Voting Rights Act of 1965 — Section Two — Disparate Impact — Brnovich v. Democratic National Committee

On January 6, 2021, American democracy was under threat. Hundreds of supporters of former President Trump stormed the U.S. Capitol in an attempt to stop the lawful certification of President Biden's victory in the 2020 general election.[1] The insurrection, coupled with the flood of voter suppression laws that soon followed, has underscored how fragile the United States' multiracial democracy truly is.[2] Six months after the attack on the Capitol, the Supreme Court delivered its own blow. Last Term, in *Brnovich v. Democratic National Committee*,[3] the Supreme Court upheld two Arizona voting restrictions under section 2 of the Voting Rights Act[4] (VRA), and in so doing articulated five "guideposts" for how courts should evaluate section 2 claims going forward.[5] The majority's ahistorical and atextual approach to section 2 is deeply concerning. Bypassing the Court's interpretive commitments from recent antidiscrimination cases, *Brnovich* foretells further hostility to the disparate impact theory of discrimination under other antidiscrimination statutes that are also critical to democracy.

Brnovich concerned two provisions of Arizona election law: the out-of-precinct (OOP) policy and a prohibition on third-party ballot collection, known as H.B. 2023.[6] Under the OOP policy, a voter can cast a provisional ballot if she attempts to vote but does not appear at her assigned precinct.[7] If, after the election, poll workers confirm that the voter does not live in that precinct, the entire ballot is thrown out, even if the voter was eligible to vote for certain offices on the ballot.[8] Under H.B. 2023, it is a felony for "[a] person [to] knowingly collect[] voted or

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[1] Dan Barry, Mike McIntire & Matthew Rosenberg, *"Our President Wants Us Here": The Mob that Stormed the Capitol*, N.Y. TIMES (May 28, 2021), https://www.nytimes.com/2021/01/09/us/capitol-rioters.html [https://perma.cc/BPC7-RWDN].

[2] *See, e.g.*, Janie Boschma, *Fourteen States Have Enacted 22 New Laws Making It Harder to Vote*, CNN (May 28, 2021, 5:15 PM), https://www.cnn.com/2021/05/28/politics/voter-suppression-restrictive-voting-bills/index.html [https://perma.cc/L9LB-RGNY]; Adam Serwer, *The Capitol Riot Was an Attack on Multiracial Democracy*, THE ATLANTIC (Jan. 7, 2021), https://www.theatlantic.com/ideas/archive/2021/01/multiracial-democracy-55-years-old-will-it-survive/617585/ [https://perma.cc/RN4L-SPYA].

[3] 141 S. Ct. 2321 (2021). This case was consolidated with *Arizona Republican Party v. Democratic National Committee*, No. 19-1258. *See* 141 S. Ct. 221 (2020) (mem.).

[4] Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 52 U.S.C. § 10301).

[5] *Brnovich*, 141 S. Ct. at 2330, 2336.

[6] Democratic Nat'l Comm. v. Reagan, 329 F. Supp. 3d 824, 831–32 (D. Ariz. 2018).

[7] *See id.* at 840. The precinct system — used by Maricopa County and Pima County, Arizona's most populous counties — means that each voter is assigned to a precinct where they must vote. *Id.* The OOP policy "derives from the collective effect of A.R.S. §§ 16-122, -135, and -584, and related rules in the Arizona Election Procedures Manual." *Id.* at 832.

[8] *See id.* at 840.

unvoted early ballots from another person."[9] The Democratic National Committee along with other plaintiffs ("the DNC") challenged these provisions as imposing unconstitutional burdens on voters' First and Fourteenth Amendment rights; as having a disparate impact on minority voters in violation of section 2; and, for H.B. 2023 only, as being passed with discriminatory intent in violation of section 2 and the Fifteenth Amendment.[10]

The district court ruled against the DNC on all claims.[11] On the First and Fourteenth Amendment claims, Judge Rayes found that, under the *Anderson-Burdick* framework,[12] the challenged law imposed minimal burdens that were sufficiently justified by the state's important regulatory interests to prevent fraud and maintain election integrity.[13] With respect to the section 2 claims,[14] the court employed a two-part results test that multiple circuits had adopted for vote denial claims.[15] The test asked whether the provisions had a disparate impact on minority voters, and if so, whether that impact was connected to social and historical conditions leading to discrimination against the burdened group.[16] Judge Rayes found that H.B. 2023 and the OOP policy failed

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[9] ARIZ. REV. STAT. ANN. § 16-1005(H) (2020). The law includes exceptions for postal workers, caregivers, and family members. *See id.* § 16-1005(H)–(I).

