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Voting Rights or Voting Entitlements?

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ARTICLE

VOTING RIGHTS OR VOTING ENTITLEMENTS?

*James J. Sample**

ABSTRACT

It took nearly 100 years after the United States gained its independence for African American men to secure the right to vote, and almost 150 years for African American women. A right perceived—though not de facto honored—as fundamental for all Americans today was fought for in a war less than two centuries ago, costing 620,000 lives. The country quite literally divided over the idea that African Americans should be afforded basic human rights. Today, resistance to the franchise—to what the mythology of America “stands for”—is not remotely erased, but rather, newly emboldened, even if it masquerades under more obfuscating terminology.

Acknowledgement of contemporary racism in the motivation and passage of voting legislation remains highly controversial. The current U.S. Supreme Court majority interprets gradual increases in voter registration as conclusive evidence that historical discrimination in voting has been eradicated. Ostensible judicial minimalists in the Court majority have effectively usurped congressional fact-finding as to the ongoing necessity of antidiscriminatory measures.

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Most provocatively, the late Justice Antonin Scalia characterized the Voting Rights Act not as a buffer mitigating discrimination, but rather, as a “racial entitlement.” Pause for a moment to consider the true meaning of the phrase—were the historically disenfranchised gaining something extra? Did their votes count doubly? Or was the “entitlement” mere facilitation of equality?

The as yet unfolding consequences of the Court embracing the “entitlement” frame? An onslaught of restrictive ID requirements, elimination of early voting, elimination of drop boxes, hyperaggressive and inaccurate purging of voter registration rolls, measures empowering state legislatures to override vote tallies, and the closing of polling locations.

Voting Rights or Voting Entitlements analyzes how a perfect storm of party-before-country priorities and politics, ongoing systemic racism, and opportunistic judicial decision aggression has produced a perilous moment for American democracy and for the legal principle of one-person, one-vote.

TABLE OF CONTENTS

I.	INTRODUCTION.....	53
II.	THE SUPREME COURT’S EVOLVING DISPOSITION TO THE VOTING RIGHTS ACT	60
III.	SCOTUS DECIDES THAT SCOTUS DECIDES	65
	A. <i>The Majority’s Predictions</i>	67
	B. <i>The Dissent’s Warnings</i>	69
IV.	UMBRELLAS AND FIREHOSES.....	74
	A. <i>Modern Voter Suppression</i>	74
	1. <i>State Legislation</i>	74
	2. <i>Federal Legislative Attempts to Combat Voter Suppression</i>	80
	B. <i>2021–2022 Tracking Efforts</i>	84
	C. <i>Section 2’s Sufficiency</i>	85
V.	CONCLUSION	91

I. INTRODUCTION

While I expected no special consideration because of my years on the faculty of UVA, I did expect my children to be evaluated fairly and carefully on their merits. I believe two of them were treated either with intentional disfavor or with gross neglect. All that is by way of long prologue to my very brief response to your letter of October 30. I will not accept the Jefferson Award, or anything else, from the University of Virginia. Not now. Not ever.

—Justice Antonin Scalia in 1989 letter to the University of Virginia, after it did not grant admission to three of his nine children.¹

[T]his last [2006] enactment [of the Voting Rights Act], not a single vote in the Senate against it. And the House is pretty much the same. Now, I don't think that's attributable to the fact that it is so much clearer now that we need this. I think it is attributable, very likely attributable, to a phenomenon that is called perpetuation of racial entitlement. It's been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes Even the name of it is wonderful: The Voting Rights Act. Who is going to vote against that in the future?

—Justice Antonin Scalia in 2013 oral argument of *Shelby County v. Holder*.²

What once was considered an impermissible attack on our democracy has increasingly become just another arrow in the quiver for Republican lawmakers and politicians alike. Over the last two decades, the Brennan Center for Justice has declared that voter suppression in the United States has “resurfaced with a vengeance,” undermining the constitutional right to vote and the Fifteenth Amendment’s ability to enforce this right.³ Florida has proposed a host of new restrictions on mail voting, including

1. Letter from Antonin Scalia, J., U.S. Sup. Ct., to Robert M. O’Neil, President, Univ. of Va. (Nov. 9, 1989) (on file with Univ. of Va. Special Collections); see Rachael E. Jones, Rosenberger’s *Unexplored History*, 46 J. SUP. CT. HIST. 107, 116–17 (2021); see also Micah Schwartzman (@mjschwartzman), TWITTER (May 11, 2021, 1:40 PM), <https://twitter.com/mjschwartzman/status/1392187900213796869> [<https://perma.cc/QE8N-KDZ9>].

2. Transcript of Oral Argument at 46–48, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

3. *Vote Suppression*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression> [<https://perma.cc/9TD2-RU2N>] (last visited May 20, 2022); see also U.S. CONST. amend. XV, §§ 1–2.

requiring voters to “put their state ID number or Social Security Number on their mail ballot application without providing an alternative for voters who lack such information.”⁴ Georgia has made it a crime to provide water and snacks for voters waiting in line to vote.⁵ Iowa subjects county election officials to criminal prosecution should they fail to enforce “the law’s aggressive new voter-roll purge provisions.”⁶ Montana got rid of Election Day registration entirely.⁷ Texas imposes criminal penalties on election officials who “expand[] voter access or even . . . encourage[] eligible voters to request mail ballots.”⁸

Strict voter photo ID laws, elimination of early voting, voter intimidation, polling place relocations, failure to accept Native American tribal IDs, dramatic voter purging, a lack of language-accessible materials, and proof of citizenship laws are only some examples of thinly veiled voter-suppression tactics utilized by creative Republican lawmakers.⁹ Their justification for this legislation? Protection of election integrity against “fraud.”¹⁰ The actual reason? Creating as many obstacles to the polls as possible for minorities in order to achieve their desired electoral result.¹¹

4. Will Wilder & Stuart Baum, *5 Egregious Voter Suppression Laws from 2021*, BRENNAN CTR. FOR JUST. (Jan. 31, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/5-egregious-voter-suppression-laws-2021> [<https://perma.cc/M5V7-72U9>].

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*; see also Tom McCarthy, *How Republicans Are Trying to Prevent People from Voting After ‘Stop the Steal,’* GUARDIAN (Apr. 7, 2021, 3:00 PM), <https://www.theguardian.com/us-news/2021/apr/07/republican-voter-suppression-policy-stop-the-steal> [<https://perma.cc/365C-EPGR>]; Hansi Lo Wang, *A Federal Law Requires Translated Voting Ballots, but Not in Arabic or Haitian Creole*, NPR (June 26, 2022, 3:16 PM), <https://www.npr.org/2022/06/24/1083848846/bilingual-ballots-voting-rights-act-section-203-explained> [<https://perma.cc/E2WA-BZRK>]; Katie Friel & Emil Mella Pablo, *How Voter Suppression Laws Target Native Americans*, BRENNAN CTR. FOR JUST. (May 23, 2022), <https://www.brennancenter.org/our-work/research-reports/how-voter-suppression-laws-target-native-americans> [<https://perma.cc/5SEX-WNQT>].

10. See Michael Grunwald, *Democrats Say Republicans Are Stealing the Midterms. Are They Right?*, POLITICO (Nov. 3, 2018), <https://www.politico.com/magazine/story/2018/11/03/georgia-republicans-democrats-2018-voter-suppression-222183/> [<https://perma.cc/G2QG-V4DV>].

11. See J. David Goodman et al., *Texas G.O.P. Passes Election Bill, Raising Voting Barriers Even Higher*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2021/08/31/us/politics/texas-voting-rights-bill.html> [<https://perma.cc/84J4-F8AC>].

The most famous examples of resistance to racism in our nation's history—like Rosa Parks's refusal to give up her seat,¹² the Montgomery Bus Boycott,¹³ the landmark decision in *Brown v. Board of Education*,¹⁴ and the Little Rock Nine¹⁵—mark only some of the countless efforts that underrepresented minorities have made in order to receive what they so desperately wanted and undoubtedly deserved: the same rights as their white counterparts. More specifically, enforcing the right to vote was a dream of civil rights activists, but one that was met with major resistance. James Mercer Langston Hughes, an American poet and social activist, pondered what would happen “to a dream deferred” in 1951.¹⁶ Well, three different federal legislation attempts to curtail violations of the Fifteenth Amendment in 1957,¹⁷ 1960,¹⁸ and 1964¹⁹ answered that inquiry as it related to the enforcement of equal voting rights: that dream would continue to be deferred due to the absence of a meaningful federal check.²⁰ Also missing in this country was the necessary political will and cooperation between our branches of government, political parties,

12. *On This Day, Rosa Parks Wouldn't Give Up Her Bus Seat*, NAT'L CONST. CTR. (Dec. 1, 2021), <https://constitutioncenter.org/blog/it-was-on-this-day-that-rosa-parks-made-history-by-riding-a-bus> [<https://perma.cc/SAH2-WL8Z>] (detailing how Rosa Parks was arrested on December 1, 1955, for refusing to give up her seat on a bus to a white passenger).

13. *Montgomery Bus Boycott*, HISTORY (Jan. 12, 2022), <https://www.history.com/topics/black-history/montgomery-bus-boycott> [<https://perma.cc/TT85-CE3F>] (writing that the Montgomery Bus Boycott was a protest that occurred from December 5, 1955, until December 20, 1956, and began four days after Rosa Parks' protest).

14. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

15. *Little Rock Nine*, HISTORY (Jan. 20, 2022), <https://www.history.com/topics/black-history/central-high-school-integration> [<https://perma.cc/5R46-PHP6>] (outlining the integration of an Arkansas all-white high school in Little Rock, Arkansas after the Supreme Court's decision in *Brown v. Board of Education*).

16. Langston Hughes, *Dream Deferred (Harlem)*, in 101 GREAT AMERICAN POEMS 75, 75 (Am. Poetry & Literacy Project ed., 1998); James Mercer Langston Hughes, ATLANTA J.-CONST. (Jan. 1, 2016), <https://www.ajc.com/news/james-mercer-langston-hughes/ZJYTOFrcvdAZ1GTrNSUyPI/> [<https://perma.cc/JQ4H-XKCC>].

17. *Introduction to Federal Voting Rights Laws: Before the Voting Rights Act*, U.S. DEPT JUST. (Aug. 16, 2018), <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> [<https://perma.cc/VC3W-74EX>] (“The 1957 Act created the Civil Rights Division within the Department of Justice and the Commission on Civil Rights; the Attorney General was given authority to intervene in and institute lawsuits seeking injunctive relief against violations of the 15th Amendment.”).

18. *See id.* (“The 1960 Act permitted federal courts to appoint voting referees to conduct voter registration following a judicial finding of voting discrimination.”).

19. *See id.* (“The 1964 Act also contained several relatively minor voting-related provisions.”).

20. *See generally History of Federal Voting Rights Laws: The Voting Rights Act of 1965*, U.S. DEPT JUST. (July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws> [<https://perma.cc/PG9D-WLR6>].

and citizens to enforce the Fifteenth Amendment, leaving our most vulnerable with no legal recourse when their right to vote was abridged.²¹

By the 1960s, Congress finally acknowledged that existing federal antidiscrimination laws were insufficient to overcome nearly a century of states' refusal to enforce the Fifteenth Amendment.²² The Department of Justice's (DOJ) method of enforcing voting rights through case-by-case litigation had proven ineffective in legislative hearings²³ because as soon as a discriminatory practice was deemed unconstitutional and blocked, states would get creative and another new discriminatory law would take its place.²⁴ Leaving the costly, timely, and ineffective avenue of litigation as the only possible means for minorities to have their rights enforced, it was clear that there needed to be compromise between the political parties to effectively remedy this ongoing issue of voter suppression.

Thankfully, political cooperation was finally attained between our branches of government and political parties, and on August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act (VRA) into law.²⁵ While a lengthy and impressive bill, the most notable sections are sections 2, 4(b), and 5. Section 2 of the VRA prohibits nationwide voting practices and procedures that discriminate on the basis of race, color, or membership in a language minority group.²⁶ Section 4(b) sets forth criteria to determine whether a jurisdiction is covered under the preclearance standard which is set out in section 5.²⁷ At the time, preclearance prohibited any change with respect to voting in a covered jurisdiction from being legally enforceable until that jurisdiction first obtained a determination from either the Attorney General or the U.S. District Court for the District of Columbia that the law did not have a discriminatory purpose or

21. See, e.g., *Black Americans and the Vote*, NAT'L ARCHIVES, <https://www.archives.gov/research/african-americans/vote> [<https://perma.cc/XW6V-V5GV>] (last visited June 29, 2022).

22. *Id.*

23. *History of Federal Voting Rights Laws*, *supra* note 20.

24. *Id.*

25. *Id.*

26. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301(a).

