The Legacy of Shelby County: Brnovich and the Supreme Court’s Ideological Struggle to Find a Standard for Vote-Deprivation Challenges to Section 2 of the Voting Rights Act

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“...We will not allow these cultural clear cutters to take [our rights] away and be removed to a racist reservation that exists in their mind. ... The Indian Wars of years gone by are no longer fought with smallpox, or demon rum, or post-Civil War cavalry with names such as Custer, Sheridan, Doane, or Baker, rather they come cloaked in judicial black robes armed with a voting rights philosophy as flawed as the Manifest Destiny.”

I. INTRODUCTION

Laura Roundine, like many other Americans, was eager to vote in the 2020 presidential election and finally have her voice heard. The week before, however, she underwent open-heart surgery that prevented her from voting in person. Roundine, who lives on the Blackfeet Indian Reservation, could not even go to the post office to vote by mail, and Montana did not offer the option of home delivery in much of her reservation. Luckily, Renee LaPlant—a Blackfeet

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* Suffolk University Law School, J.D. 2023; Providence College, B.A. 2020. Special thanks to Professor Renee Landers, whose guidance and advice was vital to developing this Note. I also want to thank my friends and family, who have unconditionally provided me with their love and support. Lastly, I am eternally grateful for the Suffolk University Law Review editors and staff for their hard work on this Note.


3. See id. (explaining medical risks if Roundine voted in person).

4. See id. (explaining home delivery not available on most reservations in northwestern Montana). Many Native Americans experience geographical challenges to voting. See Developments in the Law: Indian Law, 129 HARV. L. REV. 1652, 1737-38 (2016) (stating Native Americans may not have street addresses or access to polling locations). In many Native American rural areas, there is no address numbering system and consequently, many voters’ registration forms are rejected because they lack a proper street address. See Adam Cohen, Opinion, Editorial Observer: Indians Face Obstacles Between the Reservation and the Ballot Box, N.Y. TIMES (June 21, 2004), https://www.nytimes.com/2004/06/21/opinion/editorial-observer-indians-face-obstacles-between-reservation-ballot-box.html [https://perma.cc/R6HT-3F4Z] (noting lack-of-address obstacle to voter registration). Additionally, many Native Americans do not possess a driver’s license, which makes it especially difficult for them to comply with voter identification (ID) laws, travel to their nearest ID-issuing office, and mail ballots. See id. (explaining lack of driver’s license impedes ability to vote in states requiring voter ID); KEESHA GASKINS &
community organizer for the Native American advocacy group Western Native Voice—helped Roundine and many others by providing paid-ballot-collection services. These ballot collection efforts are now banned under House Bill 530 (H.B. 530), which the Republican-controlled Montana State Legislature passed in the spring of 2021.

H.B. 530 does not exist in a vacuum; rather, it is just one statute among many that state legislatures have passed in recent years making it more difficult for some citizens, including many Native Americans, to exercise their right to vote.

SUNDEEP IVER, BRENNAN CTR. FOR JUST., THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 4-6 (2012) (detailing challenges of traveling to find voter-ID offices); see also Developments in the Law: Indian Law, supra, at 1739 (mentioning lower rate of vehicle ownership for Native Americans); GASKINS & IVER, supra, at 3, 3 tbl.1 (stating sizable number of voters live more than ten miles away from nearest voter-ID office). Other ID-issuing offices are open at idiosyncratic, irregular hours that are difficult to remember. See GASKINS & IVER, supra, at 6 (explaining some offices only open on particular days of month).

5. See Astor, supra note 2 (explaining how Western Native Voice transported ballots to satellite election office in Browning, Montana). Advocacy organizations, such as Western Native Voice, assist by hiring and paying organizers to collect voted ballots and deliver them to election offices in the state. See W. Native Voice v. Stapleton, No. 20-0377, 2020 WL 8970685, at *22-23 (Mont. 13th Dist. Ct. Sept. 25, 2020) (finding Western Native Voice highly successful in turning out Native American vote). Mail collection services are crucial for many Native Americans living on geographically isolated reservations in Montana; nevertheless, these services are limited, and oftentimes Native Americans may only use P.O. boxes to receive their mail. See W. Native Voice, 2020 WL 8970685, at *11-13 (explaining those on reservations usually rely on others to pick up their mail); see also id. at *11-12 (noting Native Americans often share P.O. boxes due to associated costs). Given their geographic isolation, coupled with a lack of means to travel to mail-in ballot drop-off locations at polling places, Native Americans need assistance to exercise their right to vote. See id. at *23 (finding Western Native Voice’s work essential to increasing voter turnout in Montana).


