This Little Right of Mine: *Braxton v. Stokes* & Election Subversion Remedies in Alabama

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Rural American elections, without fundamental protection to occupy the offices that citizens have been elected to, are at risk of losing the soul of democracy. The Voting Rights Act preserved the most fundamental power given to every citizen of this country—the right to vote—to choose who has the power to effect and create change and defend the principles endowed by the United States Constitution. However, there is an enforcement gap. While Congress has created federal protections, how can those particular protections protect rural citizens from election subversion without similar state law protections?

This article highlights the story of Patrick Braxton and the town of Newbern in rural Alabama. While scholars and Congress have been concerned with the "right" solution to prevent election subversion on a national level, Patrick Braxton's story proves that the greatest place in need of protection from subversion is the local level. Patrick was the only named candidate for Mayor of his majority black town and by default won the election. However, he was not allowed to occupy office. This article aims to highlight specific remedies available at a local and national level applicable to cases like Braxton's. However, those particular protections also come with weaknesses that should be taken into consideration.

Part I will discuss Patrick Braxton's story to give an example of local election subversion. Part II will discuss the legal conversation surrounding different approaches to rectify election subversion and what remedies are currently available. Part III will discuss the legal conversations on judicial interference in elections to provide remedies without explicit legislative guidance. Part IV will analyze the four equitable remedies for enforcing the results of a free and fair election. Part V will evaluate how the Alabama Supreme Court has handled the most likely option to enforce the results of a free and fair election.

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INTRODUCTION

> Occasions have arisen, and will again arise, where the necessity for a speedy disposition of the question of which candidate is entitled to the office is of far more importance than whether the person elected shall lose it.
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> – Chief Judge Alton B. Parker[1]

As a child in the Black Belt of Alabama, you had to know how to sing "This Little Light of Mine."[2] This anointed African American spiritual proudly proclaimed that despite all odds, the light will shine, and

[1] People *ex rel.* Brink v. Way, 179 N.Y. 174, 181 (1904).

[2] Eric Deggans, '*This Little Light of Mine' Shines on, A Timeless Tool of Resistance*, NPR (Aug. 6, 2018), https://www.npr.org/2018/08/06/630051651/american-anthem-this-little-light-of-mine-resistance [https://perma.cc/9JNU-YX8K].

the melody brought comfort to the soul. At my church, which sat adjacent to the massive cotton lands my ancestors once worked, my grandmother was known for bursting out in this song. Before long, the whole congregation would feel the spirit. We would leave feeling refreshed, knowing that we could march on a little while longer despite any resistance.

In the 1960s, that simple song carried a major message that rested in the hearts of thousands of Black people living in the South who sought the right to vote and change the status quo.[3] In marches and demonstrations, it was an act of resistance against every police officer and white citizen who opposed allowing Black Alabamians the same constitutional right to choose who sat in seats of power and influence.[4] Soon, the light shined so bright that Congress passed the Voting Rights Act of 1965.[5] Today, Selma, Alabama, once the battleground for the civil rights movement, has a Black Mayor.[6] Our nation has had a Black President. Black people are running for seats to create change for their communities.

In 2020, Patrick Braxton decided it was his turn to do the same in the town of Newbern, Alabama: he ran to be the town's first Black mayor.[7] But his initial pursuit did not amount to great success.[8] Braxton's light in exercising his right was dimmed. Shortly after winning his uncontested election, Braxton was locked out of city hall until July 26, 2024.[9] This is an example of what leading election law scholars have identified as a great

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[3] *Id.*; *see also* Deuel Ross, *Voting Rights in Alabama 2006-2022*, 25 U. PA. J. CONST. L. 252, 253 (2023).

[4] Ross, *supra* note 3, at 253.

[5] 52 U.S.C. § 10101; Ross, *supra* note 3, at 253.

[6] *Meet the Mayor*, CITY OF SELMA, https://selma-al.gov/government/office-of-the-mayor [https://perma.cc/7KFD-E8EV].

[7] *See* Meridith Edwards & Rachel Clarke, *Black Mayor of Tiny Alabama Town Says He Was Ousted by His White Predecessor*, CNN (Aug. 6, 2023), https://www.cnn.com/2023/08/06/us/newbern-alabama-mayor-dispute/index.html [https://perma.cc/NZ5P-UJPS].

[8] Kerry Breen, *Black Man Who Says He Was Elected Mayor of Alabama Town Alleges that White Leaders are Keeping Him From Position*, CBS NEWS (July 22, 2023), https://www.cbsnews.com/news/patrick-braxton-black-man-says-he-was-elected-mayor-of-newbern-alabama [https://perma.cc/55AB-9ASJ]. This came as a shock to many Alabamians, even in my hometown of Selma, Alabama. Selma, the historic city whose nationally televised voter suppression in the 1960s led to the creation of the Civil Rights Act, greeted its first Black mayor, James Perkins Jr., with open arms in 2000. *See Meet the Mayor*, *supra* note 6.(Stating how Perkins was first elected and held office in 2000 and was reelected in 2020).

[9] Dwayne Fatherree, *Back on the Job: Alabama Town's First Black Mayor Reinstated, Sworn Into Office*, S. POVERTY L. CTR. (Aug. 16, 2024), https://www.splcenter.org/news/2024/08/16/newbern-alabama-black-mayor-reinstated [https://perma.cc/V754-WGSQ]; Order on Stipulation of Settlement, Braxton v. Newbern, No. 2:23-CV-00127-KD-N (S.D. Ala. July 23, 2024).

threat to our democracy during the 2024 election cycle and beyond: election subversion.[10]

Election subversion is the act or threat of unlawfully undermining elections to install a candidate into office.[11] Professors Richard Hasen and Lisa Marshall Manheim see election subversion as a growing national issue that threatens our democracy on a federal and state level.[12] Scholars have identified three ways election subversion can take shape: "(1) usurpation of voter choices[;] . . . (2) fraudulent or suppressive election administration[; and] . . . (3) violent or disruptive private action that prevents voting . . . or interrupts the assumption of power."[13]

The United States Constitution grants broad authority to states to regulate voting, which may include laws relating to qualifications and functions of electors.[14] However, that authority does not explicitly say that states have to ensure each person must be able to occupy the position they have legally been elected to.[15] Neither has the Supreme Court explicitly held this to be true; the Court has given attention to the constitutionality of provisions within the Voting Rights Act of 1965 and voting dilution, but not the specific issue of election subversion.[16] Moreover, Congress has been focusing on preventing vote dilution and protecting majority-minority voting districts.[17] Individual states, on the other hand, have

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[10] Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 294–97 (2022).

[11] *See* Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L. J. 312, 322 (2022). As noted in the abstract of this Article, legal experts are now focused on "the threat of participants unlawfully undermining elections from within." *Id.; see also* John C. Satterfield, *The Connally Amendment: A Detriment to the United States*, 32 MISS. L. J. 135, 145 (1961) (quoting *Hearings on S. Res. 94 Before the Senate Committee on Foreign Relations*, 86th Cong., 2d Sess. 116 (1960)) ("Without a rule of law maintaining stability preventing subversion of violence, and giving assurance against sudden, unpredictable change initiated by minorities or even by majorities, sufficient time [to form democratic consensus] is certain to be lacking").

[12] *See* Hasen, *supra* note 10, at 265; Manheim, *supra* note 11, at 312–13.

[13] *See* Hasen, *supra* note 10, at 265.

[14] U.S. CONST. art. I, § 4, cl. 1.

[15] *See id.*

[16] *See*, *e.g.*, Smith v. Paris, 257 F. Supp. 901 (M.D. Ala. 1966), *modified*, 386 F.2d 979 (5th Cir. 1967); City of Mobile v. Bolden, 446 U.S. 55 (1980); Allen v. Milligan, 599 U.S. 1 (2023). Courts have heard several Section 2 Voting Rights Act cases brought by private parties. *See, e.g.*, Ellen D. Katz et al., *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, UNIV. MICH. L. SCH. VOTING RTS. INITIATIVE (2022), https://voting.law.umich.edu [https://perma.cc/C6HK-R8DG]; *see also* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2353 (2021) (Kagan, J., dissenting).

[17] Ariane de Vogue, *Voting Rights Act: Supreme Court Will Hear Challenge to Key Section in Redistricting Case*, CNN (Oct. 4, 2022), https://www.cnn.com/2022/10/04/politics/supreme-court-voting-rights-act-race-gerrymandering/index.html [https://perma.cc/MMT8-LJ24]; *see also Racial Vote Dilution and Racial Gerrymandering*, LIBR. OF CONG., https://constitution.congress.gov/browse/essay/amdt14-S1-8-6-6/ALDE_00013453 [https://perma.cc/64R9-DCWV].

implemented additional requirements to regulate voting procedures.[18] These efforts and entities often overlook and fail to address the rising concern within the election subversion diaspora about enforcing the results of a free and fair election on a state and federal level.

When a private citizen's right to vote is violated, parties can seek redress through litigation, seeking to enforce the right under the Fourteenth Amendment through 42 U.S.C. § 1983 because it provides remedies for violations of constitutional rights.[19] However, do litigation efforts under a federal statute provide an adequate remedy for a violation of the right to occupy a state office? When federal courts are faced with issues of state law, the court will use that state's law to provide a remedy. But what if there is not an explicit remedy provided in a state's statutory code? Both questions are essential to the legal conversation around election subversion.

Many scholars are discussing how to deal with election subversion from a federal level because it is visible. For example, the January 6th riot left a mark on this nation's history after the president taunted false claims of election fraud to distort the view of many.[20] Federal statutes provide some form of recourse to continue enforcing the electoral college vote. Patrick Braxton's story illuminates a need for guidance on how to enforce election results at a localized level. This article attempts to highlight the current remedies available to enforce a free and fair election in federal and state courts, with a greater emphasis on state courts. Part I will discuss Patrick Braxton's story to give an example of local election subversion. Part II will discuss the legal conversation surrounding different approaches to rectifying election subversion and what remedies are currently available. Part III will discuss the legal conversations on judicial interference in elections to provide remedies without explicit legislative guidance. Part IV will analyze the four equitable remedies for enforcing the results of a free and fair election. Lastly, Part V will evaluate how the Alabama Supreme Court has handled the most likely option to enforce the results of a free and fair election.

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[18] *See* Rachel Looker, *These States Passed New 2023 Voting Laws. Here's What it Means for 2024*, USA TODAY (NOV. 19, 2024), https://www.usatoday.com/story/news/politics/elections/2023/11/16/these-states-passed-new-2023-voting-laws-heres-what-it-means-for-2024/70741734007 [https://perma.cc/68VW-A3L7].

[19] *See Interpreting Congress's Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1513 (2021) ("Section 1983 allows most claims against state officials based on constitutional and statutory violations, for both injunctive relief and damages.").

[20] *See* Manheim, *supra* note 11, at 313 (citing Samuel Issacharoff, *Weaponizing the Electoral System*, 74 STAN. L. REV. ONLINE 28, 30 (2022) and Hasen, *supra* note 10, at 270–76).