27. Voting Rights Act of 1965 §§ 4(b), 5, 52 U.S.C. §§ 10303(b), 10304; Jay Michaelson, *Jim Crow Is Back Because John Roberts Let It Happen*, DAILY BEAST (June 4, 2021), https://www.thedailybeast.com/jim-crow-is-back-because-john-roberts-let-it-happen?via=twitter_page [<https://perma.cc/ES8J-PFRT>].

effect.²⁸ This coverage formula would apply to a state or locality that, as of November 1, 1964, had any of the following present in its jurisdiction: the use of a test or device to restrict voting or registration; less than 50% of its voting-age persons being registered voters; or less than 50% participation by its eligible voters in the prior presidential election.²⁹ The goal behind the preclearance standard was simple: target the most culpable states and localities and stop them from passing discriminatory voter legislation before it takes effect.

Section 5 was originally enacted in 1965 as temporary legislation set to expire in 1970.³⁰ However, in the ensuing years, Congress recognized how important preclearance was to ensure the success of the VRA and continuously reauthorized the provision using updated data on voter statistics to support each reauthorization. In 1970, preclearance was extended for an additional five years, and a nearly identical coverage formula was employed³¹ that used updated data from November 1968 as its barometer,³² increasing the number of states subject to preclearance coverage.³³ Congress again extended preclearance in 1975 for an additional seven years,³⁴ using data from November 1972 to support this reauthorization.³⁵

As the seven year preclearance extension neared its expiration, organizations such as the National Association for the Advancement of Colored People (NAACP) and the National Education Association (NEA) began pressuring Congress to reauthorize the VRA's preclearance provisions.³⁶ The House of Representatives primarily focused on the extension of preclearance,³⁷ while the Senate directed its attention to the

28. See *Section 4 of the Voting Rights Act*, U.S. DEPT JUST. (May 5, 2020), <https://www.justice.gov/crt/section-4-voting-rights-act> [<https://perma.cc/53Z6-RTLJ>].

29. Voting Rights Act of 1965 § 4(b), 52 U.S.C. §§ 10303(b)(c).

30. *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013).

31. See *Section 4 of the Voting Rights Act*, *supra* note 28.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1351–52 (1983) (detailing how the NEA organized and sent mail to each of the 435 congressional districts and the NAACP set up telephone banks so members could explain to members of Congress why preclearance was still necessary).

37. See *id.* at 1356–58.

amendments to section 2.³⁸ After much “debate,”³⁹ the Senate compromised, and a twenty-five year extension of preclearance provisions with a more attainable bail-out system for states covered under preclearance was passed.⁴⁰ Time and time again, the legislature was able to collaborate politically in order to reauthorize the VRA, illustrating that it was largely seen as important and necessary on both sides of the aisle.

In 2006, Congress again extended preclearance for another twenty-five years, this time without a new coverage formula.⁴¹ The Senate eventually reauthorized preclearance with a 98–0 vote, and the House of Representatives passed the bill with a vote of 390–33, proving yet again that the VRA was a piece of legislation that Democrats and Republicans alike were willing to cooperate with one another on.⁴² However, even though this reauthorization garnered nearly unanimous approval, resentment for certain provisions was voiced by several lawmakers and later echoed by

38. See *id.* at 1407.

39. See Steven V. Roberts, *Voting Rights Act Renewed in Senate by Margin of 85-8*, N.Y. TIMES (June 19, 1982), <https://www.nytimes.com/1982/06/19/us/voting-rights-act-renewed-in-senate-by-margin-of-85-8.html> [<https://perma.cc/3CWX-5CBG>] (detailing Senator Jesse Helms’ incessant filibustering that caused more than thirty-eight hours of debate that stretched for over a week).

40. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 133 (codified at 52 U.S.C. § 10303(a)(1)(A)–(E)) (codifying that covered jurisdictions could bail out of coverage if for ten years earlier: (1) no test or device has been used with a discriminatory purpose or effect; (2) no federal court has issued a final judgment declaring that the jurisdiction denied or abridged voting rights; (3) the jurisdiction has not entered into any consent decrees, settlements, or agreements that have resulted in abandonment of a challenged voting procedure; (4) no action is then pending at the time the bailout suit is filed alleging that denials or abridgments of the right to vote have occurred anywhere in the jurisdiction; (5) neither the Attorney General nor a court has assigned federal examiners or observers to the covered jurisdiction; (6) the covered jurisdiction has complied with all the preclearance provisions of Section 5 and has not enforced nonsubmitted changes; (7) the Attorney General has made no objection to any submission for preclearance, other than those objections overturned by a court; (8) no court has denied a declaratory judgment action under Section 5 with respect to a submission of a voting change; and (9) no submission to the Attorney General or declaratory judgment actions under Section 5 are pending). Moreover, the jurisdiction seeking to terminate coverage must demonstrate that it and each governmental unit within its geographic territory have taken positive and constructive steps to end voting discrimination by (1) eliminating voting procedures and methods of election that inhibit or dilute equal access to the electoral process; (2) engaging in efforts to eliminate intimidation and harassment of persons exercising rights protected under the Act; and (3) engaging in other constructive efforts, such as expanded opportunity for convenient registration and voting and the appointment of minority persons as election officials. See *id.* § 10303(a)(1)(F).

41. See *id.* § 10303(a)(1)(A)–(E), (8).

42. *Bush Signs Voting Rights Act Extension*, CBS NEWS (July 27, 2006, 10:02 AM), <https://www.cbsnews.com/news/bush-signs-voting-rights-act-extension/> [<https://perma.cc/2AEP-QMQ6>] (explaining that, in spite of Republican reservations, the House passed the amendment 390–33 and the Senate 98–0).

the Supreme Court in the landmark decision *Shelby County v. Holder*.⁴³ Specifically, conservative government officials expressed their disdain for preclearance, believing that the practice of needing “to win Justice Department approval . . . [felt like a] punishment . . . for racist practices that were overcome long ago.”⁴⁴ The Court rendered a decision holding section 4(b) unconstitutional, eliminating the preclearance formula despite glaring evidence found in the massive Congressional Record from the 2006 reauthorization that the preclearance formula was still necessary.⁴⁵ Unfortunately, this decision from our countermajoritarian Supreme Court, comprised of unelected Justices, has since continued to reverse and destroy decades of improvement accomplished by collaborative, elected lawmakers of varying political ideologies.⁴⁶

This dramatic retreat from consistent political will and cooperation in the legislature—grounded in congressional research, findings, and facts—has had catastrophic yet predictable consequences for voters of color in this country. The Supreme Court’s destruction of section 4(b) of the VRA in *Shelby County* effectively rendered section 5 null, making modern-day voter discrimination a legislative free-for-all among states formerly covered under preclearance.⁴⁷ The impact of this new state legislation includes polling places closing in “heavily Black neighborhoods while increasing them in white ones, ending online voter registration, curtailing voting hours, making voting-by-mail harder, requiring photo ID, closing drive-through voting, eliminating drop boxes, empowering partisan poll-watchers to intimidate voters, preventing volunteers from giving voters water while they wait in long lines . . . [and] purging voters from the rolls,” to name a few.⁴⁸

States’ passage of discriminatory voting legislation shows no signs of slowing down. This is because, among many reasons, a concept that would likely be deemed novel and downright

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

44. *Bush Signs Voting Rights Act Extension*, *supra* note 42.

45. See *Shelby Cnty.*, 570 U.S. at 557; *id.* at 565–66 (Ginsburg, J., dissenting).

46. Nikolas Bowie, *How the Supreme Court Dominates Our Democracy*, WASH. POST (July 16, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/07/16/supreme-court-anti-democracy/> [https://perma.cc/6TAE-7VBA].

47. See Jenée Desmond-Harris, *Why Is Section 4 of the Voting Rights Act Such a Big Part of the Fight Over Voting Rights?*, VOX (Feb. 14, 2016, 6:25 PM), <https://www.vox.com/2016/2/14/17619202/voting-rights-fight-explained-key-sections-rights-act> [https://perma.cc/YH7C-VSDR]; Wilder & Baum, *supra* note 4.

48. Michaelson, *supra* note 27.

ridiculous three decades ago now seems to be the position of some who hold an iota of political power: antidiscrimination laws *indulge* minority voters, rather than promote equality. This Article asserts that the solution that has historically proven to combat voter suppression must be employed to remedy this retrogression: political cooperation between our branches of government, political parties, and citizens.

Part II of this Article discusses the Supreme Court majority members from *Shelby County*, their predispositions to the VRA, and how their votes in that decision were foreseeable. Part III considers the predictions made by both the majority and the dissent in *Shelby County* as they related to the ramifications of section 4(b) being deemed unconstitutional. Part IV details the modern-day price that minorities are forced to pay for the *Shelby County* decision, some of the most current discriminatory state voter legislation, and the efforts of certain organizations to continue to fight the battle against voter suppression in this country.

II. THE SUPREME COURT'S EVOLVING DISPOSITION TO THE VOTING RIGHTS ACT

Holding a position as a U.S. Supreme Court Justice provides significant latitude to act according to one's own partialities and dispositions.⁴⁹ Time and again, the Court's decisions and the individual Justice's votes have fallen in line of predictability.⁵⁰ This substantial role played by the Justices only emphasizes the importance of the need for political will in the courts, not just the legislature.

In June 2013, the Supreme Court, in an opinion contrary to the extensive findings of Congress, held that the coverage formula in section 4(b) of the VRA was unconstitutional.⁵¹ An analysis of

49. Andrew J. O'Geen & Christopher M. Parker, *Supreme Court Justices Cooperate Strategically to Strengthen Coalitions*, LSE USAPP (Dec. 22, 2015), <https://blogs.lse.ac.uk/usappblog/2015/12/22/supreme-court-justices-cooperate-strategically-to-strengthen-coalitions/> [https://perma.cc/K6KE-D6BK].

50. Jack Shafer, *Let's Be Real: The Supreme Court Is Political and Always Has Been.*, POLITICO, (Jan. 28, 2022, 12:30 PM) <https://www.politico.com/news/magazine/2022/01/28/supreme-court-is-political-always-has-been-00003224> [https://perma.cc/WDP6-V9PE].

51. *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013); see Richard Hasen, *Symposium: Ginsburg Was a Champion of Voting Rights, but Mostly in Dissent*, SCOTUSBLOG (Sept. 29, 2020, 3:30 PM), <https://www.scotusblog.com/2020/09/symposium-ginsburg-was-a-champion-of-voting-rights-but-mostly-in-dissent/> [https://perma.cc/3XLG-4RU9] (discussing Justice Ginsburg's famous dissent to the Chief Justice Robert's majority opinion in *Shelby County*).

each Justice⁵² reveals that the decision in *Shelby County* was predictable, given the political leanings of each Justice. There were four conservative Justices—Chief Justice John Roberts and Justices Samuel Alito, Antonin Scalia, and Clarence Thomas—and the four more liberal Justices—Justices Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Stephen Breyer. There was also Justice Anthony Kennedy, known as a moderate Justice, who provided the swing vote in close-call decisions. In the end, the four conservative Justices and Justice Kennedy made up the majority that deemed section 4(b) unconstitutional.⁵³ A deeper dive into the history of each individual conservative Justices’ pre-judicial disposition to the VRA reveals that this opposition was both substantial and foreseeable.

Chief Justice John Roberts has a long career opposing and dismantling the VRA, which can be documented back to the early 1980s when he was the Special Assistant to the Attorney General and wrote over twenty memos outlining his perceived shortcomings of it.⁵⁴ In his 1982 memo, Chief Justice Roberts emphasized the careful language of section 2 of the VRA and propounded a narrow application of the effects test in section 5.⁵⁵ He strongly suggested that Congress did not intend for the effects test to be incorporated in section 2.⁵⁶ Instead, he stressed that, per *City of Mobile v. Bolden*,⁵⁷ section 2 of the VRA is intended to mimic the protections of the Fifteenth Amendment and therefore requires purposeful discrimination as proof.⁵⁸ Chief Justice John Roberts’s endorsement of the decision in *City of Mobile*, which made an already difficult test nearly impossible for plaintiffs to satisfy, foreshadowed the way he would vote in future decisions on the Court.⁵⁹

52. See Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, N.Y. TIMES: FIVETHIRTYEIGHT (Mar. 29, 2012, 8:06 PM), <https://archive.nytimes.com/fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/?searchResultPosition=1> [https://perma.cc/P7CF-ZLQG].

53. See *Shelby Cnty.*, 570 U.S. at 532, 557.

54. See Ian Millhiser, *Chief Justice Roberts’s Lifelong Crusade Against Voting Rights, Explained*, VOX (Sept. 18, 2020, 8:00 AM), <https://www.vox.com/21211880/supreme-court-chief-justice-john-roberts-voting-rights-act-election-2020> [https://perma.cc/G9AQ-V3Q4].

