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BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE: SAME STORY, NEW SECTION

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INTRODUCTION

> *"If a single statute represents the best of America, it is the Voting Rights Act. . . . If a single statute reminds us of the worst of America, it is the Voting Rights Act."*[1]

After historic voter turnout rates in the 2020 elections,[2] state legislatures across the country ushered in a wave of voter suppression laws. From January 1, 2021, to September 27, 2021, nineteen states passed at least thirty-three restrictive voting laws, limiting access to the ballot box in a multitude of ways.[3] It is not an uncommon trend. Since

1. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Kagan, J., dissenting).

2. *See* Drew Desilver, *Turnout Soared in 2020 as Nearly Two-Thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/.

3. *See, e.g.*, S. 398, 122d Gen. Assemb., 1st Reg. Sess. (Ind. 2021); H.R. 574, 2021 Reg. Sess. (Ky. 2021); H.R. 167, 2021 Reg. Sess. (La. 2021); H.R. 2663, 58th Leg., 1st Reg. Sess. (Okla. 2021); S. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); S. 84, 81st Reg. Sess. (Nev. 2021); H.R. 12, 64th Leg., Gen. Sess. (Utah 2021); S. 1, 87th Leg., 2d Spec. Sess. (Tex. 2021); *see also Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021. There is also a plethora of voter suppression laws pending in state legislatures that are likely to pass in the near future. *See Voting Laws Roundup: December 2021*, BRENNAN

2013, after the United States Supreme Court rendered Section 5 of the Voting Rights Act ("VRA") of 1965[4] inoperable in *Shelby County v. Holder*,[5] states have been able to reengage in legislative efforts to limit minority access to voting.[6] As a result, many commentators observed that Section 2 was the only provision of the VRA that could provide a substantive check on discriminatory voting laws.[7]

Section 2's broad prohibition on "voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups"[8] had been primarily utilized in vote *dilution* claims.[9] Without the protections of Section 5, however, the provision was regarded as the only tool left in the VRA for vote *denial* claims.[10] But, in *Brnovich v. Democratic National Committee*, the Supreme Court's Republican-appointed majority dealt another blow to the VRA by imposing new "guideposts" for courts to follow when evaluating Section 2 claims.[11] The guideposts articulated by Justice Alito significantly heighten a plaintiff's evidentiary burden while also lowering the state's burden to show a compelling interest to restrict voting opportunities.[12] By crafting the extratextual guideposts framework for Section 2 claims, the Supreme Court's decision in *Brnovich*, and Republican lawmakers' subsequent efforts to block legislation that would restore the section, represents another chapter in the saga of Republican-appointed Justices

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CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021 (Jan. 12, 2022).

4. 42 U.S.C. § 1973(c) (1965).

5. *See* 570 U.S. 529, 541, 553–57 (2013). By striking down the Section 4(b) coverage formula, which provided the list of states covered by the Section 5 preclearance requirement, the Court rendered Section 5 of the VRA toothless against states with a history of discriminatory voting practices. *Id.*

6. *See* Will Wilder, *Voter Suppression 2020*, BRENNAN CTR. FOR JUST. (Aug. 20, 2021), https://www.brennancenter.org/our-work/research-reports/voter-suppression-2020; *Shelby Cnty.*, 570 U.S. at 547–49.

7. *See, e.g.*, Steven R. Morrison, *The Post-Shelby County Game*, 17 BERKELEY J. AFR.-AM. L. & POL'Y 236, 246 (2015); Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1972 (2018).

8. *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/section-2-voting-rights-act (last visited Oct. 18, 2022).

9. *See e.g.*, Mobile v. Bolden, 446 U.S. 55 (1982); Thornburg v. Gingles, 478 U.S. 30 (1986); Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965).

10. *See* Morrison, *supra* note 7, at 247. Vote dilution refers to a situation where a particular group's political influence is reduced by practices such as gerrymandering; vote denial refers to a situation where individuals are prevented from voting. *See* Ashley Alcantara-Harris, *Section Two of the Voting Rights Act: The Two-Prong Test Applied to Vote-Denial Cases*, 39 REV. LITIG. 459, 463 (2020).

11. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2325 (2021).

12. *See id.*

narrowing voter protections and Republican lawmakers blocking voting rights legislation due to misplaced fears of voter fraud.

I. BRIEF BACKGROUND OF SECTION 2 OF THE VOTING RIGHTS ACT OF 1965

In its original form, Section 2 was a general provision of the Voting Rights Act that vaguely provided a prohibition on the "denial or abridgment of the right of any citizen of the United States to vote on account of race or color."[13] However, in 1982, Congress amended the section in response to *Mobile v. Bolden*,[14] where the Court held that plaintiffs would need to show intentional discrimination to succeed on Section 2 claims.[15] Accordingly, Congress created a "results test"[16] and changed the language of Section 2(a) from "to deny or abridge the right . . . to vote on account of race or color" to "in a manner which *results* in a denial or abridgement of the right . . . to vote on account of race or color."[17] After Congress's swift action, Section 2 proved to be a useful tool in vote dilution claims.

In 2013, after *Shelby County v. Holder*, Section 2's relevance expanded to the vote denial context. In *Shelby County*, the Court essentially gutted Section 5 of the VRA, which required a select group of states to obtain preclearance from the Justice Department to enact any voting legislation.[18] Without such a requirement, the Justice Department had to resort to fighting discriminatory voting laws on a case-by-case basis after they had already been signed into law.[19] Amending the Act as Congress did in 1982 to fix the Court's damage, however, has proven impracticable due to the Republican Party's hostility to the VRA and voting rights more generally.[20] Thus, from 2013 until 2021, Section 2 was critical in upholding the promises of the Voting Rights Act.

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13. 52 U.S.C. § 10301(a).

14. 446 U.S. 55, 62 (1980).

15. *Id.* at 62–65.

16. *See* S. REP. NO. 97-417, at 179 (1982) ("This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards . . . which applied in voting discrimination claims prior to the litigation involved in Mobile v. Bolden.").

17. 42 U.S.C. § 1973 (1965); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2(a), 96 Stat. 131, 134 (emphasis added).

18. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 553–57 (2013).

19. In the past decade, circuit courts have applied the Section 2 vote dilution analysis to vote denial claims. *See, e.g.*, League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014); Veasey v. Abbott, 830 F.3d 216, 244–46 (5th Cir. 2016) (en banc); Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); Farrakhan v. Washington, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

20. *See* Mariana Alfaro, *Republicans Who Supported Voting Rights Act Now Oppose Bill Democrats Say Would Strengthen Its Provisions*, WASH. POST (January 19, 2022, 1:56 PM), https://www.washingtonpost.com/politics/2022/01/19/republicans-voting-rights/.

II. *BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE*

Brnovich v. Democratic National Committee involved a challenge to two Arizona statutes.[21] One statute set forth an "out-of-precinct" ("OOP") policy under which "any vote cast in the wrong polling place must be tossed out, even if it is for president, governor, or some other race in which the voter could have cast a ballot anywhere in the state."[22] The second, H.B. 2023, imposed "a ban on collecting and turning in mail ballots by anyone other than a voter's immediate family members or caregivers."[23] Operatively, both bills disadvantaged voters of color in Arizona.[24]

Although circuit courts had been ruling on Section 2 vote denial claims in a consistent manner since *Shelby County*, *Brnovich* arrived as the Court's first opportunity to consider Section 2 in the vote denial, or "time, place, or manner," context.[25] While Justice Alito, writing for the majority, declined to adopt a formal test for vote denial claims, he introduced "certain guideposts."[26] According to the majority, the guideposts should help courts determine whether a certain voting practice inhibits "equal openness" to voting opportunities.[27] As applied to the challenged policies, the Court determined that the bills impose only the "usual burdens of voting."[28]

Since 2013, Republican lawmakers have consistently ignored or voted against proposals that would have restored the coverage formula. Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong., 2d Sess. (2014); Voting Rights Amendment Act of 2015, H.R. 885, 114th Cong., 1st Sess. (2015); Voting Rights Amendment Act of 2017, H.R. 3239, 115th Cong., 1st Sess. (2017). By contrast, the 1982 amendment to Section 2 was passed with Republican support in Congress and signed into law by former President Ronald Reagan. *See* Ian Millhiser, *How America Lost Its Commitment to the Right to Vote*, VOX (July 21, 2021, 8:00 AM), https://www.vox.com/22575435/voting-rights-supreme-court-john-roberts-shelby-county-constitution-brnovich-elena-kagan.

21. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2325 (2021).

22. Sean Morales-Doyle, *The Supreme Court Case Challenging Voting Restrictions in Arizona, Explained*, BRENNAN CTR. FOR JUST. (Feb. 25, 2021), https://www.brennancenter.org/our-work/research-reports/supreme-court-case-challenging-voting-restrictions-arizona-explained; *see* ARIZ. REV. STAT. ANN. § 16-122 (2022).

23. Morales-Doyle, *supra* note 22; *see* H.R. 2023, 52d Leg., 2d. Reg. Sess. (Ariz. 2016).

24. *See* Brief for Navajo Nation as Amici Curiae Supporting Respondents at 12–26, *Brnovich*, 141 S. Ct. 2321 (Nos. 19-1257 & 19-1258); Brief for Mi Familia Vota et al. as Amici Curiae Supporting Respondents at 15–26, *Brnovich*, 141 S. Ct. 2321 (Nos. 19-1257 & 19-1258).

25. *Brnovich*, 141 S. Ct. at 2333.

26. *Id.* at 2336.

27. *Id.* at 2337–38.

28. *Id.* at 2344.

With regard to the OOP policy, Justice Alito found that identification of one's polling place does not exceed the "usual burdens of voting."[29] Addressing H.B. 2023, the Court held that limiting ballot collection to "those less likely to have ulterior motives," such as mail carriers, quells fears of potential voter fraud and can, in fact, operate to prevent such fraud.[30] Most notably, Justice Alito found that under both bills, prevention of voter fraud is a "strong and entirely legitimate state interest," without analyzing the underlying legitimacy of such a claim.[31] Additionally, the state defendants were not required to make any showing that either H.B. 2023 or the OOP policy actually prevent voter fraud, nor could the plaintiffs rebut the state interest by showing viable alternatives.[32]

In her dissent, Justice Kagan, joined by Justices Breyer and Sotomayor, concluded that the majority narrowly read Section 2 in a way that undermines its essential purpose to guarantee that members of every racial group have equal voting opportunities.[33] In so finding, the dissent noted that Justice Alito's guideposts are essentially "a list of mostly made-up factors" that are wholly disconnected from the text of Section 2.[34] Thus, the dissent concluded, the majority unreasonably favored the state interest of preventing voter fraud without proof of its legitimacy over the legitimate fear of vote suppression on account of race.[35]

III. IMPLICATIONS OF *BRNOVICH*

While the Court stated in *Brnovich* that it was not announcing a formal test for Section 2 voter denial claims,[36] its holding nonetheless cripples the VRA. Moreover, state legislatures will hear the message the Court has sent and continue to enact restrictive voting laws under the guise of preventing voter fraud or the appearance thereof. By fashioning the guideposts formula, the Court engrafted additional text onto Section 2, dismissing years of case law and applicable tests utilized in similar claims.[37] Principally, the Court has (1) made it more difficult for a plaintiff to bring a Section 2 claim, as it has increased the disparate

29. *Id.* Again, Justice Alito fails to elaborate on what would qualify as "the usual burdens of voting." *See id.*
30. *Id.* at 2347.
31. *Id.* at 2325, 2340.
32. *See id.*
33. *Id.* at 2351 (Kagan, J., dissenting).
34. *Id.* at 2362.
35. *Id.* at 2369.
36. *See id.* at 2325 (majority opinion).
37. *See id.* at 2369 (Kagan, J., dissenting).

impact burden they must carry, and (2) eased the burden on states by allowing a state interest to outweigh the effects of a discriminatory voting law despite viable alternatives.[38]

First, the Court failed to elaborate on what constitutes a "disparate impact" on minority voters under the third guidepost.[39] The Court could have adopted the disparate impact test utilized in Title VII and Fair Housing Act cases,[40] but instead it noted that because the language in those statutes differed from that of Section 2, the test is not useful for voter discrimination cases.[41] Further, the Court refused to accept the disparate impact test utilized by lower courts in Section 2 vote denial claims and seemed to caution lower courts against finding a disparate impact at all, warning that "[w]hat are at bottom very small differences should not be artificially magnified."[42] Given its disinterest in properly analyzing and applying the disparate impact test utilized by the lower courts or the test used in Title VII or Fair Housing Act cases, the majority wholly abandoned textualist principles and opted to insert its vague guidepost instead.