[10] *Reagan*, 329 F. Supp. 3d at 832. The district court proceedings culminated in a ten-day bench trial in October 2017. *Id.*

[11] *Id.*

[12] The *Anderson-Burdick* framework is a "flexible standard" developed by the Court to evaluate challenges to state election law. *Id.* at 844 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

[13] *Id.* at 844–62.

[14] In relevant part, section 2 prohibits voting practices that "result[] in a denial or abridgement" of citizens' right to vote on the basis of race. 52 U.S.C. § 10301(a). Violations of subsection (a) are "established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

[15] *See* Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J.F. 799, 802–09 (2018) (surveying relevant case law). Vote denial claims under section 2, as opposed to vote dilution claims, are relatively new. *See id.* at 801; Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 442 (2015) (explaining the distinction).

[16] *Reagan*, 329 F. Supp. 3d at 864. The second step depends on a "totality of the circumstances" analysis involving factors from the Senate Report on the 1982 VRA amendments ("Senate factors"), including the state's history of race discrimination in voting, minority representation in state offices, and the state government's lack of responsiveness to minority needs. *Id.* at 873–78.

to satisfy both steps.[17] Lastly, he found that H.B. 2023 was passed not with discriminatory intent but with validly partisan interests.[18]

In a divided panel, the Ninth Circuit affirmed.[19] Writing for the majority, Judge Ikuta[20] underscored that to establish disparate impact under the first step of the section 2 results test, a "plaintiff must show a causal connection between the challenged voting practice and the lessened opportunity of the protected class to participate and elect representatives."[21] The panel affirmed the district court's findings and conclusions as to all of the plaintiffs' constitutional and section 2 claims,[22] including their claim of intentional discrimination.[23]

Chief Judge Thomas dissented.[24] He disagreed with the panel majority's reading of section 2, reasoning that the statute "should be interpreted [with] 'the broadest possible scope' in combating racial discrimination."[25] For the dissent, so long as the policy had a disparate impact on minority voters, the first step of the section 2 results test was satisfied without a need to show causation.[26] The dissent found that both the OOP policy and H.B. 2023 disparately impacted minority voters,[27] and that the Senate factors also weighed in favor of the DNC,[28] and therefore concluded that both policies violated section 2.[29] The dissent then analyzed the constitutional claims and similarly found that the district court erred.[30] Lastly, the dissent found that H.B. 2023 was passed with

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[17] For the first prong, although minority votes were overrepresented in both third-party ballot collection and OOP ballots, *see id.* at 868, 871, the court held that the evidence did not demonstrate that the laws denied minority voters access to the political process, *id.* at 871, 873. The court was not required to continue to step two but did so anyway. *Id.* at 873.

[18] *Id.* at 882. The Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), provides the framework by which courts determine discriminatory intent. For a description of the framework, see *Reagan*, 329 F. Supp. 3d at 879 (citing *Arlington Heights*, 429 U.S. at 266–68).

[19] Democratic Nat'l Comm. v. Reagan, 904 F.3d 686, 697 (9th Cir. 2018).

[20] Judge Ikuta was joined by Judge Bea.

[21] *Reagan*, 904 F.3d at 714. The district court's findings and analysis for the First and Fourteenth Amendment claims survived clear error review. *Id.* at 705–06, 727–29.

[22] *Id.* at 710, 717, 729, 731.

[23] *Id.* at 723.

[24] *Id.* at 732 (Thomas, C.J., dissenting).

