emergency stay application.[158]

This suggests that equitable relief provides insufficient deterrence for governments, creating a remedial gap.[159] In referring to a remedial gap, though, this Note does not mean the seemingly necessary, "probably inevitable" distance between rights and remedies.[160] Rather, even in a

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147 Court's Findings of Fact, Conclusions of Law and Order, *supra* note 142, at 61.

148 Findings of Fact, Conclusions of Law, and Order at 131–36, W. Native Voice v. Jacobsen, No. DV 21-0451 (Mont. Dist. Ct. Sept. 30, 2022).

149 *Id.* at 198.

150 *See, e.g.*, North Carolina v. Covington, 138 S. Ct. 2548, 2554 (2018) (per curiam); Personhuballah v. Alcorn, 155 F. Supp. 3d 552, 557 (E.D. Va. 2016); Jacksonville Branch of the NAACP v. City of Jacksonville, No. 22-cv-493, 2022 WL 17751416, at *14–15 (M.D. Fla. Dec. 19, 2022), *stay denied*, No. 22-14260, 2023 WL 119425 (11th Cir. Jan. 6, 2023).

151 143 S. Ct. 1487 (2023).

152 *See id.* at 1501–02, 1504.

153 *Id.* at 1498.

154 *See id.* at 1502; Singleton v. Merrill, 582 F. Supp. 3d 924, 1032–34 (N.D. Ala. 2022) (explaining remedial order).

155 *See* Kim Chandler, *Alabama Rushes to Adopt New Congressional Map amid Disagreement on What District Should Look Like*, AP NEWS (July 16, 2023, 12:04 PM), https://apnews.com/article/alabama-redistricting-voting-rights-act-56404d57189541315987 8of1c0b56947 [https://perma.cc/QF6C-ZRB5].

156 *Merrill*, 582 F. Supp. 3d at 1033.

157 *See* Kim Chandler, *Plaintiffs in Voting Rights Case Urge Judges to Toss Alabama's New Congressional Map*, AP NEWS (July 30, 2023, 12:57 PM), https://apnews.com/article/alabama-redistricting-voting-rights-act-ee356d38cfa17f62ce477a923da33e65 [https://perma.cc/RND8-VZV5].

158 *See* Singleton v. Allen, No. 21-cv-1291, 2023 WL 5691156, at *3 (N.D. Ala. Sept. 5, 2023); Allen v. Caster, No. 23A241, 2023 WL 6218265, at *1 (U.S. Sept. 26, 2023) (mem.).

159 *See* Jeffries, *supra* note 134, at 87–88.

160 *See id.* at 87.

world where full remediation might be impossible, the present remedial scheme does not contribute to the rule of law and instead allows legal violations to proliferate. The repeat-wrongdoer problem in injunctions echoes the undercompliance problem from the damages-only regime. In the early antidiscrimination voting damages cases, like the white primary cases, states tried to evade the enforcement regime by giving authority to political parties or passing new versions of discriminatory laws.[161] Part of the explanation for underdeterrence in damages cases comes from the "easily circumvented" decisions the courts handed down in the white primary cases, as well as the fact that southern officials had no intention of enfranchising Black voters.[162] The fact that governments had no intention of complying with the courts' rulings, combined with the difficulty of bringing cases at all, produced underdeterrence. Once plaintiffs could more easily bring damages claims, the damages remedy seems to have had some effect on eliminating the white primary.[163]

So why do injunctions also fall short? There are two possible explanations, one about the scope of voting injunctions, and one about incentives for government when courts enjoin voting laws. First, courts will generally only enjoin the specific legal violation found and generally will not reach beyond the litigation to control future conduct.[164] In racial gerrymandering, this means only redrawing challenged districts and giving the legislature the first attempt at curing the violation.[165] And replacement laws generally reset any presumptions about the discriminatory intent of the enacting legislature.[166]

Further, when legislatures pass new versions of old laws, civil rights litigants cannot use an old injunction to prevent new harm. Consider a classic private-law injunction: *Pardee v. Camden Lumber Co.*[167] Pardee wanted to keep Camden Lumber from trespassing to cut down timber, and he sought an injunction.[168] The court granted it, even though damages were the traditional remedy, because the potential injury was the same every time.[169] If Camden threatened to cut down Pardee's trees

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161 *See* KLARMAN, *supra* note 59, at 31, 34, 85–86, 158.