While the Court did not elaborate on what threshold plaintiffs would need to meet to satisfy the third guidepost,[43] it characterized the racial disparity among voters affected by the OOP policy as "small in absolute terms."[44] Broken down, the Court accepted the District Court's findings that 1% of African American voters, 1% of Native American voters, and a little over 1% of Hispanic voters cast their votes outside of their precinct.[45] By contrast, 0.5% of non-minority voters faced the same issue.[46] A lower court correctly noted that this disparity equates to minority voters being twice as likely to have their votes thrown out due

38. *See id.* at 2338–39 (majority opinion).

39. *See id.* at 2340–48.

40. *See U.S. Supreme Court Upholds Fair Housing Disparate Impact Principle*, NAT'L LOW INCOME HOUS. COALITION (June 29, 2015), https://nlihc.org/resource/us-supreme-court-upholds-fair-housing-disparate-impact-principle; U.S. Dep't of Just., Legal Manual § 7 (2021).

41. *Brnovich,* 141 S. Ct. at 2340–41.

42. *Id.* at 2339 (reasoning that because "minority and non-minority groups differ with respect to employment, wealth, and education . . . neutral regulations . . . may well result in some predictable disparities" but courts should not conclude "that a system is not equally open" due to such disparities).

43. *See id.* (stating only that "the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. The size of any disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential. What are at bottom very small differences should not be artificially magnified").

44. *Id.* at 2344.

45. *Id.* at 2345.

46. *Id.*

to the OOP policy,[47] but the Supreme Court found that analysis to be "highly misleading."[48] Instead, it concluded that the disparity among minority and non-minority voters was small, as roughly 99% of African-American, Native American, and Hispanic voters cast their ballots in precinct, while 99.5% of non-minority voters did the same.[49]

A statistical impact alone is not enough to satisfy the test; there must also be a causal connection between the challenged policy and disparate impact.[50] But, by failing to consider the context surrounding the disparity, the majority failed to properly draw that connection. For example, Arizona routinely moves polling locations in urban areas of the state with higher minority populations and will place them in confusing areas for voters.[51] But with only the malleable third guidepost in place—applied without consideration of context—lower courts need not consider these factors in their analyses and can apply the disparate impact principle in a way that distorts statistics and diminishes the effects on thousands of voters, just as the majority did here.

Second, even if plaintiffs can meet their burden by showing a disparate impact, the majority's blind acceptance of the state's interest in preventing voter fraud is devastating to plaintiffs.[52] In a proper totality of the circumstances inquiry, "[s]tate interests do not get accepted on faith."[53] Congress knew that voter fraud is "easy to assert groundlessly or pretextually in voting discrimination cases" and thus amended Section 2 in part to preclude courts from accepting that interest despite its illegitimacy.[54] Indeed, voter fraud has historically been the vehicle for legislators to enact and successfully uphold discriminatory voting laws.[55] By incorporating the results test into Section 2, Congress intended to avoid the issue of an easily assertable state interest trumping the discriminatory effects of a voting law by imposing the requirement that the law be necessary to achieve the interest.[56] Justice Alito, however,

47. *See* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1014 (9th Cir. 2020) (en banc).

48. *Brnovich*, 141 S. Ct. at 2345 (reasoning that dividing a percentage by a percentage to illustrate a disparity can "mask the fact that the populations were effectively identical").

49. *Id.*

50. *See Hobbs*, 948 F.3d at 1012.

51. *Brnovich*, 141 S. Ct. at 2368 (Kagan, J., dissenting) ("Much of the story has to do with the siting and shifting of polling places.").