55. Memorandum from John Roberts on The Voting Rights Act: Background of the Intent/Effects Issue to the Attorney General (Jan. 22, 1982) (on file with the U.S. Dep’t of Just.).

56. *Id.*

57. See generally *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

58. See Memorandum from John Roberts, *supra* note 55.

59. See *Extension of the Voting Rights Act of 1965: Hearings Before the Subcomm. on Const. Rights of the Comm. on the Judiciary*, 94th Cong. 821 (1975).

Chief Justice Roberts's critique of the VRA escalated once he joined the Supreme Court of the United States.⁶⁰ In 2009, he laid the groundwork for the unraveling of sections 4(b) and 5 in *Northwest Austin v. Holder*.⁶¹ While the Supreme Court refrained from directly addressing the constitutionality of these two provisions, their sentiments in *Northwest Austin* provided fodder for *Shelby County* to undertake the inquiry years later.⁶² Chief Justice Roberts wrote:

The historic accomplishments of the Voting Rights Act are undeniable. When it was first passed, unconstitutional discrimination was rampant, and the “registration of voting-age whites ran roughly 50 percentage points or more ahead” of black registration in many covered States. Today, the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites.⁶³

Chief Justice Roberts stated that section 5 of the VRA, while necessary in 1965, was no longer needed in 2009.⁶⁴ He reasoned that, unlike when *South Carolina v. Katzenbach* and *City of Rome v. United States* were decided,⁶⁵ 2009 had seen improvements in voting conditions, increased equality in voter turnout, and increased registration rates.⁶⁶ Chief Justice Roberts's notion in *Northwest Austin* that “[p]ast success alone . . . is not [an] adequate justification to retain [former] requirements” was unsurprisingly later echoed throughout the majority's decision in *Shelby County*.⁶⁷ His criticisms of the VRA in *Northwest Austin*

60. Adam Bolotin, Comment, *Out of Touch: Shelby County v. Holder and the Callous Effects of Chief Justice Roberts's Equal State Sovereignty*, 49 J. MARSHALL L. REV. 751, 765–68 (2016).

61. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202–11 (2009) (determining that the VRA allows for all political subdivisions to seek exemptions from the preclearance requirement of section 5).

62. *See id.* at 203–05, 211.

63. *Id.* at 196, 201 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966)).

64. *See id.* at 201–03 (arguing that improvements in voting totals by race and voting registration exemplified that portions of the VRA were no longer necessary).

65. In *City of Rome v. United States*, the Supreme Court determined that Congress intended voting practices not to be subject to preclearance unless discriminatory purpose and effect were absent, the VRA did not exceed Congress's power to enforce the Fifteenth Amendment, the VRA did not violate principles of federalism, and the extension of VRA was constitutional. *City of Rome v. United States*, 446 U.S. 156, 172, 177–79 (1980).

66. *Nw. Austin*, 557 U.S. at 202.

67. *See id.* “Those improvements are no doubt due in significant part to the Act itself, and stand as a monument to its success, but the Act imposes current burdens and must be justified by current needs. The Act also differentiates between the States in ways that may no longer be justified.” *Id.* at 193.

became a foundation and central theme in the *Shelby County* decision.⁶⁸ In *Shelby County*, Chief Justice Roberts underscored his 2009 belief that practices must adjust to current needs, stating that “[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”⁶⁹ He condemned the VRA’s coverage formula for being based on statistics from 1965 and for continuing to treat “the Nation . . . [as if it were still] divided along those lines.”⁷⁰ Chief Justice Roberts conveniently failed to properly acknowledge the role that the comprehensive Congressional Record played in Congress’s rationale for the reauthorization.

Justice Alito long opposed the VRA, as evidenced by his time on the U.S. Court of Appeals for the Third Circuit where he joined in the majority opinion of *Jenkins v. Manning*, which held that a method of electing members to a school board did not dilute minority voting strength in violation of section 2 of the VRA.⁷¹ This conclusion was reached despite the belief that plaintiffs satisfied a three-prong test established in *Thornburg*, strongly suggesting that there was indeed a violation.⁷² Justice Alito, like the 2006 lawmakers who raised objections to extending the preclearance provision, believed that southern states should not be treated differently based on their discriminatory actions from decades ago.⁷³

Justice Scalia’s opposition to the VRA in *Shelby County* was similarly unsurprising based on his past work. A law review article written by Justice Scalia in 1979 demonstrated the predictability

68. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529, 536 (2013).

69. *Id.* at 557.

70. *Id.* at 551.

71. See *Jenkins v. Manning*, 116 F.3d 685, 688, 699–700 (3d Cir. 1997); ACLU, REPORT OF THE AMERICAN CIVIL LIBERTIES UNION ON THE NOMINATION OF THIRD CIRCUIT COURT JUDGE SAMUEL A. ALITO JR., TO BE ASSOCIATE JUSTICE ON THE UNITED STATES SUPREME COURT 1, 19 (2005), <https://www.aclu.org/report/aclu-report-nomination-judge-samuel-alito-jr-be-associate-justice-united-states-supreme-court> [<https://perma.cc/XQ9L-E58P>].

72. See *Thornburg v. Giles*, 478 U.S. 30, 50–51 (1986); REPORT OF THE ACLU, *supra* note 71, at 19 (“[T]he minority community [wa]s politically cohesive . . . they [we]re sufficiently numerous and geographically compact to comprise a majority in a single-member district, and . . . white voters generally vot[ed] as a bloc to defeat the minority community’s candidates of choice.”).

73. See *Abbott v. Perez*, 138 S. Ct. 2305, 2324–25 (2018) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)) (writing that when a plaintiff challenges a law as discriminatory, even a state legislature that has displayed a history of discrimination will not shift the burden from plaintiffs to the state); *Bush Signs Voting Rights Act Extension*, *supra* note 42.

of his vote. He wrote: “The affirmative action system now in place . . . is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; that is to say, because it is racist.”⁷⁴ While affirmative action programs and the protections afforded by the VRA are clearly distinguishable, both of these remedial efforts aimed at historical discrimination embody what, in Justice Scalia’s view, is the wrongheaded approach he describes in the very title of his article: *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race.”*⁷⁵ In Justice Scalia’s view, the “racial entitlement” of wanting comparable voting rights is not something that could be deemed constitutional, given that whites did not require (and are therefore not provided) the same “entitlement.”⁷⁶ Accordingly, Justice Scalia’s “entitlement” quote—excerpted at the outset of this Article—reflects a deeply personal thesis and ideological hobbyhorse some thirty-plus years in the making. More pointedly, against a backdrop of rampant real-world discrimination, Justice Scalia’s approach represents head-in-the-sand formalism run amok.

Though he would write no opinion, Justice Kennedy was the crucial decision-maker in *Shelby County*.⁷⁷ Statistically, Justice Kennedy spent his Supreme Court career voting conservative 57% of the time, and for close call decisions he joined the conservative majority over 70% of the time.⁷⁸ This predisposition permeated throughout his comments during the oral arguments, where he focused on a specific burden of the VRA: the cost of the act—financial or otherwise—that states undertook in submitting proposals and developing new plans.⁷⁹ Justice Kennedy’s analysis

74. Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race”*, 1979 WASH. U. L.Q. 147, 154 (1979).

75. See *id.*

76. See Transcript of Oral Argument *supra* note 2, at 46–48 and accompanying text.

77. See Lawrence Norden, *Kennedy’s Swing Vote Cut Both Ways*, BRENNAN CTR. FOR JUST. (June 28, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/kennedys-swing-vote-cut-both-ways> [<https://perma.cc/8P9R-T5N8>].

78. Amelia Thomson-DeVeaux, *Justice Kennedy Wasn’t a Moderate*, FIVETHIRTYEIGHT (July 3, 2018, 5:58 AM), <https://fivethirtyeight.com/features/justice-kennedy-wasnt-a-moderate> [<https://perma.cc/H3SY-P8U2>] (“Since he joined the court in 1988, Kennedy voted in a conservative direction about 57 percent of the time—a record that’s nearly identical to that of Chief Justice John Roberts and only slightly less conservative than Justices Samuel Alito, Antonin Scalia and Clarence Thomas. And in close decisions, Kennedy sided with the conservatives 71 percent of the time.”).

79. Joan Biskupic, *Justice Kennedy: Voting Rights Act Might Now Be Unfair*, ABC NEWS (Apr. 29, 2009, 2:25 PM), <https://abcnews.go.com/Politics/story?id=7462092&page=1> [<https://perma.cc/78NT-N747>].

emphasized how the VRA differentiated the states from one another. He questioned whether Congress’s message was “that the sovereignty of Georgia is less than the sovereign dignity of Ohio, [and whether] the sovereignty of Alabama is less than the sovereign dignity of Michigan?”⁸⁰ Justice Kennedy believed that the principles of federalism were more important than the right for all people to have equal voices in democracy, as also reflected in his opinion in *Citizens United*.⁸¹

Previously, in *Crawford v. Marion County Election Board*, the same Justices who joined the majority opinion in *Shelby County* joined to uphold photo ID requirements, stating that this was a legitimate state interest and best left to the states to legislate on.⁸² In walking the line of predictability, Justices from that 2008 opinion would go on to declare the formula established in section 4(b) of the VRA unconstitutional.⁸³ The predispositions of each Justice and their substitution of their own political ideologies for the sound judgment of Congress brought us to the *Shelby County* decision.

III. SCOTUS DECIDES THAT SCOTUS DECIDES

Alabama—particularly Shelby County—had a “record of persistent and adaptive voting discrimination.”⁸⁴ Congress confirmed this fact in the extraordinary legislative record developed during the 2006 reauthorization period of the VRA.⁸⁵ This record was comprised of findings from twenty-one hearings and over 15,000 pages of evidence regarding ongoing voting discrimination in covered jurisdictions.⁸⁶ One example of this discrimination was Alabama’s lack of elected African American state officials, despite Alabama’s population being over 25% African American.⁸⁷ To be sure, even when African American candidates prevailed in one local election, the mayor refused to

80. *Id.*

81. *See* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349–50 (2010) (highlighting Justice Kennedy’s disapproval of federal government regulation of political speech, despite the potential negative impact on representative democracy).

82. *Compare* *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 181, 203–04 (2008), *with* *Shelby Cnty. v. Holder*, 570 U.S. 529, 532 (2013).

83. *See* *Shelby Cnty.*, 570 U.S. at 557.

84. Brief for Respondent-Intervenors at 47, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

85. *Id.* at 3–4.

86. *Id.*

87. *Id.* at 13–14.

swear them in and the town clerk sued to prevent them from taking office.⁸⁸

During the 2006 reauthorization period, Alabama had 238 discriminatory voting laws blocked or remedied: forty-six by section 5 objections and 192 by section 2 litigation.⁸⁹ Furthermore, in 2008—just five years before the Supreme Court decided *Shelby County*—a city within Shelby County “submitted a redistricting plan that eliminated the sole majority-Black district,” admitted to having implemented 177 annexations without the requisite preclearance, and conceded to having conducted an election with the unapproved changes.⁹⁰ Suffice it to say, Alabama was still plagued by persisting acts of intentional discrimination within its government. Shelby County never outright denied that point—presumably due to the unprecedented volume of evidence in the record supporting it—but still “sued the Attorney General in Federal District Court . . . seeking a declaratory judgment that [sections 4(b) and 5 were] facially unconstitutional, as well as a permanent injunction against their enforcement.”⁹¹

The district court ultimately denied Shelby County’s motion for summary judgment⁹² and deferred to Congress’s reauthorization, holding that “[s]ection 4(b)’s disparate geographic coverage remains ‘sufficiently related’ to the problem that it targets.”⁹³ Therefore, the *Shelby County* district court declined to “overturn Congress’s carefully considered judgment.”⁹⁴ On appeal, the Court of Appeals for the D.C. Circuit affirmed the reasoning of the district court and wrote that it owed “much deference to the considered judgment of the People’s elected representatives.”⁹⁵ Shelby County petitioned the Supreme Court for review and was granted certiorari.⁹⁶

88. *Id.* at 17–18; *see also* Dillard v. Town of N. Johns, 717 F. Supp. 1471, 1475 (M.D. Ala. 1989).

89. Brief for Respondent-Intervenors, *supra* note 84, at 13.

90. *Id.* at 19–20.

91. *Shelby Cnty. v. Holder*, 570 U.S. 529, 540–41 (2013).

92. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011).

93. *Id.* at 507–08 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

94. *Id.* at 508.

95. *Shelby Cnty. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012).

96. *Shelby Cnty.*, 570 U.S. at 542.