I. *BRAXTON V. STOKES*: A GOOD CASE GONE WRONG

Braxton's case presents several challenging issues and questions surrounding the appropriate means for how a court can address this form of election subversion.[21] Professor Richard Hasen, one of the leading scholars on election law, believes election subversion is one of the greatest threats facing our election franchise.[22] The mere belief in false election results has had several detrimental effects over the last few years.[23] Braxton's case presents a case study from a localized level showcasing what can happen without a means to enforce the results of a free and fair election.[24]

Newbern, Alabama is a small town of around 200 residents in Hale County, nestled in the Black Belt of Alabama.[25] The town is about a mile wide and 45 minutes away from my hometown of Selma, Alabama, with a single state highway that cuts right down the middle. The majority of Newbern's residents are Black.[26] There is a volunteer fire department, an old country store, a new library, and a few homes. But there is not a single grocery store in the area, and all of the schools are 20 minutes north in Greensboro, Alabama. The town is a class 8 municipality with a mayor-council form of government consisting of a single mayor and five-member town council.[27] Most people liked the way things were in the town.[28] Patrick Braxton, on the other hand, saw and wanted more. The town's leaders did not.

In April 2020, Patrick Braxton decided to take a chance at becoming mayor of Newbern, Alabama.[29] Braxton could not remember the last time an election was held for mayor, so he sought out advice from Woody

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[21] *See generally* Complaint for Violation of Civil Rights (Non-Prisoner Complaint), Braxton v. Stokes, No. 2:23-cv-00127-KD-N (S.D. Ala. Nov. 21, 2022); *see also* Edwards & Clarke, *supra* note 8.

[22] *See* Hasen, *supra* note 10.

[23] *See id*. at 276. For example, Professor Hasen noted that the January 6 Riot on the Capitol "left over 140 law enforcement officers injured, four Trump supporters dead, and four Capitol police officers who died by suicide by August 2021." *Id*. There has not been a successful attack on the Capital since 1812. *Id.*

[24] *See* Edwards & Clarke, *supra* note 7.

[25] *See Welcome to the Town of Newbern*, ATLAS ALA., https://www.atlasalabama.gov/municipalities/newbern [https://perma.cc/N2BD-JLSN]. I taught in this county as a math teacher before coming to law school.

[26] Edwards & Clarke, *supra* note 7.

[27] In Alabama, the classification of a municipality can affect the way a town holds an election. *See* ALA. CODE § 11-40-12 (explaining the classification levels for municipalities within the state). Other potentially relevant statutory provisions to this case are ALA. CODE § 11-44G-1-2 and ALA. CODE § 11-41-7 (outlining procedures for filling city council vacancies and reorganizing a lapsed municipal government, respectively).

[28] *See* Edwards & Clarke, *supra* note 7.

[29] *Id.*; Complaint, *supra* note 22.

Stokes.[30] Stokes was serving as mayor of the town and had been for the past ten years.[31] Stokes could be considered a legacy mayor, since his father, grandfather, and previous generations had served in the role before him.[32] Braxton claimed Stokes told him false information about how to qualify as a candidate to run, but he was determined to see it through.[33] Alabama law required prospective candidates for elected positions in similarly classified townships to file an intent to run in the clerk's office at the county courthouse and pay a small fee to qualify before a mid-summer deadline.[34] Braxton did just that, and once the deadline passed he found himself as the only qualified candidate listed on the ballot.[35] By default, this meant that Braxton was now the mayor-elect for Newbern and would soon be the first Black mayor in the town's history.[36] In November 2020, Braxton was sworn in.[37] He met with Stokes, who gave him the keys to the town hall.[38] Braxton immediately exercised his new rights as mayor and appointed five members to the town's council—all Black local residents.[39] For the first time, the elected officials all looked like the majority of the population.[40]

However, the celebration did not last long; Braxton was locked out of the town hall the very next day.[41] Neither he nor the newly appointed town council members were able to obtain access to the town accounts, nor the town mail.[42] Braxton's claims further point out that Stokes and the former majority-white town council members held a special election to reappoint Stokes as mayor, who then reappointed each council member, all without informing anyone in the town about the special election.[43] Without adequate resources, Braxton has been unable to perform his mayoral duties, despite meeting the requirements. Braxton remained locked out of office for over three years.[44]

As of November 2023, Braxton had a pending lawsuit filed in the United States District Court for the Southern District of Alabama against

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[30] Complaint, *supra* note 21.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *See* ALA. CODE § 17-9-3; *see also* ALA. CODE § 11-46-2.
[35] *See* Complaint, *supra* note 22.
[36] *Id*.
[37] Edwards & Clarke, *supra* note 7.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *See* Complaint, *supra* note 21.
[42] *Id*.
[43] *Id*.
[44] *See supra* note 9.

Stokes and all five members of the former town council.[45] Braxton originally filed suit in Alabama state court, seeking redress to enforce the results of the free and fair election and alleging violations of his constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[46] However, the action was removed to federal court because of the aforementioned violations of his constitutional rights under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.[47]

Braxton's story presents a unique case study for the election subversion conversation; he lawfully won the town's election and was not able to occupy his position. Ultimately, Braxton is seeking to enforce the results of the election, but it has been almost four years since he was

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[45] *See id.* and accompanying text.

[46] *See id.* and accompanying text; *see also* U.S. CONST. amend. XIV § 3. Under the Fourteenth Amendment, the Disqualification Clause could apply to similar cases like Patrick Braxton's. Section 3 states that "No person shall . . . hold any office . . ., who, having previously taken an oath . . . as an executive or judicial officer of any State, . . . engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." U.S. CONST. amend. XIV § 3. Here, since Stokes was an elected officer of the town under Alabama law, he could be considered an officer of the state. However, the extent to which a state officer is defined is unique in Alabama. Many states may differ in how their state officers are defined under their respective statutory codes. For further discussion, see generally Jennifer L. Mascot, *Who are "Officers of the United States?"*, 70 STAN. L. REV. 443 (2018). From a state perspective, former governor Albert Brewer and Robert Maddox evaluated Alabama's state-equivalent of the Fourteenth Amendment. *See* Albert P. Brewer & Robert R. Maddox, *Equal Protection Under the Alabama Constitution*, 53 ALA. L. REV. 31 (2001). Alabama courts have found Equal Protection provisions for Alabama citizens under sections 1, 6, 13, 22, and 35 of Article I of the 1901 Alabama Constitution. *Id*. at 41 (citing Barrington v. Barrington, 89 So. 512, 513 (Ala. 1921)).

[47] Patrick Braxton filed his complaint in federal court pro se. *See* Complaint, *supra* note 21. The complaint also contains two additional claims: (1) a claim for conspiracy pursuant to 42 U.S.C. § 1985 and (2) a violation of the Voters Right Act pursuant to 52 U.S.C. § 10301 for discrimination in order to deny and abridge African Americans from voting based upon their race. *See supra* note 21*; see also* 42 U.S.C. § 1983; U.S. CONST. amend XIV. Section 1343 of Title 28 affords federal district courts with original jurisdiction in civil rights and election franchise actions:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages . . . because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To . . . secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1343.

elected, further complicating the availability of remedies.[48] The question is now whether there is an adequate remedy that can be provided to enforce the results of this free and fair election.

II. REMEDIES FOR ENFORCEMENT

Legal scholars have proposed and identified a variety of solutions to prevent election subversion.[49] For example, Professor Manheim identified three possible approaches from the current scholarship to fight against election subversion. The first is a constraint-based approach that offers legal reforms and preemptive legal justification to head off the problem beforehand.[50] Professor Manheim uses the Electoral Count Act as an example and proposes that removing the ambiguity from the statute would foreclose the opportunity for abuse.[51] However, considering Patrick Braxton's case, no ambiguity exists in the state election statutes. The issue was never that the law was unclear, but rather that there was nothing to aid him in obtaining his rightful seat after the previous town leadership locked him out of office. Nevertheless, Professor Manheim does mention that a significant hurdle for the constraint-based approach is the risk of the state legislature continuing to rely on its own legal theory for statutory construction instead of the most persuasive scholarly arguments.[52]

The second proposed solution is an incentive-based approach to use the law to raise the cost of engaging in subversion and lower the cost of upholding the rule of law.[53] Professor Manheim relies on an idea for illustrative purposes from Professor Hasen—for all jurisdictions to run elections with paper ballots.[54] While cost could counter the idea of subverting an election, Braxton's case never involved a physical ballot since he won by default. Moreover, scholars have alluded that this approach could bolster public confidence and counteract subversion

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[48] *See supra* note 21 and accompanying text.

[49] *See infra* notes 51, 54.

[50] *See* Manheim, *supra* note 11, at 329–30.

[51] *Id.* ("the most prominent [reform] proposals involve prophylactic attempts to foreclose some of the opportunity for abuse by, among other things, removing the relevant statutory ambiguity."); *see also* Mathew A. Seligman, Disputed Presidential Elections and the Collapse of Constitutional Norms 63–84 (Jan. 30, 2022) (unpublished manuscript, on file with SSRN: https://dx.doi.org/10.2139/ssrn.3283457).

[52] Manheim, *supra* note 11, at 331–32 (citing Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 51 (2021) (criticizing all manifestations of the ISL theory and acknowledging author's "hope that what scholars say might . . . matter")).

[53] *See* Manheim, *supra* note 11, at 333–39.

[54] *Id.* at 333–34 ("ensuring a verifiable and tangible record for elections, [paper ballots] would increase the difficulty (i.e., cost) of subverting an election and, by extension, decrease the difficulty of maintaining the rule of law.").

attempts[55] but still falls short by failing to consider elections where some candidates win by default. The is also the risk of possible alterations being made to the names on the ballot.

The third approach Professor Manheim offers is a corrective approach to a question this article similarly seeks to answer: what remedies can be used to correct the problem after the fact?[56] For this approach, Professor Derek Muller's scholarship is proposed for the use of a mandamus to compel performance of a particular action.[57] However, stand-alone mandamus is not always going to be a solution where there's at least some uncertainty about legal duties.[58] Professor Manheim also points out that courts have developed doctrines to identify, defuse, and deter election subversion maneuvers.[59]

Remedies can be provided by courts for plaintiffs who might find themselves in similar situations to Patrick Braxton: facing localized election subversion. Those needing to seek redress to enforce the results of a free and fair election can do so from either federal or state courts.[60] Our judicial system has a duty to protect and enforce the integrity of our election franchise that stands as the bedrock for our democracy. This burden rests more heavily on state courts because they have been given the authority and duty to invalidate election subversion issues.[61] On this issue, some scholars have advocated against the courts getting further involved in deciding election disputes, preferring respective legislative bodies impose statutes to address the issue or to act as the governing body over disputes instead.[62] While scholars have addressed gaps in election

[55] *Id*.; *see also* Hasen, *supra* note 10, at 294–97; Richard H. Pildes, *Election Law in an Age of Distrust*, 74 STAN. L. REV. ONLINE 100, 112 (2022).

[56] *See* Manheim, *supra* note 11, at 339.

[57] *Id*. at 340; *see also* Derek Muller, *Election Subversion and The Writ of Mandamus*, 65 WM. & MARY L. REV. 327, 344–49 (2023).

[58] Muller, *supra* note 57, at 344–49.

[59] *Id*.

[60] In Braxton's case, he requested general and special damages and attorney fees, along with punitive damages and injunctive relief to enforce the probate judge's order declaring him as the winner of the 2020 mayoral race. *See supra* note 21 and accompanying text.

[61] *See* Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principal and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1365 (2022).