52. *See id.* at 2359.

53. *Id.*

54. *Id.* at 2365.

55. *Id.*

56. Houston Lawyers' Ass'n v. Att'y Gen. of Tex., 501 U.S. 419, 428 (analyzing whether the "impairment of a minority group's voting strength could be remedied without significantly impairing the State's interest in electing judges on a district-wide basis" and thus suggesting that a court must ask whether a state law that produces discriminatory effects is necessary in a results test analysis).

did not inquire into the legitimacy of the claim and simply declared the prevention of voter fraud a compelling interest.[57]

Moreover, the Court signaled that a plaintiff cannot rebut a showing of a compelling state interest through proof of viable alternative means of preventing voter fraud in a less restrictive manner.[58] As Justice Kagan pointed out, the Court has consistently held that "[w]hen a less racially biased law would not 'significantly impair[] the State's interest,' the discriminatory election rule must fall."[59] In practically all discrimination contexts, a discriminatory law will be upheld only if it is absolutely necessary to achieve a state interest.[60] As such, the Court here has substantially reduced a state's evidentiary burden by disallowing a plaintiff to rebut a state interest through a showing of less restrictive means and, consequently, forcing the plaintiff to accept the state's word.

By both heightening a plaintiff's burden of showing a disparate impact and lowering a state's evidentiary burden of showing a compelling state, the Court has dealt a fatal blow to the VRA. Lower courts now have wide discretion to uphold discriminatory voting laws by distorting the impact on minority voters. Further, even upon such a showing, a state can merely claim voter fraud to successfully fight off the challenge. Given the implications of *Brnovich*, it is likely that state legislatures will continue to enact restrictive voting laws, understanding that they could be upheld under Justice Alito's guideposts.[61]

IV. THE POLITICS OF VOTING RIGHTS

In *Brnovich*, the Court effectively crippled the only practical provision that remained in the Voting Rights Act. The decision makes clear that if we are to stave off the increasing threat of voter discrimination, the commands of the Act must be restored with sufficient protections that afford the benefit of the doubt to minority voters.[62] Thus, the fate of Section 2 and the VRA generally is inherently a political problem.

Efforts to pass voting legislation, however, have been fruitless.[63] The House of Representatives passed the John Lewis Voting Rights Advancement Act (the "Lewis bill"), but it failed in the Senate due to the

57. *Brnovich*, 141 S. Ct. at 2330–50.
58. *Id.* at 2345–46.
59. *Id.* at 2359 (Kagan, J., dissenting) (alteration in original).
60. *Id.* at 2364 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).
61. *See id.* at 2330–50 (majority opinion).
62. *See id.*
63. *See* Burgess Everett & Marianne Levine, *Biden's Foray into Filibuster Fight Leaves Liberals No Closer to Victory*, POLITICO (Mar. 17, 2021, 11:51 AM), https://www.politico.com/news/2021/03/17/biden-filibuster-fight-476684.

sixty-vote threshold imposed by the filibuster.[64] The bill's demise, like the Court's decision in *Brnovich*, is unsurprising. Both showcase Republican lawmakers' and Republican-appointed Justices' embrace of the voter fraud conspiracy and dismissal of the burdens that minority voters face.

To understand why the Lewis bill failed in the Senate, it is important to look at the substantial legislative barriers it encountered. In the face of an inevitable filibuster by Senate Republicans, Democrats made a push to use a "carve out," which would have allowed the bill to pass with only fifty votes in the Senate in addition to a tie-breaking vote from Vice President Kamala Harris.[65] Unfortunately, the plan still required Senators Joe Manchin of West Virginia and Kyrsten Sinema of Arizona to eliminate the filibuster, both of whom expressed an unwillingness to do so.[66] Thus, the Lewis bill failed once again.[67]

The Court's decision in *Brnovich* and Senate Republicans' subsequent blocking of the Lewis bill showcase the effects of Republican dogma around voting rights in the modern political era. More specifically, both actions exemplify how Republican legislators' and Republican-appointed Justices' misstatements and overestimations about the prevalence of voter fraud have resulted in significantly weaker voting protections for minorities. It is unclear whether their belief in voter fraud is one held in good faith or whether their efforts are rooted in political advantage, but the result is the same nonetheless: a narrowly interpreted VRA—stripped of its power—and a lack of new statutory authority to takes its place.