[25] *Id.* at 734 (quoting Chisom v. Roemer, 501 U.S. 380, 403 (1991)).

[26] *See id.* at 736.

[27] *Id.* at 733, 751. Chief Judge Thomas noted the frequency with which Arizona changes precinct locations and the socioeconomic barriers that minority voters have to being able to vote in the correct precinct, *id.* at 733, and that minorities relied on ballot collection far more than white voters, *id.* at 751.

[28] *Id.* at 738.

[29] *Id.* at 740–42, 746.

[30] *Id.* at 742. Chief Judge Thomas characterized the burden on voters from the OOP policy as having one's vote thrown out for voting in the wrong precinct, as opposed to the district court's framing of the burden as needing to comply with the policy in the first place, *see id.*, and therefore found the burden on minority voters "severe," *id.* at 744, and lacking sufficient state interests to

racial animus in violation of section 2 and the Fifteenth Amendment.[31] The Ninth Circuit voted to rehear the case en banc.[32]

The en banc majority reversed and remanded the district court decision, holding that the OOP policy and H.B. 2023 violated the VRA.[33] Writing for the majority, Judge Fletcher[34] first analyzed the OOP policy. He found that the district court erred in its analysis when it concluded that the 3,709 OOP ballots discarded in Arizona's general election in 2016 burdened a de minimus number of voters.[35] Next, he analyzed the Senate factors and concluded that they all favored the plaintiffs.[36] Judge Fletcher then turned to H.B. 2023, similarly holding that the law had a disparate impact on minority voters[37] — who disproportionately used ballot-collection services[38] — and that the Senate factors favored the plaintiffs.[39] Lastly, the majority considered the intent-based challenges to H.B. 2023 and held that the law was passed with discriminatory intent.[40]

Judges O'Scannlain and Bybee dissented. In his dissent, Judge O'Scannlain[41] criticized the majority for "draw[ing] factual inferences that the evidence cannot support and misread[ing] precedent along the way."[42] He emphasized that the standard of review for analyzing the district court's factual findings was clear error, which was not satisfied here.[43] Judge Bybee[44] dissented as well. He focused on the necessity for states to enact policies to determine the "time, place, and manner" of

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justify it. *Id.* at 744–45. Further, he found that H.B. 2023 imposed a heavy burden on Native American voters, also without sufficient state interests. *See id.* at 753–54.

[31] *Id.* at 746. Contrary to the majority, the dissent afforded great weight to a racist video by former Maricopa Republican Party Chair A.J. LaFaro that led to the law's passage, other legislative interests notwithstanding. *See id.* at 749.

[32] Democratic Nat'l Comm. v. Reagan, 911 F.3d 942, 942 (9th Cir. 2019).

[33] Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 999 (9th Cir. 2020). The en banc majority did not reach the First and Fourteenth Amendment claims. *Id.*

[34] Judge Fletcher was joined by Chief Judge Thomas and Judges Berzon, Rawlinson, Murguia, and Owens. Judge Watford, in a separate concurrence, only joined the parts of the majority invalidating the policies under the VRA's results test; he did not join the discussion of the intent test. *Id.* at 1046 (Watford, J., concurring).

[35] *Id.* at 1014–16 (majority opinion). Moreover, according to the majority, rather than showing that the OOP policy *caused* voters to vote out of precinct, the plaintiffs only had to show that the policy of *discarding* out-of-precinct ballots had a disparate impact on minority voters. *Id.* at 1016.

[36] *Id.* at 1032.

[37] *Id.* at 1033.

[38] *Id.*

[39] *Id.* at 1037.

[40] *Id.* at 1042. Judge Fletcher noted that some legislators' "good-faith belief" in fraud did not negate the discriminatory intent of legislators who propogated racist allegations. *Id.* at 1041.

[41] Judge O'Scannlain was joined by Judges Clifton, Bybee, and Callahan.

[42] *Hobbs*, 948 F.3d at 1047 (O'Scannlain, J., dissenting).

[43] *See id.* at 1049, 1060.