A. *The Majority's Predictions*

The issue before the Supreme Court in *Shelby County* was whether there still existed a constitutional basis for the continued use of the coverage formula under section 4(b) of the VRA. The majority determined there was no such basis.⁹⁷ The Court found that section 4(b) was no longer a constitutionally permissible means to solve the still-present but less prevalent issue of voter discrimination in the United States.⁹⁸ The primary issue with the Court's reasoning, however, is that when a system or process starts at a level of inequity, and a level of neutrality is layered on, this inevitably and invariably leads to a perpetuation of baseline inequality.⁹⁹

Furthermore, the Court reasoned that the issues that led to the passage of the VRA were not as pressing in 2013 as they were in the 1960s.¹⁰⁰ The Court similarly viewed the burdens imposed on covered states as a strain on the systems of federalism and the benefits of section 4(b)'s coverage as having run their course.¹⁰¹ In

97. See *id.* at 551 (writing that the coverage formula was “based on decades-old data and eradicated practices”); *id.* at 535 (describing how “the conditions that originally justified these measures no longer characterize[d] voting in the covered jurisdictions”); see also Ilya Shapiro, *Shelby County and the Vindication of Martin Luther King's Dream*, 8 N.Y.U. J.L. & LIBERTY 182, 188 (2013) (“[T]he Court must restore the constitutional order—the *status quo* that existed before the temporary Sections 4 and 5—because there’s no longer systemic racial disenfranchisement.”); Ellen D. Katz, *What Was Wrong with the Record?*, 12 ELECTION L.J. 329, 330 (2013) (arguing that the majority established “what appears to be a new, constitutionally significant line between what we might call contained and extreme unconstitutional conduct”); Wendy B. Scott, *Reflections on Justice Thurgood Marshall and Shelby County v. Holder*, 76 LA. L. REV. 121, 145 (2015) (identifying one of the current conditions that bolstered *Shelby County*’s argument that preclearance was no longer necessary was “the increase in the election of African-American office holders, including an African-American president”).

98. *Shelby Cnty.*, 570 U.S. at 540 (pointing to modern-day improvements such as “[v]oter turnout and registration . . . approach[ing] parity” in covered jurisdictions, “minority candidates hold[ing] office at unprecedented levels,” and how rare “[b]latantly discriminatory evasions of federal decrees” had become) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)); see also Shapiro, *supra* note 97, at 191 (contending that the *Shelby County* decision “underlines, belatedly, that Jim Crow is dead, and that American election law is ready to return to normalcy”).

99. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 918 (1987).

100. See *Shelby Cnty.*, 570 U.S. at 546–47, 551; see also Transcript of Oral Argument, *supra* note 2, at 67–68 (acknowledging that the VRA specifically targeted states with lower African American voter turnout but was implemented to stop the use of blatantly discriminatory devices and the devices were gone).

101. *Shelby Cnty.*, 570 U.S. at 540, 554, 557; see also Transcript of Oral Argument, *supra* note 2, at 12 (Shelby County’s attorney arguing that what happened in Alabama in 1965 does not justify the current burdens of preclearance, especially considering that Alabama now considers those events disgraceful); *id.* at 32 (Chief Justice Roberts pointing out that Massachusetts had a worse record on African American registration and turnout

sum, the Court's rationale was that Congress must examine the current state of the nation rather than use a formula devised in 1965 to combat indirect voter discrimination.¹⁰² Therefore, the Court held that the preclearance formula created when the VRA was originally passed was outdated and declared that if Congress desired to fix another issue with voting rights, a new formula would need to be created with contemporary data.¹⁰³

During oral arguments, Justice Scalia labeled the VRA as a "racial entitlement."¹⁰⁴ In Justice Scalia's view, one of the most transformative pieces of legislation—with a goal of eradicating racist voting practices—was nothing more than an entitlement. It would appear that having equal access to vote and participation in our nation's democracy, at least where the law plays a role in promoting that equality, is an entitlement: much like social security or Medicaid.

Justice Scalia further argued that a court needed to intervene and do what Congress would not do.¹⁰⁵ Without any references or validation, Justice Scalia claimed that "[w]henver a society adopts racial entitlements, it is very difficult to get out of them

than Mississippi at the time of oral argument); *id.* at 23 (Shelby County's attorney stating that neither Illinois nor Tennessee deserved preclearance but had similar records when it came to VRA violations); Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 GEO. J.L. & PUB. POL'Y 561, 565, 571–72 (2007) (arguing that the law violated the constitutional principles of federalism).

102. *Shelby Cnty.*, 570 U.S. at 552–53 ("[H]istory did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the 'current need[]' for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs. The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future."); *see also* Transcript of Oral Argument, *supra* note 2, at 68 (Shelby County's attorney arguing that Congress needed to look at current data rather than data from a different constituency in the 1960s).

103. *Shelby Cnty.*, 570 U.S. at 556–57; *see also* Transcript of Oral Argument, *supra* note 2, at 40 (Justice Alito arguing that under preclearance, violations in covered jurisdictions were treated as "a bigger problem" than in uncovered jurisdictions); *Jurisdictions Previously Covered by Section 5*, U.S. DEPT JUST. (Nov. 29, 2021), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [https://perma.cc/M6GX-VXK M] (providing that Arizona and Virginia were previously covered jurisdictions under the Voting Rights Act prior to *Shelby County*).

104. *See* Transcript of Oral Argument, *supra* note 2, at 46–47 and accompanying text.

105. *See id.*

through the . . . political process[].”¹⁰⁶ He proclaimed that no senator would have voted against the reauthorization of the VRA even if they wanted to.¹⁰⁷ Justice Scalia asserted that whether or not the VRA should be reauthorized is not the kind of question that should be left to Congress, despite Congress being the only body to have ever addressed this question before.¹⁰⁸ Justice Scalia’s opinion also ignored the thousands of pages in the Congressional Record that were produced by the House and the Senate to justify the VRA’s reauthorization.¹⁰⁹

Ignoring the Congressional Record almost completely, the Court held section 4(b) no longer served to respond to the current conditions of voting districts.¹¹⁰ The Court in their decision put the power back to the states to implement their own voting procedures without federal review.¹¹¹ In doing so, the Court placed the fundamental right to vote in jeopardy. *Shelby County* marked the turning point for this essential right and is the foundation for the current legislation that, day by day, removes voting power from the hands of citizens.¹¹²

B. *The Dissent’s Warnings*

The dissenters responded to the majority with predictions and observations of their own. During oral arguments, Justice Kagan reasoned that whether or not racial discrimination had been solved was a question best left answered by Congress, not the Supreme Court.¹¹³ Congress was well within its power when it determined that discrimination was still rampant and

106. *Id.*

107. *See id.* at 47–48 (saying that this was because there was nothing to gain from voting against it, and disapproval may have been unpopular with many of their constituents, especially constituents of color).

108. *Id.* at 47 (“There are certain districts in the House that are black districts by law just about now. And even the Virginia Senators, they have no interest in voting against this.”); *see also* Amy Davidson Sorkin, *In Voting Rights, Scalia Sees a “Racial Entitlement,”* NEW YORKER (Feb. 28, 2013), <https://www.newyorker.com/news/amy-davidson/in-voting-rights-scalia-sees-a-racial-entitlement> [<https://perma.cc/X7EE-K9XL>] (noting that the decision ultimately amounts to “the idea that the Court has to stand in for politicians who, thanks to Section Five [of the VRA], have to answer to black voters”).

109. *See* S. REP. NO. 109-295, at 11–15 (2006).

110. *Shelby Cnty. v. Holder*, 570 U.S. 529, 556–57 (2013).

111. *See id.* at 543–44, 557.

112. *See infra* Section IV.A.1.

113. *See* Transcript of Oral Argument, *supra* note 2, at 66–67 (Justice Kagan stating her belief that the decision of whether racial discrimination had been solved did not fall within the Court’s bailiwick).

reauthorized the VRA to remedy that discrimination.¹¹⁴ In other words, ninety-eight duly elected senators had concluded that the historic data was still relevant and necessary to consider how the federal government should prevent state and local level voter discrimination.

The dissent argued that the majority's handpicked findings from the Congressional Record that illustrated the successes of section 4(b) could not serve as a basis for its destruction.¹¹⁵ While conceding that the record supporting the reauthorization of the VRA in 2006 was less striking than the initial record from 1965, the dissent argued that such a result was to be expected.¹¹⁶ Justice Ginsburg noted that if there had been abundant evidence of discrimination in the 2006 record, there would be "scant reason to renew a failed regulatory regime."¹¹⁷ She further stated that the majority's reasoning was flawed when it strategically used the "increases in voter registration and turnout as if that were the whole story," while blatantly ignoring the glaring Congressional Record which *clearly* established otherwise.¹¹⁸

Justice Ginsburg cautioned that voter discrimination was not gone and that elimination of section 4(b) was likely to cause backsliding.¹¹⁹ Conveniently absent from the majority's opinion was data from the Congressional Record regarding the number of discriminatory changes to voting laws that preclearance had prevented from 1982 to 2004.¹²⁰ During the 2006 reauthorization period, "Congress found [that] there were *more* DOJ objections [to proposed discriminatory voting laws] between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490)."¹²¹ By 2006, the DOJ had blocked over 700 voting changes between then and 1982 and, in that same time frame, "succeeded in more than 100 actions to enforce the [section] 5 preclearance requirements."¹²² Even more strikingly, "Alabama was found to have 'deni[ed] or abridge[d]' voting rights 'on account of race or

114. See Katz, *supra* note 97, at 330 ("Congress was not starting from scratch in 2006. Instead, it was considering whether a remedy everyone agreed had been lawfully imposed should continue.").

115. *Shelby Cnty.*, 570 U.S. at 590 (Ginsburg, J., dissenting).

116. *Id.* at 569 (reasoning that less evidence of discrimination implied that the statute was working and thus justified its reauthorization).

117. *Id.*

118. *Id.* at 580.

119. See *id.* at 576–77.

120. *Id.*

121. *Id.* at 570–71.

122. *Id.* at 571.

color’ more frequently than nearly all other States in the Union.”¹²³ The dissent concluded that this data suggested that the state of voting rights in covered jurisdictions without preclearance would be dramatically different.¹²⁴ By striking section 4(b)’s coverage provision, Justice Ginsburg contended that the majority recklessly disregarded Congress’s determination that there was a need to reinforce the improvements already made to prevent backsliding¹²⁵ and warned that the possibility “of retrogression was real.”¹²⁶ The preposterous nature of the majority’s decision was not lost on the dissenters. As Justice Ginsburg famously noted, “Throwing 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.”¹²⁷

Justice Ginsburg additionally explained that “[s]econd-generation barriers¹²⁸ come in various forms.”¹²⁹ Examples of these blockages include racial gerrymandering,¹³⁰ “adoption of . . . at-large voting in lieu of district-by-district voting, [and] discriminatory annexation [via] 71ncorporate[ion of] majority-white areas into city limits.”¹³¹ She highlighted the Court’s long-held view that vote dilution, when adopted with discriminatory intentions, “cuts down the right to vote as certainly as denial of access to the ballot,” underscoring her point that these unobtrusive measures taken by states to promulgate the same discriminatory outcome do in fact yield the same effect and result.¹³² As such, she illustrated that the “structural and institutional approaches” required to combat discrimination must also respond to the different “manners in which [that

123. *Id.* at 582 (quoting 42 U.S.C. § 1973(a)) (alterations in original).

124. *Id.* at 573.

125. *Id.* at 576–77.

126. *Id.* at 590 (analogizing the majority’s decision to strike down section 4(b) to “throwing away your umbrella in a rainstorm because you are not getting wet”).

127. *Id.*

128. Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 78 (2010) (describing various “voting barriers that do not bar minorities from the political process in a wholesale way but prevents the full participation of minorities in the political process”).

129. *Shelby Cnty.*, 570 U.S. at 563 (Ginsburg, J., dissenting).

130. Bridgette Baldwin, *Backsliding: The United States Supreme Court, Shelby County v. Holder and the Dismantling of Voting Rights Act of 1965*, 16 TUORO L.J. RACE, GENDER, & ETHNICITY & BERKELEY J. AFR.-AM. L. & POL’Y, 2015, at 253.

131. *Shelby Cnty.*, 570 U.S. at 563–64 (Ginsburg, J., dissenting); *see also* Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181, 1219 (2021).

132. *Shelby Cnty.*, 570 U.S. at 564 (Ginsburg, J., dissenting).

discrimination] might present itself.”¹³³ Consequential to the majority throwing out section 4(b) and “mak[ing] no genuine attempt to engage with the massive legislative record that Congress assembled,”¹³⁴ the dissent claimed that the majority left minority voters vulnerable to second-generation barriers¹³⁵ that would either deprive them of their right to vote or dilute their vote.¹³⁶

The dissent further predicted that the concept of invalidating discriminatory legislation via case-by-case litigation would be “inadequate to the task.”¹³⁷ Reflected in the Congressional Record was evidence that section 2 of the VRA would be an “inadequate substitute for preclearance in the covered jurisdictions” because of the potential for an illegal scheme to be in place for multiple election cycles before evidence could be compiled to challenge it, and the heavy financial burden litigation places on minority voters.¹³⁸ As such, the dissent believed that section 4(b) would still be necessary to combat residual voter discrimination in a timely and efficient manner.