The voter fraud myth took root in modern Republican ideology after the 2000 election and the subsequent *Bush v. Gore*[68] case.[69] Without a clear winner after election day, Florida was subject to a state-wide machine recount, a manual recount in four counties, and more than fifty lawsuits filed by the Bush and Gore legal teams.[70] Eventually, the

64. Nicholas Fandos, *Republicans Block Voting Rights Bill, Dealing Blow to Biden and Democrats*, N.Y. TIMES (June 22, 2021), https://www.nytimes.com/2021/06/22/us/politics/filibuster-voting-rights.html; Nicholas Reimann, *John Lewis Voting Rights Act Fails to Pass Senate*, FORBES (Nov. 3, 2021, 3:45 PM), https://www.forbes.com/sites/nicholasreimann/2021/11/03/john-lewis-voting-rights-act-fails-to-pass-senate/?sh=61458bbfb3d2.

65. Amy Goodman & Denis Moynihan, *MLK, Jr.'s Birthday, The Racist Filibuster and the Fight for Voting Rights*, DEMOCRACY NOW (Jan. 13, 2022), https://www.democracynow.org/2022/1/13/mlk_jrs_birthday_the_racist_filibuster.

66. *Id.*

67. *See id.*

68. 531 U.S. 98 (2000).

69. Richard Hasen, *Election Hangover: The Real Legacy of Bush v. Gore*, SLATE (Dec. 3, 2010, 4:39 PM), https://slate.com/news-and-politics/2010/12/the-real-legacy-of-bush-v-gore.html.

70. *Bush v. Gore*, ENCYC. BRITANNICA, https://www.britannica.com/event/Bush-v-Gore (last visited Oct. 4, 2022).

Florida Supreme Court ordered that all votes in the state be manually recounted.[71] The following day, on December 9, the Bush team responded, petitioning the United States Supreme Court for a stay on the order.[72] The parties submitted their briefs on December 10, oral arguments took place on December 11, and the Court issued its decision on December 12.[73] The Court granted the stay and ordered an end to the contentious recount, essentially awarding the win to former President George W. Bush.[74] With breakneck speed, the nation's leader was chosen by an unelected judiciary. The impact of this spectacle was not so much legal as it was political.[75] Put another way, *Bush v. Gore* does not stand today as powerful precedent in election law, but rather it finds significance in its political ramifications.[76] The event marked a moment in United States history where voters began to cast doubt on the legitimacy of the Court and of elections.[77]

After *Bush v. Gore*, voters began to lose faith in the fairness of elections.[78] The basic lesson that candidates and their consultants took out of this loss of confidence was that it is always better to challenge the results of an election rather than concede.[79] Accordingly, charges of cheating became prevalent throughout the nation, mobilizing voters before an election, but ultimately shaking their confidence in its result.[80] Despite its lack of validity,[81] voter fraud was the primary theory behind such allegations.[82] Republican strategists even founded a "think tank," the American Center for Voting Rights, that was designed to lend

71. *Id.*
72. *Id.*
73. *Id.*
74. Bush v. Gore, 531 U.S. 98, 111 (2000).
75. *Id.* at 144 (Breyer, J., dissenting) ("The political implications of this case for the country are momentous. But the federal legal questions presented, with one exception, are insubstantial."); Hasen, *supra* note 69.
76. Chad Flanders, *Please Don't Cite This Case! The Precedential Value of* Bush v. Gore, 116 YALE L. J. POCKET PART 141, 143–44 (2006).
77. *See Bush*, 531 U.S. at 128–29 (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."); Hasen, *supra* note 69 ("Before 2000, most people were confident their votes were going to be counted accurately. After 2000, they are much less so.").
78. *See* Hasen, *supra* note 69.
79. *See id.*
80. *See id.*
81. *See generally* Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST. (Nov. 9, 2007), https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud.
82. *See* Hasen, *supra* note 69 ("Republicans generally charge that the election system is rife with fraud, often committed by poor and minority voters to give Democrats the advantage.").

academic support for baseless claims of voter fraud after the Justice Department continually shut down such claims.[83] Ultimately, the public became inoculated to the idea that voter fraud is a pervasive, legitimate issue within our nation's electoral administration systems and that elections should be challenged.