[44] Judge Bybee was joined by Judges O'Scannlain, Clifton, and Callahan.

elections and argued that both of the challenged Arizona policies were relatively common among states.[45]

The Supreme Court reversed.[46] Writing for the majority, Justice Alito[47] held that "the en banc court misunderstood and misapplied" section 2.[48] After quickly dismissing challenges to the petitioners' standing to appeal, Justice Alito made clear that the Court was not creating a test for section 2 cases; instead, it was announcing "certain guideposts" to inform future cases.[49]

First, Justice Alito briefly examined the text of section 2, finding that the operative phrase was "equally open,"[50] meaning that political processes must be "'equally open' to minority and non-minority groups alike."[51] Next, Justice Alito put forth five nonexhaustive factors that courts should consider in their "totality of the circumstances" analysis.[52] These were: (1) the size of the burden on voters beyond mere inconveniences,[53] (2) the law's departure from "standard practice when [section 2] was amended in 1982,"[54] (3) the size of the disparity,[55] (4) the means of voting other than the one burdened by the challenged policy,[56] and (5) the state's interest in promulgating the electoral practice.[57] Using these guideposts, the Court concluded that the Arizona policies did not violate the VRA.[58]

Justice Gorsuch, joined by Justice Thomas, briefly concurred to note that the Court has assumed but never held that the VRA includes an implied cause of action.[59] Since *Brnovich* did not present this question as an issue, however, he did not elaborate on this point further.[60]

Justice Kagan dissented.[61] She critiqued the majority's reading of the statute, writing that the Court had "rewritten — in order to weaken — a statute that stands as a monument to America's greatness,

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45 *Hobbs*, 948 F.3d at 1062 (Bybee, J., dissenting).

46 *Brnovich*, 141 S. Ct. at 2350.

47 Justice Alito was joined by Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barrett.

48 *Brnovich*, 141 S. Ct. at 2330.

49 *Id.* at 2336.

50 *Id.* at 2336–37.

51 *Id.* at 2337.

52 *Id.* at 2338.

53 *Id.*

54 *Id.* This factor was based on the assumption that Congress did not intend to disrupt long-held voting practices that were in place in 1982. *Id.* at 2339.

55 *Id.* at 2339.

56 *Id.*

57 *Id.* at 2339–40.

58 *Id.* at 2343–44. The Court also held that the district court's assessment of the discriminatory intent–based claims was permissible. *Id.* at 2349.

59 *Id.* at 2350 (Gorsuch, J., concurring).

60 *Id.*

61 *Id.* (Kagan, J., dissenting). Justice Kagan was joined by Justices Breyer and Sotomayor.

and protects against its basest impulses."[62] Examining the language of the statute, Justice Kagan noted that by using the term "results in," section 2 focuses on the consequences of electoral practices, as opposed to the motives by which they were enacted.[63] Justice Kagan continued to interpret the words "equally open," writing that "equal opportunity" does not exist when "it [is] harder for members of one racial group . . . to cast ballots."[64] Lastly, she focused on the "totality of the circumstances" inquiry and its attention to how the voting rule operates with the "facts on the ground" and state interests.[65] Justice Kagan dismissed the majority opinion as occupying a "law-free zone"[66] and reprimanded the Court for abandoning the text and adopting "mostly made-up factors."[67] Finally, Justice Kagan analyzed the Arizona policies[68] and found that both had a disparate impact on minority voters in violation of section 2.[69]

After the Court's ruling in *Shelby County v. Holder*,[70] which effectively invalidated the preclearance requirements in section 5 of the VRA,[71] lawyers and scholars correctly predicted that section 2 vote denial claims would percolate through the courts to fill the gap left by section 5's invalidation.[72] Section 2's increasing importance culminated in the first occasion for the Court to announce how vote denial claims would be analyzed under section 2 of the VRA.[73] The Court's choice to opt for "guideposts" instead of a rigid test might lead some to assume that the Court chose a less consequential path. However, the majority's ahistorical and atextual analysis of section 2 should ring alarm bells for voting rights advocates and all those fighting for robust antidiscrimination regimes. The Court's departure from the interpretive methods it has used in recent antidiscrimination cases, coupled with recent trends against the disparate impact theory of discrimination, previews how the Court will approach with hostility similar critical antidiscrimination statutes in the future.