Despite the majority in *Shelby County* predicting that the nation would have sufficient protections and opportunity to address voter discrimination, the dissent concluded that the issue of racial discrimination was not solved; it simply took on new forms.¹³⁹ Congress can certainly create laws to combat such practices—they had already done so by reauthorizing the VRA’s provisions in 2006—but the majority’s assertion that Congress could combat discriminatory voter laws by using a formula that

133. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Pathological Racism, Chronic Racism & Targeted Universalism*, 109 CAL. L. REV. 1107, 1137 (2021) (discussing Justice Ginsburg’s dissent in *Shelby County*).

134. *Shelby Cnty.*, 570 U.S. at 580 (Ginsburg, J., dissenting).

135. Katz, *supra* note 97, at 331 (“[T]he practices grouped as ‘second generation’ are not unrelated to the concerns that first animated Congress to enact the VRA. They were part and parcel of the practices the original statute targeted. The Supreme Court itself recognized as much in 1969. Justice Harlan disagreed at the time, and Justices Thomas and Scalia would do so later, but a majority of the Court has repeatedly recognized congressional intent for the VRA to apply to these practices and confirmed Congress’s power to deploy the VRA in this way.”).

136. *See Shelby Cnty.*, 570 U.S. at 566 (Ginsburg, J., dissenting).

137. *Id.* at 561 (explaining that Congress had learned as much from its past legislative attempts and failures).

138. *Id.* at 572.

139. *See* Peter Halewood, *Any Is Too Much: Shelby County v. Holder and Diminished Citizenship*, 16 TUORO L.J. RACE, GENDER, & ETHNICITY & BERKELEY J. AFR.-AM. L. & POL’Y, 2015, at 66–67 (writing that the majority overlooked carefully documented records of recent and ongoing discrimination against minority voters in jurisdictions covered under the VRA’s section 4 preclearance formula).

was evidence based was ironically undermined by its own decision.¹⁴⁰

What Justice Ginsberg argued in dissent is supported by Congress's extensive legislative record from the 2006 reauthorization of the VRA.¹⁴¹ A similar record was produced each time the VRA was up for reauthorization in the past, and the Court had never raised an issue.¹⁴² The findings within the report indicated much of what Justice Ginsberg stated in her dissent: preclearance requirements were effective and should be kept in place.¹⁴³

Additionally, Justice Ginsburg properly emphasized Congress's discretion to enforce the Civil War Amendments broadly.¹⁴⁴ When examining whether a law passed by Congress intended to protect the right to vote and prevent against racial discrimination, the Court must ask only whether the means selected by Congress are rational and appropriate to achieve the goals of the legislation.¹⁴⁵ The government must only meet this rational basis test to pass the reauthorization,¹⁴⁶ and Justice Ginsburg stated that the extensive legislative record, the nature of the limitations within the original act, and the fact that the Court should have expected the newer record to be weaker was enough to survive this challenge.¹⁴⁷

The predictions made by Justice Ginsberg in her dissent have proven unfortunately accurate in the years since the decision. Post-*Shelby County*, a wave of restrictive voting laws began to unfold and dismantle the work that was previously done to protect voting rights.¹⁴⁸ *Shelby County* propelled forward an era in which courts and legislatures both seemingly lacked political will to protect a fundamental right.

140. *Shelby Cnty.*, 570 U.S. at 567–69 (Ginsburg, J., dissenting).

141. *See, e.g.*, S. REP. NO. 109-295, at 10–15 (2006) (consisting of testimony from ninety-two different witnesses and over 15,000 pages of evidence. The record includes statistics, court findings, expert testimony, and firsthand accounts of real-world voter discrimination).

142. *Id.* at 7; *Shelby Cnty.*, 570 U.S. at 531 (Ginsburg, J., dissenting).

143. *See* S. REP. NO. 109-295, at 35.

144. *Shelby Cnty.*, 570 U.S. at 567–68 (Ginsburg, J., dissenting).

145. *Id.* at 568–69.

146. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (“Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”).

147. *Shelby Cnty.*, 570 U.S. at 569 (Ginsburg, J., dissenting).

148. *See infra* Section IV.A.

IV. UMBRELLAS AND FIREHOSES

Beginning on June 25, 2013—the day *Shelby County* was decided—the dissent’s warnings proved accurate. To borrow Justice Ginsburg’s metaphor, the Supreme Court removed the umbrella and voting rights got soaked, not by rain but by hostile firehoses aimed directly at the franchise.¹⁴⁹ The volume of voting legislation both introduced and passed since that decision has risen dramatically. These facts have, regrettably, proven the dissent correct; retrogression has occurred.

A. *Modern Voter Suppression*

In 2019, the progressive Voting Rights Alliance compiled a list of sixty-one ways that voter suppression can occur, such as lacking disability accessibility and gerrymandering.¹⁵⁰ The *Shelby County* decision “opened the floodgates . . . of Republican-led voter suppression that ha[s] disproportionately affected communities of color.”¹⁵¹ Pre-*Shelby County*, section 5 was an effective tool used to fight discrimination.¹⁵² Post-*Shelby County*, the absence of section 5 protection has been the driving factor behind the since-implemented discriminatory voting practices of covered states.¹⁵³

1. *State Legislation.* States that were subject to preclearance under the VRA pre-*Shelby County*—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—were suddenly permitted to have voting restrictions free from federal oversight.¹⁵⁴ Many of these

149. See *supra* note 127 and accompanying text.

150. Barbara Arnwine, *61 Forms of Voter Suppression*, VOTING RTS. ALL. (2019), <https://www.votingrightsalliance.org/forms-of-voter-suppression> [https://perma.cc/XV67-BRFQ] (last visited Sept. 21, 2022).

151. Michaelson, *supra* note 27.

152. See Transcript of Oral Argument, *supra* note 2, at 29 (calling preclearance a very effective restraint and deterrence).

153. See *id.* (calling section 5 preclearance the principal engine to stop state discriminatory voting practices); *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [https://perma.cc/6255-AFQ3].

154. See P.R. Lockhart, *How Shelby County v. Holder Upended Voting Rights in America*, VOX, <https://www.vox.com/policy-and-politics/2019/6/25/18701277/shelby-county-v-holder-anniversary-voting-rights-suppression-congress> [https://perma.cc/EDS2-BHVL] (June 25, 2019, 7:49 PM) (“The *Shelby* ruling released nine states—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—from the previous preclearance coverage formula. The ruling also affected some counties and

restrictions included voter identification laws, cutbacks to early voting, and poll closures.¹⁵⁵ Previously covered states have also purged voters off of their rolls at a higher rate than noncovered jurisdictions.¹⁵⁶ “Before the *Shelby County* decision, [s]ection 5 of the Voting Rights Act” would have curbed these changes by preclearance laws.¹⁵⁷ Additionally, the threat of bringing suit via section 2 of the VRA has predictably not proven to be a strong enough deterrent.¹⁵⁸

This lack of protection for minorities and absence of political cooperation between political parties has only become more tumultuous. In 2021, nearly 90% of all voting laws proposed or enacted “were sponsored primarily or entirely by Republican legislators.”¹⁵⁹ According to the Brennan Center for Justice, “As of January 14, [2022,] legislators in at least 27 states have introduced, pre-filed, or carried over 250 bills with restrictive provisions.”¹⁶⁰ Voter identification laws became the second most popular form of legislation behind only absentee voting,¹⁶¹ including twenty-eight new laws passed by seventeen states as of June 21, 2022.¹⁶² These laws disfavor IDs African American voters are most likely to possess, such as Medicaid and student ID cards. Meanwhile, identification cards that white people have wide access to, such as concealed carry permits and hunting licenses,

townships in California, Florida, Michigan, New York, North Carolina, and South Dakota.”).

155. Max Feldman, *Voting Rights in America, Six Years After Shelby v. Holder*, BRENNAN CTR. FOR JUST. (June 25, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voting-rights-america-six-years-after-shelby-v-holder> [https://perma.cc/7KWA-JZD3].

156. Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CTR. FOR JUST. (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds> [https://perma.cc/HA8V-CSE9] (showing that previously covered jurisdictions purged voters at rates between 2–3% higher than noncovered jurisdictions between 2013 and 2018).

157. *Id.*

158. Douglas M. Spencer & Christopher S. Elmendorf, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2157 (2015).

159. See Geoffrey Skelley, *How the Republican Push to Restrict Voting Could Affect Our Elections*, FIVETHIRTYEIGHT (May 17, 2021), <https://fivethirtyeight.com/features/how-the-republican-push-to-restrict-voting-could-affect-our-elections> [https://perma.cc/FPJ5-UGND].

160. *Voting Laws Roundup: February 2022*, BRENNAN CTR. FOR JUST. (Feb. 9, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022?_ga=2.146907441.760237453.1649009043-2084202985.1630522243 [https://perma.cc/2SZZ-3QQC] [hereinafter *Voting Laws Roundup February*].

161. *See id.*

162. *Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> [https://perma.cc/L5C7-Y2UM] [hereinafter *Voting Laws Roundup May*].

are acceptable forms of ID for voting privileges.¹⁶³ Some voter identification laws also require IDs to have residential addresses, even for those living on tribal reservations—which may not have traditional street names—and, therefore, would be deemed an unacceptable residential address.¹⁶⁴ Further, exact match laws require that names on voter identification match their counterparts on the voter rolls, including trifling differences, such as spacing.¹⁶⁵ What was required to pass the VRA in the first place is what this country is missing—and so desperately needs—in order to ensure equality among all voters: “The drive to make our democracy a national mission again.”¹⁶⁶

While these restrictive laws would also have been struck down by the VRA’s preclearance prior to *Shelby County*,¹⁶⁷ states have since been able to enact legislation that leaves citizens with little recourse. Some examples include: Alabama restricting disability access to ballots and absentee voting;¹⁶⁸ Arkansas restricting provisional ballots and enforcing voter identification laws;¹⁶⁹ and, after the Supreme Court’s 2021 decision in *Brnovich v. Democratic National Committee*,¹⁷⁰ Arizona can, *inter alia*, ban

163. See Mark Niesse, *Georgia Absentee ID Law Has Outsized Impact on Black and Metro Voters*, ATLANTA J.-CONST. (June 1, 2021), <https://www.ajc.com/politics/georgia-absentee-id-law-has-outsized-impact-on-black-and-metro-voters/ZFAZVG46EZEL5MUICUQI6SHQ44> [<https://perma.cc/Q9K2-3MNB>] (stating that African American voters are much less likely to have a state ID number matched to their voter registrations); Rebecca Leber, *In Texas, You Can Vote with a Concealed Handgun License—but Not a Student ID*, NEWREPUBLIC (Oct. 20, 2014), <https://newrepublic.com/article/119900/texas-voter-id-allows-handgun-licenses-not-student-ids> [<https://perma.cc/VG46-RRNP>]; *Voter ID Laws*, NCSL (July 18, 2022), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/R6KG-ZA33>].

164. Matt Vasilogambros, *For Some Native Americans, No Home Address Might Mean No Voting*, PEW CHARITABLE TRS. (Oct. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/04/for-some-native-americans-no-home-address-might-mean-no-voting> [<https://perma.cc/3YYC-UFZD>].

165. Ted Enamorado, *Georgia’s ‘Exact Match’ Law Could Potentially Harm Many Eligible Voters*, WASH. POST (Oct. 20, 2018, 7:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/20/georgias-exact-match-law-could-disenfranchise-3031802-el-igible-voters-my-research-finds/> [<https://perma.cc/53JE-MUFB>].

166. Michael Waldman, *The Push to Restrict Voting Rights Continues*, BRENNAN CTR. FOR JUST. (Feb. 9, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/push-restrict-voting-rights-continues> [<https://perma.cc/Q9HP-XNC2>].

167. Morris, *supra* note 156.

168. *Alabama Challenged in Court for Denying Accessible Absentee Voting Ballots to the Blind and People with Print Disabilities*, S. POVERTY L. CTR. (June 8, 2022), <https://www.splcenter.org/presscenter/alabama-challenged-court-denying-accessible-absentee-voting-ballots-blind-and-people> [<https://perma.cc/P6LH-CSY2>].

169. *Long List of New Election Laws Taking Effect*, ARK. SENATE (July 21, 2021), <https://senate.arkansas.gov/senate-news/posts/2021/july/long-list-of-new-election-laws-taking-effect> [<https://perma.cc/XY5R-HA7Y>].