162 *See* Klarman, *supra* note 70, at 60.

163 *See id.* at 105–06.

164 *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329–30 (2006) (discussing norms of deference to the legislature in crafting equitable remedies); LAYCOCK & HASEN, *supra* note 129, at 284.

165 *See* Perry v. Perez, 565 U.S. 388, 393 (2012) (per curiam) (listing cases); Personhuballah v. Alcorn, 155 F. Supp. 3d 552, 563 (E.D. Va. 2016) (same); *id.* at 557 (legislature should get first attempt at curing the violation). Only in rare cases will courts reach beyond the violation already found. *See, e.g.*, Griffin v. Cnty. Sch. Bd., 363 F.2d 206, 210 (4th Cir. 1966).

166 *See, e.g.*, Veasey v. Abbott, 888 F.3d 792, 801 (5th Cir. 2018) (explaining that replacement law that "retain[ed] characteristics" of enjoined voter ID law could not be automatically invalidated "as the tainted fruit" of the prior law, and could not be enjoined "until a plaintiff pleads and proves some constitutional or statutory infirmity").

167 73 S.E. 82 (W. Va. 1911).

168 *See id.* at 83.

169 *See id.* at 85.

again, the court would be able to use its contempt powers to prevent Camden from doing so or render fines to at least compensate Pardee for the harm done to his property. But the same isn't true in Montana's ongoing BIPA litigation, even though BIPA 1 and BIPA 2 have few differences and the harms are substantially the same.

Because injunctions generally cannot reach future misconduct by legislatures, legislatures enjoy the freedom to pass new versions of old laws.[170] This puts the burden on civil rights organizations to relitigate the same case and further divides their resources, weakening the deterrence power of the threat of future litigation. In addition, the application of other legal rules, like the *Purcell*[171] principle, means that legislatures sometimes benefit for at least one election cycle from laws that have already been or are later found to be unlawful.[172] With reduced deterrence both for present and future lawmaking decisions, the courts leave voters with remedies that underdeter future violations and leave them vulnerable to future predations.

Second, injunctions against government may be improperly calibrated to deter future wrongdoing because of misconceptions about how governments respond to injunctions. Scholars like Professor Daryl Levinson have explained in the context of money damages that government actors respond to different kinds of costs and benefits than their private-party counterparts.[173] While private parties like individuals and firms can be said to "behave as rational maximizers of their self-interest,"[174] meaning that they tend to maximize profit or utility, governments cannot be said to do the same, in part because of imperfect communication of political preferences between the represented and their representatives, the seeming irrationality of political preferences as compared to market preferences, and inefficiencies in control over elected or appointed officials.[175] Government actors respond to political incentives, which involve both market costs and benefits as well as political and social factors.[176]

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170 *See* David Herman, Note, *Reviving the Prophylactic VRA: Section 3,* Purcell*, and the New Vote Denial*, 132 YALE L.J. 1462, 1465 (2023).

171 Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam).

172 *See* Herman, *supra* note 170, at 1466–67. Again, *Milligan* offers an illustration. Nearly a year and a half after staying the district court's injunction, the Court concluded that Alabama's maps did indeed violate the VRA and ordered Alabama to draw new maps — leaving as casualties the Alabamians who were now represented by congresspeople elected through unconstitutional maps. *See* Melissa Murray & Steve Vladeck, Opinion, *The Supreme Court's Voting Rights Act Ruling Is No Victory for Democracy*, WASH. POST (June 8, 2023, 9:28 P.M.), https://www.washingtonpost.com/opinions/2023/06/08/supreme-court-alabama-redistricting-voting-rights-act [https://perma.cc/8N2E-UK94].

173 *See* Levinson, *supra* note 133, at 347, 354–56.

174 *Id.* at 354.

175 *See id.* at 355–56.

176 *See id.* at 347, 357.