[62] *See* Manheim, *supra* note 11, at 345 (citing Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY, 86, 89 (Guy-Uriel E. Charles, Heather K. Gerken & Micheal S. Kang eds., 2011)). This idea was one of the reasons cited behind the January 6, 2021 riot on the Capital, the so-called Independent State Legislature Theory. Ethan Herenstein & Thomas Wolf, *The 'Independent State Legislature Theory,' Explained*, BRENNAN CTR. FOR JUSTICE (June 27, 2023), https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained [https://perma.cc/6NH7-3GMK]. While the U.S. Constitution's Elections Clause, Art. I, § 4, cl. 1, specifically states that the House of Representatives can act on state disenfranchisement laws since they are the portion of the government intended to represent "We the people," the provision has to be satisfied before

subversion issues on a national level, more statutory safeguards are in place nationally as compared to the local level.[63] Many options to address national election violations will not do so adequately on a local level for plaintiffs like Patrick Braxton.[64] In *Braxton v. Stokes*, the primary concern was only for Braxton to occupy the office of mayor in a timely manner because he legally won a free and fair election under Alabama law.

In general, plaintiffs who find themselves in this position have options for equitable relief available to enforce a desired result or action from an election contest. First, they can obtain a declaratory judgment; second, they can seek injunctive relief against further action; third, they can pursue a mandamus order; or lastly, they can bring a quo warranto action. All four options can be awarded in federal and state courts.[65] However, all four options still come with risk in election controversies. Seeking any sort of action from a court takes time. Moreover, ligation can be gruesome and expensive, with the real possibility of the plaintiff being awarded nothing in the end. Some scholars have additionally raised grave concerns concerning the disregard for localized forms of government.[66] Seeking local enforcement of an election in a small town might not impact the nation as a whole, but it does provide a necessary case study to determine what should be the proper course of action to enforce the results of a free and fair election.[67]

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it can be invoked. *See* U.S. CONST. art. I, § 4, cl. 1. And since this is a provision of the Constitution, two-thirds of the states to agree to a constitutional convention to amend the Constitution itself to lower the threshold required to enact the clause. *See* Manheim, *supra* note 11, at 330. *See generally* Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529 (2021) (discussing Congress' power to object under the Electoral Count Act).

[63] *See, e.g.*, Hasen, *supra* note 10, at 299 nn.165–67.

[64] *Id.*

[65] *E.g.*, ALA. CODE § 6-6-220-232 (declaratory judgment in Alabama); 28 U.S.C. § 2201 (declaratory judgment in federal court); ALA. CODE § 6-6-503 (injunctive relief in Alabama); ALA. CODE § 6-6-503 (writ of mandamus in Alabama).

[66] *See* Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 17 (2012).

[67] While election subversion has generally not occurred in the months leading up to and following the 2024 election, some election challenges have been centered on state action. *E.g.*, Rusty Jacobs, *Legal Challenge in North Carolina Supreme Court Race is Likely*, WUNC (Dec. 12, 2024), https://www.wunc.org/politics/2024-12-12/legal-challenge-in-north-carolina-supreme-court-race-is-likely [https://perma.cc/TT47-N4BG]; Nina Totenberg & Ilana Dutton, *Supreme Court Allows Virginia to Purge Individual From Voter Rolls*, NPR (Oct. 30, 2024), https://www.npr.org/2024/10/30/g-s1-30644/supreme-court-virginia-elections [https://perma.cc/MQQ6-HTTP]; Aaron Mendelson & Ashely Lopez, *'The Restrictions are Unbelievable': States Target Voter Registration Drives*, THE CTR. FOR PUB. INTEGRITY (May 16, 2024), https://publicintegrity.org/politics/elections/who-counts/the-restrictions-are-unbelievable-states-target-voter-registration-drives [https://perma.cc/UMB8-BM7S] (describing state-level efforts to interfere with voter registration & the casting of ballots).

III. EFFECTIVENESS OF JUDICIAL INTERVENTION IN ELECTIONS

Enforcing the result of a free and fair election can be pursued through common law suits of equity to obtain judge-authorized remedies for constitutional violations, even in the small towns and countryside of our nation.[68] However, one concern is the amount of judicial involvement in the election process, as there is no clear limit in place.[69] Take *Bush v. Gore*, for example.[70] There, the Supreme Court intervened in the 2000 election for president, when former candidate Al Gore contested the popular vote count in a deadlock election in Florida.[71] The Supreme Court held that the request for hand-recount in an ambiguous manner decided by each county in the dispute, instead of a state-wide uniform system, violated the Equal Protection Clause of the Fourteenth Amendment.[72] Some have said that, with this decision, the Supreme Court determined who would be president.[73] In the context of the Fifteenth Amendment's Enforcement Clause, for example, the Supreme Court held in *Shelby County v. Holder* that the federal government's use of the preclearance requirement had exceeded their oversight over powers afforded to the states.[74] In *Shelby County*, the Court held that the preclearance requirement no longer had the evidence necessary to justify its use in certain jurisdictions—such as the state of Alabama—known for infringing on voting rights.[75] Eleven years later, Patrick Braxton is suing in federal court to enforce the results of an Alabama election due to racially motivated resistance, starkly undercutting the logic of *Shelby County*.

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[68] *See* Richard H. Fallon, Jr., *Constitutional Remedies in One Era and Out the Other*, 136 HARV. L. REV. 1300, 1356 (2023).

[69] *See* Manheim, *supra* note 11, at 345 ("Recent scholarship has gone still further in questioning the extent to which courts offer any value in election law . . ."); *see also* Fallon, supra note 68, at 1325 ("[C]onstitutional rights and remedies [have] changed significantly since 1991 . . .").

[70] 531 U.S. 98 (2000).

[71] *Id.*

[72] *Id.* at 110.

[73] *See* NCC Staff, *On This Day,* Bush v. Gore *Settles 2000 Presidential Race*, NATI'L CONST. CEN. (Dec. 12, 2023), https://constitutioncenter.org/blog/on-this-day-bush-v-gore-anniversary [https://perma.cc/FZ6N-3C2Q]. After the case, Courts struggled to apply the precedence set in *Bush*. *See, e.g.*, Comment, Bush v. Gore *and the Uses of "Limiting,"* 116 YALE L. J. 1159, 1160 (2007) (discussing the Sixth Circuits application of Bush to determine what the Supreme Court intended when the court limited the case to just the circumstances presented).

[74] Fallon, *supra* note 68, at 1332 (citing Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1557–78 (2020) (comparing and contrasting restrictions on Fourteenth and Fifteenth Amendment enforcement)); *see also* Shelby Cnty. v. Holder 570 U.S. 529, 547 (2013).

[75] *See* Shelby Cnty. v. Holder, 570 U.S. 529, 547 (2013).

Nonetheless, it is still necessary for both federal and state courts to address election subversion.[76] Chief Justice Marshall once wrote, "It is a settled and invariable principle that every right, when withheld, must have a remedy."[77] Justice Marshall's theory comes from a core principle from *Marbury v. Madison*: our Courts have a duty to state what the law is and how it applies in the context of election law issues.[78] In *Watson v. Sutherland*, the Supreme Court also held "[t]he absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case . . . ."[79] Although neither Congress nor the Alabama state legislature have codified all of the potential harms to our election franchise, courts still have to decide cases or controversies that arise from election subversion issues.[80]

As one scholar points out, a number of statutes and doctrines exist to provide recourse for the violation of constitutional or statutory rights.[81]

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[76] *See* Bulman-Pozen & Seifter, *supra* note 61, at 1356 (discussing how the democracy principle impacts courts).

[77] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803); *see also* Fallon, *supra* note 67, at 1301. Many Scholars have already pointed out how the "right for remedy" theory from *Marbury v. Madison* has yet to be fully realized. *See id.*; *see also* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 970 (2019) ("[W]e should not assume that a scheme of federal remedies for constitutional rights violations would include full compensation for every victim."); John C. Jefferies, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 88 (1999) ("[L]egislative power to provide one remedy and withhold another strongly implies that there will be situations where individual victims of constitutional violations do not receive effective redress.").

[78] *See* Danika Elizabeth Watson, *Free and Fair Judicial Intervention in Elections Beyond the* Purcell *Principle and* Anderson-Burdick *Balancing*, 90 FORDHAM L. REV. 991, 1001 (2021).

[79] Watson v. Sutherland, 72 U.S. 74, 79 (1866).

[80] *See* Watson, *supra* note 78, at 1001 ("[I]t is the judiciary's role 'to say what the law is'—a principal that extends to election law.") (citing generally RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* (2003)).

[81] *See, e.g.*, 42 U.S.C. § 1983 (providing for damages and injunctive relief against state officials for violations of the Constitution or other federal laws); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (providing for damages where federal actors violate the Fourth Amendment); *Ex parte* Young, 209 U.S. 123, 167–68 (1908) (permitting injunctive relief against state actors to enjoin constitutional and federal statutory violations). Additionally, one of the challenges with election subversion is that these cases often arise from campaign finance issues, which come with rules that the court can use to find remedies. For example, the Alabama Supreme Court in *Ex parte Krages* relied on *City of Talladega v. Pettus* to address the petitioner's argument that the third prong of the mandamus test for election results enforcement was satisfied. *See Ex parte* Krages, 689 So. 2d 799, 804 (Ala. 1997). In *Pettus*, the election challenge was based on a failure to comply with the FCPA requirement to file a campaign committee form and statement of contribution and expenditures within five days of declaring candidacy. *See* City of Talladega v. Pettus, 602 So. 2d 357, 358 (Ala. 1992). Section 17-5-7 of the Alabama statutory code governs when and how campaign funds can be used and touches on how a quo warranto and other proceedings could be affected. *See* ALA. CODE § 17-5-7.

Scholars have identified, at times, Congress may fail to speak clearly or create alternative schemes, leaving courts to determine if Congress intended for a broader application of relief.[82] When this occurs, a court is left with only its own discretion to address the issue and provide a remedy proportionate to the violated right.[83]

Professor Jamal Greene identified a similar concept embedded into our American culture.[84] He called it "exceptionalism" and discussed how it can lead to the removal of certain rights as time progresses.[85] He identified that the Framers' intent for constitutional rights was not to protect minorities, but rather to protect the "majority from fractional capture or executive overreach."[86] Professor Greene also pointed out an additional fallacy: rights are not secure; they often conflict, leading to the people—local bodies of government—as the group best situated to define what potentially constitutes a right and what the appropriate remedy should be if one is infringed.[87]

However, as Professor Richard Fallon noted, Congress has wide discretion in the choice of which remedies to make available.[88] To be adequate and effective, these remedies are not just given in relation to a

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[82] *See Interpreting Congress's Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1516 (2021) ("[T]he absence of a textually conferred right of action proved only a roadblock. . . . '[I]t is the duty of the courts to be alert to provide such remedies. . . .'"). For example, if an issue in an election contest or challenge for validating the results centers on a campaign finance issue, federal and state courts have guidelines and regulations to determine the warranted measure of relief depending on the severity of the issue. However, with rising election subversion cases like Braxton's case, the regulations may not apply.

[83] Professor Bray points out that the Supreme Court has a history of making mistakes about remedies. *See* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L. J. 1091, 1093 (2014) (citing Metens v. Hewitt Assocs., 508 U.S. 248, 255 (1993) (describing restitution as equitable)). For a critique, see John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trial of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1348–55 (2003)).

[84] *See* JAMAL GREENE, HOW RIGHTS WENT WRONG xxi (2021).