(1) On or before July 1, 2022, the secretary of state shall adopt an administrative rule in substantially the following form: (a) For the purposes of enhancing election security, a person may not provide or offer to provide, and a person may not accept, a pecuniary benefit in exchange for distributing, ordering, requesting, collecting, or delivering ballots . . .

(2) A person violating the rule adopted by the secretary of state pursuant to subsection (1) is subject to a civil penalty. The civil penalty is a fine of $100 for each ballot distributed, ordered, requested, collected, or delivered in violation of the rule.

H.B. 530 § 2.

While the federal government originally treated Native American tribes as separate nations or entities, the Supreme Court has held that reservations shall be viewed as part of the surrounding state or territory, thereby endowing Native Americans with voting rights in state and federal elections. Yet, as soon as Native Americans gained voting rights, states attempted to severely limit them. In the past, courts viewed statutes making it more difficult to vote with suspicion, especially those made with a discriminatory purpose or that disproportionately affected marginalized populations, including Native Americans. Nevertheless, in \textit{Brnovich v. DNC}, the Supreme Court signaled it would give considerable discretion to states passing strict voting laws, even those that primarily burden minority communities.

\textit{Brnovich} involved two recently passed voting restrictions in Arizona that require the disposal of votes cast in undesignated locations, as well as a prohibition against collecting ballots for delivery to designated locations, unless the third

\footnotesize{\begin{enumerate}
\item See Utah & N. Ry. Co. v. Fisher, 116 U.S. 28, 31 (1885) (holding state authority extends to matters not interfering with federal protection); Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962) (asserting state laws apply to Native Americans with few exceptions); Colliflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965) (noting reservations considered part of surrounding state or territory except where prohibited by federal law); see also Ryan D. Dreveskracht, \textit{Enfranchising Native Americans After Shelby County v. Holder: Congress’s Duty to Act}, 70 NAT’L L. W. GUILD REV. 193, 196-97 (2013) (including brief history of tribal-state voting relations).
\item See \textit{infra} notes 68-69 and accompanying text (explaining state attacks on Native American voting rights). Obstacles to voting have shifted from “first generation barriers,” or those that explicitly deny minority citizens the right to vote, to “second generation barriers,” like voter dilution and vote denial, which subtly work to deny the right to vote. \textit{See Developments in the Law: Indian Law, supra note 4, at 1732 (describing how new voter suppression prevents full political participation).} Voter dilution involves legislatures manipulating the political geography of a state by using creative redistricting techniques that ensure even if minority communities could vote, their votes would not result in any meaningful representation. \textit{See id. at 1735 (describing how state and local jurisdictions dilute Native American voting strength).}
\item 141 S. Ct. 2321 (2021).
\item See \textit{id. at} 2347 (holding H.B. 2023 does not violate section 2 of Voting Rights Act). The Court’s opinion noted that a disparate burden was not enough to invoke section 2 liability. \textit{See id. at} 2347-48 (stating State’s justifications for statute outweigh potential burdens upon voters); \textit{Developments in the Law: Indian Law, supra note 4, at} 1732-41 (describing how strict voting laws disproportionately affect Native Americans). Recently, the Supreme Court’s decisions have empowered states to pass potentially discriminatory laws under the guise of state sovereignty. \textit{See Perry & Tong, supra note 7, at} 3 (explaining doctrine of state legislative supremacy). This doctrine has additionally empowered federal judges to strike down state efforts to protect voting rights. \textit{See id. at} 3-4 (warning state legislative supremacy potentially empowers federal judges to block voting reforms). Some legal and political commentators also refer to the doctrine of state legislative supremacy as the “independent state legislature doctrine.” \textit{See Michael T. Morley, The New Elections Clause, 91 NOTRE DAME L. REV. ONLINE 79, 94 (2016) (stating authority of state legislatures to enact election laws rooted in Constitution).}
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party is a family member, caregiver, or household member.\textsuperscript{13} Despite evidence that these restrictions would more heavily burden historically marginalized groups, the Court concluded that the disadvantages do not exceed the “usual burdens of voting.”\textsuperscript{14} Additionally, the Court explicitly rejected the use of the disparate-impact test—requiring a plaintiff to establish disparate impact from voting restrictions before the burden shifts to the defendant to prove the law accomplishes a substantial, legitimate justification—in favor of a totality-of-the-circumstances inquiry that provides considerable deference to states.\textsuperscript{15}