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[62] *Id.* at 2351

[63] *Id.* at 2357.

[64] *Id.* at 2358.

[65] *Id.* at 2359.

[66] *Id.* at 2361.

[67] *Id.* at 2362. The dissent discussed each factor articulated in the majority, *id.* at 2362–66, and concluded that the majority's approach "enable[d] voting discrimination," *id.* at 2366.

[68] *Id.* at 2366–72.

[69] *Id.* at 2366, 2372.

[70] 570 U.S. 529 (2013).

[71] *See id.* at 557.

[72] *See, e.g.*, 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, 677 (2014).

[73] *See* Richard L. Hasen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems*, SLATE (July 8, 2021, 10:16 AM), https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html [https://perma.cc/HF93-ADZN].

In subordinating racial equality to state interest, the *Brnovich* Court's interpretation was contrary to section 2's text and purpose. The Court first heightened plaintiffs' evidentiary burden to establish disparate impact,[74] and then held that even if plaintiffs satisfy this burden, a state's compelling interest in election integrity can overcome section 2 liability.[75] But to do so, Justice Alito had to brush over section 2(a)'s text, which explicitly focuses on disparate "results" without any reference to lawmakers' motives or justifications.[76] Congress added this explicit focus on "results" in 1982 to overturn the Court's decision in *City of Mobile v. Bolden*,[77] which limited section 2 to discriminatory intent claims.[78] Congress has thus made it clear that it is not the state but "voters of color [who] get the benefit of the doubt."[79]

Brnovich represents a departure from the Court's interpretive approaches in recent antidiscrimination cases. For example, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[80] the Court held that the Fair Housing Act[81] (FHA) encompassed disparate impact liability, with an analysis grounded in the text.[82] Justice Kennedy, writing for the majority, held that the words "otherwise make unavailable" speak to consequences rather than intent.[83] Similarly, in *Bostock v. Clayton County*,[84] Justice Gorsuch wrote a hypertextualist opinion and concluded that discrimination "because of . . . sex" in Title VII[85] included discrimination on the

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[74] *See Brnovich*, 141 S. Ct. at 2338.

[75] *See id.* at 2347.

[76] 52 U.S.C. § 10301(a); *see also Brnovich*, 141 S. Ct. at 2357 (Kagan, J., dissenting) (discussing the "results in" language of section 2(a)). Justice Alito wrote that it was not necessary to determine what section 2(a) meant by itself since section 2(b) articulated the standard for how to find a section 2 violation. *See id.* at 2337 (majority opinion).

[77] 446 U.S. 55 (1980); *Brnovich*, 141 S. Ct. at 2357 (Kagan, J., dissenting) (explaining that Congress amended section 2 in response to *Bolden*).

[78] *See Bolden*, 446 U.S. at 60–61 (plurality opinion).

[79] Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, THE ATLANTIC (July 8, 2021), https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330 [https://perma.cc/4L69-69SG].

[80] 135 S. Ct. 2507 (2015).

[81] 42 U.S.C. §§ 3601–3619.

[82] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2525; *see also* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1598 (2019). In relevant part, the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added).

[83] *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2518. The Court buttressed its conclusion by discussing how the 1988 amendments to the FHA confirmed that Congress understood the FHA to allow for disparate impact claims, *id.* at 2519–21, and noting how disparate impact liability is "consistent with the FHA's central purpose," *id.* at 2521.

[84] 140 S. Ct. 1731 (2020).

[85] 42 U.S.C. § 2000e–2.

basis of sexual orientation and gender identity.[86] Throughout the opinion, Justice Gorsuch repeatedly emphasized the importance of the statute's text.[87] And although *Bostock* was only one year before *Brnovich*, this Term brought with it a newly constituted Court.[88] The methods of statutory interpretation used in *Inclusive Communities* and *Bostock* are glaringly absent in *Brnovich*, leaving advocates to wonder what the Court will use next.