170. See generally *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

absentee ballot collecting “by anyone other than a relative or caregiver.”¹⁷¹ Moreover, in some jurisdictions, valid ballots mistakenly filed in the wrong precinct can now be disqualified, rather than rectified.¹⁷² The reason given by the Supreme Court in *Brnovich*: “Mere inconvenience cannot be enough to demonstrate a violation of § 2.”¹⁷³ In other words, states should not have to wait for fraud to occur to take steps to prevent it, especially not for something like the trivial impact on minority voters. The *trivial* impact includes polling places closing “in heavily Black neighborhoods while increasing them in white ones, ending online voter registration, curtailing voting hours, making voting-by-mail harder, requiring photo ID, closing drive-through voting, eliminating drop boxes, empowering partisan poll-watchers to intimidate voters, preventing volunteers from giving voters water while they wait in long lines (which matters more if polling places have been shuttered), [and] purging voters from the rolls”—these being only the tip of the iceberg.¹⁷⁴ These actions being upheld for the sake of fraud prevention appear tenuous in light of examples like that of “[Texas Attorney General] Ken Paxton spen[d]ing 22,000 hours trying to find fraud[] and [discovering just] 16 false registrations out of 11 million voters.”¹⁷⁵ In fact, many who oppose these restrictive voter laws believe that Republican legislators have “done pretty much everything they can to violate the Voting Rights Act” and get away with it too because they are safeguarded by the likelihood of their law being reviewed by Republican courts.¹⁷⁶

From 2020 to 2036, “the percentage of eligible voters who identify as nonwhite in Texas [is projected to] grow from 50 to 60 percent, in Georgia from 43 to 50 percent, [and] in Arizona from 38 to 48 percent.”¹⁷⁷ As these percentages grow, Republicans will

171. Nina Totenberg, *The Supreme Court Deals a New Blow to Voting Rights, Upholding Arizona Restrictions*, NPR (July 1, 2021, 4:37 PM), <https://www.npr.org/2021/07/01/998758022/the-supreme-court-upheld-upholds-arizona-measures-that-restrict-voting> [https://perma.cc/8F7J-7GGS] (stating that the laws at issue were: valid in-person votes cast in the wrong precinct would no longer be counted and mail-in ballots could only be collected by an election official, mail carrier, or member of the voter’s household or family, not ballot harvesters).

172. *See id.*

173. *Brnovich*, 141 S. Ct. at 2338.

174. Michaelson, *supra* note 27.

175. *Id.* (quoting Ari Berman).

176. *Id.*

177. Thomas B. Edsall, *How Far Are Republicans Willing to Go? They’re Already Gone*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/opinion/us-democracy-republicans.html>? [https://perma.cc/ZL8P-NEWU].

undoubtedly continue to be put under mounting political pressure by their counterparts and constituents to enact legislation that further restricts the registration and voting of minorities.¹⁷⁸ New legislation as a result of this growing political pressure has only increased in volume and frequency. For example, in Georgia, one of the most contested states in the 2020 election where Joe Biden won by a mere 11,779 votes,¹⁷⁹ “[m]ore than 272,000 registered voters [now] lack the forms of identification that are newly required to cast absentee ballots.”¹⁸⁰ Of those, the majority are unsurprisingly Black voters.¹⁸¹ Georgia’s new voting laws also prohibit “the use of provisional ballots by voters who show up at the wrong precinct before 5 p.m. on Election Day.”¹⁸² These laws have had a drastic impact on out-of-precinct voters, as they make up about 44% of the provisional ballots.¹⁸³ These new laws additionally reduced the number of drop boxes from ninety-four, in the 2020 election, to just twenty-three drop boxes.¹⁸⁴ New legislation in Georgia also eliminates or limits sending mail ballot applications to voters who do not specifically request them, limits early voting days and hours, and even bans distributing snacks and water to voters waiting in line.¹⁸⁵ The state legislature has also increased its power to suspend county officials and appoint temporary replacements.¹⁸⁶ These bills have effectively transformed the historically ceremonial act of certifying elections into a hyper-politicized event. State legislatures stripping power from their prospective executive branches politicizes and endangers the administration of free elections. Democracy itself is already at stake in Georgia, and without substantial federal

178. *Id.*

179. *See, e.g., Georgia Election Results 2020*, NBC NEWS, <https://www.nbcnews.com/politics/2020-elections/georgia-results> [<https://perma.cc/QN83-Q9Z5>] (last visited Sept. 22, 2022).

180. Nick Corasaniti, *How a Defunct Federal Provision Helped Pave the Way for New Voting Restrictions*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2021/08/26/us/politics/voting-restrictions.html> [<https://perma.cc/7ZZC-UL25>].

181. *See id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Wilder & Baum, *supra* note 4; Mark Niesse, *Bills to Limit Georgia Voting Access Reach Legislative Endgame*, ATLANTA J.-CONST. (Mar. 9, 2021), <https://www.ajc.com/politics/bills-limiting-georgia-voting-access-reach-legislative-endgame/M5KCY4LWRFCNXJQE B4ZO3ORGYY/> [<https://perma.cc/D74A-RAF3>].

186. S.B. 202, 156th Gen. Assemb., Reg. Sess. (Ga. 2021).

legislation protecting voting rights, democracy will continue to be imperiled by Republican-led voting laws.¹⁸⁷

Rob Griffin, Ruy Teixeira, and William Frey believe that both Millennials and Generation Z “appear to be far more Democratic leaning than their predecessors were at the same age.”¹⁸⁸ Even if they become more conservative, it may not be the same conservatism from previous generations. As a result, “the underlying demographic changes [that] our country is likely to experience over the next several elections generally favor the Democratic Party.”¹⁸⁹ Perhaps more distressing than preventing citizens from casting their vote, Republicans have passed and continue to propose laws that subject elections to partisan pressures. Bills introduced this year strip state executive branches of the task of administering elections and reassign this task to the legislatures.¹⁹⁰ These bills have and will continue to create a higher probability of partisan election meddling.¹⁹¹

Perhaps the most egregious and threatening state legislation to our democracy and the administration of fair elections post-*Shelby County*: legislation that vests its officials with authority that offers them opportunities to alter election results.¹⁹² Per the Brennan Center for Justice, “Nineteen bills in seven states have been introduced that would politicize elections administration in a manner that could open the door to election sabotage.”¹⁹³ As a trend that started becoming popular in state legislatures in 2021, there are three main types of this dangerous legislation. The first kind is legislation that removes election officials for, among other things, “failure to perform official election duties” or for a “less than satisfactory performance.”¹⁹⁴ This type of legislation is especially alarming as it allows for more partisan officials to replace professional election officials and potentially manipulate election results.¹⁹⁵ The second kind of legislation transfers authority from professional election officials

187. See Wilder & Baum, *supra* note 4.

188. Edsall, *supra* note 177 (quoting Griffin, Teixeira, and Frey).

189. *Id.*

190. STATES UNITED DEMOCRACY CTR., A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION 3–4, 8 (2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/04/FINAL-Democracy-Crisis-Report-April-21.pdf> [<https://perma.cc/AS6H-Z2KU>].

191. *Id.* at 4.

192. *Voting Laws Roundup February*, *supra* note 160.

193. *Id.*

194. *Id.* (quoting S.B. 459 (Va. 2022)).

195. *Id.*

to different officials, again leaving room for more partisan actors to interfere with and alter elections.¹⁹⁶ The third kind of legislation establishes election oversight commissions and agencies that, although seemingly well intentioned, are designed to perpetuate false claims of voter fraud and “election denialism” by tasking these entities with supervising elections for issues with “integrity.”¹⁹⁷ While any of the above mentioned types of legislation may look facially neutral, make no mistake: this is a clear Republican-led mission to “[c]hange the rules” and “change the referees” in order to achieve their desired result.¹⁹⁸

2. *Federal Legislative Attempts to Combat Voter Suppression.* Congressional Democrats have begun fighting for voting rights within the legislative chambers because the fight for increased voting rights has been consistently lost in the courts.¹⁹⁹ Since the Supreme Court dismantled the VRA in *Shelby County*, Congress has failed to address these residual issues of voter suppression.²⁰⁰ Democrats in Congress have consistently sought, unsuccessfully, to pass laws that will both protect voting rights and survive constitutional challenges.²⁰¹ The Voting Rights Advancement Act, For the People Act, and Freedom to Vote Act are examples of Congress’s attempts to do so and are clear indications that the task is a nearly impossible one, due to, among other things, politicians employing filibusters as a guise for their lack of political will to combat modern-day disenfranchisement.

The For the People Act of 2021 (HR 1) passed the House of Representatives but failed to reach cloture in the Senate.²⁰² HR 1 was considered by some a poor match for the moment, as some speculated that it sought to accomplish more than what was

196. *Id.*

197. *Id.*

198. *Tracking the Trend of Election Deniers Running for Statewide Office in 2022*, STATES UNITED DEMOCRACY CTR. (July 28, 2022), <https://statesuniteddemocracy.org/resources/replacingtherefs> [<https://perma.cc/49MS-JQX3>].

199. Reid J. Epstein & Nick Corasaniti, *Inside Democrats’ Scramble to Repel the G.O.P. Voting Push*, N.Y. TIMES (Oct. 14, 2021), <https://www.nytimes.com/2021/05/07/us/politics/democrats-republican-voting-rights.html> [<https://perma.cc/SZZ6-JHWD>].

200. See Marisa A. O’Gara, *The Independent Citizen Commission: Our Best Chance at Ending Racial Gerrymandering and Restoring the Promise of the Voting Rights Act of 1965*, 30 CORNELL J.L. & PUB. POL’Y 179, 184–85, 188–89 (2020).

201. See *id.*; see, e.g., *infra* text accompanying note 207.

202. For the People Act of 2021, H.R. 1, 117th Cong. (2021); see also Nick Corasaniti, *Democrats Vow to Redouble Voting Push: ‘Today Is the Starter Pistol’*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/06/22/us/politics/voting-rights-bill-democrats.html> [<https://perma.cc/4SJX-V6VB>].

realistic and practical.²⁰³ HR 1 also failed to address some of the clearest threats to democracy, such as state officials having the ability to overturn election results.²⁰⁴ *Shelby County* has led to a demonstrable increase in legal actions against states, costs to monitor and pursue litigation over voting restrictions, and laws restricting the right to vote.²⁰⁵ It has also stripped voting rights activists of their most powerful tool in preventing voter suppression: eliminating discriminatory legislation before it ever becomes a law.²⁰⁶

House Democrats have since introduced and attempted to pass an amendment of the VRA: the John Lewis Voting Rights Advancement Act of 2019. The Act was passed in the House on August 24, 2021, by a vote of 219 to 212.²⁰⁷ According to political scientists, this bill was Congress's long overdue response to *Shelby County*.²⁰⁸ It required "states and localities that had 15 or more violations in the past 25 years [to obtain] preclearance from Washington before any changes to voting laws [took] effect."²⁰⁹ The John Lewis Voting Rights Advancement Act was backed by all fifty Democratic senators, including Senator Joe Manchin III of West Virginia, who was the only Democrat that did not endorse HR 1.²¹⁰

The bill proposed to create a coverage formula that applied to all states, rather than the states exclusively targeted by the VRA.²¹¹ It also provided a mechanism for states to exit coverage.²¹²

203. See Nick Corasaniti, *Republicans Use Filibuster to Block Voting Rights Bill*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/live/2021/06/22/us/joe-biden-news> [https://perma.cc/A3MF-BZ59].

204. Andrew Prokop, *Democrats' Doomed Voting Bill Is Too Broad to Pass – and Not Broad Enough to Work*, VOX (June 8, 2021, 8:00 AM), <https://www.vox.com/2021/6/8/22521563/manchin-hr1-s1-for-the-people-act> [https://perma.cc/GGH9-4TCC].

205. Lockhart, *supra* note 154.

206. *Id.*

207. See Juana Summers, *The House Has Passed a Bill to Restore the Voting Rights Act*, NPR (Aug. 24, 2021, 7:15 PM), <https://www.npr.org/2021/08/24/1030746011/house-passes-john-lewis-voting-rights-act>. [https://perma.cc/R653-ALL7].

208. Kate Ackley, *5 Things to Know About the Voting Rights Bill Named for John Lewis*, ROLL CALL (Aug. 31, 2021, 5:30 AM), <https://www.rollcall.com/2021/08/31/5-things-to-know-about-the-voting-rights-bill-named-for-john-lewis> [https://perma.cc/Y9VE-AXGU]; Eliza Sweren-Becker, *Filling the Voting Rights Hole Left by SCOTUS in Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (June 22, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/filling-voting-rights-hole-left-scotus-shelby-county-v-holder> [https://perma.cc/CV5Q-65YN].