The Court’s decision in \textit{Brnovich} is part of a larger trend through which the importance of the Voting Rights Act (VRA) has been overlooked under the guise of state sovereignty.\textsuperscript{16} Congress passed the VRA in 1965 due to rampant voter suppression at state and local levels that flourished beginning at the end of the Civil War through the Jim Crow era.\textsuperscript{17} Despite promises of political progress after the Civil War ended, the Fifteenth Amendment, which addressed the issue of Black suffrage, was unable to stop states as they continued to marginalize Black Americans.\textsuperscript{18} Finally, following the passage of the VRA, there initially appeared to be positive progress in the voting rights arena, as more and more Black Americans were able to exercise their right of political participation in the country.\textsuperscript{19}

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15. \textit{See id.} at 2340-41 (holding disparate-impact model used in Fair Housing Act (FHA) and Title VII cases not useful). In the opinion, Justice Alito expressed concern that applying a disparate-impact test would have the effect of invalidating many neutral voting regulations. \textit{See id.} (criticizing application of disparate-impact test). Thus, Alito employed a test that focuses on any factor that may logically bear on whether voting is “equally open” and affords “equal opportunity” for a state’s citizens to vote. \textit{See id.} at 2338 (including factors considered in totality-of-circumstances test).
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17. \textit{See infra} notes 45-46 and accompanying text (remarking end of Reconstruction contributed to rampant voter discrimination in South).
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18. \textit{See U.S. Const. amend. XV, § 1} (preventing denial or abridgement of voting rights to Black Americans); \textit{see also id. amend. XIV, § 1} (granting citizenship to former slaves); Jeremy Amar-Dolan, \textit{The Voting Rights Act and the Fifteenth Amendment Standard of Review}, 16 U. PA. J. CONST. L. 1477, 1482 (2014) (explaining Fifteenth Amendment’s power obliterated in post Reconstruction South).
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The VRA has two major provisions that provide the power behind the statute. First, section 2 contains a nationwide prohibition against discrimination in voting practices. Second, section 5 includes a temporary provision that requires certain jurisdictions—determined by the preclearance formula outlined in section 4(b)—to obtain permission, or “preclearance,” before altering their voting practices.

While historically viewed as a success, recent decisions have severely weakened the VRA, such as Shelby County v. Holder, which held that section 4(b) of the VRA was unconstitutional, thus immobilizing section 5. Without section 5, states are free to enact discriminatory voting laws with little to no oversight. Shelby County, when viewed in conjunction with cases like Brnovich, demonstrates a new, concerning development in voting law: Despite strong evidence of discriminatory effect, courts will not overturn voting restrictions that disproportionately impact minority communities such as Black Americans.

This Note explores recent efforts by states to pass strict voting laws that disproportionately disenfranchise their most marginalized citizens. Given that the Civil Rights Movement spurred the advancement of voting rights for all

20. See Voting Rights Act of 1965 §§ 2, 5 (including various important VRA provisions); see also id. § 203(c) (requiring jurisdictions to accommodate minority language groups). Legislators enacted section 203(c) to accommodate minority language groups, such as Native Americans, by providing accurately translated materials and oral language assistance. See James T. Tucker, The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006, 33 J. LEGIS. 205, 225 (2007) (stating requirements allow language-minority citizens to participate effectively in voting).

21. See Voting Rights Act of 1965 § 2 (banning various forms of voter discrimination); see also Kristopher A. Reed, Note, Back to the Future: How the Holding of Shelby County v. Holder Has Been a Reality for South Dakota Native Americans Since 1975, 62 S.D. L. REV. 143, 147-48 (2017) (detailing history of section 2 of VRA). Section 2 of the VRA primarily targets two types of discrimination: when a person is denied the right to vote, and when a person’s vote is diluted. See Reed, supra, at 147-48 (describing purpose of section 2).

22. See Voting Rights Act of 1965 § 4(b) (including formula to determine if district subject to section 5 preclearance). Section 4(b) of the VRA asks whether the district used a test or device to restrict the opportunity to register to vote and whether less than half of the district’s eligible citizens were registered to vote or voted in the presidential election. See id. (setting forth preclearance formula); see also Reed, supra note 21, at 151 (describing how preclearance formula has caused intense debate). Section 5 enforces the provisions of section 4(b) and requires that specific districts receive approval of proposed election law changes from the federal government before enforcement. See Reed, supra note 21, at 151-53 (noting how all changes require approval, no matter how trivial); Voting Rights Act of 1965 § 5 (describing section 5 requirement before changing voting laws in certain states).


24. See id. at 557 (striking down section 4(b)). In its opinion, the Court noted that the states have sovereignty to manage their own elections and enjoy equal sovereignty amongst themselves, and thus, section 4(b) infringed upon this right by taking a power that should be reserved to the states. See id. at 543-44, 549 (articulating constitutional concerns with section 4(b)’s coverage formula).