Enacting federal legislation aimed against VRA for the purpose of thwarting voter fraud was a nonstarter. Republican lawmakers were aware that weakening the VRA is an incredibly unpopular legislative goal.[84] In fact, the preclearance requirement under Section 5, which was set to expire five years after it was originally enacted in 1965, was extended four times under Republican presidents.[85] Even more significantly, the 1982 amendment to the VRA was passed during the Reagan administration despite vehement opposition from a conservative faction, which included current Chief Justice John Roberts.[86] The amendment ultimately passed as it was widely considered politically volatile to oppose to it.[87]

Thus, understanding that there existed no political will to support legislation that would weaken the VRA, Republicans turned to the courts to do so.[88] Relying on the Court insulated those making the final decisions from political consequence.[89] Federal lawmakers could then allow state legislatures to enact restrictive voting regulations, let the Court cripple the VRA so those new regulations would not encounter any federal interference, and then obstruct efforts to restore the Act.

The Court is now filled with Republican-appointed Justices who have shown open hostility to the VRA and to voting rights generally.[90] Such

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83. Richard Hasen, *The Fraudulent Fraud Squad*, SLATE (May 18, 2007, 1:41 PM), https://slate.com/news-and-politics/2007/05/the-incredible-disappearing-american-center-for-voting-rights.html. The American Center for Voting Rights no longer exists. *Id.*

84. *See* Millhiser, *supra* note 20.

85. *Id.*

86. *See id.* Chief Justice Roberts was working in the Reagan administration at the time and pressed the then-President to veto the 1982 amendment. *Id.*

87. *See id.* ("As then-Rep. Trent Lott (R-MS) warned Reagan in 1981, after an expansive voting rights renewal had already passed the House, 'anyone who seeks to change' that bill 'will risk being branded as racist.'").

88. *Id.*

89. *Id.* Due to the Justices' lifetime appointments, the Court was insulated from political pressure and backlash. *Id.*

90. Mark Joseph Stern, *How Unprecedented Is the Supreme Court's Voting Rights Act Ruling?*, SLATE (July 1, 2021, 4:34 PM), https://slate.com/news-and-politics/2021/07/brnovich-supreme-court-unprecedented-cruel-radical.html. For cases showing their hostility, see, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding the constitutionality of Indiana's voter ID laws, as such requirements closely relate to the State's interest in protecting against voter fraud); Abbott v. Perez, 138 S. Ct. 2305 (2018) (failing to find discriminatory intent where the state legislature of Texas created a congressional districting map that included racial gerrymanders); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (striking down the Section 4(b) coverage formula of the

hostility is cloaked by the view that voter fraud or the appearance thereof serves as a sufficient justification for restrictive and discriminatory voting regulations without question. *Crawford v. Marion County Election Board* stands as an earlier example of the conservative Justices' use of voter fraud as a justification.[91] In *Crawford*, the Court upheld an Indiana law that required all voters to present a United States or Indiana ID before submitting a ballot after a Fourteenth Amendment challenge to the bill.[92] In a plurality opinion, the Court determined that the state's interest in preventing voter fraud and protecting voter confidence in the election results and the state's electoral administration outweighed the burdens on minority voters imposed by the law.[93] Despite failing to find any evidence of voter fraud in the state, either currently or historically, the Court still determined that Indiana had a legitimate and important need to enforce the law.[94] The Court even acknowledged the partisan advantage-seeking background behind the bill but dismissed such concerns.[95] In dissent, Justice Souter argued that the state should be required to prove the existence of voter fraud before claiming it as a justification, a requirement that the Lewis bill would have imposed.[96]

Shelby County was likewise devastating to voting rights.[97] Although the case did not address a voter fraud justification, the aftermath of the decision nonetheless illustrates how Republican credulity over the voter fraud risk works in tandem with the Court's narrowing of the VRA.[98] As discussed earlier, by invalidating the Section 4(b) coverage formula, and Section 5 by consequence, the Court no longer requires states to go through the Justice Department and obtain preclearance before enacting a new voting law.[99] Thus, minority voters in the nine states that were previously subjected to the preclearance requirement were stripped of

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Voting Rights Act and, in turn, rendering the Section 5 preclearance requirement ineffective against states with a history of discriminatory voting practices).

