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# On the Road Again: How *Brnovich* Steers States Toward Increased Voter Restrictions

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# Comment

## ON THE ROAD AGAIN: HOW *BRNOVICH* STEERS STATES TOWARD INCREASED VOTER RESTRICTIONS

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For nearly fifty years, the Voting Rights Act of 1965 ("VRA") protected American elections.[1] For nearly fifty years, America had a system in place to eliminate existing tools of voter discrimination and prevent new barriers from being erected.[2] And for nearly fifty years, the VRA worked as intended.[3] America has never treated its citizens truly equally, but the VRA was an effective attempt at leveling the playing field in an arena in which so much power is vested: the political process.[4]

After the VRA's passage, registration and turnout rates for voters of color in the South skyrocketed.[5] Discrimination did not disappear overnight, as states were increasingly creative in developing new ways to suppress



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1. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437-46 (codified as amended at 52 U.S.C. §§ 10301-10314, 10501-10508, 10701-10702).

2. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 571 (2013) (Ginsburg, J., dissenting) (noting that the VRA prevented nearly 1,200 discriminatory laws from going into effect between 1965 and 2006).

3. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2354 (2021) (Kagan, J., dissenting) ("And for decades, Section 5 operated as intended.").

4. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that no descendant of an enslaved person could be an American citizen); Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding state-imposed racial segregation); Korematsu v. United States, 323 U.S. 214 (1944) (allowing the forced internment of citizens of Japanese descent).

5. Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight under the Voting Rights Act*, 11 AM. ECON. J.: APPLIED ECON. 2019 1, 3 (2019) (finding that the VRA led to gains in voter participation that persisted for forty years).

voters of color.[6] But the VRA was designed to catch these attempts, and it usually did.[7] With each VRA reauthorization, Congress tweaked what was not working, and kept what was.[8] As a result, our country seemed to be moving towards a political process that was slowly but surely becoming equally accessible to all voters.[9]

But America's dedication to voting rights did not last forever. In *Shelby County v. Holder*,[10] the Supreme Court put America back on the road to voter suppression by striking down the VRA's most effective provision, which required certain states to receive federal approval before changing their voting laws.[11] Predictably, states that had been prevented by the VRA from passing restrictive voting legislation rushed to enact laws that made it more difficult for voters of color to cast a ballot.[12] The Court's most recent voting rights decision, *Brnovich v. Democratic National Committee*,[13] weakened the VRA's most important remaining provision, Section 2, which broadly prohibits discriminatory voting practices.[14] By ignoring the factors established in *Thornburg v. Gingles*[15] that governed Section 2 claims for years, *Brnovich* makes it significantly harder for plaintiffs to successfully challenge voting laws under Section 2.[16]

The *Brnovich* Court also recognized the prevention of voter fraud as a "strong and entirely legitimate" interest that could justify passing a law that may place additional burdens on voters.[17] This recognition gives states the green light to pass restrictive voting legislation under the guise of preventing voter fraud.[18] It also suggests that the Court's decision-making process was

6. Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1968) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.").

7. *See id.* at 565.

8. The VRA originally required reauthorization after five years. The reauthorization period was extended to seven years in 1975 and to twenty-five years in 1982 and 2006. *See infra* Section I.A.2.

9. *See* Nw. Austin Mun. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) (noting that in 2009, voter turnout and registration rates approached parity in jurisdictions covered by the VRA).

10. 570 U.S. 529 (2013).

11. *Id.* at 557.

12. *See* Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 60 (2014) (noting that soon after *Shelby County* was decided, officials in Alabama, Florida, Mississippi, North Carolina, Texas, and Virginia announced plans to pass stricter voting laws).

13. 141 S. Ct. 2321 (2021).

14. *See infra* Section II.A.1.

15. 478 U.S. 30 (1986).

16. *See infra* Section II.A.1.

17. *Brnovich*, 141 S. Ct. at 2340.

18. *See infra* Section II.B.

not grounded in reality, as voter fraud is incredibly rare and does not impact the outcome of American elections.[19]

Part I of this Comment will discuss America's simultaneously tragic and triumphant history of voting rights.[20] It will examine the conditions that led to the passage of the VRA and describe how the Court upheld the legislation against constitutional attacks.[21] Part I will also explore the Court's approach to interpreting the VRA in *Shelby County* and *Brnovich*.[22] Finally, Part I will survey the voting legislation that has been proposed by state legislatures and Congress.[23]

Part II of this Comment will argue that the Court's most recent voting rights decision, *Brnovich v. Democratic National Committee*, weakens the VRA—and by extension the right to vote—even further.[24] First, Part II will explain how the *Brnovich* Court improperly ignored its precedent in two other VRA cases.[25] Next, Part II will show why the Court's recognition of a "voter fraud" state interest is so concerning.[26] Finally, Part II will identify the John Lewis Voting Rights Advancement Act as the law best poised to address the Court's concerns about the VRA's constitutionality.[27] By restoring the VRA and updating its provisions to apply to all states, this Act is a course correction that will prevent our country from continuing down the path of increased voter restrictions.[28]

## I. BACKGROUND

Since its passage in 1965, the VRA has been America's primary piece of federal voting legislation.[29] Two decisions, *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*, have significantly changed the way the VRA operates in modern elections by invalidating and weakening some of the law's most important provisions.[30] As a result, states are now

19. *See infra* Section II.B.
20. *See infra* Part I.
21. *See infra* Section I.A.
22. *See infra* Section I.B.
23. *See infra* Section I.C.
24. *See infra* Part II.
25. *See infra* Section II.A.
26. *See infra* Section II.B.
27. *See infra* Section II.C.
28. *See infra* Section II.C.
29. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437-46 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702).
30. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013) (finding Section 4(b) of the VRA unconstitutional); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2338–40 (2021) (creating a new set of standards to evaluate legislation challenged under Section 2 of the VRA).

able to make sweeping changes to their election laws that restrict ballot access and disparately impact voters of color.[31]

This Section provides an overview of: (1) the VRA, including its legislative history and reauthorizations;[32] (2) two recent cases, *Shelby County* and *Brnovich*, in which the Court eroded key sections of the VRA;[33] and (3) state and federal legislation that addresses voting.[34]

### *A. Congress Designed the VRA to Address Racial Discrimination in Voting*

Because prior efforts to eliminate voter discrimination had failed, Congress designed the VRA to eradicate the tools of blatant discrimination and prevent states from enacting new laws that would disenfranchise voters of color.[35] Throughout its history, Congress reauthorized the VRA and tweaked the legislation to respond to new forms of discrimination.[36] Although the VRA was effective at closing registration and turnout gaps, many states persisted in their efforts to disenfranchise voters of color, rendering the VRA's protections necessary.[37]

#### *1. The VRA Addressed the Shortcomings of Previous Voting Rights Legislation*

The VRA was not the federal government's first attempt at tackling the issue of voter discrimination.[38] After the states ratified the Fifteenth Amendment,[39] Congress tried to guarantee formerly enslaved people the right to vote by passing the Enforcement Act of 1870,[40] which made it a crime for public officers and private citizens to prevent others from voting.[41] But enforcement of the law quickly became "spotty and ineffective."[42] As a result of this lax enforcement, in 1890, many Southern states began to enact literacy

31. *See, e.g.*, 2021 Ga. Laws 14 (SB 202); 2021 Tex. Gen. Laws 1 (SB 1); *see infra* Section I.C.1.

32. *See infra* Section I.A.

33. *See infra* Section I.B.

34. *See infra* Section I.C.

35. *See infra* Section I.A.1.

36. *See infra* Section I.A.2.

37. *See infra* Section I.A.3.

38. South Carolina v. Katzenbach, 383 U.S. 301, 310–13 (1966) (detailing statutes and lawsuits that attempted to challenge racial discrimination in voting).

39. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

40. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870) (repealed 1894).

41. *Katzenbach*, 383 U.S. at 310.

42. *Id.*

tests and other measures that were "specifically designed" to prevent Black citizens from voting.[43]

Because Congressional action targeting specific electoral practices failed to prevent discrimination, the strategy to combat voter discrimination focused on individual lawsuits.[44] However, almost as soon as a court could respond to a law, states would pass another, slightly different law that continued to disenfranchise voters of color.[45] In this way, early attempts to address race-based voter discrimination were like "battling the Hydra[:] Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place."[46] Using lawsuits to target voting practices in individual states was ineffective for several reasons, including the amount of time and effort required to prepare for trial.[47] Additionally, attacking voter discrimination using lawsuits did not proactively prevent discrimination, but rather addressed problems *after* voters had already been disenfranchised.[48]

Congress passed the VRA in 1965 after concluding that "the unsuccessful remedies" of the past needed to be replaced by "sterner and more elaborate measures."[49] Several features of the VRA made it effective at reducing and preventing voter discrimination.[50] First, Section 2's broad discrimination prohibition allowed plaintiffs to challenge any "voting qualification or prerequisite to voting, or standard, practice, or procedure" that resulted in the denial or abridgement of the right to vote on account of

43. *Id.* at 310–11. States using literacy tests also adopted tools such as grandfather clauses to ensure that illiterate white citizens could still vote. *Id.* at 311.

44. *Id.* at 313 (noting that the Civil Rights Acts of 1957, 1960, and 1964 did "little to cure the problem of voting discrimination"); *id.* at 311 (listing a line of cases that struck down specific discriminatory tools, such as grandfather clauses and all-white primaries).

45. *Id.* at 314 ("Even when favorable [court] decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees . . . ."); *see, e.g.*, Nixon v. Herndon, 273 U.S. 536 (1927) (holding that a Texas statute violated the Fourteenth Amendment by creating whites-only primaries); Smith v. Allwright, 321 U.S. 649 (1944) (holding that a Texas statute violated the Fourteenth Amendment by allowing the Texas Democratic Party to require all voters in its primary to be white); Terry v. Adams, 345 U.S. 461 (1953) (holding that a Texas political association violated the Fifteenth Amendment by excluding Black voters from participating in its primaries).

46. Shelby Cnty. v. Holder, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting).

47. *Katzenbach*, 383 U.S. at 314.

48. *Id.* at 315; *see also Shelby Cnty.*, 570 U.S. at 572 (Ginsburg, J., dissenting) ("Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency.").

49. *Katzenbach*, 383 U.S. at 309. Of course, Congress did not reach this conclusion on its own; the tireless efforts of Black leaders within the Civil Rights Movement created the political momentum that led to the VRA's passage. *See generally* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015) (detailing how civil rights leaders used marches and protests to bring attention to voting rights).

50. *Shelby Cnty.*, 570 U.S. at 560 (Ginsburg, J., dissenting).

race or color.[51] Next, Section 4's coverage formula brought jurisdictions with a history of voter discrimination under the supervision of the federal government.[52] Finally, Section 5's preclearance requirement mandated that these covered jurisdictions get their voting legislation approved, or "precleared," by the federal government.[53] A proposed voting law would only be approved if it did not have the purpose and would not have the effect of "denying or abridging the right to vote on account of race or color."[54]

The combination of Section 4's coverage formula and Section 5's preclearance requirement made the VRA particularly effective at addressing the shortcomings of previous voting legislation.[55] By requiring jurisdictions with a history of de jure discrimination to seek federal approval of new voting legislation, Section 4 and Section 5 worked in tandem to prevent states from creating new practices that would discriminate against voters of color.[56] In this way, the VRA helped stop states from doing what they had done so many times before: tweaking their laws to seemingly comply with federal decrees but in fact continuing to disenfranchise citizens of color.[57]

By proactively preventing the passage of discriminatory laws, Sections 4 and 5 also reduced the need for litigation to eliminate individual state use of a particular voting practice, a strategy that had proved ineffective in previous years.[58] When read alongside Sections 4 and 5, Section 2, which allows voters to challenge voting practices after a state had already used them, is best understood as a back-up option in the fight against voter discrimination.[59] Unlike Sections 4 and 5, Section 2 was not designed to prevent discriminatory laws from going into effect.[60] However, Section 2 at

51. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437-46 (codified as amended at 52 U.S.C. § 10301).