209. See Ackley, *supra* note 208.

210. Carl Hulse, *As Democrats Renew Voting Rights Push, Offsetting Roberts Court Is Top of Mind*, N.Y. TIMES (Aug. 21, 2021), <https://www.nytimes.com/2021/08/21/us/politics/democrats-voting-rights-supreme-court.html> [https://perma.cc/V8WU-M34Z].

211. See Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019).

212. See *id.*

This coverage formula would ensure that the Act would keep up with current conditions and concerns, while not unfairly targeting states for their past actions.²¹³ Under the proposed Act, eleven states would be subject to preclearance: Alabama, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, Texas, and Virginia.²¹⁴ While these formulas would relieve some of the reservations expressed by the Court in *Shelby County*, the Court could certainly still strike down these proposals.

The Senate additionally introduced the Freedom to Vote Act on September 14, 2021.²¹⁵ The Freedom to Vote Act was intended to be a comprehensive baseline standard for voting access while also providing the reform needed to tackle partisan gerrymandering and issues with campaign finances.²¹⁶ The Act provided an expansion on “[o]pportunities to [v]ote,” countered “voter suppression,” prevented “election sabotage,” enhanced “[r]edistricting [r]eform,” modernized “voter registration,” and promoted “election security.”²¹⁷

On January 13, 2022, the House passed HR 5746, which was a combination of the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act.²¹⁸ Through technical congressional procedures,²¹⁹ the bill was debated on the Senate floor on January 19.²²⁰ The bill ultimately failed to reach cloture by a yea-nay vote of 49–51.²²¹ The more damning defeat, however, occurred alongside that vote as the Senate Democrats failed to

213. See *id.* (explaining that states can come out of coverage if they have a clean record and work with the federal government on many fronts to ensure their election practices are not discriminatory).

214. See Nick Thieme & Mark Niesse, *U.S. House Bill Would Restore Voting Rights Act Protections*, ATLANTA J.-CONST. (Dec. 13, 2019), <https://www.ajc.com/news/national-government/politics/house-bill-would-restore-voting-rights-act-protections/a8puSjWxWtjhUPS4TwDogO/> [<https://perma.cc/5532-XDLL>].

215. S. 2747, 117th Cong. (2021).

216. *The Freedom to Vote Act*, BRENNAN CTR. FOR JUST. (Jan. 4, 2022), <https://www.brennancenter.org/our-work/research-reports/freedom-vote-act> [<https://perma.cc/Q8UV-CQ5Z>].

217. *Id.*

218. See Grace Panetta, *What's in the Major Voting Rights Bill that Senate Republicans Voted to Block*, BUS. INSIDER (Jan. 20, 2022, 11:12 AM), <https://www.businessinsider.com/freedom-to-vote-act-john-lewis-voting-rights-bill-explainer-2022-1> [<https://perma.cc/SCL5-BFL3>].

219. *Id.*

220. H.R. 5746, 117th Cong. (2022).

221. Lisa Mascaro, *Voting Bill Collapses, Democrats Unable to Change Filibuster*, AP NEWS (Jan. 19, 2022), <https://apnews.com/article/biden-voting-rights-bill-collapses-27c888b4f9bf876520913d7036a942b0> [<https://perma.cc/NUL3-Y3KN>].

garner the requisite support to change the highly controversial filibuster rules of the Senate.²²² All fifty Republican senators, alongside democratic Senators Joe Manchin and Kyrsten Sinema, voted against changing the filibuster rules.²²³ The elimination of the filibuster was the Democrats' last real hope in getting voting rights legislation passed through this Congress, as there seems to be no feasible scenario where they would be able to attain sixty votes.²²⁴

As Republicans prepare to further suppress the right to vote, voting rights advocates are exploring other avenues to protect this fundamental right.²²⁵ When asked about the failure of the Senate to pass any meaningful voting rights legislation, President Biden ensured he would “explore every measure and use every tool at our disposal to stand up for democracy.”²²⁶ Many are now looking to the courts for assistance, as evidenced by the DOJ filing lawsuits in Georgia and Texas.²²⁷ However, it is unfortunately predictable how these cases will be decided if argued in front of the current Supreme Court.²²⁸ Furthermore, Democrats may have to turn to aggressive organizational efforts at the state level to protect the right to vote.²²⁹ These organizational efforts would likely consist of voter registration initiatives, voter turnout programs, and voter education.²³⁰ These initiatives are likely to be costly and less effective than sweeping federal legislation.²³¹ However, with scant political cooperation and will to compromise in our current Congress, voting rights advocates seem to be left with no other options.

222. Carl Hulse, *After a Day of Debate, the Voting Rights Bill Is Blocked in the Senate*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html> [<https://perma.cc/9XS5-Y65T>].

223. Mascaro, *supra* note 221.

224. Hulse, *supra* note 222.

225. See Nick Corasaniti, *What Happens with Voting Rights Now?*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/interactive/2022/01/20/us/politics/voting-restrictions-laws.html?shared=1> [<https://perma.cc/44Q7-L6HE>].

226. Mascaro, *supra* note 221 (quoting President Joseph R. Biden).

227. Corasaniti, *supra* note 225.

228. See *generally* *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

229. See Corasaniti, *supra* note 225.

230. *Id.*

231. *Id.*

B. 2021–2022 Tracking Efforts

Republicans and other opponents of the VRA seem to believe that America is no longer in a place where its protections are necessary.²³² Democrats and other supporters of the VRA have been fighting a seemingly uphill battle both in Congress and in the courts. Congressional Democrats have been stymied in attempts to pass voting legislation.²³³ Democrats have also been dealt substantial losses in the courts, particularly by the current conservative Supreme Court.²³⁴ With the struggles that Democrats face in Congress and in the courts, the work that advocacy groups contribute has become increasingly important.

These advocacy groups pressure elected officials, spread awareness about voting rights battles, and pursue lawsuits nationwide. Groups like Fair Fight Action, founded by Georgia gubernatorial candidate Stacey Abrams, engage in the mitigation and reversal of voter suppression while advocating for voter mobilization and civics education.²³⁵ “Fair Fight Action brings awareness to the public on election reform, [and strongly] advocates for election reform at all levels” of government.²³⁶ Furthermore, Fair Fight has joined multiple lawsuits challenging voting legislation that occurred after the 2020 elections, such as *Fair Fight Action v. Raffensperger* and *Fair Fight Action v. True the Vote*.²³⁷ The NAACP also works to expand voting access across the country, particularly for African Americans, and called for the passage of the John Lewis Voting Rights Act.²³⁸ They are also

232. See, e.g., Brief for Petitioner at 24–28, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

233. See Epstein & Corasaniti, *supra* note 199.

234. Sean Morales-Doyle, *The Supreme Court Clearly Won't Protect Voting Rights. But Congress Can.*, BRENNAN CTR. FOR JUST. (July 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-clearly-wont-protect-voting-rights-congress-can> [https://perma.cc/QGU4-MJSW].

235. *About Fair Fight Action*, FAIR FIGHT, <https://fairfight.com/about-fair-fight> [https://perma.cc/EVF3-ZJ3R] (last visited July 5, 2021); *About Stacey Abrams*, FAIR FIGHT, <https://fairfight.com/about-stacey-abrams/> [https://perma.cc/T5D9-TEGU] (last visited Aug. 10, 2022).

236. See *About Fair Fight Action*, *supra* note 235.

237. See *id.*; *Fighting Against Voter Intimidation: Fair Fight, Inc. v. True the Vote*, FAIR FIGHT, <https://fairfight.com/ttv/> [https://perma.cc/AX5Q-FQSB]. See generally *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019).

238. *Democracy & Voting*, NAACP, <https://naacp.org/find-resources/know-your-rights/democracy-voting> [https://perma.cc/X97P-HEHK] (last visited July 5, 2021); *NAACP President & CEO Derrick Johnson on Passage of the John R. Lewis Voting Rights Advancement Act*, NAACP (Aug. 24, 2021), <https://naacp.org/articles/naacp-president-ceo-derrick-johnson-passage-john-r-lewis-voting-rights-advancement-act> [https://perma.cc/Z549-SRTM].

fighting in court against legislation in *NAACP Georgia State Conference v. Raffensperger* and *NAACP v. Florida Secretary of State*.²³⁹

Litigation has dramatically shifted post-*Shelby County*, as litigators are now adding “Fourteenth and Fifteenth Amendment intentional discrimination claims” to challenge laws created to cut back on voting rights.²⁴⁰ Following section 4(b)’s elimination, section 2 has remained the chief tool to fight voting rights barriers.²⁴¹ Litigators have had to adapt to the lack of judicial urgency present in section 2 litigation, as it now takes about eighteen months for the litigation to complete.²⁴² Previously, section 5 litigation regarding early voting and voter ID restrictions was completed in about four months.²⁴³ The Brennan Center for Justice is tracking changes to voting laws in every state as well as active lawsuits and legislative battles occurring at all levels of government.²⁴⁴

C. Section 2’s Sufficiency

Perhaps not since Lucy pulled the football back in *Peanuts*²⁴⁵ has a bait-and-switch been so clear: in *Shelby County* the Court concluded that section 2 of the VRA would be a sufficient substitute for section 5 to prevent discriminatory voting laws.²⁴⁶ Nevertheless, eight years later in *Brnovich*, it was largely the

239. *Democracy & Voting*, *supra* note 238.

240. Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 783 (2018), <http://www.yalelawjournal.org/forum/a-post-shelby-strategy> [https://perma.cc/YRC4-CJNL].

241. Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 675, 679 (2014).

242. *See id.* at 684 (“By contrast, current ongoing Section 2 litigation over similar provisions in North Carolina is scheduled to take over *eighteen months* and will not reach final judgment until after the November 2014 elections.”).

243. *Id.*

244. *Voting Laws Roundup: May 2022*, BRENNAN CTR. FOR JUST. (May 26, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022> [https://perma.cc/9Y4J-JDE5]; *Voting Rights Litigation Tracker*, BRENNAN CTR. FOR JUST. (Aug. 4, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker> [https://perma.cc/6GXX-NN47].

245. Eric Schulmiller, *All Your Life, Charlie Brown. All Your Life: The Complete History of Lucy’s Pulling the Football Away*, SLATE (Oct. 8, 2014, 9:33 AM), <https://slate.com/culture/2014/10/the-history-of-lucys-pulling-the-football-away-from-charlie-brown-in-peanuts.html> [https://perma.cc/Y4LY-MKM5].

246. *See* Brief for Petitioner, *supra* note 232, at 20; Transcript of Oral Argument, *supra* note 2, at 24–25.

same majority who ensured that section 2 will not be the bastion of legitimacy and democracy that the Court assured it would be in *Shelby County*.²⁴⁷ In *Brnovich*, the Court applied section 2 of the VRA to laws governing the collection and accounting of ballots.²⁴⁸ In doing so, the Court held that Arizona's out-of-precinct voting policy did not violate the VRA.²⁴⁹ The Court also held that Arizona's House Bill 2023 did not violate the VRA, nor did the Arizona legislature have discriminatory purpose through the statute's adoption.²⁵⁰ In so holding, the Court removed whatever teeth the VRA still possessed.

At issue in *Brnovich* was Arizona's policy of discarding ballots cast in a precinct other than one specified for the voter²⁵¹ and House Bill 2023 (HB 2023), a statute passed by the Arizona state legislature that criminalized the collection and delivery of another person's ballot.²⁵² The first policy empowered election officials to discard ballots cast by validly registered voters if the ballot was cast outside their voting precinct.²⁵³ The latter law criminalized the collection and delivery of another person's ballot, a practice known as ballot harvesting.²⁵⁴ These laws, while facially neutral, had an adverse and unequal impact on minority voters' ability to vote.²⁵⁵

The Democratic National Committee challenged these restrictions as violating section 2 of the VRA and, due to the laws' discriminatory intent, the Fifteenth Amendment.²⁵⁶ Following a ten-day bench trial, the District Court for Arizona ruled in

247. Compare *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2329 (2021), with *Shelby Cnty. v. Holder*, 570 U.S. 529, 532 (2013) (Roberts, C.J., Thomas and Alito, JJ., were in the majority in both cases).

248. *Brnovich*, 141 S. Ct. at 2330, 2343–44.

249. *Id.* at 2343–44.

250. *Id.* at 2348–50.

251. See Totenberg, *supra* note 171.

252. See *Brnovich*, 141 S. Ct. at 2334. HB 2023 included exceptions for a “postal worker, an elections official, or a voter’s caregiver, family member, or household member.” *Id.*

253. See *id.* (citing ARIZ. REV. STAT. ANN. § 16–584(E) (2018)) (explaining that Arizona allows each county to choose between a voter-center system or a precinct-based system. Registered voters may cast a vote at any polling location in their county in a voter-center system. But in a precinct-based system, registered voters may only cast ballots at the polling place designated in their precinct).