This suggests that there may also be mismatch between typical models of how private parties respond to injunctions and how government reacts. The traditional model of injunctions conceives of an injunction as forcing negotiation.[177] An injunction allocates rights between parties, who can then bargain over the right — preferably, in the court's view, outside of court.[178]

Such bargaining seems difficult to envision when legislatures are involved. Consider a situation in which a state legislature passes a law requiring voters to bring driver's licenses to polling places. A voter seeks to enjoin the law. If the court decides in favor of the voter, the state cannot simply buy the entitlement to infringe that right from the voter. This creates incentives for states to pass a new, slightly different law in the hopes of better success in a second round of litigation. Conversely, if the court decides in favor of the legislature, the voter cannot buy the entitlement to not have the law enforced against them or to have the legislature repeal the law. When the state is involved, then, it seems like negotiation should work differently.

This presents a question of governmental cost internalization, which involves consideration of the political costs of compliance. These include the costs both to individual officials of supporting or opposing legislation, as well as to governments in terms of implementation or litigation. In the voting context, this entails costs like hiring experts for both redistricting and defending lawsuits, attorney's fees, resource tradeoffs with other initiatives, and potential lost votes. Return to the voter ID example from above. Legislator *X* might sit in a district that wants her to support restrictions on voting. The feedback that she gets from her constituency makes her much less likely to bargain, either with her fellow legislators or with voters who do not want a voter ID law, since she benefits from supporting the law. Not only that, she might win additional benefits from supporting an aggressive litigating posture defending the law. When political incentives make litigation that perpetuates voting wrongs less costly to officials, their incentives to pass laws that restrict voting increase, even where injunctions impose a cost.

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As a result, injunctive relief falls short when it comes to deterring future voting wrongs. Even though injunctions are more effective in terms of keeping voters from experiencing harm, a remedial gap persists

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[177] *See* LAYCOCK & HASEN, *supra* note 129, at 390; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1118 (1972).

[178] *See* LAYCOCK & HASEN, *supra* note 129, at 390–91; Calabresi & Melamed, *supra* note 177, at 1092, 1116–17.

because injunctions underdeter, at least in the voting context, future wrongs.

CONCLUSION

Given the historic failure of the damages remedy to effectively deter voting wrongs, as well as the remedial gap left by the present system of injunctive relief, any solution should include a backward-looking element that imposes a consequence for past wrongdoing. The VRA worked around the underdeterrence problem in voting remedies through preclearance, which subjected jurisdictions with long histories of voting discrimination to greater scrutiny when they wanted to change voting laws.[179] The law imposed a consequence for past wrongdoing, a set of consequences now near absent from modern voting law.[180] While some solutions might involve seeking either compensatory[181] or punitive[182] damages, more promising solutions would require legislative action. These regimes could draw on other areas of antidiscrimination law or class relief,[183] update Section 4(b) of the VRA, or authorize more creative forms of equitable relief. The current system leaves judges underequipped to address voting wrongs. But legislatures need not leave judges with only traditional tools to remedy new, evolving conditions and to confront the consequences of ongoing discrimination.

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[179] Voting Rights Act of 1965 § 4(b), 52 U.S.C. 10303(b), *invalidated in part by* Shelby County v. Holder, 570 U.S. 529 (2013); *see* SOPHIA L. LAKIN ET AL., ACLU, THE CASE FOR RESTORING AND UPDATING THE VOTING RIGHTS ACT 2 (2021).

[180] *See* LAKIN ET AL., *supra* note 179, at 2–3.

[181] This path has several limitations, among them officer immunities and a lack of consensus about whether the VRA offers a damages remedy for voting wrongs, as well as practical concerns about the deterrence effects of damages. *See, e.g.*, Taylor v. Howe, 225 F.3d 993, 1012 (8th Cir. 2000); Isabel v. Regan, No. 18-03217, 2019 WL 5684195, at *5 (D. Ariz. Nov. 1, 2019).

[182] Courts will sometimes grant both punitive damages and an injunction, but this might have limited impact since punitive damages are not available against municipalities in § 1983 claims. *See* Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 866 (1996).

[183] One option could be to enact a punitive damages scale, similar to those that the Equal Employment Opportunity Commission can order in employment discrimination cases, where the punitive damages award increases with every finding of a violation. Another could be to authorize a cy pres remedy in voting cases, where damages awards would go not to individual plaintiffs, but instead to a local or community organization in the community affected by a discriminatory law.