[85] *Id*.

[86] *Id*. at xxii.

[87] *See id.* at 12 (2021). For further discussion of the rights-remedy dichotomy, see Michael Coenen, *Right-Remedy Equilibrium and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C. L. REV. 129, 139 (2020) (defining "legal entitlement" to mean "remedy made available in response to a particular violation of a substantive right"). *See also* Daryl J. Levinson, *Right Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 914 (1999) ("[R]ights and remedies [are] part of a single package.").

[88] Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1309 (2023) (citing Henry M. Hart, Jr., *The Power of Congress to Limit jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366-70 (1953)); *see also Interpreting Congress's Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1500 (2021) ("[P]olicy is Congress's prerogative, not the Court's."); *see, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) ("With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statue enacted by Congress. . . .").

secular right.[89] Professors Fallon and Daniel Meltzer argue that courts are "Congress's junior partners in developing remedies."[90] Under their "Common Law Model," both scholars identified the existence of a presumption afforded to courts to craft remedies designed to promote individual redress and keep the actions of the government and its officials "generally within constitutional bounds," even when particular remedies were not strictly necessary.[91] From a state law perspective, Professor Ann Woolhandler identified that at times, "a state court remedy for state officials' constitutional violations might be constitutionally adequate if a state provided one."[92] But, if the state precludes all remedies, then the "Supreme Court . . . must determine which remedy to furnish if the Constitution requires one" in reviewing state court judgments.[93] Nonetheless, if "legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[94]

Thus, while damages have been identified as an appropriate remedy for constitutional violations, even in the absence of express legislative authority,[95] equitable remedies are needed to enforce the results of a free and fair election. The next section will discuss the application of four potential remedies to Patrick Braxton's case to determine what course of action would be best to enforce the results of a free and fair election.[96]

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[89] Fallon, *supra* note 68, at 1309 (citing Henry M. Hart, Jr., *The Power of Congress to Limit Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953)).

[90] *Id.* at 1310 (citing Younger v. Harris, 401 U.S. 37 (1971) (Brennan, J., concurring)). In *Younger*, as Professor Fallon points out, eight out of nine justices agreed that federal courts should nearly always decline to exercise jurisdiction over suits to enjoin pending state prosecution. *Id*. at 53–54, 56.

[91] *Id*. at 1310. (citing Richard H. Fallon Jr. & David J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787 (1991)).

[92] *Id.* at 1311.; *see also* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 120-44 (1997).

[93] Fallon, *supra* note 69, at 1310; Woolhandler, *supra* note 93, at 111–25.

[94] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946) (omission in original)).

[95] *See* Carlos M. Vazquez, Bivens *and the* Ancien Régime, 96 NOTRE DAME L. REV. 1932, 1929 (2021).

[96] Another area worth considering that will not be discussed in-depth in this article is the *Purcell* principle. This is the idea that courts should not order any changes to the current election procedures too close to the actual date for an election. *See generally* Purcell v. Gonzalez, 549 U.S. 1 (2006). The term was originally coined by Professor Richard Hansen. *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. STATE U. L. REV. 427, 428 (2017). For a more in-depth discussion on the effect of the *Purcell* principle, see Harry B. Dodsworth, *The Positive and Negative* Purcell *Principle*, 2022 UTAH L. REV. 1081 (2022).

IV. "LET IT SHINE, LET IT SHINE": THE EXTRA-ORDINARY RELIEF

> "The very nature of equitable power – the thing that distinguishes it from law – is its flexible and discretionary nature, its ability to respond to real-world practicalities, and its general aversion to rules that let bad actors capitalize on legal technicalities."[97]

The question remains: how do you enforce the results after the election is over?[98] The best available options for equitable relief to enforce a desired result or action from a state or federal election are: (1) obtaining a declaratory judgment, (2) seeking injunctive relief against further action, (3) pursuing a mandamus order to make a higher authority correct the injustice, if it is within their scope of power, or (4) bringing a quo warranto action to remove the person who unlawfully holds the seat. Generally, plaintiffs like Patrick Braxton can seek to enforce the results of a free and fair election in federal or state court, unless an adequate and independent state ground does not exist.[99]

Under Alabama law, penalties are in place for illegal activities in state elections.[100] But plaintiffs akin to Braxton will need an equitable remedy to invoke those protections; automatic trigger is not guaranteed.[101] This part of the article will discuss the elements of each option for equitable relief and how they might have applied within Patrick Braxton's case. The flaws with each remedy will be based on this case study as well. Notably, under Alabama law, only the fourth option is available to seek relief.[102] But even so, the remaining three remedies may provide relief in other jurisdictions and therefore will be discussed more in this section.

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[97] *See* United States v. Askins & Miller Orthopedics, P.A., 924 F.3d 1348, 1359 (11th Cir. 2019) (citing Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905)).

[98] *See* Manheim, *supra* note 11, at 339.

[99] For a discussion of the adequate and independent state grounds doctrine, see Donald L. Bell, *The Adequate and Independent State Grounds Doctrine: Federalism, Uniformity, Equality and Individual Liberty*, 16 FLA. STATE U. L. REV. 365, 397 (1988) and Cynthia L. Fountain, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053, 1054 (1999).

[100] Election offenses are listed in Chapter 17 under Title 17 of the Alabama Code. *See* ALA. CODE § 17-17-56.

[101] This is not to say that state prosecutors may or may not catch and seek to enforce a state's law if it is in fact broken. But often, waiting on someone else to do something is not as effective in vindicating a plaintiff's interests when a private course of action exists for the affected parties to seek out a solution to fix the problem themselves.

[102] *See* Riley v. Hughes, 17 So. 3d 643, 646 (Ala. 2009) ("the exclusive remedy to determine whether a party is usurping a public office is a quo warranto action pursuant to § 6-6-591, Ala. Code 1975, and not an action seeking a declaratory judgment.").

A. Declaratory Judgment

The first remedy that may serve as a tool for enforcing the results of a free and fair election is a declaratory judgment.[103] However, a declaratory judgment, irrespective of where it is filed, will not extend enough authority to enforce the results of an election. As Professor Samuel Bray points out, a declaratory judgment is a milder form of relief than an injunction.[104] The United States Supreme Court articulated this in *Steffel v. Thompson*.[105] In *Steffel*, the court advanced the "mildness thesis" in stating that "[t]he express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy."[106]

Under Alabama law, a declaratory judgment "serves the broader function of enabling parties to obtain a judicial determination of their legal rights related to an actual controversy between them in advance of an invasion of such rights and whether or not further relief is or could be claimed."[107] In other words, a declaratory judgement basically just says "XYZ Person is the winner" – meaning this form of relief would only say what we already know to be true. In fact, the Alabama Supreme Court has expressly stated that declaratory judgment actions "must settle a 'bona fide justiciable controversy'"[108] that is "definite and concrete," must be "real and substantial," and must seek relief by asserting a claim opposed to the interest of another party based on the state of facts that have accrued.[109] Declaratory judgments also carry a much broader public policy scope.[110]

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[103] Josh Blackman, *Declaratory Judgment as a Quasi-Injunction*, L. & LIBERTY (March 25, 2014), https://lawliberty.org/declaratory-judgment-as-a-quasi-injunction [https://perma.cc/YL27-73A4]. Actions for a declaratory judgment can be pursued in federal and state courts. *See* 28 U.S.C. § 2201 (Statute granting federal courts jurisdiction over declaratory judgement actions); *see also* FED. R. CIV. P. 57 & *infra* note 109.

[104] *See* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L. J. 1091, 1093 (2014).

[105] *Id.*; *See generally* Steffel v. Thompson, 415 U.S. 452 (1974).

[106] *Steffel*, 415 U.S. at 467 (1974) (quoting Perez v. Ledesman, 401 U.S. 82, 111 (1972) (Brennan, J., concurring in part and dissenting in part) (quotation marks omitted)); *see also, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 33 (2008) (quoting Steffel's alternative to the "strong medicine of the injunction").

[107] Hudson v. Ivey, 383 So. 3d 636, 640 (Ala. 2023); *see, e.g.*, Harper v. Brown, Stagner, Richardson, Inc., 873 So. 2d 220, 224 (Ala. 2003) (stating that the purpose of Alabama's Declaratory Judgment Act is "to enable parties between whom an actual controversy exists or those between whom litigation is inevitable to have the issues speedily determined when a speedy determination would prevent unnecessary injury caused by the delay of ordinary judicial proceedings"); *see also* ALA. R. CIV. P. 57.

[108] Baldwin Cnty. v. Bay Minette, 854 So. 2d 42, 45 (Ala. 2003) (quoting Gulf S. Conf. v. Boyd, 369 So. 2d 553, 557 (Ala. 1979)).

[109] *Id.* (quoting Copeland v. Jefferson Cnty., 226 So. 2d 385, 387 (1969)).

[110] *See, e.g.*, Ala. State Fed'n of Labor v. McAdory, 325 U.S. 450, 471 (1945) ("[I]n the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid . . . needless

From an Alabama state law perspective, very few changes occur in the application of the relief, but seeking a declaratory judgment when other alternatives could be used to provide relief has negative consequences. As noted above, the Alabama Supreme Court held in *Riley v. Hughes* that a declaratory judgment is not available remedy for expelling an official from office, thereby rendering the case nonjusticiable.[111]

One of the possible reasons Braxton sought to have his case removed to federal court could have been to avoid losing subject-matter jurisdiction in his case. There is also a public policy motivation for a court to grant relief here because the local election franchise is in jeopardy if the former mayor's actions are upheld without penalty. However, a declaratory judgment will only afford Braxton a temporary decree that Stokes and his council members could choose not to comply with because the judgment would not impose any penalty on them for failing to enforce the result of the election. In other words, the grant of a declaratory judgment here would be nothing more than another order handed down by the local probate court that certified the results of the election. It would have precisely zero bite. Thus, another remedy is necessary for plaintiffs who might deal with similar issues.

B. Injunctive Relief

Another option for plaintiffs like Braxton who seek the enforcement of election results is injunctive relief. Injunctive relief and declaratory judgment appear similar in terms of their function but differ in the degree of authority granted. On a federal level, injunctive relief can be awarded against state officers for violating federal law.[112] Rule 65 of the Federal Rules of Civil Procedure generally governs injunctions.[113] In *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court established a test for issuing preliminary injunctions.[114] To determine if a permanent injunction is warranted, a court must consider whether: (1) the plaintiff has a high likelihood of success on the merits; (2) the plaintiff will suffer

obstruction to the domestic policy of the States by forestalling state action in construing and applying its own statutes."). For further discussion, see Bray, *supra* note 105, at 1102.

[111] Riley v. Hughes, 17 So. 3d 643, 646 (Ala. 2009).

[112] Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015) ("We have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been true not only with respect to violations of federal law by state officials, but also with respect to . . . federal officials." (citations omitted) (citing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 838–39 (1824))). For a discussion of injunctions in civil rights cases, see James M. Altman, *Implementing a Civil Rights Injunction: A Case Study of* NAACP v. Brennan, 78 COLUM. L. REV. 739 (1978). Injunctions are codified under Alabama law. *See* ALA. CODE §§ 6-6-500–503.

[113] FED. R. CIV. P. 65.