52. In 1965, Section 4(b) covered jurisdictions that used a literacy test or device and that had voter registration or turnout rates below 50% in the 1964 election. Voting Rights Act of 1965 § 4(b).

53. States subject to Section 5's preclearance requirement had to get voting legislation approved by the Attorney General or by a panel of federal judges. Voting Rights Act of 1965 § 5.

54. *Id.*

55. *Shelby Cnty.*, 570 U.S. at 560 (Ginsburg, J., dissenting).

56. Voting Rights Act of 1965 § 4(b), *invalidated by* Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Voting Rights Act of 1965 § 5.

57. *See supra* note 45 and accompanying text.

58. *See supra* notes 44–48 and accompanying text.

59. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2356 (2021) (Kagan, J., dissenting) (emphasizing that "Congress never meant for Section 2 to bear all of the weight of the [VRA's] commitments").

60. Plaintiffs who attempt to use Section 2 to secure relief against discriminatory voting laws before such laws go into effect face an uphill battle. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. U. L. REV. 2143, 2158 (2015) (noting that plaintiffs secure preliminary injunctions in about 5% of Section 2 cases).

least gives voters another source from which to challenge such laws, rather than relying primarily on the Fifteenth Amendment.[61]

### 2. *Congress Repeatedly Reauthorized the VRA, Recognizing the Need for Continued Voter Protections*

Since its initial passage, Congress has reauthorized the VRA four times.[62] In 1970, Section 4's coverage formula was extended to jurisdictions that used a literacy test or device[63] and that had less than 50% voter registration or turnout in the 1968 election.[64] The 1970 reauthorization also banned literacy tests and devices nationwide.[65]

Five years later, Congress reauthorized the VRA again.[66] The coverage formula was once more extended, and the Act's definition of "test or device" was broadened to include the practice of providing English-only voting materials in places where over 5% of the voting-age population spoke another language.[67] Additionally, Sections 2 and 5 were amended to prohibit voting discrimination based on membership in a minority language group.[68]

In 1982, Congress reauthorized the VRA for twenty-five more years.[69] This reauthorization introduced the "bailout" provision, in which a political subdivision could seek exemption from Section 5's preclearance requirement.[70] Congress also amended Section 2 to prohibit voting practices that had the *effect* of denying or abridging the right to vote, in addition to practices that had the *purpose* of vote denial or abridgement.[71]

The most recent VRA reauthorization came in 2006.[72] Like the 1982 reauthorization, this reauthorization approved the statute for another twenty-five years and did not change Section 4's coverage formula.[73] This reauthorization amended Section 5 to prohibit voting changes with "any

61. South Carolina v. Katzenbach, 383 U.S. 301, 311–12 (1966) (listing cases in which plaintiffs challenged voting practices under the Fifteenth Amendment).

62. *See infra* notes 63–74 and accompanying text.

63. Examples of a "device" included requirements that a person demonstrate "good moral character" or have a registered voter vouch for their qualifications. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(c), 79 Stat. 437-46 (codified as amended at 52 U.S.C. § 10303(c)).

64. Voting Rights Act of 1965, *amended by* Pub L. 91-285, 84 Stat. 314 (1970).

65. *Id.*

66. Voting Rights Act of 1965, *amended by* Pub L. 94-73, 89 Stat. 402 (1975).

67. *Id.*

68. *Id.*

69. Voting Rights Act of 1965, *amended by* Pub L. 97-205, 96 Stat. 134 (1982).

70. *Id.* A covered jurisdiction could seek a bailout if, in the last ten years, it had not used a forbidden test or device, had not been denied preclearance, and had not lost a Section 2 lawsuit. *Id.*

71. *Id.*

72. Voting Rights Act of 1965, *amended by* Pub L. 109-246, 120 Stat. 577 (2006).

73. *Id.*

discriminatory purpose" as well as changes that diminished the ability of citizens "to elect their preferred candidates of choice" on account of race, color, or language minority status.[74] This reauthorization was overwhelmingly popular with both major political parties: it passed 98-0 in the Senate, and 390-33 in the House of Representatives.[75]

### *3. The VRA Reduced Voter Discrimination, but Persistent State Attempts at Disenfranchisement Made Its Ongoing Protections Necessary*

The VRA was largely successful in addressing the blatant voter discrimination and disenfranchisement that had plagued America since the end of Reconstruction.[76] In the five years after the VRA was passed, almost as many Black voters registered to vote in six Southern states as had registered in the entire century before 1965—an enormous improvement.[77] Because Section 5's preclearance requirement forced states to seek approval before making changes, state legislatures were also prevented from enacting other "vote denial schemes," such as racially motivated redistricting plans.[78] In this way, the VRA adapted as the forms of voter discrimination changed.[79]

Data from 2009 demonstrated the VRA's effectiveness at preventing voter discrimination.[80] In its decision in *Northwest Austin Municipal District Number One v. Holder*,[81] the Supreme Court noted that "the racial gap in voter registration and turnout is lower in the [s]tates originally covered by [Section] 5 than it is nationwide."[82] Three years later, in the same decision in which the Supreme Court declared Section 4's coverage formula unconstitutional, the Court acknowledged that the VRA had proved "immensely successful" at reducing racial discrimination in voting.[83]

74. *Id.*

75. Shelby Cnty. v. Holder, 570 U.S. 529, 565 (Ginsburg, J., dissenting).

76. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2353 (2021) (Kagan, J., dissenting).

77. *Id.*

78. *Id.* at 2353–54.

79. *Id.* at 2354. Another example of the VRA's adaptability was the 1975 reauthorization's inclusion of language discrimination. Voting Rights Act of 1965, *amended by* Pub L. 94-73, 89 Stat. 402 (1975).

80. Nw. Austin Mun. Dist. No. One v. Holder, 557 U.S. 193, 201–02 (2009).

81. 557 U.S. 193 (2009).

82. *Id.* at 203–04. Instead of seeing this progress as a sign that the legislation was working as intended, the Court viewed it as an indication that the "evil that [Section] 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance." *Id.* at 203.

83. Shelby Cnty. v. Holder, 570 U.S. 529, 548 (2013) ("There is no doubt that these improvements are in large part *because of* the Voting Rights Act.").

But despite its successes, the VRA did not completely eliminate voter discrimination.[84] In the years leading up to the 2006 reauthorization, Section 5's preclearance requirement was still being used to strike down state legislation that targeted or burdened voters of color.[85] When it reauthorized the VRA in 2006, Congress acknowledged that the VRA was the "driving force" behind the significant improvement in voting conditions in the South.[86] However, because the record showed that voter discrimination had not disappeared but instead had evolved into "more subtle forms of voting rights deprivations," Congress determined that the VRA's protections were still necessary.[87]

### *B. Recent Supreme Court Decisions Have Significantly Eroded the VRA*

In the decades following the VRA's passage, the Court consistently preserved the VRA against constitutional attacks.[88] However, beginning in the 2000s, the Court began to question whether the VRA's most stringent protections remained necessary.[89] In *Shelby County v. Holder*, the Court invalidated the VRA's most effective provision, Section 4's coverage formula,[90] and in *Brnovich v. Democratic National Committee*, the Court created a new list of factors that will significantly change how lower courts view challenges to voting laws under Section 2's broad discrimination provision.[91]

#### *1. For the Majority of the VRA's History, the Court Upheld the VRA Against Constitutional Challenges*

The first significant challenge to the VRA's constitutionality came immediately after its passage.[92] In *South Carolina v. Katzenbach*,[93] the Court considered whether certain sections of the VRA were unconstitutional.[94] South Carolina challenged several provisions of the VRA, particularly

84. *Id.* at 573 (Ginsburg, J., dissenting).

85. *Id.* at 573–75 (listing numerous examples of laws blocked by Section 5's preclearance requirement in the 1990s and 2000s).

86. *Id.* at 575.

87. *Id.* at 575–76.

88. *See infra* Section I.B.1.

89. *See infra* Section I.B.1.

90. *See infra* Section I.B.2.

91. *See infra* Section I.B.3. and Section II.A.1.

92. South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966).

93. 383 U.S. 301 (1966).

94. *Id.* at 307.

Section 4's coverage formula and Section 5's preclearance requirement.[95] South Carolina argued that in passing these sections, Congress had exceeded its powers and encroached on an area reserved to the states by the Constitution.[96] South Carolina also asserted that Section 4's coverage formula violated the principle of "the equality of [s]tates."[97]

The Court rejected South Carolina's arguments, holding that Congress was operating within its Fifteenth Amendment authority when it passed the VRA.[98] The Court added that the VRA was a "legitimate response"[99] to the voting discrimination that existed on a "pervasive scale,"[100] despite previous legislative attempts to eradicate it.[101] The Court also explained that the doctrine of equality of the states only applies to the terms on which states are admitted to the country.[102] As a result, it was irrelevant that the VRA did not apply to all states.[103]

The *Katzenbach* Court used strong language to uphold the constitutionality of the VRA.[104] The Court acknowledged that the VRA was an "uncommon exercise of congressional power" but contended that the legislation was justified by "exceptional conditions."[105] Because Congress knew that some states covered by the VRA had resorted to the "extraordinary stratagem of contriving new rules . . . for the sole purpose of perpetuating voting discrimination," Congress had responded in a "permissibly decisive manner."[106] In this way, the *Katzenbach* Court properly recognized that the VRA was an appropriate exercise of Congress's power to enforce the Fifteenth Amendment and prevent racial discrimination in voting.[107]

Over the next few decades, the Court would continue to maintain the constitutionality of the VRA.[108] For example, in the 1973 case *Georgia v.*

95. *Id.* at 317.

96. *Id.* at 323.

97. *Id.* This doctrine requires states to be admitted to the country on "equal footing." Coyle v. Smith, 221 U.S. 559, 567 (1911).

98. *Katzenbach*, 383 U.S. at 325–27 ("[Section] 2 of the Fifteenth Amendment expressly declares that 'Congress shall have power to enforce this article by appropriate legislation.'").

99. *Id.* at 328.

100. *Id.* at 308.

101. *Id.* at 313.

102. *Id.* at 328–29.

103. *Id.* at 330–31.

104. *Id.* at 324 ("Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting.") (emphasis added).

105. *Id.* at 334.

106. *Id.* at 335.

107. *Id.* at 325–26.

108. *See, e.g.*, City of Rome v. United States, 446 U.S. 156 (1980) (holding that a city within a state covered by Section 4's coverage formula could not seek exemption from Section 5's preclearance requirement); Lopez v. Monterey Cnty., 525 U.S. 266 (1998) (finding that Section 5's

*United States*,[109] the Court upheld a decision to enjoin Georgia from implementing a redistricting plan for the State's House of Representatives.[110] The Georgia legislature passed this plan without receiving preclearance as required by Section 5.[111] The Court found that this plan, which would have decreased the number of multimember districts, had the potential to dilute the value of votes cast by Black Georgians.[112] As a result, the Court struck down the plan.[113]

The 1986 case *Thornburg v. Gingles* presented the Court with its first opportunity to construe Section 2's broad prohibition of voting practices that deny or abridge the right to vote.[114] In 1982, North Carolina enacted a legislative redistricting plan, and a group of Black North Carolinians alleged that the plan impaired their ability to elect representatives of their choice in several districts.[115] After the lawsuit was filed, Congress amended Section 2 to clarify that violations did not require showing a "discriminatory *purpose*" but rather only showing a "discriminatory *effect*."[116] The Senate also identified a list of factors that might be "probative" of a Section 2 violation.[117] These factors included the jurisdiction's history of de facto discrimination against voters in a minority group (*Gingles* factor one); the extent of racially polarized voting in the jurisdiction (*Gingles* factor two); whether the effects of past discrimination persist (*Gingles* factor five); and the extent to which political campaigns in the jurisdiction have used racial appeals (*Gingles* factor six).[118] In a unanimous decision, the *Gingles* Court applied these factors to North Carolina's redistricting plan and found that the plan violated Section 2 by diluting the power of Black votes in five of the six challenged districts.[119]

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preclearance requirement applies to all covered counties, even when the legislation is passed by a non-covered state).