One potential explanation for Justice Alito's interpretation of section 2 may reside in the "totality of the circumstances" inquiry embedded in section 2. This broad language has allowed the Court to use its judicial discretion to create entirely new rules and standards to govern vote dilution claims.[89] Some commentators have supported the Court using its discretion in this way, writing that, so long as the Court is guided by the underlying norms of section 2, it should use its discretion to create "a common law of racially fair elections."[90] Justice Alito's general guideposts, then, could be another instance of taking a broadly worded statute as a congressional delegation to develop judicially created standards for adjudicating claims that necessarily evolve over time.

However, even if Congress delegated this interpretive authority to courts, this delegation should not give the Court free rein to read the statute contrary to its goals.[91] In line with this principle, in *Chisom v. Roemer*,[92] the Court recognized that section 2's broad language "cannot justify a judicially created limitation" of the statute.[93] Similarly, in *Thornburg v. Gingles*,[94] the Court relied heavily on the legislative history and purposes of section 2.[95] A coherent development of a common law

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[86] *Bostock*, 140 S. Ct. at 1737.

[87] *See, e.g.*, *id.* ("Only the written word is the law. . . .").

[88] *See* Melissa Quinn, *Supreme Court Shifts Slowly to the Right in First Term with Expanded Conservative Majority*, CBS NEWS (July 6, 2021, 3:33 PM), https://www.cbsnews.com/news/us-supreme-court-conservative-term [https://perma.cc/CK6G-FA7T].

[89] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 50 (1986) (introducing geographic-compactness requirement into vote dilution claims involving multimember districts); Johnson v. De Grandy, 512 U.S. 997, 1000 (1994) (reading a proportionality factor into the section 2 vote dilution analysis).

[90] *See, e.g.*, Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 404 (2012). For more on common law and statutory interpretation, see generally Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357 (2015).

[91] There is also reason to doubt the efficacy of this common law approach for section 2, as relying on the Court to remedy racial discrimination in voting may be misguided. *See* Lani Guinier, *The Supreme Court, 1993 Term — Comment: [E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 112–13 (1994).

[92] 501 U.S. 380 (1991).

[93] *Id.* at 403; *see also id.* ("[T]he [VRA] should be interpreted in a manner that provides the 'broadest possible scope' in combating racial discrimination." (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969))).

[94] 478 U.S. 30 (1986).

[95] *Id.* at 71–73.

for voting rights protection must rely on the Court abiding by the norms underlying section 2.[96] As Professor Elmendorf puts it, courts should act in partnership with Congress when making this statutory common law while being faithful to Congress's purpose.[97] In stark contrast, none of the *Brnovich* factors refer to section 2's goals, and, even worse, each one makes it more difficult for plaintiffs to succeed on section 2 claims.[98] Judges crafting standards to enforce broadly worded statutes is one thing; the Supreme Court creating atextual standards that actively undermine the efficacy of federal statutes like the VRA just because it might disagree with the statute is something else entirely.

The freedom the majority took with the statutory interpretation in *Brnovich* is especially troublesome when paired with the Court's recently increasing skepticism of the disparate impact theory of discrimination. In *Washington v. Davis*,[99] the Court held that disparate impact alone cannot establish a violation under the Equal Protection Clause,[100] but it suggested that Congress could still allow disparate impact liability under civil rights statutes, including the VRA, Title VII, and the FHA.[101] Times have changed, and the Court today is much more intolerant of the disparate impact theory of discrimination.[102] This hostility intensified in *Brnovich* when Justice Alito called the dissent's proposal of a disparate impact framework for the VRA a "radical project."[103] Even more, some Justices have questioned the constitutionality of

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[96] *See* Elmendorf, *supra* note 90, at 417; *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1396 (2015) (describing the "superstatutory interpretation" necessary to "effectuate the [VRA's] broad and evolving purpose"); Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 768 (2016) (arguing that in vote denial cases, courts "should be guided by the Voting Rights Act's overall commitment to expanding the opportunity for minority citizens to participate in the political process").