[114] Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008).

irreparable harm if the court withholds injunctive relief; (3) the balance of equities tips in favor of the plaintiff; and (4) the public interest is served by a grant of injunctive relief.[115] In the Eleventh Circuit, which maintains appellate review over federal cases for the states of Alabama, Georgia and Florida, the third and fourth element for a preliminary injunction can merge when the government is an opposing party.[116] There are two traditional methods for obtaining an injunction. Parties seeking injunctive relief can file an application for a temporary restraining order (commonly called a "TRO") and a motion for a preliminary injunction ("PI"). In Alabama, the rule governing both actions works slightly differently because the state rule includes a notice and hearing requirement for injunctions.[117]

Applying the factors to facts in Braxton's case, the first element is satisfied because he won the free and fair election. The balance of equity tips in Braxton's favor because he lawfully won the election and met all of the requirements to qualify to run. Lastly, granting the injunction would protect the local election franchise by preserving the integrity of the system. With that, it appears Braxton could be entitled to injunctive relief. However, element two is where the need for a preliminary injunction fails because the alleged irreparable harm cannot be remote nor speculative, but actual and imminent, and "cannot be undone through monetary remedies."[118] Voting, which is at the heart of an election, has no monetary value and is "nothing other than the opportunity to participate in the collective decision-making of a democratic society" by "add[ing] one's on perspective to that of […]fellow citizens."[119]

The court in *Braxton* relied on *Jones v. Governor of Florida*. This case might help explain why Braxton is likely unable to show the harm necessary for injunctive relief. In *Jones* and *Braxton*, both plaintiffs failed to obtain PIs due to technical issues that were not satisfied to award the relief. More specifically, *Jones* concerned a group of felons who were eligible for re-enfranchisement and given a pathway to vote once more after the state at large voted to amend the Florida constitution. But the

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[115] *See id*.; eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2010). As for the other option, a TRO is awarded based on a two-factor test: (1) whether immediate and irreparable injury will result before the adverse party can be heard and (2) what efforts have been made to give notice and the reasons supporting the claim that notice should not be required. *See* FED. R. CIV. P. 65. The Eleventh Circuit has adopted this test. *See* Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

[116] *See* Gonzalez v. Governor of Ga., 978 F.3d 1266, 1271 (11th Cir. 2020).

[117] *Id.*

[118] Ne. Fla. Chpater of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990).

[119] *See* Braxton v. Stokes, No., 2024 WL 2116057, at *4-5 (S.D. Ala. May 10, 2024) (quoting Jones et al. v. Governor of Fla., 950 F.3d 795, 828-29 (11th Cir. 2020) (per curiam).

Florida Supreme Court interpreted the amendment to require the felons to pay all remaining legal financial obligations.[120] However, due to their indigent statuses, they could not. So, the felons sought a preliminary injunction to stop the electors from enforcing this requirement. The plaintiffs initially succeeded,[121] but the injunction was later repealed. On *en banc* review, the Court found that the likelihood of success was not satisfied to award the injunction because the alleged wealth discrimination did not warrant a heightened level of constitutional review; it was circumstantially specific to a set of facts that did not exist in the case.[122] A similar line of reasoning is what led to the denial of a preliminary injunction in *Braxton*. The harm was not *imminent*.[123] Reasonable minds can differ here, which is what makes this form of relief less appealing. On one hand, Braxton's alleged harm did warrant a preliminary injunction because his term was set to expire in November 2024, he could not occupy his lawfully elected position as the mayor of Newbern, and the local election franchise will accordingly suffer.[124] On the other, the Alabama's statute governing municipal elections required the next Election to be held in August 2025, giving Braxton more time to occupy office than originally planned. The Court also considered that a preliminary injunction was not sought earlier in the litigation. Deciding whether imminence existed here is akin to attempting to draw a line in fresh mud. If the decision was based on whether race was at the root of the decision, the line becomes no clearer because of the standard to prove a discriminatory basis. And you cannot just leave out timing in all of this, or whether the plaintiff's began seeking relief in state court.

As Professor Kevin Lynch points out, challenges to government action have not been as successful as one might hope.[125] This is mainly because the imminence prong of the PI standard is discretionary, and therefore uncertain, so it can be hard to ascertain certainty with this strategy. Indeed, the deference courts have to grant injunctive relief has generated a split on the standards for approving a PI.[126] The question is

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[120] *See* Jones v. Governor of Fla., 950 F.3d 795, 803-04 (11th Cir. 2020) (citing Advisory Op. to Gov. re: Implementation of Amend. 4, The Voting Restoration Amendment, 288 So.3d 1070 (Fla. 2020)).

[121] *See id.* at 832-33 (11th Cir. 2020) (affirming the district court's grant of a preliminary injunction).

[122] *See* Jones v. Governor of Fla., 975 F.3d 1016, 1032 (11th Cir. 2020) (en banc).

[123] *See* Braxton v. Stokes, No., 2024 WL 2116057, at *5 (S.D. Ala. May 10, 2024) (citing Ala. v. U.S. Dep't of Com., 546 F. Supp. 3d 1057, 1073 (M.D. Ala. 2021)).

[124] *Id.*

[125] For a discussion on the dramatic shift in circuit courts' precedence on injunctions, see Kevin J. Lynch, *Preliminary Injunctions in Public Law: The Merits*, 60 HOUS. L. REV. 1067 (2023).

[126] *Id.* at 1083.

whether a flexible approach to the merits should apply in granting a preliminary injunction.[127] In the context of Braxton's case, a flexible approach arguably would have made a difference considering how the Court found that there was not an irreparable harm because the next election in Newbern was set to occur in August 2025 and the parties own delay in seeking a preliminary injunction weighed against such a finding.[128] This is similar to the reasoning Second Circuit applied in finding a narrower interpretation of the test for granting an injunction, as Professor Lynch identified.[129] A threshold requirement for success on the merits for a preliminary injunction is urgency; in Braxton the two factors above weighed against such a finding.[130] In other words, timing is everything. When a litigant does not have time on their side, attempting to enforce election results through injunctive relief could be a waste of litigation resources.

But it goes without saying there are certain harms that come with having the wrong candidate in a position where they are not legally entitled to be. This can make for a rather disruptive environment towards communal progress for an electing body of any size. But whether that is as important as issuing an injunction against *all progress*, as a PI can impose, can be a deciding factor on whether this relief is granted. That is also not to say it should never be sought or granted when the need to enforce the results of a free and fair election arises, but great deference should always be given to the facts presented in each case and weighed appropriately.[131] If a plaintiff were to choose this route, they should be mindful the standard is high, making the outcome uncertain, just like any election. Parties seeking to enforce results should not overlook injunctive relief, but the risk of not getting one and prolonging the litigation plan should be considered. Seek this type of relief sooner rather than later. Local positions matter, but whether they matter enough to award this sort of relief a year or two after the election is a gamble that might weigh against an injunction in cases similar to Patrick Braxton's.

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[127] *Id.*

[128] Order Denying Motion for Preliminary Injunction, Braxton v. Stokes, No. 2:23-cv-00127-KD-N (S.D. Ala. May 10, 2024).

[129] *See, e.g.*, Lynch, *supra* note 125, at 1083-84 (citing Citigroup Glob. Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 32, 34 (2d Cir. 2010)).

[130] Order Denying Motion for Preliminary Injunction, Braxton v. Stokes, at 10, No. 2:23-cv-00127-KD-N (S.D. Ala. May 10, 2024).

[131] If a court does not give appropriate shrift to a case's unique facts, there is a possibility for appeal on grounds of abuse of discretion. *See* Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1317 (11th Cir. 2019).

C. Seeking Mandamus

Another option for plaintiffs who seek recourse for election subversion is to pursue enforcement through a writ of mandamus.[132] A mandamus is a court order that directs an election official to take a specified action.[133] Professor Derek Muller, an election law scholar, believes that a mandamus order is "uniquely situated to help courts prevent election subversion."[134] For a writ of mandamus to be issued, there must be: "(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) a lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."[135] Additionally, the difficulty of meeting the extraordinary circumstances bar should not be understated, especially when the issue can be raised on appeal.[136]

Writs of mandamus are often held to narrow, exceptional circumstances by the Alabama Supreme Court.[137] Writs of mandamus in Alabama are issued only in extraordinary circumstances, hinging on the question of whether an appeal would provide an adequate remedy.[138] If not, the Alabama Supreme Court can then rely on the four-part test articulated in *Ex parte Martin* to determine if granting the petition is appropriate based on the circumstances of the case.[139] For example, if an election resulted in the wrong candidate being declared the winner of an election, the court, even on a writ of mandamus, would not be able to effect

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[132] *See* 28 U.S.C. § 1651(a). The United States Supreme Court affirmed that mandamus orders are appropriate in matters of public importance. *See also* LaBuy v. Howes Leather Co., 352 U.S. 249 (1957); United States v. McGarr, 461 F.2d 1 (7th Cir. 1972); U.S. Dep't of Just., *Mandamus*, *in* JUST. MANUAL, https://www.justice.gov/jm/civil-resource-manual-215-mandamus [https://perma.cc/842A-CCT3].

[133] *See* FED. R. CIV. P. 70; *see also* ALA. R. CIV. P. 70.

[134] Shannon Roddel, *'Writ of Mandamus' A Readily Available Tool to Address Election Disputes, Study Shows*, NOTRE DAME NEWS (July 17, 2023), https://news.nd.edu/news/writ-of-mandamus-a-readily-available-tool-to-address-election-disputes-study-shows [https://perma.cc/94TB-A8WH].

[135] *Ex parte* Martin, 598 So. 2d 1381, 1383 (Ala. 1992).

[136] *Id.* ("Mandamus will not issue when there is an adequate remedy by appeal, and a writ cannot be used as a substitute for appellate review."); *see also Ex parte* Brooks, 572 So. 2d 409, 411 (Ala. 1990) ("Mandamus is not a substitute for appeal and is not available when there is a remedy by appeal"); *Ex parte* Fowler, 574 So. 2d 745, 747 (Ala. 1990) ("It is well established in Alabama that a writ of mandamus, which is a drastic and extraordinary, will not issue when there is an adequate remedy by appeal); *Ex parte* Furnace & Corrosive Serv., Inc., 418 So. 2d 891, 893 (Ala. 1982) ("Generally, the writ will not be granted if the matter complained of can be raised on appeal.").

[137] *Ex parte* Carter, 275 So. 3d at 119 (quoting *Ex parte* Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 761-62 (Ala. 2002)).

[138] *See Ex parte* Martin, 598 So. 2d 1381, 1383 (Ala. 1992).