109. 411 U.S. 526 (1973).

110. *Id.* at 541.

111. *Id.* at 529–30.

112. *Id.* at 529–31; *see also* Burns v. Richardson, 384 U.S. 73, 88 (1966) (explaining that multimember districts are discriminatory when they "minimize or cancel out the voting strength of racial [minorities]" (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

113. 411 U.S. at 541.

114. 478 U.S. 30, 34 (1986).

115. *Id.* at 35.

116. *Id.* (emphasis added).

117. *Id.* at 36. The *Gingles* Court referred to these factors as the "Senate Report factors." *Id.* at 48–49 n.15. In this Comment, I refer to them as the *Gingles* factors to make comparison with the *Brnovich* factors more clear.

118. *Id.* at 36–37.

119. *Id.* at 80.

But the new millennium brought new doubts about whether the VRA's heavy hammer was still needed.[120] In 2009, the Court began to question the constitutionality of certain sections of the VRA.[121] In *Northwest Austin Municipal District Number One v. Holder*, the Court held that a utility district responsible for running its own elections was eligible to seek a bailout under Section 5, even though the district was not a "political subdivision" as defined in the VRA.[122] Although the *Northwest Austin* Court did not rule on the VRA's constitutionality, its discussion of the VRA's preclearance requirements and coverage formula foreshadowed the Court's future treatment of the VRA.[123] Despite contending that its usual practice was to "avoid the unnecessary resolution of constitutional questions,"[124] the *Northwest Austin* Court emphasized that the VRA "imposes current burdens and must be justified by current needs."[125] It also asserted that any departure from the "fundamental principle of equal sovereignty" required showing that Section 4's coverage formula, which applied only to some jurisdictions, was sufficiently related to the problem it targeted.[126] The Court reached its decision on statutory interpretation grounds but addressed the federalism and equal sovereignty issues at length in dicta.[127] In doing so, the *Northwest Austin* decision reflected how much the Court's view of the VRA had changed.[128]

### 2. *In* Shelby County*, the Supreme Court Gutted the VRA by Invalidating Section 4's Coverage Formula*

*Shelby County v. Holder* stripped the VRA of its most powerful tool by striking down Section 4's coverage formula.[129] The facts in *Shelby County*

120. *See, e.g.*, Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 321 (2000) (finding that Section 5 does not prohibit preclearance of a redistricting plan that was enacted with a discriminatory but nonretrogressive purpose); Georgia v. Ashcroft, 539 U.S. 461, 479 (2003) (holding that a state's redistricting plan can diminish the effectiveness of minority votes without violating Section 5 if the state can show that the "gains in the plan as a whole offset the loss in a particular district").

121. Nw. Austin Mun. Dist. No. One v. Holder, 557 U.S. 193, 201–05 (2009).

122. *Id.* at 206–11.

123. *Id.* at 201–05 (discussing the "substantial 'federalism costs'" of Section 5's preclearance requirement) (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).

124. *Id.* at 197.

125. *Id.* at 203.

126. *Id.*

127. *Id.* at 206–11.

128. *Compare id.* at 203 ("The Act also differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'"), *with* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966) ("The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union . . . .").

129. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

mirrored those in *Katzenbach*.[130] Shelby County, Alabama, sought a declaratory judgment that Sections 4(b) and 5 of the VRA were facially unconstitutional.[131] The district court upheld the VRA, finding that the evidence Congress used in the 2006 reauthorization was sufficient to justify continued use of the challenged sections.[132] The Court of Appeals for the D.C. Circuit affirmed the district court and accepted Congress's conclusion that Section 5's preclearance requirement remained necessary.[133]

Reversing the lower courts, the Supreme Court concluded that Section 4's coverage formula was unconstitutional because it was based on forty-year-old facts and was not grounded in "current conditions."[134] In its explanation, the Court echoed its reasoning in *Northwest Austin* by relying heavily on the "'fundamental principle of equal sovereignty' among the states"—the same principle that the Court found inapplicable in *Katzenbach*.[135] The Court found that Section 4's coverage formula departed from the equal sovereignty principle because it required only some jurisdictions to get voting legislation precleared.[136] And by declaring Section 4's coverage formula unconstitutional, the Court also rendered Section 5's preclearance requirement useless.[137] Without Section 4's coverage formula, Section 5 had no jurisdictions subject to preclearance.[138]

In a dissenting opinion, Justice Ginsburg stressed that the Fifteenth Amendment made it clear that whether and how to reauthorize the VRA was for Congress, not the Court, to decide.[139] Justice Ginsburg contended that the Court should have deferred to Congress's decision, especially because Congress took the reauthorization process so seriously.[140] The dissent also addressed the majority's assertion that the VRA was no longer needed because voting discrimination in covered jurisdictions had decreased

130. *Id.* at 540–41; *see supra* notes 92–97 and accompanying text.

131. Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 427 (D.D.C. 2011).

132. *Id.* at 492–98.

133. Shelby Cnty. v. Holder, 679 F.3d 838, 853, 865–73 (D.C. Cir. 2012). The Court of Appeals also noted that the use of Section 2 litigation in covered jurisdictions was inadequate to protect the rights of voters of color. *Id.* at 863–64.

134. *Shelby Cnty.*, 570 U.S. at 553–54, 556.

135. *Id.* at 544 ("[A]s we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of [s]tates.").

136. *Id.* at 544–45.

137. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437-46 (codified as amended at 52 U.S.C. § 10304).

138. *Id.* (explaining that Section 5's preclearance requirements apply to states covered by Section 4(b)'s coverage formula).

139. *Shelby Cnty.*, 570 U.S. at 566–567 (Ginsburg, J., dissenting). The *Shelby County* Court split along ideological lines, with Justices Breyer, Sotomayor, and Kagan joining Justice Ginsburg's dissent. *Id.* at 559.

140. *Id.* at 564–65.

dramatically.[141] In a now-famous line, Justice Ginsburg declared that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[142]

### *3. In* Brnovich*, the Court Created a New Set of Factors to Determine Whether a State's Voting Laws Violate Section 2*

With Section 4 invalidated and Section 5 rendered moot, the burden to prevent discrimination shifted to Section 2.[143] Section 2 prohibits voting practices or standards that have the effect of denying or abridging the right to vote on account of race.[144] In *Brnovich v. Democratic National Committee*, the Court created a new standard for evaluating Section 2 claims.[145]

At issue in *Brnovich* were two Arizona statutes: one preventing out-of-precinct ballots from being cast (the "out-of-precinct rule"), and another forbidding the collection of early mail-in ballots by third-party groups ("HB 2023").[146] The U.S. District Court for the District of Arizona found that the out-of-precinct rule did not have a "meaningfully disparate impact" on voters of color and thus did not violate Section 2.[147] The district court also upheld HB 2023, finding that it was unlikely to "cause a meaningful inequality in the electoral opportunities of minorities" because the rule applied to all voters and did not impose burdens beyond those normally associated with voting.[148] Finally, the district court found that HB 2023 was not enacted with discriminatory intent because the majority of the bill's proponents were "sincere in their belief" that Arizona needed stronger ballot collection restrictions to prevent fraud.[149]

The Court of Appeals for the Ninth Circuit reversed the district court, finding that both the out-of-precinct rule and HB 2023 imposed disparate

141. *Id.* at 571 (explaining that Congress reauthorized the VRA in part because "there were *more* DOJ objections [to proposed legislation] between 1982 and 2004 (626) than there were between 1965 and [1982] (490)").

142. *Id.* at 590.

143. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2356 (2021) (Kagan, J., dissenting).

144. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437-46 (codified as amended at 52 U.S.C. § 1301).

145. *Brnovich*, 141 S. Ct. at 2338–40.

146. *Id.* at 2334; *see also* ARIZ. REV. STAT. ANN. § 16-1005(H)–(I) (2016) (criminalizing the collection of absentee ballots by anyone besides a postal worker, an elections official, or the voter's caregiver, family member, or household member); ARIZ. REV. STAT. ANN. § 16-122 (2015) (requiring a person's name to appear in precinct registers to be able to vote in that precinct).

147. Democratic Nat'l Comm. v. Reagan, 329 F. Supp. 3d 824, 872, 878 (D. Ariz. 2018).

148. *Id.* at 845, 871.

149. *Id.* at 879–80.

impacts on voters of color in violation of Section 2.[150] The Ninth Circuit also held that the district court "clearly erred" when it held that HB 2023 was not enacted with discriminatory intent.[151]

In a 6-3 decision, the Supreme Court reversed the Ninth Circuit and found that the Arizona rules did not violate Section 2 because the laws did not prevent Arizona's political process from being "equally open" to voters of color.[152] The Court also held that HB 2023 was not enacted with discriminatory intent.[153] Writing for the majority, Justice Alito explained that the totality of the circumstances showed that neither Arizona law went beyond the '"usual burdens' of voting."[154] The Court also found that the prevention of voter fraud was a "strong and entirely legitimate" state interest that could justify voting laws which might have a disparate impact on voters of color, despite no evidence of voter fraud in Arizona being presented.[155]

*Brnovich* was notable because the Court chose not to apply the factors it utilized in *Gingles*.[156] The *Gingles* factors had long been applied to Section 2 cases.[157] But instead of following this Section 2 precedent, the *Brnovich* majority created a new set of factors to determine whether a voting law violates Section 2.[158] The Court explained that this "fresh look" was appropriate because *Gingles* dealt with a redistricting plan, while *Brnovich* dealt with what the majority described as "time, place, or manner" of voting rules.[159]

The first *Brnovich* factor is the size of the burden imposed by the voting rule.[160] Because voting naturally involves some burdens, "[m]ere inconvenience" does not demonstrate a Section 2 violation.[161] The second factor is the degree to which a voting rule departs from the voting practices

150. Democratic Nat'l. Comm. v. Hobbs, 948 F. 3d 989, 1032, 1037 (9th Cir. 2020) (en banc).

151. *Id.* at 1041.

152. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2337, 2343–44 (2021).

153. *Id.* at 2350.

154. *Id.* at 2344 (citing Crawford v. Marion Cnty. Election. Bd., 553 U.S. 181, 198 (2008)).

155. *Id.* at 2340.

156. *Id.* at 2337; *see supra* notes 117–119 and accompanying text.

157. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986); Voinovich v. Quilter, 507 U.S. 146 (1993); Johnson v. De Grandy, 512 U.S. 997 (1994).

158. *Brnovich*, 141 S. Ct. at 2338–40. The *Gingles* factors focused more directly on racial discrimination in voting, such as the history of voting-related discrimination in the state. *Gingles*, 478 U.S. at 44–45; *see supra* notes 118–119 and accompanying text. The *Brnovich* factors focus less on discrimination and more on balancing the burdens of a voting rule against the other voting opportunities that exist. *Brnovich*, 141 S. Ct. at 2338–40.

159. *Brnovich*, 141 S. Ct. at 2337.

160. *Id.* at 2338.