91. *See generally* 553 U.S. 181 (2008).

92. *Id.* at 185–89.

93. *Id.* at 188–89.

94. *Id.* at 194–96 (stating that even though "[t]he record contain[ed] no evidence of any . . . fraud actually occurring in Indiana at any time in its history" and that any method of preventing voter fraud is of debatable effectiveness, "[t]here is no question about [its] legitimacy or importance").

95. *Id.* at 204 (determining that the state's "justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators").

96. *Id.* at 230 (Souter, J., dissenting) ("[T]he ultimate valuation of the particular interest a State asserts has to take account of evidence against it.").

97. *See* Morrison, *supra* note 7, at 246–47.

98. *See id.* at 246–49.

99. *See supra* Section I.

direct federal protection from discriminatory voting laws.[100] That left Section 2 as the only viable VRA protection afforded to such voters.[101] States then were largely permitted to systematize restrictive voting practices using voter fraud as the justification, understanding that the Court will accept such a justification on faith.[102] Indeed, many states have enacted discriminatory voting laws in the name of combatting voter fraud since.[103]

Brnovich and the failure of the Lewis bill should thus be understood as the latest chapter of a Republican crusade against the VRA. Republican-appointed Justices on the Court have narrowed federal voting protections enshrined by the Act, and Republicans in Congress have done their part by obstructing any effort to repair those protections, both using voter fraud as a justification. The case is not an anomaly nor is it likely to be the culmination of the efforts to weaken minority voting protections. However, it is a representation of Republican legislators' and conservative Justices' decades-long fight against federal legislation that protects minority voters against discrimination by states. Again, it is not completely clear whether lawmakers and Justices sought to kill the VRA as an end goal—using voter fraud as a justification—or whether they believe in good faith that voter fraud is a prevalent issue that outweighs minority voter burdens and thus find it necessary for state legislatures to enact voting laws without fear of federal interference. However, the evidence points to the latter, and whatever the motivation, they have worked in tandem to significantly weaken the VRA because of their overestimations and misstatements about voter fraud.

CONCLUSION

Almost seventy years after John Lewis was brutally beaten for marching on the Edmund Pettis bridge in an effort to make true the promises of our democracy and fight for equality in our voting systems,[104] we find ourselves again fighting for the same cause. Discrimination in state voting laws is still undeniably present. Regardless, the Supreme Court decided that voter fraud—despite its lack of evidence—must

100. Joshua S. Sellers, *Shelby County as a Sanction for States' Rights in Elections*, 34 ST. LOUIS U. PUB. L. REV. 367, 368 (2015).

101. *Id.* at 383–84.

102. *See id.* at 378–79.

103. For current discriminatory voting laws that were enacted after *Brnovich*, see sources cited *supra* note 3.

104. *See* Angela Vang & Emma Bowman, *For the First Time in 56 Years, A 'Bloody Sunday' Without John Lewis*, NPR (Mar. 5, 2021, 5:27 PM), https://www.npr.org/2021/03/05/974035873/for-the-first-time-in-56-years-a-bloody-sunday-without-john-lewis.

outweigh the burdens placed on minority voters by discriminatory voting laws. Thus, protections enshrined by Section 2 of the VRA are no longer effective. In *Brnovich*, the Court engrafted additional text onto Section 2, raising the burden on plaintiffs challenging discriminatory voting laws and making it easier to for states defend such laws.[105] The decision was in line with a decades-long pattern of Republican lawmakers and Republican-appointed Justices' showing open hostility to the Voting Rights Act and acting to cripple the landmark piece of legislation under the guise of voter fraud.

105. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2325, 2340 (2021).