[139] *Id.*

the result because the declaration of a winner would prevent the court from exercising jurisdiction over the action.[140]

A writ of mandamus is "usually a much speedier process than other ways of suing in court, and it can often be filed directly in front of the state supreme court."[141] However, there are some distinct differences among states. For example, in Nebraska state district courts can issue writs of mandamus under the statutory code.[142] In addition, the Nebraska Supreme Court has set out a different test for issuing a writ of mandamus. Under Nebraska law, four elements must be satisfied for an action to be enforced through a writ of mandamus: (1) the writ must compel a state officer to act; (2) the duty sought is imposed on the officer by law; (3) the law must exist at the time the writ is applied for; and (4) it must be clear.[143] Furthermore, a writ of mandamus, contrary to the common law standard, is not issued on an equity basis, but only as a remedy for state citizens to obtain justice for infringed-upon individual rights.[144] Nebraska trial-level district courts can issue writs of mandamus, provided the party seeking the writ has satisfied the procedural requirements by filing a motion upon

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[140] *See* City of Talladega v. Pettus, 602 So. 2d 357, 359 (Ala. 1992); *see also* ALA. CODE § 17-22A-21. In *Pettus*, the Alabama Supreme Court stated that "under the provisions of § 17-22A-21, the court did not have the jurisdiction to revoke the certificate of election issued to Barton." *Pettus*, 602 So. 2d at 359. Instead, "had Pettus filed the action before the certificate was issued or if he had challenged Barton's noncompliance with the provisions of the FCPA before the election, then the court would have had jurisdiction to grant whatever relief was appropriate." *Id.* In circumstances surrounding elections, time is of the essence. It is also worth mentioning that State Supreme Courts can be overruled in certain circumstances if the election so happens to affect a federal office despite the state having the ultimate authority governing elections. *See generally* Bush v. Gore, 531 U.S. 98 (2000). Needless to say, judges do not always make decisions that everyone will like; facts don't aways led to result that everyone will want. And as *Pettus* reveals, mistakes made during the heat of election season may not be corrected post-hoc.

[141] Roddel, *supra* note 134; *see, e.g.*, ALA. CODE § 12-2-7 ("The Supreme Court shall have authority: . . . (2) To exercise original jurisdiction in the issue and determination of writs of . . . mandamus in relation to matters in which no other court has jurisdiction."). In federal courts, writs of mandamus are issued pursuant to 28 U.S.C. § 1651. Writs of mandamus are issued in other states as well, including but not limited to: TEX. GOV'T CODE ANN. § 22.221 (2023); TEX. CONST. art. V § 3; ARK. CODE ANN. § 16-115-101 (1939); P.R. LAWS. ANN. tit. 32, § 3422 (1933); OR. REV. STAT. § 34.150 (2023); OKLA. STAT. tit. 12, § 1451 (2023); N.M. STAT. ANN. § 10-4-2 (2023); TENN. CODE ANN. § 29-35-101.

[142] *See* Burries v. Schmaderer, 968 N.W.2d 128, 131–32 (Neb. Ct. App. 2021).

[143] *See* State *ex rel.* Johnson v. Goble, 285 N.W. 569, 574 (Neb. 1939) ("To warrant issue of mandamus against officer to compel him to act, the duty must be imposed on him by law, it must exist at the time the writ is applied for, and it must be clear.").

[144] *See, e.g.*, Trainum v. Sutherland Assocs., L.L.C., 642 N.W.2d 816, 820 (Neb. 2002); State *ex rel.* Fick v. Miller, 584 N.W.2d 809, 814 (Neb. 1998) ("Mandamus is a law action. It is an extraordinary remedy and not a writ of right. . . ."); State *ex rel*. Tyler v. Douglas Cnty. Dist. Ct., 580 N.W.2d 95, 98 (Neb. 1998) ("Mandamus . . . will issue only when the duty to act is clear."); State *ex rel.* Krieger v. Bd. of Supervisors of Clay Cnty., 105 N.W.2d 721, 725 (1960). In Nebraska, writs of mandamus are governed by state statutory code. *See* NEB. REV. STAT. §§ 25-2156–2169 (2016).

affidavit or a verified petition.[145] If the requirements are not met, not only will the district court not have jurisdiction, but neither will the court of appeals.[146]

However, mandamus orders have weaknesses in correcting the issue that might arise in election subversion cases.[147] Professor Derick Muller has questioned what would happen if an election official continued to refuse and defies the mandamus order. He identified that courts, in issuing mandamus orders, could attach property to compel the offending officer to comply, or use the contempt power to compel compliance by issuing fines, forcing imprisonment, replacing the official, or substituting another official to perform the act.[148] More simply, mandamus relief requires authority to enforce the desired action. Without it, this remedy is nothing more than a reworded, watered-down declaratory judgment that is easily ignored. As such, a mandamus action is only likely to be successful if the court has sufficient tools within its own power to enforce the results of an election.

So what if one seeks to compel that Court to enforce the results? Once again, plaintiffs in similar predicaments to Braxton will need to determine whether the court, be it federal or state, has the authority to actually enforce the results. Take *Ex parte Scrushy* for example.[149] In *Scrushy*, the town of Hayneville, Alabama held a municipal election in 2016 for town council members and mayor.[150] At the end of the election, a run-off election was needed to determine the winners for the three remaining seats.[151] Election contestants sought the enforcement power of the local circuit court through filling a writ of mandamus to compel the remining council members and mayor to perform their duties under Alabama law to commence the election.[152] But the Mayor and a council member refused to attend the meeting, resulting in no quorum.[153] The circuit court was asked to intervene again by certifying two of the three seats, resulting in only one seat eligible for a runoff election so the council

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[145] *See* Burries v. Schmaderer, 968 N.W.2d 128, 132 (Neb. Ct. App. 2021) (quoting State *ex rel.* Malone v. Baldonado-Bellamy, 950 N.W.2d 81, 87 (2020) ("[T]he filing of a motion and affidavit or a verified petition is a jurisdictional requirement before a . . . court may issue a writ of mandamus, and until such filing is made, the court does not have jurisdiction over an action for writ of mandamus.")).

[146] *Id.* (citing State v. McGuire, 921 N.W. 2d 77, 82 (2018)) ("When a trial court lacks jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits. . . .").

[147] *See* Muller, *supra* note 57, at 344–49.

[148] *Id.* at 349–50.

[149] *Ex parte Scrushy*, 262 So. 3d 638 (Ala. 2018).

[150] *Id.* at 639-40.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 641.

could have a quorum to conduct its business.[154] However, the Mayor and the other council member refused to attend the meetings.[155] The circuit court then, on a second motion, enforced its prior orders since the council could not meet as a body to certify the election results.[156] This resulted in a petition for mandamus relief to the Alabama Supreme Court.[157]

The question before the court in *Scrushy* was whether the circuit court had jurisdiction to enforce its own motion.[158] The majority held that it did.[159] One could consider this case to be an exception. State supreme courts are often the final authority on what the law is within the state border. But because many state supreme court justices are elected positions or appointed by the governor, state decisions can come down to the political beliefs of the state population at large. As precedent *Scrushy*'s holding would have helped Braxton if the case was kept in state court. Hayneville and Newbern are small towns in Alabama and faced similar situations to determine how to enforce the results of elected local leadership. But the two differ in application. In *Scrushy*, the Court appears to vest upon the circuit court the inherent power to enforce the results,[160] but that was largely driven by the fact that there was no other way to make the people comply with the statutory requirements for holding a special election. In Braxton's case, *Scrushy* indicates that the correct inquiry is whether a writ of mandamus is the only way to comply with the relevant election law. That question favors Braxton's case because the former mayor's reappointment of himself and the former council members was inconsistent with Alabama law.

D. Quo Warranto

The last option to consider is seeking enforcement of fair and free elections through a writ of quo warranto. "Quo warranto" is a Latin phrase meaning "by what authority" and refers to a proceeding used to prevent continued exercise of unlawfully asserted authority by inquiring into the authority for holding or claiming a public office or franchise.[161] While a

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[154] *Id.* at 641-42.
[155] *Id.*
[156] *Id.* at 642-43.
[157] *Id.* at 643.
[158] *Id.* at 644.
[159] *Id.* at 645.
[160] *Id.* at 645 (citing McMorrough v. McMorrough, 930 So.2d 511, 516 (Ala. Civ. App. 2005)).
[161] *See, e.g.*, 21 TENN JURIS § 1 (2023) (citing Silliman v. City of Memphis, 449 S.W.3d 440 (Tenn. Ct. App. 2014)); Fla. House of Reps. v. Crist, 999 So. 2d 601, 607 (Fla. 2008); Spykerman v. Levy, 421 A.2d 641, 649 (Pa. 1980); State *ex rel.* Burnquist v. Village of North Pole, 6 N.W.2d 458, 460–61 (Minn. 1942); State *ex rel*. Watkins v. Fiorenzo, 643 N.E.2d 521, 521–22 (Ohio 1994).

quo warranto action can be pursued in federal court, states have explicit statutes governing when and how a writ of quo warranto action can be granted.[162] In fact, the quo warranto has been one way that courts have been able to embody Justice Marshall's "right for remedy" theory.[163] Several state courts have heard quo warranto actions in some fashion.[164]

Under Alabama law, a writ of quo warranto is a common law writ used to determine whether an individual is properly qualified and eligible to hold public office.[165] The writ is utilized to test whether a person may lawfully hold office, unlike impeachment, which is the removal of an office holder for inappropriate acts while lawfully holding office.[166] The purpose of the writ is to ascertain whether an officeholder is "constitutionally and legally authorized to perform any act in, or exercise any functions of, the office to which he lays claim."[167] Action for relief

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[162] For example, a quo warranto action in California is governed by statute. *See* CAL. CIV. PROC. CODE § 803 (West 1872); *see also* 8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 27–31 (6th ed. 2021); *accord* Richard C. Turrone, *Quo Warranto*, 15 HASTINGS L.J. 222 (1963). California would make for a great case study to uncover other solutions to this issue that this article will not cover. Marguerite Leoni and Chris Skinnell identified the effects of the California Voting Rights Act that was passed by the legislature in 2002 to supplement the Voting Rights Act of 1965 (*i.e.*, 52 U.S.C. §§10101–10314, which had negligible success in the state). *See* Marguerite M. Leoni & Chris Skinnell, *The California Voting Rights Act*, *in* AMERICA VOTES!: A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS (Benjamin E. Griffith ed., 2d ed. 2012).

[163] *See* Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning from Florida's Presidential Election Debacle*, 63 U. PITT. L. REV. 159, 186 (2001) (citing State *ex rel.* Watkins v. Fernadez, 143 So. 638, 641 (Fla. 1932)); *see also* Watson, *supra* note 73, at 1001.

[164] *See generally* State *ex rel.* Varnau v. Wenninger, 128 Ohio St. 3d 361 (2011); Violet v. Voccola, 497 A.2d 709 (R.I. 1985); Lopez v. Bd. of Educ. of Bridgeport, 81 A.3d 184 (Conn. 2013); Saunder v. Gatling, 81 N.C. 298 (1879); State *ex rel.* Holmes v. Griffin, 667 So. 2d 1319 (Miss. 1995); McElhaney v. Anderson, 598 N.W.2d 203 (S.D. 1999); Com *ex rel.* Koontz v. Dunkle, 50 A.2d 496 (Pa. 1947); State *ex rel.* King v. Sloan, 253 P.3d 33 (N.M. 2011); Warren v. DeSantis, 365 So. 3d 1137 (Fla. 2023); Edwards v. Smith, 892 S.E.2d 566 (Ga. Ct. App. 2023); Sutton v. Adams, 356 So. 3d 1017 (La. 2023); Snell v. Walz, 993 N.W.2d 669 (Minn. 2023); Gulley v. State *ex rel.* Jegley, 664 S.W.3d 421 (Ark. 2023).

[165] *See* ALA. CODE § 6-6-591. In Alabama, a quo warranto action is not limited just to election issues. For further discussion or inquiry, see ALA. CODE § 28-4-72 ("Forfeiture of charters of clubs or incorporated associations violating provision of Sections 28-4-70 or 28-4-71") or ALA. CODE § 27-34-50 ("Action to enjoin or in Quo Warranto; Liquidation; Receivership"), to name a few.