161. *Id.* (providing examples of burdens associated with voting, such as time spent traveling to a polling place).

commonly used in 1982.[162] The Court explained that those practices would be a "useful" benchmark when comparing the burdens imposed by a challenged rule.[163] The third factor is the size of the disparities imposed by a rule on different minority groups.[164] The smaller the disparity, the more likely it is that the voting process is equally open.[165] The fourth factor is whether there are other voting opportunities provided by the state's election system, which requires courts to evaluate a law's burden alongside other methods of voting.[166] The final factor is the strength of the state interest served by the voting rule.[167] When the state interest served by the rule is strong, the rule is less likely to violate Section 2.[168]

In dissent, Justice Kagan contended that the majority's creation of new factors undermined Section 2 and incorrectly interpreted the VRA.[169] Justice Kagan asserted that the majority rested its decision on a list of "mostly made-up factors" that ignore both the statutory text and the legislative intent of Section 2.[170] The dissent also emphasized that preserving the broad protections of Section 2 "matters more than ever" because after *Shelby County* decimated the protections of Sections 4 and 5, Section 2 "is what voters have left."[171]

### *C. States Previously Subject to VRA Preclearance Resume Passing Restrictive Voting Laws*

For decades, Section 4's coverage formula and Section 5's preclearance requirement worked together to prevent states from discriminating against voters of color.[172] However, after *Shelby County*, states were once again free to pass legislation making it harder for certain groups of voters to cast a

162. *Id.* at 2338–39 (listing state laws in 1982 that required "nearly all voters" to vote in person on Election Day and that restricted absentee ballots to "only narrow and tightly defined categories of voters").

163. *Id.*

164. *Id.* at 2339.

165. *Id.*

166. *Id.* (explaining that this factor stems from Section 2's reference to a state's '"political process' as a whole").

167. *Id.* at 2339–40.

168. *Id.* at 2340.

169. *Id.* at 2351 (Kagan, J., dissenting).

170. *Id.* at 2362; *id.* at 2356 (emphasizing that Congress "meant to eliminate all 'discriminatory election systems or practices'" and asserting that the Court should "read [Section 2] as Congress wrote it").

171. *Id.* at 2356.

172. *See* Nw. Austin Mun. Dist. No. One v. Holder, 557 U.S. 193, 201 (2009) ("The historic accomplishments of the [VRA] are undeniable.").

ballot.[173] Many states wasted no time in doing so.[174] For example, immediately after *Shelby County* was decided, Texas announced that it would implement a strict voter ID law that had previously been blocked by Section 5's preclearance requirement.[175] Other states enacted redistricting plans "guaranteed to reduce minority representation" and closed polling places in minority neighborhoods.[176] These significant changes in voting legislation reinstated practices that likely would have been prevented by the VRA's preclearance requirement.[177]

### *1. Georgia and Texas Pass Severely Restrictive Voting Laws*

Almost ten years after *Shelby County* was decided, the barrage of restrictive voting legislation at the state level has not slowed down.[178] Georgia and Texas, two states previously covered by the VRA, passed even stricter voting laws after the 2020 election.[179]

In March 2021, the Georgia legislature passed Senate Bill 202 ("SB 202").[180] This law made significant changes to Georgia elections, including (1) shortening the amount of time voters have to request absentee ballots;[181] (2) banning election officials from mailing absentee ballot applications to voters;[182] and (3) prohibiting the distribution of food or water to voters waiting at polling places.[183] However, SB 202 does not stop at pre-election changes.[184] It also made changes to the State Election Board, which oversees

173. *See Brnovich*, 141 S. Ct. at 2355 (Kagan, J., dissenting) (detailing state efforts to enact restrictive voting legislation).

174. *Id.* at 10.

175. *Id.*; *see also* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (striking down proposed legislation because it "target[ed] African Americans with almost surgical precision").

176. *Brnovich*, 141 S. Ct. at 2355–56 (Kagan, J., dissenting).

177. *Id.* at 2356 (noting that some new voting laws may contain lawful restrictions, but "chances are that some have the kind of impact the [VRA] was designed to prevent").

178. *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021.

179. *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/jurisdictions-previously-covered-section-5. Both states have also been involved in numerous VRA lawsuits. *See supra* notes 108–113, 121–128 and accompanying text; *see also* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 440 (2006) (holding that Texas's attempt to redraw a congressional district to reduce the strength of Latino voters bore "the mark of intentional discrimination" and ordering the district redrawn).

180. 2021 Ga. Laws 14 (SB 202).

181. *Id.* § 25(a)(1)(A).

182. *Id.* § 25(a)(1)(C)(ii).

183. *Id.* § 33(a).

184. *Id.*

election administration.[185] Under SB 202, the Republican-controlled Georgia legislature gained more control over the State Election Board and has the power to suspend county election officials.[186]

In September 2021, the Texas legislature enacted Senate Bill 1 ("SB 1").[187] This law made sweeping changes to the state's voting processes and took particular aim at practices used by diverse metropolitan areas in the 2020 election.[188] Among other restrictions, SB 1 bans drive-thru voting[189] and 24-hour early voting periods;[190] forbids election officials from sending applications to request an absentee ballot;[191] and imposes new identification requirements on absentee ballots.[192] The law also includes a process for purging voters from voter rolls.[193] Like the provisions in Georgia's SB 202, the changes in Texas's SB 1 would have been subject to Section 5's preclearance requirement and likely would have been prevented from going into effect.[194]

In June 2021, the Department of Justice ("DOJ") filed a lawsuit against Georgia, alleging that portions of SB 202 were racially discriminatory in violation of Section 2.[195] The DOJ challenged the changes made to absentee ballot requirements, noting that nearly 30% of Black Georgians voted by mail in 2020, compared to 24% of white voters.[196] The DOJ also challenged the prohibition on food and water distribution at polling places, emphasizing that this provision would disproportionately harm Black voters.[197] In November 2021, the DOJ filed a lawsuit against Texas challenging SB 1.[198] In its complaint, the DOJ asserted that certain provisions of SB 1 will make it harder for "vulnerable voters" to cast a ballot.[199] In filing these lawsuits, the

185. *Id.* § 6.

186. *Id.*

187. 2021 Tex. Gen. Laws 1 (SB 1).

188. Nick Corasaniti, *Texas Senate Passes One of the Nation's Strictest Voting Bills*, N.Y. TIMES (May 29, 2021), https://www.nytimes.com/2021/05/29/us/politics/texas-voting-bill.html.

189. 2021 Tex. Gen. Laws 1 (SB 1) § 3.04.

190. *Id.* § 3.09(c).

191. *Id.* § 5.04.

192. *Id.* § 5.02(a).

193. *Id.* § 2.05.

194. U.S. DEP'T OF JUST., *supra* note 179.

195. Complaint at 1–3, United States v. Georgia, No. 1:21-cv-02575-JPB (N.D. Ga. June 25, 2021).

196. *Id.* at 7.

197. *Id.* at 20. Approximately two-thirds of the polling places that had to stay open late because of long lines during the June 2020 primary election were in majority-Black neighborhoods. *Id.*

198. Complaint at 1–2, United States v. Texas, No. 5:21-cv-01085 (W.D. Tex. Nov. 4, 2021).

199. *Id.* The DOJ challenged SB 1 under the VRA's requirement of aiding voters who are blind, disabled, or illiterate. *Id.* at 1. The complaint specifically names voters with limited English proficiency, elderly voters, and disabled voters as among those most impacted by the law. *Id.* It is

federal government found itself back at square one: attacking individual instances of voter discrimination after they happen, instead of preventing discrimination before voters of color are disenfranchised.[200]

### *2. Proposed Federal Legislation Aims to Restore and Update the VRA*

With the VRA's once-mighty powers nearly extinguished, new legislation has been proposed to address the resurgence of restrictive voting laws. At the time of this writing, three bills have been introduced in Congress to restore federal voting rights protections. The first, the For the People Act ("HR 1"),[201] would tackle a range of issues from voter registration to campaign finance. Among other things, HR 1 would require that provisional ballots from eligible voters at incorrect polling places be counted and would prohibit states from imposing restrictions on a voter's ability to vote by mail.[202]

The second bill is the John Lewis Voting Rights Advancement Act ("HR 4").[203] This bill focuses on restoring and updating VRA protections.[204] HR 4 would create a new coverage formula that would apply to all states.[205] Under HR 4, states that have had repeated voting rights violations in the past twenty-five years would be subject to preclearance.[206] Additionally, the twenty-five-year preclearance period would move continuously: A covered state's voting practices would be evaluated each year, ensuring that the coverage formula is always aligned to current conditions.[207]

The final proposed legislation is the Freedom to Vote Act ("S. 2747").[208] This bill seeks to nationalize many of the voting procedures that have been limited in states with Republican leadership, such as early voting and voting by mail.[209] The Freedom to Vote Act would prohibit states from imposing

not clear why the DOJ chose not to challenge the Texas law under Section 2 like it did in the Georgia lawsuit. However, it is worth noting that the Georgia lawsuit was brought before *Brnovich* created a new list of Section 2 factors, while the Texas lawsuit was brought after. *See infra* Section II.B.2.

200. *See supra* notes 44–48 and accompanying text.

201. *See generally* For the People Act, H.R. 1, 117th Cong. (2021).

202. H.R. 1, tit. 1, §§ 1601, 1621.

203. *See generally* John Lewis Voting Rights Advancement Act, H.R. 4, 117th Cong. (2021).

204. *See generally id.*

205. *Id.* § 5.

206. *Id.*

207. *Id.*

208. *See generally* Freedom to Vote Act, S. 2747, 117th Cong. (2021).

209. S. 2747 §§ 1201, 1301–05.

burdens on absentee ballots and would address some of the election administration restrictions that states like Georgia have signed into law.[210]

## II. ANALYSIS

The Supreme Court's most recent voting rights decision, *Brnovich v. Democratic National Committee*, weakens the right to vote in America even further. First, by improperly departing from its precedent in other VRA cases, the *Brnovich* Court failed to uphold even the meager protections that voters have left under Section 2.[211] Second, by listing the prevention of voter fraud as a "strong and entirely legitimate" state interest, the Court gave states a blueprint for passing restrictive voting legislation.[212]

### *A. The Court's Approach in Brnovich Defied its VRA Precedent*

By failing to apply the *Gingles* factors, which had governed Section 2 claims for over twenty years, the *Brnovich* Court eroded what few VRA protections remain.[213] The Court's new factors for Section 2 cases will make it more difficult for plaintiffs to succeed when challenging potentially discriminatory voting laws.[214] Additionally, by disregarding the "current conditions" precedent established in *Shelby County*, the Court once again indicated that it has no interest in upholding the VRA and protecting vulnerable voters.[215]

#### *1. The* Brnovich *Court Improperly Ignored the* Gingles *Factors that Govern Section 2 Claims*

In *Thornburg v. Gingles*, the Court established that the "essence" of a Section 2 claim is that the challenged voting practice "interacts with social and historical conditions to cause an inequality in the opportunities" voters have to elect their preferred representatives.[216] Under *Gingles*, a plaintiff bringing a Section 2 lawsuit had to prove two things: (1) that the challenged law had a racially disparate impact, and (2) that the impact could be linked to

210. S. 2747 §§ 3001, 3101–02; *see supra* Section I.C.1. For example, the Act would increase protections for local election administrators to prevent them from being removed for partisan reasons. S. 2747 § 3001.

211. *See infra* Section II.A.

212. *See infra* Section II.B.

213. *See infra* Section II.A.1.

214. *See infra* Section II.A.1.

215. *See infra* Section II.A.2.

216. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

social and historical conditions.[217] The *Gingles* factors, which have been consistently applied to Section 2 cases, allow courts to evaluate the challenged voting law's impact in light of a state's history of discrimination or the current landscape of racial discrimination or polarization.[218]

Although *Gingles* addressed vote dilution,[219] lower courts have used its factors as guidance in other types of Section 2 cases, such as vote denial cases.[220] However, the *Brnovich* Court improperly ignored the *Gingles* factors and instead decided to create its own list of factors.[221] The Court did this under the guise of distinguishing *Brnovich* from vote dilution cases like *Gingles*.[222] The majority asserted that some of the *Gingles* factors were "plainly inapplicable" to a case that does not address vote dilution.[223] While this may be true, Justice Alito understated the extent to which many of the *Gingles* factors can and should apply to a case like *Brnovich*.[224] Indeed, the *Gingles* Court itself acknowledged that the factors it relied on were not designed specifically for vote dilution claims, but instead were factors "which typically may be relevant to a [Section] 2 claim."[225]

The *Brnovich* Court identified only two *Gingles* factors as relevant to the challenged Arizona laws: whether minority groups have suffered past discrimination (*Gingles* factor one) and whether the effects of that discrimination persist (*Gingles* factor five).[226] But a closer look at *Gingles* reveals that more of its factors could be relevant to a Section 2 vote denial

217. *See, e.g.*, Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015) (applying the *Gingles* factors to Texas's voter ID law); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014) (applying the *Gingles* factors to North Carolina legislation that shortened early voting and barred out-of-precinct ballots from being counted).

218. *See supra* note 118 and accompanying text.

219. Vote dilution is the practice of sprinkling voters of color into majority-white districts in a way that weakens the ability of voters of color to elect their preferred representative or win an election. It is premised on the pattern that white voters and voters of color usually prefer different candidates. *See generally* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001) (explaining that vote dilution claims are often raised under Section 2).

220. *See supra* note 217. Although the majority refers to *Brnovich* as involving "facially neutral time, place, or manner voting rule[s]," *Brnovich* is more accurately described as a "vote denial" case. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2340 (2021). Vote denial occurs when states pass laws to make voting harder. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 439–40 (2015). Modern examples of vote denial include laws that prohibit the counting of provisional ballots cast in the wrong precinct and that limit early and absentee voting. *Id.* at 440.

221. *Brnovich*, 141 S. Ct. at 2338–40.

222. *Id.* at 2337, 2340.

223. *Id.* at 2340.

224. Thornburg v. Gingles, 478 U.S. 30, 44–45 (1986).

225. *Id.* at 44.

226. *Brnovich*, 141 S. Ct. at 2340.

case like *Brnovich*.[227] For example, the extent to which voting in the state is racially polarized (*Gingles* factor two) and the use of overt or subtle racial appeals in political campaigns (*Gingles* factor six) can be useful when evaluating a Section 2 vote denial claim.[228] The Ninth Circuit properly followed precedent by using the *Gingles* factors to evaluate the Arizona legislation.[229] In finding that the Arizona laws violated Section 2, the Ninth Circuit pointed to racial campaign appeals, racially polarized voting, current socioeconomic disparities between racial groups, and Arizona's long history of racial discrimination, all of which were *Gingles* factors.[230]

The Supreme Court erred when it overturned the Ninth Circuit and created a new set of Section 2 factors, but it did not stop at ignoring *Gingles* precedent.[231] The Court also failed to consider the few *Gingles* factors it listed as relevant to the challenged Arizona laws.[232] Even though the *Brnovich* Court acknowledged that *Gingles* factors one and five (addressing past discrimination and current effects of discrimination) should not be "disregarded," the majority proceeded to do just that.[233] In evaluating the Arizona legislation, the Court only used its newly created factors and did not attempt to consider the *Gingles* factors it had recognized as being potentially relevant.[234] This omission suggests that the Court did not distinguish *Brnovich* from *Gingles* solely because *Brnovich* was not a vote dilution case.[235] Instead, the Court emphasized the distinction between vote dilution and vote denial cases in order to create new Section 2 factors "out of thin air."[236] Furthermore, the factors the Court invented "all cut in one direction—toward limiting liability for race-based voting inequalities," which makes its error more obvious.[237]

227. *Gingles*, 478 U.S. at 44–45; *see supra* note 220.

228. *See infra* notes 229–230 and accompanying text.

229. Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1016–32 (9th Cir. 2020) (en banc).

230. *Id.* at 1019–32.

231. *Brnovich*, 141 S. Ct. at 2337.

232. *See supra* notes 226–231 and accompanying text.

233. *Brnovich*, 141 S. Ct. at 2340.

234. *Id.* at 2343–46.

235. *Id.* at 2337.

236. Strict Scrutiny, *Textually Challenged*, CROOKED MEDIA, at 03:59 (July 6, 2021), https://strictscrutinypodcast.com/podcast/textually/.

237. *Brnovich*, 141 S. Ct. at 2362 (Kagan, J., dissenting).

### 2. *The* Brnovich *Court Went Against Its Own "Current Conditions" Precedent Established in* Shelby County

In addition to ignoring the *Gingles* factors, the Court also disregarded the flawed precedent it created in *Shelby County*.[238] The *Brnovich* Court's application of its newly created factors upheld Arizona's voting legislation that was purportedly designed to prevent fraud without requiring Arizona to provide any evidence of fraud.[239] However, in *Shelby County*, the Court struck down Congress's decision to reauthorize the VRA because the decision was not grounded in "current conditions."[240] In the Court's view, the use of outdated data in Section 4's coverage formula—even if voter discrimination still existed—was enough to justify gutting a statute that had been reauthorized by an overwhelming majority of Congress.[241]

In *Brnovich*, the Court reversed course completely. The Court's abandonment of the VRA was unreasonable in *Shelby County*, but its abandonment of its "current conditions" precedent a mere eight years after it was established is even more unreasonable. In a far cry from *Shelby County*'s fixation on current data, the *Brnovich* Court did not bat an eye at Arizona's lack of evidence of voter fraud.[242] Instead, the majority reasoned that "it should go without saying that a [s]tate may take action to prevent election fraud without waiting for it to occur and be detected within its own borders."[243]

But current evidence that a law is needed is precisely what the Court required in *Shelby County*.[244] There, the Court second-guessed Congress's judgment in reauthorizing the VRA and declared that because the racial gaps in voter registration and turnout had closed significantly, the legislation was no longer needed.[245] In *Brnovich*, which also addressed a legislative decision, the once-urgent need for current data suddenly disappeared.[246] The Court

238. To be clear, the *Shelby County* Court erred by overturning Section 4 because it improperly usurped Congressional authority. Shelby Cnty. v. Holder, 570 U.S. 529, 566–67 (2013) (Ginsburg, J., dissenting). The Fifteenth Amendment grants Congress—not the Court—the power to decide whether the VRA's protections were still warranted, and Congress's decision was due more deference than the Court gave it. *Id.*

239. *Brnovich*, 141 S. Ct. at 2335, 2349; *id.* at 2371 (Kagan, J., dissenting).

240. *See supra* Section I.B.2.

241. *Shelby Cnty.*, 570 U.S. at 536 (acknowledging that "voting discrimination still exists; no one doubts that"); s*ee supra* text accompanying note 75.

242. Democratic Nat'l Comm. v. Reagan, 329 F. Supp. 3d 824, 852 (D. Ariz. 2018) ("[T]here has never been a case of voter fraud associated with ballot collection charged in Arizona.").

243. *Brnovich*, 141 S. Ct. at 2348.

244. *Shelby Cnty.*, 570 U.S. at 553–54.

245. *Id.* at 559 (Ginsburg, J., dissenting).

246. *Brnovich*, 141 S. Ct. at 2348.

asserted that voter fraud "has had serious consequences in other [s]tates"[247] and declared—without any proof to back up its claim—that "[f]raud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it."[248] To make matters worse, the *Brnovich* Court did not even limit its voter fraud factor to legislation involving absentee ballots, the method of voting that Arizona legislators were allegedly worried about when they passed HB 2023.[249] Instead, the voter fraud factor applies to all legislation challenged under Section 2, which will only make it harder for restrictive laws to be struck down.[250]

The *Brnovich* Court ignored its *Shelby County* precedent in another way: by creating a factor that asks courts to consider the degree to which the challenged law departs from standard voting practices in 1982.[251] In *Shelby County*, the Court rejected the standards that existed in 1965 (which Congress used to pass and then repeatedly reauthorize the VRA) because they led to a coverage formula "based on decades-old data and eradicated practices."[252] The Court found that 1965 had "no logical relation to the present day" and thus could not justify upholding the challenged sections of the VRA.[253] But in *Brnovich*, the Court embraced the use of nearly forty-year-old practices, arguing that the burdens associated with the voting rules used in 1982 are "useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally 'open' . . . in the sense meant

247. *Id.* The only example of fraud the Court provides is a 2018 incident in North Carolina in which a Republican political operative organized an operation to illegally complete absentee ballots. Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks*, BROOKINGS (June 2, 2020), https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks/. This type of fraud is more accurately described as election fraud because it was an organized attempt to interfere with an election and did not involve individual voters attempting to vote twice. Michael Blitzer, *Three Lessons from North Carolina's Tainted Election—And What Comes Next*, WASH. POST (Feb. 25, 2019), https://www.washingtonpost.com/politics/2019/02/25/three-lessons-north-carolinas-tainted-election-what-comes-next/ (noting that the "extraordinary attention" paid to voter fraud meant that not enough attention was paid to election fraud, "a more dangerous and prevalent type of election malfeasance").

248. *Brnovich*, 141 S. Ct. at 2348. Based on the evidence available, it is likely that the lack of voter fraud in Arizona was not because of "good fortune," but because almost no voter fraud occurs. *See infra* notes 271–281 and accompanying text; *see supra* note 242.

249. *Brnovich*, 141 S. Ct. at 2335 (noting that some members of the Arizona legislature thought HB 2023 was necessary to bring "early mail ballot security in line with in-person voting").

250. *Id.* at 2337–40 (creating new factors for "time, place, or manner" voting laws).

251. *Id.* at 2338. The Court viewed 1982 as relevant because that was the last time Congress amended Section 2. *Id.* at 2332.

252. Shelby Cnty. v. Holder, 570 U.S. 529, 551 (2013).

253. *Id.* at 554.

by [Section] 2."[254] In this way, the Court's approach to voting rights cases becomes even more clear—it will find a way to erode the voting protections that Congress put in place, even if the reasoning it uses to do so is inconsistent.

It is true that although *Shelby County* and *Brnovich* both addressed a legislative decision, the cases are not directly analogous. Both Congress and state legislatures have authority over certain parts of the election process, but their powers derive from different parts of the Constitution.[255] Congress's ability to pass the VRA derived from the Fifteenth Amendment, while states reserve authority over their elections through the Tenth Amendment and Article 1.[256] But the Fifteenth Amendment, which was passed in part to prevent states from denying the right to vote, arguably returns some of that authority to Congress.[257] As a result, the Court should be more skeptical of challenges to the VRA, which is explicitly within Congress's purview, and examine the motivations behind state voting laws more carefully.[258]

### *B. The Court's Creation of a Voter Fraud Factor Allows States to Evade Section 2's Prohibition of Discriminatory Voting Practices*

By creating a voter fraud factor, the Court signaled to states that potentially discriminatory legislation will be immune to Section 2 challenges as long as the state alleges that the law is needed to prevent voter fraud.[259] The Court's creation of this voter fraud factor is concerning for two reasons. First, because all evidence available shows that voter fraud is incredibly rare in American elections,[260] and second, because it suggests that the conservative members of the Court have bought into, and are willing to perpetuate, the patently false talking points of the Republican Party.[261]

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254. *Brnovich*, 141 S. Ct. at 2338–39.

255. *Compare* U.S. CONST. art. I, § 4, cl. 1 (granting state legislatures the power to determine the time, place, and manner of elections, with some exceptions), *with* U.S. CONST. amend. XV, § 2 (granting Congress the authority to enforce the Fifteenth Amendment's prohibition of vote denial or abridgement).