254. See Totenberg, *supra* note 171; Bob Christie, *Records Show Coordinated Arizona Ballot Collection Scheme*, ASSOCIATED PRESS, June 1, 2022, <https://apnews.com/article/arizona-presidential-elections-conspiracy-election-2020-government-and-politics-65a3f0f130905dd7151e5189e7242784> [https://perma.cc/BKF2-A7T2].

255. See *id.*

256. See *Brnovich*, 141 S. Ct. at 2334.

Arizona's favor and held that the criminalization of ballot harvesting and the elimination of out-of-precinct voting did not impact minority voters severely.²⁵⁷ The case was then appealed to the Ninth Circuit for review, where the Ninth Circuit held that Arizona's out-of-precinct policy violated the results test of section 2.²⁵⁸ The Ninth Circuit further held that HB 2023 violated both the results test and the intent test of section 2, in addition to the Fifteenth Amendment.²⁵⁹ Thus, the judgment by the District Court of Arizona was reversed and remanded for further proceedings.²⁶⁰ After the Ninth Circuit rendered its opinion, the state of Arizona appealed the decision to the Supreme Court of the United States, and the Supreme Court granted certiorari on October 2, 2020.²⁶¹

Justice Alito, writing for the majority, stressed that Congress was not concerned with equal application of otherwise facially neutral laws when it reauthorized section 2 of the VRA in 1982²⁶² and that section 2 was well equipped to handle the challenge of protecting voting rights.²⁶³ The majority in *Brnovich* kept with the Court's long-standing practice of construing the VRA more narrowly than Congress intended. The majority stressed section 2's focus on the totality of the circumstances and provided a non-exhaustive list of factors to be considered.²⁶⁴ These factors included:

[1] the size of the burden imposed by a challenged voting rule

257. *Id.* at 2334–35.

258. *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824 (D. Ariz. 2018), *rev'd on reh'g en banc*, *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1016, 1032 (9th Cir. 2020), *rev'd and remanded sub nom. Brnovich*, 141 S. Ct. 2321 (2021).

259. *Id.* at 1037, 1042.

260. *Id.* at 1046.

261. *Brnovich*, 141 S. Ct. at 2336.

262. *See id.* at 2329, 2332–33. *But see Restoring the Voting Rights Act After Brnovich and Shelby County: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 117th Cong. 1, 5 (2021) (statement of Richard Hasen, Professor of Law and Political Science, University of California Irvine School of Law), <https://www.judiciary.senate.gov/imo/media/doc/Hasen%20-%20Testimony1.pdf> [<https://perma.cc/L9M2-MVH5>]. Hasen describes Justice Alito's majority opinion in *Brnovich* as one that “is unmoored to the text of [Section 2 of the VRA], ignores the relevant history of [the VRA], and thwarts Congress's intent.” *Id.* Hasen told the Senate that Justice Alito's opinion in *Brnovich* offered a new and difficult test for plaintiffs to meet to show Section 2 vote denial and established nonbinding guideposts for deciding vote denial cases. Hasen stated that the ad hoc test that was created by the decision acted more like a “roadblock[]” than a “guidepost[].” *Id.*

263. *See Brnovich*, 141 S. Ct. at 2343.

264. *Id.* at 2338–40.

[2] the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982

[3] [t]he size of any disparities in a rule's impact on members of different racial or ethnic groups

[4] the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision.

[5] the strength of the state interests[—such as the strong and entirely legitimate state interest in preventing election fraud—]served by a challenged voting rule²⁶⁵

These factors collectively would determine whether a state's voting law has impaired the “equal openness” of voting.²⁶⁶ The majority concluded that neither law imposed “significant” burdens on voting, that precautions had been taken to mitigate the law's impact, and that the law's effects on minority voters would be “small.”²⁶⁷ Thus, the Court found that Arizona's two laws did not violate section 2 of the VRA, effectively giving Arizona a license to discriminate against minority voters under the thinly veiled justification of “ending voter fraud.”²⁶⁸

As Justice Kagan wrote in her dissent, “Congress never meant for [s]ection 2 to bear all of the weight of the Act's commitments.”²⁶⁹ Section 2 serves as an after-the-fact remedy, incapable of providing relief until after subsequent litigation and usually multiple election cycles.²⁷⁰ “But after *Shelby County*, the vitality of [s]ection 2—a ‘permanent, nationwide ban on racial discrimination in voting’—matters more than ever.”²⁷¹ This is because section 2 is now the only protection that voters have left.²⁷²

265. *Id.*

266. *Id.* at 2338, 2340–41 (stating that the disparate impact requirement cannot stand alone, based on the text of § 2 and the Court's precedent construing it).

267. *Id.* at 2344–45, 2348.

268. See Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, ASSOCIATED PRESS, June 28, 2022, <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d> [https://perma.cc/SH7G-574Y] (quoting Attorney General Barr) (“[T]o date, we have not seen fraud on a scale that could have effected a different outcome in the election.”); cf. Sharad Goel et al., *One Person, One Vote; Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, 114 AM. POL. SCI. REV. 456, 467 (2020) (using a mathematical model to show that instances of double voting are too statistically insignificant to affect the outcome of elections).

269. *Brnovich*, 141 S. Ct. at 2350, 2356 (Kagan, J., dissenting).

270. *Id.* at 2356 (citing *Shelby Cnty. v. Holder*, 570 U.S. 529, 572 (2013) (Ginsburg, J., dissenting)).

271. *Id.* (quoting *Shelby Cnty.*, 570 U.S. at 557).

272. *Id.*

The contrast between the majority opinions in *Brnovich* and *Shelby County* reeks of irony. In *Shelby County*, Congress’s vast documentation of discrimination in its Congressional Record proved insufficient to justify federal preclearance.²⁷³ However, in *Brnovich*, without sufficient evidence²⁷⁴ the “threat” of voter fraud was sufficient to uphold laws restricting the right to vote.²⁷⁵ This reasoning illustrates the method of many conservative Justices—abiding by textualism when convenient and inventing judicial fictions when not.²⁷⁶ Additionally, when describing the nonexistent voter fraud, the Court stressed that “[f]raud can affect the outcome of a close election.”²⁷⁷ Thus, the Court described how relatively few votes can change the course of an election. But when discussing the impact of Arizona’s voting laws on minority voters, the majority clearly exhibited less concern. Conveniently, the Court emphasized how a small number of votes can change the outcome of an election yet dismissed restrictions on minority voters as simply “a small disparity.”²⁷⁸ The majority wrote:

The District Court found that among the counties that reported out-of-precinct ballots in the 2016 general election, roughly 99% of Hispanic voters, 99% of African-American voters, and 99% of Native-American voters who voted on election day cast their ballots in the right precinct, while roughly 99.5% of non-minority voters did so.²⁷⁹

The Court clearly held the miniscule potential of voter fraud more significant than the prevalent, well-documented proliferation of racist and restrictive laws that are promulgated specifically to curtail minority votes. Overall, the Court erroneously believes that the dismantling of the VRA in *Shelby County* proves that sections 4 and 5 should be eliminated, being

273. See *Shelby Cnty.*, 570 U.S. at 551; see also Brief for the Federal Respondent at 20, *Shelby Cnty.*, 570 U.S. 529 (2013) (No. 12-96).

274. See Balsamo, *supra* note 268.

275. See *Brnovich*, 141 S. Ct. at 2343.

276. See David Gans, *Selective Originalism and Selective Textualism: How the Roberts Court Decimated the Voting Rights Act*, SCOTUSBLOG (July 7, 2021, 11:10 AM), <https://www.scotusblog.com/2021/07/selective-originalism-and-selective-textualism-how-the-roberts-court-decimated-the-voting-rights-act/> [<https://perma.cc/Z9FK-V6S5>] (writing that Justice Alito focused on the equal openness portion of section 2, rather than the “explicit requirement that voters of color not be saddled with ‘less opportunity’ than other voters”).

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

278. See *id.* at 2340, 2345.

279. *Id.* at 2345.

that section 2 is the only necessary mechanism to combat residual voter suppression.²⁸⁰

The Court's ironic decision-making does not end there; it continues under the concept of the *Purcell* Principle.²⁸¹ The *Purcell* Principle is the idea that "courts should not issue orders which change election rules in the period just before the election."²⁸² Facially, this principle is meant to prevent voter confusion and burdens on election administrators—both of which would affect voter turnout.²⁸³ Currently, however, judges weaponize the *Purcell* Principle when its application would support their desired outcome, yet ignore the same principle when its application would contradict their desired result.²⁸⁴

From 2013 to 2021, the egregious attempts—and often successes—at dismantling the VRA through state legislatures and the judiciary have only compounded. The Court eviscerated preclearance and left voting rights protections practically null and void through its holding in *Shelby County*.²⁸⁵ Without the protection of preclearance, states previously covered under preclearance were now free to pass laws making it difficult for minorities to vote.²⁸⁶ This fight was consistently lost in the courts and continued in the legislature by voting rights advocates who have thus far failed to push past the filibuster.²⁸⁷ The concept of

280. See *Shelby Cnty. v. Holder*, 570 U.S. 529, 537, 538, 544, 549, 557 (2013); see also Brief for Petitioner, *supra* note 232, at 20.

281. See *The Purcell Principle: A Presumption Against Last-Minute Changes to Election Procedures*, SCOTUSBLOG, <https://www.scotusblog.com/election-law-explainers/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures> [https://perma.cc/5QWY-7E2Q] (last visited July 27, 2022) ("The principle takes its name from *Purcell v. Gonzalez*, in which the Supreme Court reversed an October 2006 decision of the U.S. Court of Appeals for the 9th Circuit blocking an Arizona voter ID law during that year's midterm election.").

282. Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).

283. *Id.* at 440.

284. Compare *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248, 1251 (2022) (per curiam) (reversing and remanding the Governor's redistricting maps despite less than five months before a primary election), with *Moore v. Circosta*, 141 S. Ct. 46, 48 (2020) (mem.) (Gorsuch, J., dissenting) (supporting injunctive relief against an Election Board's "last minute changes" to voting rules, despite that staying such changes would also create voter confusion), and *Moore v. Circosta*, SCOTUSBLOG, <https://www.scotusblog.com/election-litigation/moore-v-circosta> [https://perma.cc/5U6N-MKSP] (last visited July 28, 2022) (explaining that Fourth Circuit judges invoked the *Purcell* Principle in support of the state Republican's request for injunctive relief against the Election Board's changes, despite that such application of the principle would also create last-minute changes and would be a novel application of a federal principle against state courts and agencies).

285. See *supra* Part III.

286. See *supra* Section IV.A.1.

287. See *supra* Section IV.A.2.

voting entitlement plagues the courts and legislatures, and its result is clear—a perpetuation of baseline inequality.

V. CONCLUSION

The history of voting rights in America is the story of two steps forward, one step back. Expansions of the franchise have, invariably, been met with new means of restricting access. Eric Segall bluntly summarizes the history by noting that “[f]irst Blacks couldn’t vote. Then whites used violence to stop Blacks from voting. Then whites used literacy and character tests to stop Blacks from voting. Congress stepped in with the VRA. SCOTUS gutted it. Now the GOP is making it harder for Blacks to vote again.”²⁸⁸

In the decades preceding *Shelby County*, proponents of equalizing access to the franchise included bipartisan majorities in Congress *and* a sympathetic majority on the Supreme Court. To wit, following (1) an uninterrupted line of Supreme Court decisions upholding the VRA through the 2000s, the 2006 reauthorization of the Act was marked by its (2) 98–0 vote in the Senate, followed by the signing into law by (3) stalwart Republican and then-President George W. Bush.²⁸⁹ Now, not even yet twenty years onward, not only is a decisive Court majority embracing Justice Scalia’s notion that equal access is a dangerous “entitlement” but in Congress, an entire political party is resolutely opposed to federal legislation to expand the franchise. State-based solutions to state-specific restrictions on the franchise, are, at best, quixotic. In states committed to equalizing the franchise, there remains, as ever, room for improvement. But in states where voting rights are under siege, only federal legislation—short of a massive shift in political will that places country over party, equality over discrimination, and access over exclusion—stands a chance of reversing a decidedly nonhyperbolic decline in the core of the grand experiment that is American democracy: the franchise.

288. Eric Segall (@espineseall), TWITTER (Jan. 17, 2022, 7:53 AM), <https://twitter.com/espineseall/status/1483075121527103489> [<https://perma.cc/FD45-8YAE>].

289. See Carl Hulse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES (July 21, 2006), <https://www.nytimes.com/2006/07/21/washington/21vote.html> [<https://perma.cc/5HKZ-QLCK>]; *Cases – Voting Rights Act of 1965*, OYEZ, <https://www.oyez.org/issues/199> [<https://perma.cc/ES7H-Y87E>] (last visited July 15, 2022).