[97] *See* Elemendorf, *supra* note 90, at 412; *see also* Charles & Fuentes-Rohwer, *supra* note 96, at 1403–04 (asserting that "effective implementation of [the VRA's] public policy aims obliges extensive partnership or cooperation between at least two of the three branches," *id.* at 1403).

[98] *See* Nicholas Stephanopoulos, *Opinion: The Supreme Court Showcased Its "Textualist" Double Standard on Voting Rights*, WASH. POST (July 1, 2021, 7:28 PM), https://www.washingtonpost.com/opinions/2021/07/01/supreme-court-alito-voting-rights-act [https://perma.cc/KFT3-FANZ].

[99] 426 U.S. 229 (1976).

[100] *See id.* at 239.

[101] *Id.* at 248; *see* Erwin Chemerinsky, *The 2016 Election, the Supreme Court, and Racial Justice*, 83 U. CHI. L. REV. ONLINE 49, 60 (2016), https://chicagounbound.uchicago.edu/uclrev_online/vol83/iss1/6 [https://perma.cc/9522-UEDU].

[102] *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 563 (2009); Alexander v. Sandoval, 532 U.S. 275, 285 (2001); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2526 (2015) (Thomas, J., dissenting); *id.* at 2532 (Alito, J., dissenting).

[103] *Brnovich*, 141 S. Ct. at 2341.

disparate impact,[104] a question that until recently was "all but unthinkable."[105]

With this backdrop in mind, *Brnovich* offers an insight into how this Court will tackle disparate impact in other antidiscrimination statutes, and the forecast is concerning. The VRA has historically occupied a special status among civil rights statutes,[106] and Title VII has similarly been deemed a common law statute that warrants pragmatic statutory interpretation in line with its goals.[107] Notably, however, "the disparate impact prong of Title VII has never much shared in that status."[108] Were the Court to narrowly construe disparate impact under Title VII as it did under the VRA, its construction would likely spread to other statutes, as is often the case with its Title VII decisions.[109] Given the similarity between Title VII, the FHA, the VRA, and other antidiscrimination statutes, the Court's departure from text and history to narrow the VRA can easily repeat in future civil rights statutory cases to the detriment of the purpose behind these statutes: preventing discrimination.

Contextualizing *Brnovich* with its contemporaries serves as a warning that antidiscrimination provisions across a variety of fields are in danger. *Brnovich* weakened the last hope that voting rights advocates had to fight voter suppression,[110] but its consequences for American democracy extend far beyond the ballot box. Although the VRA is the principal statute to protect against antidiscrimination in voting, robust antidiscrimination regimes across all issue areas are vital to maintaining our nation's democracy. While the *Brnovich* Court undervalued the role that socioeconomic disparities play in undermining our democracy,[111] social equality and economic agency are essential to ensuring that everyone can participate in our democracy,[112] and disparate impact antidiscrimination regimes in housing, employment, and more play a critical role in that project. The *Brnovich* Court's threat to democracy runs much deeper than the immediate ramifications of the decision may suggest. And in times when our multiracial democracy is consistently under threat, the Supreme Court is making advocates' and organizers' ability to fight for it in the courts all the more difficult.

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104 *See, e.g.*, *Ricci*, 557 U.S. at 594 (Scalia, J., concurring); *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2551 (Alito, J., dissenting).

105 Richard Primus, *The Future of Disparate Impact,* 108 MICH. L. REV. 1341, 1343 (2010).

106 *See* Charles & Fuentes-Rohwer, *supra* note 96, at 1390–91 ("A term of art, the word 'superstatute' describes a category of landmark legislation that addresses a significant public policy problem that if left unresolved would call into question a fundamental constitutional commitment.").

107 *See* William N. Eskridge Jr., Feature, *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 404 (2017).

108 Primus, *supra* note 105, at 1380 n.177.

109 *See, e.g.*, *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2516–18.

110 *See* Hasen, *supra* note 73.

111 *See Brnovich*, 141 S. Ct. at 2339.

112 *See* Jedediah Britton-Purdy et al., Feature, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1831 (2020).