256. U.S. CONST. amend. XV, § 2; *id.* amend. X; *id.* art. 1, § 4, cl. 1.

257. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 135–36 (2015) ("The Court's decision in *Shelby County* . . . rests on the assumption that the Reconstruction Amendments did not change our understanding of 'our federalism' in any meaningful way.").

258. Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 554 (2015) (noting that the Court has "accepted almost any assertion of a state interest to protect the integrity of the election" but applies a much higher level of scrutiny to Congress's justifications of its voting laws).

259. *See infra* Section II.B.

260. *See infra* Section II.B.1.

261. *See infra* Section II.B.2.

*1. The Court's Discussion of Voter Fraud Ignores the Well-Documented Reality that Voter Fraud Does Not Impact American Elections*

*Brnovich* was not the first decision in which the Court raised the issue of voter fraud.[262] In *Purcell v. Gonzalez*,[263] the Court improperly inflated the threat of voter fraud, opining that "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government."[264] The Court went on to theorize that "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will *feel* disenfranchised."[265] Two years later, in *Crawford v. Marion County Election Board*,[266] the Court upheld an Indiana voter identification law despite a lack of evidence of any voter fraud occurring at any point in the state's history.[267] But the *Brnovich* Court takes this voter fraud acknowledgement several steps further. By listing the prevention of voter fraud as a "strong and legitimate" state interest—even though there is no evidence that voter fraud impacts American elections—the *Brnovich* Court gave states a blueprint for how to evade what few VRA protections remain.[268]

In *Brnovich*, the majority offered little explanation for why voter fraud is a strong enough threat to justify restrictive and potentially discriminatory laws.[269] The Court stated that fraud can "affect the outcome of a close election;" asserted that "fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight;" and contended that fraud can undermine "public confidence" in election fairness and the "perceived legitimacy" of an election's outcome.[270] Notably, the majority did not include any proof to back up these claims—probably because voter fraud is

262. *See infra* notes 263–267 and accompanying text.

263. 549 U.S. 1 (2006).

264. *Id.* at 4.

265. *Id.* (emphasis added). The Court did not address the fact that *feeling* disenfranchised and *being* disenfranchised are two entirely different things.

266. 553 U.S. 181 (2008).

267. *Id.* at 204; *id.* at 226 (Stevens, J., dissenting).

268. *See infra* notes 287–290, 298–304 and accompanying text; *see also* Rick Hasen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse than It Seems*, SLATE (July 8, 2021), https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html (explaining the likely consequences of the *Brnovich* ruling).

269. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2340 (2021).

270. *Id.*

virtually nonexistent, which makes evidence hard to find.[271] Additionally, Arizona did not provide any evidence of voter fraud occurring in the state.[272]

The *Brnovich* Court's discussion of fraud is deeply concerning precisely because there is no data to support the allegation that voter fraud impacts American elections in any way.[273] Studies, including those done by conservative organizations such as the Heritage Foundation, repeatedly show that voter fraud is extremely rare.[274] The term "voter fraud" is generally understood to mean voter impersonation fraud, in which a voter pretends to be someone else to cast another ballot.[275] Far from being a legitimate threat to our elections, voter fraud is "exceedingly rare."[276] For example, of the 3.3 million votes cast in Wisconsin in the 2020 election, only twenty-seven were found to be potentially fraudulent.[277] The statistics are similar for absentee

271. Voter fraud simply does not occur frequently enough to have any impact on American elections. *See, e.g.*, *A Sampling of Recent Election Fraud Cases from Across the United States*, HERITAGE FOUND. (2021), https://www.heritage.org/voterfraud (finding that of the 250 million absentee ballots cast over the past twenty years, just 143 ballots led to a criminal conviction because of fraud); John S. Ahlquist et al., *Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment*, 13 ELECTION L.J. 460, 460 (2014) (finding no evidence of widespread voter fraud, even in states that did not have voter identification laws); Sharad Goel et al., *One Person, One Vote: Examining the Prevalence of Double Voting in U.S. Presidential Elections*, 114 AM. POLI. SCI. R. 456, 467 (2020) (finding that the same person voting twice is not carried out in a way that "presents a threat" to American elections); David Cottrell et al., *An Exploration of Donald Trump's Allegations of Massive Voter Fraud in the 2016 General Election*, 51 ELECTORAL STUD. 123, 123 (2018) (finding no data to support Trump's assertions of "systematic voter fraud").

272. *Brnovich*, 141 S. Ct. at 2371 (Kagan, J., dissenting) ("Arizona has not offered any evidence of fraud in ballot collection, or even an account of a harm threatening to happen.").

273. Brief for Maxwell V. Pritt as Amici Curiae Supporting Respondents at 6, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) [hereinafter Brief for Amici Curiae Supporting Respondents] ("There is an overwhelming consensus among political scientists that voter fraud in contemporary U.S. elections is rare.").

274. *See supra* note 271.

275. Lynn Adelman, *A New Stage in the Struggle for Voting Rights*, 43 U. ARK. LITTLE ROCK L. REV. 477, 480–81 (2021); *see also* Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 6 (2009) (explaining that "voter-initiated fraud" includes voting multiple times or impersonating a voter).

276. Brief for Amici Curiae Supporting Respondents, *supra* note 273, at 3. States already have harsh punishments in place for voters who commit fraud. MICHAEL WALDMAN, THE FIGHT TO VOTE 183 (2016). For example, in Wisconsin, voter fraud is punishable by a $10,000 fine and three years in prison. *Id.*

277. A potentially fraudulent ballot is a ballot that has not been proven to be fraudulent, but that gives investigators reasons to be suspicious. Scott Bauer, *27 Possible Voter Fraud Cases in 3 Million Wisconsin Ballots*, AP NEWS (May 21, 2021), https://apnews.com/article/1291onmou-trump-wisconsin-election-2020-government-and-politics-daa3ac227c936d7fc038996af6e27cbe; Elise Viebeck, *Miniscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts Trump Claims about Election Risks*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/politics/minuscule-number-of-potentially-fraudulent-ballots-in-

voting, a voting method at issue in *Brnovich*.[278] For example, in Oregon—which conducts its elections entirely by mail—only fourteen of the 15.5 million ballots cast between 2000 and 2019 were found to be fraudulent.[279] These are hardly the kinds of numbers that indicate that voter fraud is a threat urgent enough to make a state's interest in preventing it "strong and entirely legitimate."[280] By listing the prevention of voter fraud as a state interest, the *Brnovich* Court created a factor that is not based on reality, but on an incredibly rare possibility.[281]

While voter fraud does not impact the outcome of elections, it certainly impacts public opinion.[282] As allegations of voter fraud have increased with each passing election cycle, a growing percentage of Americans have started to believe that voter fraud is a pressing problem.[283] A Monmouth University poll from June 2021 found that 37% of Americans view voter fraud as a "major problem."[284] While this figure has increased by only one percentage point since 2012, the percentage of Republicans who see voter fraud as a major problem has grown from 51% in 2012 to 64% in 2021.[285] This increase suggests that the constant roar within the Republican Party about the nonexistent threat of voter fraud has "made [voter fraud] seem to be a real problem."[286]

### *2. The Creation of a Voter Fraud Factor Gives States a Blueprint for How to Pass Restrictive Voting Legislation*

In listing the prevention of voter fraud as a state interest that can justify passing restrictive voting legislation, the Court made it easier for states to circumvent what little VRA oversight remains.[287] If a state passes legislation

states-with-universal-mail-voting-undercuts-trump-claims-about-election-risks/2020/06/08/1e78aa26-a5c5-11ea-bb20-ebf0921f3bbd_story.html.

278. *See supra* note 271.

279. Kamarck, *supra* note 247. This means that less than one ballot per year was fraudulent. *Id.*

280. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2340 (2021).

281. *See supra* note 271.

282. Brief for Amici Curiae Supporting Respondents, *supra* note 273, at 4 ("[A]llegations of voter fraud are not evidence of fraud. Allegations do, however, affect public opinion.").

283. Margaret Groarke, *The Impact of Voter Fraud Claims on Voter Registration Reform Legislation*, 131 POL. SCI. Q. 571, 571 (2016) ("In recent years, concerns about voter fraud have grown louder. . . . Is there a sudden epidemic of fraud? No.").

284. Patrick Murray, *National: Public Supports Both Early Voting and Requiring Photo ID to Vote*, MONMOUTH UNIV. POLL (June 21, 2021), https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_062121.pdf/.

285. *Id.*

286. WALDMAN, *supra* note 276, at 193. The Republican Party often invokes the threat of fraud as a justification for opposing efforts to increase ballot access. *See generally* Groarke, *supra* note 283 (detailing the Republican Party's rhetoric regarding voter fraud in the 1970s and 1990s).

287. *See infra* notes 298–304 and accompanying text.

that restricts the right to vote, *Brnovich* ensures that the law will likely be upheld, as long as the state argues that the law is necessary for the prevention of voter fraud.[288] Under the *Brnovich* factors, it does not matter if a state's claims about voter fraud are "tenuous" or "unsupported."[289] As long as a state alleges the risk of voter fraud, it will suffer "few legal consequences," even if its law restricts the right to vote.[290]

*Brnovich* is not the first time that a Court decision has validated the likely discriminatory purpose of a state legislature.[291] In *Abbott v. Perez*,[292] the Court considered a Texas redistricting plan that had been under federal review as mandated by Section 5's preclearance requirement.[293] While the redistricting plan case was pending, the Court struck down Section 4's coverage formula in *Shelby County*.[294] No longer under VRA supervision, Texas was able to pass its plan, which was arguably enacted with discriminatory intent.[295] When the plan returned to the Supreme Court, the Court upheld Texas's plan.[296] The Court reasoned that it should presume that a state acted with "legislative good faith," even when the state has a history of past discrimination.[297]

While *Abbott* gave states more leeway to engage in partisan actions when redistricting, *Brnovich* gave states the green light to suppress voters by passing restrictive legislation.[298] By crafting a voter fraud factor, the Court created another presumption that will benefit partisan actors in state

288. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2372 (2021) (Kagan, J., dissenting) (noting that under the majority's rule, a state does not even need to show "that the discriminatory rule it enacted is necessary to prevent the fraud it purports to fear").

289. Hasen, *supra* note 268. Arizona's assertions about the threat of voter fraud were not supported by any data. *See supra* note 272 and accompanying text.

290. Hasen, *supra* note 268; *see also* Guy-Uriel E. Charles & Luis E. Fuentes Rohwer, *The Court's Voting-Rights Decision Was Worse than People Think*, ATLANTIC (July 8, 2021), https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330/ (arguing that the *Brnovich* factors "make Section 2 claims less likely to be filed by plaintiffs, and more likely to be lost when they are"); Joshua Sellers, *Brnovich and Its Implications*, REG. REV. (Sep. 20, 2021), https://www.theregreview.org/2021/09/20/sellers-brnovich-implications/ ("[T]he Court's amplification of the voter fraud canard gives justificatory fodder to Republican officials in their quest to suppress votes.").

291. Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 51 (2020).

292. 138 S. Ct. 2305 (2018).

293. *Id.* at 2313–14.

294. *Id.* at 2317.

295. *Id.* at 2318.

296. *Id.* at 2313–14.

297. *Id.* at 2324–25.