[166] *See* Sullivan v. State *ex rel.* Att'y Gen. of Ala., 472 So. 2d 970, 972 (Ala. 1985); State *ex rel.* Chambers v. Bates, 171 So. 370, 372 (Ala. 1936); *see also* Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning from Florida's Presidential Election Debacle*, 63 U. PITT. L. REV. 159, 183 (2001) (quoting Alto Admas & George John Miller, *Origins and Current Florida Status of the Extraordinary Writs*, 4 FLA. L. REV. 421, 453 (1951) ("A quo warranto writ 'tests the right to title to public office, including the title of nominee or official of a legally qualified political party, the right either to possess a franchise or to exercise an admittedly valid franchise in a certain manner.'")).

[167] *See* 65 AM. JUR. 2D *Quo Warranto* § 122 (2023); *see also Ex parte* Sierra Club, 674 So. 2d 54, 56–57 (Ala. 1995) ("Quo warranto is . . . used to determine whether one is properly

through a writ of quo warranto may be brought by private citizens. The issuance of a writ of quo warranto must serve the public good, although it may also incidentally benefit the person or persons that institute the action. A quo warranto action looks to the sovereign power of the state with respect to the use or abuse of election franchisee privileges to protect the interest of the public from usurpation or abuse.[168]

Other states also have or make use of statutes governing writs of quo warranto. For example, in Florida, a writ of quo warranto has been used to challenge the results of an election.[169] Judge Donald Carroll of the Florida First District Court of Appeals wrote:

> The proper holding of an election is so vital in a democracy that we feel that any citizen has a real stake in seeing that elections are lawfully held – so that [they] should be able to institute quo warranto proceedings to test the validity of the election, even though the Attorney General may refuse the use of his name.[170]

If the office is public in nature, then a writ of quo warranto can be sought.[171] Like Alabama, Florida has been clear on the application of a quo warranto only in extraordinary circumstances.[172] However, Florida's statutory code governing writs of quo warranto is slightly different, requiring the Attorney General to bring the action instead of private citizens.[173]

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qualified and eligible to hold a public office. . . . Stated another way . . . to ascertain whether an officeholder is 'constitutionally and legally authorized to perform any act in, or exercise any functions of, the office to which he lays claim.'"); Betrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 ALA. L. REV. 221, 270 (2021).

[168] *See* Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 732 (Ala. 1940).

[169] *See* Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning from Florida's Presidential Election Debacle*, 63 U. PITT. L. REV. 159, 184 (2001); *see, e.g.*, Fouts v. Bolay, 795 So. 2d 1116, 1117 (Fla. Dist. Ct. App. 2001) ("Quo warranto is a writ of inquiry through which a court determines the validity of a party's claim that an individual is exercising a public office illegally."). For the statutory code, see FLA. STAT. ANN. § 80.01, § 80.02, §§ 80.031–32, & § 80.04.

[170] Wash. Cnty. Kennel Club, Inc. v. State *ex rel.* McAllister, 107 So. 2d 176, 178 (Fla. Dist. Ct. App. 1958).

[171] State *ex rel.* City of St. Petersburg v. Noel, 154 So. 214, 214 (Fla. 1934); *see also* State *ex rel.* Wurn v. Kasserman, 179 So. 410, 412 (Fla. 1938) (holding that quo warranto challenge was not proper since individuals were not claiming title to public office.).

[172] Fouts v. Bolay, 795 So. 2d 1116, 1118 (Fla. Dist. Ct. App. 2001) (citing Beckstrom v. Volusia Cnty. Canvassing Bd., 707 So. 2d 720 (Fla. 1998)) ("An election should not be set aside unless a court finds substantial non-compliance with a statutory election procedure and also makes a factual determination that reasonable doubt exist as to whether a certified election expressed the will of the voters.").

[173] *See* McGhee v. City of Frostproof, 289 So. 2d 751, 752 (1974) ("While [quo warranto] is ordinarily the proper method to determine entitlement to an office, it may be instituted only

Mississippi, however, does things a little differently. Pursuant to the state code, there are ten avenues in which a writ of quo warranto maybe used: (1) for unlawfully holding office; (2) for acting in a manner to forfeit office; (3) for acting as an illegal corporation with another person; (4) for abusing corporate powers; (5) for, as a corporation, willfully exercising power not granted by law; (6) when a corporation fails to exercise powers conferred by law (7) by forfeiture of the franchise, against a corporation for negligence; (8) when a corporation violates the laws made for regulation; (9) for forfeiting the ability to have the right of any corporation for refusal to comply with the law; and (10) when any non-resident alien or corporation shall acquire or hold lands contrary to law.[174]

In *State ex. rel. Holmes v. Griffin*, the Mississippi Supreme Court explained that, similar to Florida, to obtain relief for a quo warranto action, a complaint must be filed in the name of the state, on behalf of the attorney general or a district attorney.[175] After the complaint is filed, a court will hold a proceeding and the judgment rendered will be based on what rights the claimant is entitled to.[176] As a result, the claimant will be granted all damages subject to the proceeding.[177] However, a quo warranto proceeding will not be an appropriate change until the usurper has entered into office or exercised some authority in the position.[178] As Professor Muller articulates, the key difference between a writ of mandamus and a writ of quo warranto is the time in which to seek them. Mandamus orders can address election subversion issues before the election occurs, while a writ of quo warranto generally will not be proper until after the election and after the individual has acted with authority of the position.

V. GOOD TO GO OR "QUO WARRANT-NO"?

Considering that the events in Braxton's case occurred after the election, the appropriate remedy to enforce the results could be realized by filing a writ of quo warranto to enforce the results of a free and fair election. However, Braxton's pleadings did not seek a writ of quo warranto for relief.[179] While we can only speculate why Braxton did not pursue quo warranto relief, the Alabama Supreme Court has recently decided three

by the Attorney General . . . or by a person claiming title to the office."); *accord* Tobler v. Beckett, 297 So. 2d 59, 61 (1974).

[174] MISS. CODE ANN. § 11-39-1 (1942).

[175] State *ex rel.* Holmes v. Griffin, 667 So. 2d 1319, 1324 (Miss. 1995).

[176] *Id.*; *see also* MISS. CODE ANN. § 11-39-5 (1942).

[177] MISS. CODE ANN. § 11-39-5 (1942).

[178] *See, e.g.*, League of Women Voters v. Scott, 232 So. 3d 264, 265 (Fla. 2017).

[179] Complaint for Violation of Civil Rights (Non-Prisoner Complaint), Braxton v. Stokes, No. 2:23-cv-00127-KD-N (S.D. Ala. Nov. 21, 2022).

quo warranto cases that help delineate the appropriate times to grant the writ.[180]

A. *Burkes v. Franklin*

First, in *Burkes v. Franklin*, Fredrick Burkes filed a quo warranto action in the Jefferson County Circuit Court alleging that James Franklin had unlawfully usurped the public office of constable in District 59.[181] In March 2020, Burkes defeated Franklin in a primary election for constable.[182] Burkes ran unopposed in the general election and was declared and certified as the winner on Friday, November 13, 2020.[183] However, Franklin sent a letter to the probate court stating that Burkes had not filed an official bond within forty days of being elected to office.[184] As a result, the probate court sent a letter to Governor Kay Ivey stating that under state law, "[i]f any officer required by law to give bond fails to file the same within the time fixed by law, he vacates his office."[185] The probate court ended the letter by reminding the Governor that "[v]acancies in the office of constable shall be filed by appointment of the Governor, and the person appointed shall hold office for the unexpired term until his successor is elected and qualified."[186] Additionally, the probate court reminded the Governor that Mr. Burkes ran unopposed in the November 2020 general election.[187] The Governor proceeded to appoint Franklin to the position.[188]

In April 2021, Burkes filed a pro se suit for a writ of quo warranto because he had filed a timely official bond on December 31, 2020 pursuant to section 36-23-4 and had been sworn into office as constable on January 4, 2021.[189] As a remedy, Burkes requested that all paperwork related to the constable position be returned and for all actions concerning the position to cease and desist.[190] Franklin filed a pro se answer for summary judgment

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[180] It is worth considering that a writ of quo warranto is issued during an extraordinary circumstance. *See supra* notes 166-69 and accompanying text. Extraordinary circumstances have been defined as those "unusual and extreme situations where principles of equity mandate relief." Jinks v. AlliedSignal, Inc., 250 F.3d 381, 387 (6th Cir. 2001) (quoting Olle v. Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir. 1990)); *e.g.*, United States v. Askins & Miller Orthopedics, P.A., 924 F.3d 1348, 1359 (11th Cir. 2019) (discussing how equity courts have long recognized extraordinary circumstances in equity decisions).

[181] Burkes v. Franklin, 376 So. 3d 455, 456 (Ala. 2022).

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* (quoting ALA. CODE § 36-5-15) (alterations in original).

[186] *Id.* at 456–57 (quoting ALA. CODE § 36-23-2) (alterations in original).

[187] *Burkes*, 376 So. 3d at 457.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 4.

and asserted that Burkes had vacated the office of constable by failing to comply with the requirements to pay the official bonds and for the quo warranto action to be dismissed with prejudice.[191] Franklin also attached a copy of the letter from the probate court addressed to the Governor, as well as the Governor's letter appointing Franklin as the constable.[192] Because Burkes did not appear for oral argument or file a response, the Jefferson County Circuit Court granted Franklin's motion for summary judgment and dismissed Burkes's complaint.[193] Burkes then followed by appealing the decision to the Alabama Supreme Court.[194]

B. *Turner v. Ivey*

In *Turner v. Ivey*, the Alabama Supreme Court addressed a writ of quo warranto claim brought by Angela Turner on behalf of the State.[195] Unlike Burkes, Turner is a state inmate serving a life sentence for murder.[196] The public officers at issue are the appointed board members of the Alabama Pardon and Parole Board.[197] In 2020, the Governor appointed three members to the Board to conduct parole hearings and make determinations for requests for pardons, parole, and restoration of political and civil rights, among others.[198] In the middle of the pandemic, Turner applied for parole consideration.[199] The board denied Turner's request during a virtual hearing held in November 2020.[200] Turner then filed claims, including a writ for quo warranto on behalf of the State of Alabama, as a "relator" in the Montgomery County Circuit Court.[201] Turner alleged that the members of the Alabama Pardon and Parole Board were unlawfully holding their positions.[202] The named defendants filed a motion to dismiss, which the circuit court granted.[203]

The court dismissed Turner's claims not only for failing to state a redressable claim,[204] but for a lack of jurisdiction.[205] The jurisdictional requirement, which was also at issue in Burkes's case, is a procedural requirement similar to the state of Nebraska's requirement for a mandamus

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[191] *Id.*
[192] *Id.*
[193] *Burkes*, 376 So. 3d at 457.
[194] *Id.* at 458.
[195] Turner v. Ivey, No. SC-2022-0538, 2023 WL 4672503, at *2 (Ala. 2023).
[196] *Id.* at *1.
[197] *Id.*
[198] *Id.*; *see* ALA. CODE § 15-22-24(a)(1); *see also* ALA. CODE § 15-22-23(a).
[199] *Turner*, 2023 WL 4672503, at *1.
[200] *Id.*
[201] *Id. at *2.*
[202] *Id.* at *2.
[203] *Id.* at *3.
[204] For a motion to dismiss a state claim, see ALA. R. CIV. P. 12(b)(6).
[205] *Turner*, 2023 WL 4672503, at *3.