298. Hasen, *supra* note 291, at 59–60.

legislatures.[299] But a presumption of legislative good faith—whether it is stated outright as in *Abbott* or rephrased as a "state interest"[300] in *Brnovich*—is "particularly inappropriate" in the context of voting legislation.[301] Election laws are often passed with "incumbency protection, self-interest, and partisanship in mind," so if there is any presumption in election cases, it should be a presumption "*against* the state[s]."[302] *Brnovich* did the opposite, reassuring states that Section 2 challenges to potentially restrictive legislation will not succeed as long as the state cries "voter fraud."[303] In doing so, the Court made it clear that it is no longer interested in interpreting Section 2 of the VRA as written; instead, it is willing to look the other way as states suppress their voters.[304]

The "predictable consequences" of weakening the VRA have already begun to play out.[305] As of December 2021, at least nineteen states have enacted thirty-four laws that restrict ballot access.[306] In Texas, the

299. Elaine Kamarck, *Voter Suppression or Voter Expansion? What's Happening and Does It Matter?*, BROOKINGS (Oct. 26, 2021), https://www.brookings.edu/blog/fixgov/2021/10/26/voter-suppression-or-voter-expansion-whats-happening-and-does-it-matter/ ("[S]olidly red states tended to pass restrictive voting laws and solidly blue states tended to pass expansive voting laws.").

300. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2340 (2021).

301. Hasen, *supra* note 291, at 64.

302. *Id.* at 64–65 (emphasis added); *see also* Douglas, *supra* note 258, at 554 (noting that the Court usually fails to probe the underlying reason for a state's voting law, "which is often to gain partisan advantage for the majority party").

303. Sellers, *supra* note 290 ("The [*Brnovich*] guideposts provide judicial cover for voter suppression efforts, making it harder to bring successful Section 2 claims."). For now, there is at least one circumstance in which Section 2 will still work as intended to prevent voter discrimination: *Brnovich* does not appear to change the long-standing application of the *Gingles* factors to vote dilution cases. *Brnovich*, 141 S. Ct. at 2337. However, plaintiffs in Section 2 vote dilution cases have "seen diminished success over time." Ellen D. Katz, Brian Remlinger, Andrew Dziedzic, Brooke Simone & Jordan Schuler, *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, UNIV. MICH. L. SCH. VOTING RIGHTS INITIATIVE (2022), https://voting.law.umich.edu (collecting four decades' worth of data regarding both vote dilution and vote denial lawsuits brought under Section 2). Indeed, the Court's recent decision to stay an Alabama court's ruling that the state's redistricting plan violated Section 2 by diminishing the power of Black voters implies that the conservative members of the Court are ready and willing to make it harder for plaintiffs to prove vote dilution claims in addition to vote denial claims. Merrill v. Milligan, 142 S. Ct. 879, 889 (2022) (mem.) (Kagan, J., dissenting).

304. *See Brnovich*, 141 S. Ct. at 2365 (Kagan, J., dissenting) (noting that Congress understood that the interest of preventing voter fraud is easy to assert "groundlessly or pretextually" and thus amended Section 2 to strike down even facially neutral laws that discriminated against voters of color); *see* Strict Scrutiny, *supra* note 236, at 03:33 ("All five of the [newly created *Brnovich*] factors . . . are entirely nontextual.").

305. *Brnovich*, 141 S. Ct. at 2354 (Kagan, J., dissenting).

306. BRENNAN CTR. FOR JUST., *supra* note 178. Five of these states (Alabama, Arizona, Georgia, Louisiana, and Texas) were covered by Section 5's preclearance requirement. U.S. DEP'T OF JUST., *supra* note 179. Two more states (New York and Florida) had counties covered by Section 5. *Id.* The remaining eleven states are Arkansas, Iowa, Kentucky, Oklahoma, Kansas, Montana,

Republican-controlled state legislature enacted SB 1 under the guise of preventing voter fraud, even though Texas officials have been unsuccessful in finding any evidence to support their assertion that fraud threatens Texas elections.[307] Republicans in Georgia took the same approach when passing the restrictive SB 202 and were similarly unsuccessful in producing evidence of fraud.[308] But under the newly-created *Brnovich* factor, which encourages a court to "close[] its eyes to the facts on the ground," it does not matter if a state can prove that voter fraud has happened or even is likely to happen.[309] Under *Brnovich*, a state can pass any legislation it likes to combat this imaginary threat.[310]

### *3. The Court's Explicit Listing of Voter Fraud as a State Interest Suggests that Its Decision-Making Process Is Divorced from Reality*

In addition to providing states with a framework for passing legislation that suppresses voters, the *Brnovich* Court's voter fraud factor is concerning for another reason: It suggests that the Court has bought into the increasingly partisan and patently false rhetoric surrounding voter fraud.[311]

Although there is no evidence to support the allegation that voter fraud poses any threat to American elections, the Republican Party has seized on voter fraud as reason to support restrictive voting laws.[312] This is not a new phenomenon.[313] Since the contentious presidential election of 2000, Republican politicians have consistently used the "phantom threat" of voter

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Idaho, Indiana, New Hampshire, Wyoming, Utah, and Nevada. BRENNAN CTR. FOR JUST., *supra* note 178.

307. *See supra* notes 187–193 and accompanying text. The preamble to the bill states that the changes in the law are "enacted solely to prevent fraud in the electoral process." Corasaniti, *supra* note 188.

308. *See supra* notes 180–186 and accompanying text; *see also* David Wickert, *Lawsuits Failed, but Bills May Restrict Georgia Voting*, ATLANTA J.-CONST. (March 12, 2021), https://www.ajc.com/politics/georgia-state-legislature/failed-lawsuits-paved-the-way-for-georgia-voting-restriction-bills/RH232D64CBFZPPT3Z2ZIMJLPJE/ ("[A]llegations of widespread voter fraud [in Georgia] wilted under scrutiny.").

309. *Brnovich*, 141 S. Ct. at 2366 (Kagan, J., dissenting).

310. Hasen, *supra* note 268 (emphasizing that under *Brnovich*, "[s]tates don't have to prove fraud at all").

311. Marc Elias, *Republicans Are Manufacturing Fake Fraud*, DEMOCRACY DOCKET (Oct. 25, 2021), https://www.democracydocket.com/news/republicans-are-manufacturing-fake-fraud/.

312. *Id.*; *see also* Wickert, *supra* note 308 ("Trump and the Georgia Republican Party . . . say negligence and misconduct allowed tens of thousands of illegal voters to steal the election.").

313. *See* Groarke, *supra* note 283, at 571 (explaining that the strategy of using fears of fraud to "constrict the electorate" dates back at least to the Progressive Era).

fraud to stir up fear about American elections.[314] Voter fraud rhetoric reached a fever pitch in the 2020 election, with Republican politicians predicting that an increase in absentee voting would lead to an inaccurate election.[315] And although the 2020 election was actually the most secure in American history, the dangerous consequences of spreading lies about voter fraud quickly became obvious.[316] On January 6, 2021, Trump supporters who believed the 2020 election had been stolen attacked the U.S. Capitol with the goal of getting a "resolution on these voter corruption issues."[317] Two months after the Capitol Riot, belief in voter fraud was still strong: A March 2021 poll showed that six in ten Republicans believed the election was "stolen" from Donald Trump.[318]

The Court's explicit reference to voter fraud is extremely concerning because it suggests that the Court is ignoring the plethora of data that points to American elections being secure.[319] All the evidence available points to the fact that any voter fraud that does exist occurs on such a miniscule scale that it has no impact on election outcomes.[320] But the lack of data does not seem to matter to the conservative members of the Court.[321] Indeed, in a troubling dissent to a different election case, Justice Thomas asserted that the growing trend of "permissive" absentee voting—that is, allowing more voters

314. Waldman, *supra* note 276, at 183; *see also* Berman, *supra* note 49, at 222 ("After the 2004 election, Republicans intensified their drive to restrict access to the ballot by hyping the threat of voter fraud.").

315. Louis Jacobson & Amy Sherman, *Donald Trump Says Joe Biden Can Only Win by a 'Rigged Election.' That's Wrong in Several Ways*, POLITIFACT (Aug. 24, 2020), https://www.politifact.com/factchecks/2020/aug/24/donald-trump/donald-trump-says-joe-biden-can-only-win-rigged-el/.

316. *Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees*, CYBERSECURITY & INFRASTRUCTURE AGENCY (Nov. 12, 2021), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election.

317. Greg Miller, Greg Jaffe & Razzan Nakhlawi, *A Mob Insurrection Stoked by False Claims of Election Fraud and Promises of Violent Restoration,* WASH. POST (Jan. 9, 2021), https://www.washingtonpost.com/national-security/trump-capitol-mob-attack-origins/2021/01/09/0cb2cf5e-51d4-11eb-83e3-322644d82356_story.html.

318. James Oliphant & Chris Kahn, *Half of Republicans Believe False Accounts of Deadly U.S. Capitol Riot*, REUTERS (Apr. 5, 2021), https://www.reuters.com/article/us-usa-politics-disinformation-idUSKBN2BS0RZ?taid=606af4c8a0a3570001acce1f&utm_campaign=trueAnthem:+Trending+Content&utm_medium=trueAnthem&utm_source=twitter.

319. *See supra* note 271.

320. *See supra* note 271.

321. Like *Shelby County*, the *Brnovich* Court split along ideological lines, with Justices Breyer and Sotomayor joining Justice Kagan's dissent. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Kagan, J., dissenting).

to vote by mail—"vastly" increases the risk of fraud.[322] These statements, combined with the Court's outright legitimization of voter fraud prevention in *Brnovich*, indicate a willingness to uphold any state legislation that can be justified by a state's interest in preventing voter fraud, even if the fraud is nonexistent and even if the law makes it harder for voters to cast a ballot.[323]

Furthermore, in creating a voter fraud factor, the Court is irresponsibly contributing to the dangerous inflation of the "threat" of voter fraud.[324] Our country has already seen the violent consequences that result when those in positions of authority spread false allegations of fraud.[325] By crafting a voter fraud factor in the absence of any evidence of fraud, the Court is lending legitimacy to the fringe groups and Republican politicians who know that voter fraud accusations are an easy way to get their supporters fired up.[326] State legislatures have already realized that there is political advantage associated with passing legislation under the guise of preventing fraud, and with the *Brnovich* decision, they have the Court's blessing to pursue new voting restrictions.[327]

### *C. Congress Must Pass Federal Voting Rights Legislation*

*Brnovich* makes it clear that the Court can no longer be relied upon to uphold what is left of the VRA.[328] Instead of following its own VRA precedent, the Court has allowed itself to be swayed by Republican talking points.[329] The recent surge of restrictive voting laws also makes it clear that

322. Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 735 (2021) (Thomas, J., dissenting). The case concerned a Pennsylvania decision to extend the deadline for accepting absentee ballots but was dismissed by the Court as moot. *Id.* at 1.

323. Hasen, *supra* note 268.

324. Sellers, *supra* note 290.

325. *See supra* notes 317–318 and accompanying text.

326. Sheera Frenkel, *How Misinformation 'Superspreaders' Seed False Election Theories*, N.Y. TIMES (Nov. 23, 2020), https://www.nytimes.com/2020/11/23/technology/election-misinformation-facebook-twitter.html; *see supra* notes 282–286 and accompanying text. The Court's treatment of voter fraud is even more concerning in light of text messages and emails that show Ginni Thomas, the wife of Justice Clarence Thomas, repeatedly urging White House officials and lawmakers to overturn the 2020 election, alleging fraud. Bob Woodward & Robert Costa, *Virginia Thomas Urged White House Chief to Pursue Unrelenting Efforts to Overturn the 2020 Election, Texts Show*, WASH. POST (Mar. 24, 2022), https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/; Emma Brown, *Ginni Thomas, Wife of Supreme Court Justice, Pressed Ariz. Lawmakers to Help Reverse Trump's Loss, Emails Show*, WASH. POST (May 20, 2022), https://www.washingtonpost.com/investigations/2022/05/20/ginni-thomas-arizona-election-emails/.