petition.[206] In Turner's case, the Alabama Supreme Court held that any person who gives security for the cost of the action may bring a writ of quo warranto on behalf of the State because the security payment can establish subject matter jurisdiction.[207] Without the security, the person will "[usurp] the authority of the state."[208] This requirement led the Alabama Supreme Court to affirm the Montgomery County Circuit Court in Turner's case, as she "never posted any type of security with the circuit court."[209] This same defect is what led the Alabama Supreme Court to reverse the Jefferson County Circuit Court's decision in favor of Burkes.[210] In order for the circuit court in *Burkes v. Franklin* to have had jurisdiction to rule on the matter, Burkes needed to have paid the court security cost.[211]

C. *Hudson v. Ivey*

The third case the Alabama Supreme Court heard on appeal of a writ of quo warranto during the 2023-24 term was *Hudson v. Ivey*.[212] The case centers on the reallocation of a state court judgeship in Jefferson County.[213] In May 2022, attorney Tiara Hudson was the Democratic Party nominee for appointment to the state circuit bench.[214] In June 2022, the Alabama Judicial Resource Allocation Commission voted to reallocate the judgeship placement from the 10th Circuit in Jefferson County, which Hudson was a nominee for, to the Madison County metro area.[215] In July 2022, Governor Ivey appointed Patrick Tuten to fill the new seat.[216] Hudson then filed a complaint seeking a declaratory judgment and injunctive relief.[217] Hudson alleged that the act of reappointment was unconstitutional under the state's constitution.[218]

The defendants in the case filed for a motion to dismiss.[219] First, the defendants filed a motion to dismiss for lack of subject matter jurisdiction because no quo warranto action was filed and that action was the exclusive

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[206] *See supra* notes 119–20 and accompanying text.
[207] *Turner*, 2023 WL 4672503, at *3–4.
[208] *Id.* (quoting Burkes v. Franklin, 376 So. 3d 455, 459 (Ala. 2022).
[209] *Id.* at *4, *8.
[210] Burkes v. Franklin, 376 So. 3d 455, 460 (Ala. 2022).
[211] *Id.*; *see* ALA. CODE § 6-6-591(b).
[212] Hudson v. Ivey, 383 So. 3d 636, 639 (Ala. 2023).
[213] *Id.* at 638.
[214] *Id.*
[215] *Id.* The Judicial Resource Board has the authority to reallocate judgeships when vacancies on the state bench arise due to death, retirement, resignation, or removal from office of a district or circuit judge. *See* ALA. CODE § 12-9A-2(a).
[216] *Hudson*, 383 So. 3d at 638.
[217] *Id.*
[218] *Id.*at 638–39.
[219] *Id.* at 639.

remedy to provide relief for the present circumstances.[220] The second ground for dismissal was for lack of standing because Hudson's injury was "neither caused by nor capable of being redressed by the named defendants."[221] Lastly, the defendants claimed that Hudson had failed to state a claim upon which relief could be granted.[222] The circuit court agreed with the defendants on all three grounds and dismissed Hudson's action, a decision which Hudson appealed to the Alabama Supreme Court.[223] On appeal, the court chose to address only the first issue of subject matter jurisdiction for Hudson's failure to file a writ of quo warranto within her complaint.[224] Here, the court noted that another downfall of seeking a declaratory judgment is that these actions are aimed at serving the "broader function" of determining legal rights before those rights are invaded.[225] The court relied on its opinion in *Etowah Baptist Association v. Entrekin*, discussing several limitations of declaratory judgment actions.[226] Of note, the court stated that anticipated controversies are insufficient grounds for a declaratory judgment proceeding due to public policy concerns.[227] When qualifications for service are questioned, the writ of quo warranto is the only proper remedy.[228] Hudson attempted to overcome this deficiency by claiming that the writ of quo warranto would not afford her the complete relief she seeks.[229] However, the court held that quo warranto actions do not preclude determining the constitutionality of an act; instead, the two actions may be addressed simultaneously.[230] As the court held in *Tyson v. Jones*, trial courts are not precluded from issuing the appropriate injunctive relief in a quo warranto action.[231]

On the surface, the main opinion in *Hudson* mildly articulates the same line of reasoning used in the aforementioned cases.[232] However, the special concurrence is what makes this case essential to evaluating the

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[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.* at 640.
[226] *Id.* (citing Etowah Baptist Ass'n v. Entrekin, 45 So. 3d 1266, 1274–75 (Ala. 2010)).
[227] *Id.*
[228] *See ex parte* Sierra Club, 647 So. 54, 58 (Ala. 1995).
[229] *Hudson*, 383 So. 3d at 642.
[230] *Id.* at 642–43 (citing Corprew v. Tallapoosa Cnty., 3 So. 2d 53, 54 (1941)) ("[For] statutory quo warranto[,] . . . in adjudicating the existence of such office vel non, the court may determine the constitutionality of the act purporting to create the same.").
[231] *See* Tyson v. Jones, 60 So. 3d 831, 843 (Ala. 2010) (rejecting the argument that a circuit court lacked jurisdiction to issue injunctive relief in a quo warranto action).
[232] *See Hudson*, 383 So. 3d at 643; Burkes v. Franklin, 376 So. 3d 455, 460 (Ala. 2022); Turner v. Ivey, 2023 WL 4672503, at *8 (Ala. 2023).

adequacy of a quo warranto action.[233] Standing alone, one justice wrote separately to address concerns with portions of Hudson's complaint that he viewed as irrelevant information.[234] Like Braxton's amended complaint, Hudson's complaint frequently mentioned her race and, in the opinion of the justice, used biased language, such as capitalizing "Black" every time it appeared in her brief.[235] Further, the justice was compelled to believe that Hudson's position insinuated that the reallocation was motivated by racism, not based on the statutory code.[236] While Hudson conceded that the facts showed a greater need for reallocating the judgeship, the justice continued expressing concern by questioning her professional judgment, specifically mentioning her counsel, the Southern Poverty Law Center, and the use of preferred personal pronouns to "curry favor [from the court] based on the attorneys' political views."[237] While the justice concluded that the focus should be on substantive legal arguments, the justice chose to support his claim that our system of justice is color-blind by citing *Plessy v. Ferguson*.[238] If nothing more, this concurrence explains why Braxton's case was removed to federal court; suing in state court can allow for a decision to be influenced by political considerations more so than in a federal court.[239]

Overall, seeking a writ of quo warranto is the best option for plaintiffs seeking to enforce the results of a free and fair election. However, the circumstances will vary from state to state depending on how the subversion occurs.[240] In Alabama, quo warranto actions have not always been the most favorable to plaintiffs as illustrated by *Burkes*, *Turner*, and *Hudson*. Take the Alabama Supreme Court's decision in *Burkes* for example: it stands as an outlier, exemplifying how a quo warranto action can be successful if specific procedural defects do not

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[233] *See Hudson*, 383 So. 3d at 643–45.

[234] *Id.* at 644.

[235] *Id.*

[236] *Id.*; *see also* ALA. CODE § 12-9A-1(d). It is also worth noting that the justice alluded to an inference of the word "Black" only being relevant to pleadings when a violation of the Fourteenth Amendment to the United States Constitution or a claim for racial discrimination is an element. *See Hudson*, 383 So. 3d at 643.

[237] *Hudson*, 383 So. 3d at 645.

[238] *Id.* (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). While Justice Harlan's dissent in *Plessy* is powerful, there is no small irony in the concurrence choosing to invoke the infamous *Plessy* decision at all in his opinion accusing the plaintiff of bias.

[239] *See also* Donald L. Bell, *The Adequate and Independent State Grounds Doctrine: Federalism, Uniformity, Equality and Individual Liberty*, 16 FLA. STATE UNIV. L. REV. 365, 397 (1988) ("[S]tate court judges are often subject to political pressures and, therefore, may be less inclined to expand individual liberties."). However, it is also worth noting that state courts have the final decision on conducting elections. So if a party wanted to pursue an action in federal court, once again they should keep in mind the jurisdictional bar that a writ of mandamus action would run into. *See supra* note 124.

[240] *See supra* notes 137–39 and accompanying text.

arise while litigation is pursued.[241] Applying *Burkes* to Braxton's situation, the only difference between the two—besides the position and location—is that Braxton did not have any additional requirements to satisfy after the election to be sworn into office.[242] Without the additional bond requirement, Burkes would not have had grounds to find an alternative route to obtain the constable position. Likewise, *Turner* and *Hudson* both give additional weight in favor of enforcement through a writ of quo warranto.

However, *Hudson* points out a concern—enforcement with racial undertones could have negative outcomes in state court, especially in states with a history of discrimination.[243] Nonetheless, none of the equitable remedies should be taken as an absolute "fix" if someone is seeking to enforce the results of a free and fair election. The law surrounding election law changes just as a population's opinion changes over time. Since Braxton's complaint did not mention a writ of quo warranto, the case could not have been successful in state court alone. Bringing claims for relief in federal court is an option but gets us no closer with the limited jurisdiction for those courts to address the real issues, especially if race and gender plays a factor in an election nonenforcement case. Similar plaintiffs will need to think strategically, considering both the timing of their claim and whether the court can even address the merits of a quo warranto or other equitable action. Braxton's complaint, and the other cases surveyed, are imperfect vessels that have not succeeded in vindicating their proposed theories. Even so, these cases' procedural and factual weaknesses do not undercut the theoretical application of these remedies in future, carefully crafted election subversion cases.

CONCLUSION

As scholars have identified, election subversion poses the greatest threat to our democracy.[244] The outcome of an election can often be influenced by how an election system is structured and protected.[245] Therefore, it is vital to ensure that adequate remedies are accessible on a rural and local level to enforce the results of free and fair elections. Patrick

[241] *See supra* notes 179–80 and accompanying text.

[242] *See* Edwards & Clarke, *supra* note 7.

[243] For a synopsis of Alabama's history, see Deuel Ross, *Voting Rights in Alabama, 2006-2022*, 25 U. PA. J. CONST. L. 252, 257–64 (2023).

[244] Hasen, *supra* note 10, at 266.

[245] *See* Pamela S. Karlan, *The Alabama Foundations of the Law of Democracy*, 67 ALA. L. REV. 415, 428 (2015).

Braxton's efforts to reclaim his rightfully elected seat presented an example of the challenges election subversion could invoke in the future. Courts are equipped with the tools and remedies to enforce the results of an election. But many of these tools remain untested, and with many litigants optioning for settlements like Braxton did we may never know if they will be effective. Moreover, each state is different in their approach to awarding potential remedies. Plaintiffs will need to ensure that they meet all procedural requirements that states may have imposed before relief proceedings can overcome motions to dismiss. The responsibility rests on the judicial system, especially with state courts, to protect the integrity of our election franchise and to enforce the results of free and fair elections. This Article has highlighted specific remedies available at a local and national level and to discuss what can be done if other citizens find themselves in situations to that of Patrick Braxton. However, those potential protections also come with weaknesses that should be taken into consideration at a state and national level. Ultimately, it is our collective job to ensure that this land of the free and the brave is protected so that each person has the right to lead when their time has come, and the people have spoken. The remedies for election subversion are plentiful, but they will not let the light of freedom shine if improperly utilized.