327. Sellers, *supra* note 290.

328. *See supra* Sections II.A.1–2.

329. *See supra* Section II.B.2.

individual states cannot be trusted to protect equal access to the ballot box.[330] Although some states have passed legislation that makes it easier to vote,[331] many states have jumped at the chance to pass legislation that disparately impacts voters of color.[332] To combat these disenfranchisement efforts, Congress must take action by passing federal voting rights legislation.[333]

The legislation best poised to restore VRA protections is the John Lewis Voting Rights Advancement Act (HR 4).[334] While the other two bills, HR 1 and S.2747, would nationalize many voting methods, HR 4 would rebuild and improve the VRA.[335] Because HR 4 does not create federal rules that would dictate how states can run their elections, HR 4 respects state power over elections—as long as states do not use that power to discriminate against voters of color.[336]

HR 4 specifically addresses the shortcomings of Section 4's coverage formula.[337] First, HR 4's coverage formula would update each year, so that only states with persistent, recent violations are covered.[338] HR 4's coverage formula is designed to use current data instead of relying on Congress to make changes during reauthorization.[339] In this way, HR 4 would respond to the concerns that led the Court to declare Section 4 unconstitutional in *Shelby County*.[340] Second, HR 4's coverage formula would apply to all fifty states,

330. *See supra* Section I.C.1.

331. Between January 1 and December 7, 2021, twenty-five states enacted legislation that expanded voting access. BRENNAN CTR. FOR JUST., *supra* note 178.

332. *See supra* note 306. Many of these restrictive laws reduce the availability of alternative methods of voting, like absentee ballots and early voting, which creates disproportionately longer wait times at polling places that serve voters of color. *See, e.g.*, M. Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data*, 2–61 (NAT'L BUREAU OF ECON. RSCH., Working Paper No. 26487, 2020) (finding that residents of Black neighborhoods were 74% more likely than residents of white neighborhoods to spend more than 30 minutes at their polling place).

333. Elias, *supra* note 311 ("Only Congress can enact national legislation to stamp out the scourge of fake fraud now infecting state election codes. The time is now for it to act.").

334. *See supra* Section I.C.2; John Lewis Voting Rights Advancement Act, H.R. 4, 117th Cong. (2021). As of January 2022, Democrats in Congress have combined HR 4 and S.2747 and are attempting a procedural maneuver to bring the bills for a vote. Mike DeBonis, *Schumer Sets Up Final Senate Confrontation on Voting Rights and the Filibuster*, WASH. POST (Jan. 12, 2022), https://www.washingtonpost.com/politics/senate-voting-rights-schumer/2022/01/12/a3487238-73e4-11ec-b202-b9b92330d4fa_story.html.

335. *See supra* Section I.C.2; *see generally* John Lewis Voting Rights Advancement Act, H.R. 4, 117th Cong. (2021).

336. *See supra* notes 255–258 and accompanying text.

337. H.R. 4, § 5.

338. *Id.*

339. *Id.*

340. The Court suggested that if Congress had updated the coverage formula before the 2006 re-authorization, it could have upheld Section 4 as constitutional. Shelby Cnty. v. Holder, 570 U.S.

which means that the Court cannot bring an "equal sovereignty" argument and allege that it unfairly burdens certain states but not others.[341] A coverage formula that applies everywhere will also protect voters in states like Iowa, which recently enacted restrictive voting laws but was never included in Section 4's coverage formula.[342]

Unfortunately, it is unlikely that HR 4 will pass the Senate.[343] Like most issues in our current political climate, support for federal voting rights legislation splits along party lines, with Democrats significantly more likely to support legislation that protects or expands the right to vote.[344] However, the Republican Party restricts voting access at its own peril.[345]

Studies have shown that initiatives that make voting easier do not advantage one political party over the other.[346] And results from November 2021 state elections support the idea that widened ballot access can help Republican candidates just as much as Democratic candidates.[347] For

529, 557 (2013) ("Congress could have updated the coverage formula . . . but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.").

341. *Id.* at 544.

342. Stephen Gruber-Miller, *Gov. Kim Reynolds Signs Law Shortening Iowa's Early and Election Day Voting*, DES MOINES REG. (Mar. 8, 2021), https://www.desmoinesregister.com/story/news/politics/2021/03/08/iowa-governor-kim-reynolds-signs-law-shortening-early-voting-closing-polls-earlier-election-day/6869317002/. Iowa Republicans described the restrictions as an "election integrity measure" but unsurprisingly could not offer any evidence of voter fraud in Iowa. *Id.*

343. Mike DeBonis & Seung Min Kim, *Sinema and Manchin Confirm Opposition to Eliminating Filibuster, Probably Dooming Democrats' Voting Rights Push*, WASH. POST (Jan. 13, 2022), https://www.washingtonpost.com/politics/biden-set-to-visit-senate-democrats-in-a-final-improbable-pitch-for-voting-rights-action/2022/01/13/fde533b6-7475-11ec-8b0a-bcfab800c430_story.html.

344. *Senate Democrats Fail to Advance Voting and Elections Bill Over GOP Opposition*, CBS NEWS (Oct. 21, 2021), https://www.cbsnews.com/news/freedom-to-vote-act-voting-rights-fails-senate/.

345. Robert Griffin, *Republicans Want to Make It Much Harder to Vote. That Strategy Could Backfire*, WASH. POST (Mar. 22, 2021), https://www.washingtonpost.com/outlook/2021/03/22/republican-vote-restriction-turnout/ (noting that non-college-educated voters, who have shifted towards the Republican Party, could benefit from laws that make it easier to vote).

346. *See, e.g.*, Michael Barber & John B. Holbein, *The Participatory and Partisan Impacts of Mandatory Vote-by-Mail*, SCI. ADVANCES 5 (Aug. 26, 2020), https://www.science.org/doi/epdf/10.1126/sciadv.abc7685 (finding that vote-by-mail initiatives have "no meaningful effect on how well Democrats do in elections"); John B. Holbein & D. Sunshine Hillygus, *Making Young Voters: The Impact of Preregistration on Youth Turnout*, 60 AM. J. POL. SCI. 364, 365 (2016) (finding that efforts to preregister young voters is "equally effective" for Democrats and Republicans, and that preregistration "actually slightly narrows" the advantage that Democrats have with young voters).

347. Grace Panetta, *Republican Victors on Tuesday Likely Benefited from Laws Making Voting Easier that the GOP Opposed*, BUS. INSIDER (Nov. 5, 2021), https://www.businessinsider.com/gop-election-wins-likely-helped-by-expanded-voting-access-2021-11.

example, in 2020, Virginia made it easier to vote by repealing its voter ID law and expanding the early voting period.[348] These laws were enacted by a Democratic-controlled state legislature and signed into law by a Democratic governor, but it was Republican candidates who benefitted from a more accessible voting process.[349] Virginia saw the highest turnout in a state election since 1997,[350] and voters elected a Republican governor for the first time since 2009.[351] Republicans also saw large gains in New Jersey,[352] where Democratic legislators successfully expanded the state's early voting period in April 2021.[353]

Conventional wisdom dictates that Republicans support voter restrictions because doing so helps them win.[354] But the recent Virginia and New Jersey elections suggest that laws that protect and expand the right to vote do not necessarily benefit one party over the other.[355] Perhaps reframing the issue of voting rights as one that can help turn out their own voters will

348. Reid J. Epstein & Nick Corasaniti, *Virginia, the Old Confederacy's Heart, Becomes a Voting Rights Bastion*, N.Y. TIMES (Apr. 2, 2021), https://www.nytimes.com/2021/04/02/us/politics/virginia-voting-rights-northam.html.

349. Panetta, *supra* note 347.

350. Annika Kim Constantino, *Virginia Election Sees Highest Turnout in Recent History, Fueling Glenn Youngkin's Victory*, CNBC (Nov. 3, 2021), https://www.cnbc.com/2021/11/03/virginia-election-sees-highest-turnout-in-recent-history-fueling-glenn-youngkins-victory.html.

351. *Glenn Youngkin Becomes First Republican to Win Statewide Office in Virginia Since 2009*, CBS BALT. (Nov. 3, 2021), https://baltimore.cbslocal.com/2021/11/03/glenn-youngkin-becomes-first-republican-to-win-statewide-office-in-virginia-since-2009-in-major-setback-for-democrats/.

352. Tracey Tully, *N.J. Senate President Blames 'Red Wave' as He Concedes to Republican Underdog*, N.Y. TIMES (Nov. 10, 2021), https://www.nytimes.com/2021/11/10/nyregion/steve-sweeney-durr-nj-election.html?searchResultPosition=2.

353. Panetta, *supra* note 347; Taylor Romine & Devan Cole, *New Jersey Lawmakers Approve Bills Expanding Voting Rights as GOP-Led States Move to Restrict Access*, CNN (Apr. 2, 2021), https://www.cnn.com/2021/03/29/politics/new-jersey-voting-rights-bills/index.html.

354. Jon Ward, *Democrats and Republicans Agree that High Turnout Hurts the GOP. But What if They're Wrong?*, YAHOO NEWS (May 25, 2021), https://news.yahoo.com/democrats-and-republicans-agree-that-high-turnout-hurts-the-gop-but-what-if-theyre-wrong-090035233.html; *see generally* DARON SHAW & JOHN PETROCIK, THE TURNOUT MYTH: VOTING RATES AND PARTISAN OUTCOMES IN AMERICAN NATIONAL ELECTIONS (2020) (explaining that fifty years of election data shows no consistent partisan effect associated with voter turnout).

355. Barber, *supra* note 346; Griffin, *supra* note 345. Elderly voters provide another reason for Republicans to support legislation making it easier to vote: 56% of Republican and Republican-leaning voters are over the age of fifty, and 54% of elderly voters voted by mail in the 2020 election. John Gramlich, *What the 2020 Electorate Looks Like by Party, Race and Ethnicity, Age, Education, and Religion*, PEW RSCH. CTR. (Oct. 26, 2020), https://www.pewresearch.org/fact-tank/2020/10/26/what-the-2020-electorate-looks-like-by-party-race-and-ethnicity-age-education-and-religion/; Ryan Teague Beckwith & Gregory Korte, *Vote-By-Mail Favored by Older, Affluent Voters, Census Finds*, CHI. TRIB. (Apr. 30, 2021), https://www.chicagotribune.com/nation-world/ct-aud-nw-vote-by-mail-older-affluent-20210430-qa2rzirzebfqvafx63q4olxf3q-story.html.

convince Republican politicians that expanding ballot access is a cause worthy of their support.

## III. CONCLUSION

Since its founding, America has had a shameful history of voter discrimination.[356] For nearly fifty years, the VRA worked as intended to correct that history.[357] But with Section 4's coverage formula and Section 5's preclearance requirement struck down in *Shelby County*, and Section 2 significantly weakened in *Brnovich*, the Supreme Court has put our country back on the road to a voting landscape that restricts the right to vote in a way that disparately impacts voters of color.[358] The Court's creation of a voter fraud factor paves the way for states to pass restrictive voting legislation, and many states have done just that.[359]

These restrictive laws pose a major roadblock in America's journey to becoming a more perfect union.[360] If America is to live up to its ideals, our leaders must remember that all other rights, "even the most basic, are illusory if the right to vote is undermined."[361] Now is the time for Congress to realize that both parties benefit when voting rights are protected, and both parties lose when those rights are restricted. If it waits too long, who knows where America will end up.

356. *See supra* notes 40–46 and accompanying text.

357. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2354 (2021) (Kagan, J., dissenting).

358. Hasen, *supra* note 268 ("Justice Alito and the other conservative justices are leading the United States back to a time when racial discrimination in voting was easy [and] voting lawsuits hard.").

359. *See supra* Section I.C.1.

360. U.S. CONST. pmbl.

361. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).