25. See id. at 591-92 (Ginsburg, J., dissenting) (arguing preclearance necessary to protect minority rights and prevent backsliding).


27. See infra Part II (describing rise in voter restrictions following consequential elections).
Americans, this Note begins with a discussion of the history of voting rights as they apply to Black Americans.\textsuperscript{28} Subsequently, it transitions to the development of Native American voting rights throughout American history, as well as how Native Americans have been acutely affected by recent voter suppression efforts.\textsuperscript{29} After describing current and pending voting legislation, this Note discusses the Supreme Court’s recent decision in Brnovich, its reaffirmation and expansion of the holding in Shelby County, and the impact of future restrictive voting laws upon American citizens.\textsuperscript{30} Finally, this Note argues that courts should apply the disparate-impact test to determine whether a newly passed time, place, or manner voting restriction violates the VRA in order to effectuate the original intent of the statute.\textsuperscript{31}

II. HISTORY

A. From Founding to Freedom: Understanding the Transformation of Voting Rights in a New Nation

A discussion of the United States’s voting laws naturally begins with the nation’s founding document itself: the Constitution.\textsuperscript{32} While heralded as the symbol of freedom and self-determination in a newly founded nation, the Constitution simultaneously defined who was worthy of political power and, by extension, who would be incapable of achieving it.\textsuperscript{33} Despite their lofty ideals, the founders embedded clauses in the Constitution that Black Americans were three-fifths of a person and that Native Americans were not deserving of political rights.\textsuperscript{34} Indeed, universal suffrage was not present in any state, and many states

\textsuperscript{28} See infra Section II.A (discussing history of voting rights related to Black Americans).

\textsuperscript{29} See infra Section II.B (detailing history of voting restrictions upon Native Americans and its current impact).

\textsuperscript{30} See infra Part III (analyzing Court’s decision in Brnovich).

\textsuperscript{31} See infra Part III (advocating for application of disparate-impact test to challenges to voting restrictions).


\textsuperscript{33} See Donald G. Nieman, From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction, 17 CARDOZO L. REV. 2115, 2115-16 (1996) (stating Constitution symbolic of slavery and white supremacy before Civil War). The Constitution, as interpreted in Dred Scott v. Sandford, excluded Black Americans from citizenship, whether they were free or a slave. See id. at 2116 (explaining antebellum Constitution reinforced principles of white supremacy); 60 U.S. (19 How.) 393, 400 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV. This decision served to perpetually exclude Black Americans from political participation in the United States. See Nieman, supra, at 2116 (noting Black Americans considered lower class); Steven I. Friedland, African-Americans and Sustained Voting Rights Inequality, 31 DUQ. L. REV. 685, 686 (1993) (explaining Constitution assigned nonwhite people inferior status in new nation). Within the Constitution, there existed a dichotomy between the ideals of freedom, hope, and promise for all, and that of oppression and limitation for certain groups. See Friedland, supra, at 693 (noting slave trade emphasized dichotomy of American ideals and reality).

\textsuperscript{34} See U.S. CONST. art. I, § 2, superseded by constitutional amendment, U.S. CONST. amend. XIV, § 2 (stating Black Americans constitute three-fifths of one person); id. (excluding “Indians not taxed” from
created property qualifications that restricted certain populations from voting.\textsuperscript{35} Property qualifications were among the first barriers to voting for even the most privileged in the nation, and it would take until 1850 for all states to abolish them.\textsuperscript{36}

The next scene in the fight for voting rights—the Civil War—brought the country to the brink of dissolution.\textsuperscript{37} Lasting from 1861 to 1865, the country fought the Civil War to end the barbaric practice of slavery within the country, which directly contradicted the supposed founding ideals of equality that the founders espoused.\textsuperscript{38} At the war’s end, the Thirteenth Amendment generally outlawed the practice of slavery and set the stage for future social and political progress.\textsuperscript{39} Later, the Fourteenth Amendment granted citizenship to those born or naturalized in the United States, and the Fifteenth Amendment protected the right to vote for all Americans regardless of race, color, or previous condition of servitude.\textsuperscript{40}

Endowed with the rights granted by the Fourteenth and Fifteenth Amendments, Black Americans possessed significant political power in some southern

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\textsuperscript{35} See Elizabeth M. Yang, \textit{History of Voting in the United States}, 20 UPDATE ON L. RELATED EDUC. 4, 4 (1996) (stating voting rights initially limited to those who owned property or paid poll taxes). At the time the Constitution was enacted, roughly 6\% of the adult male population was eligible to vote—a consequence of both federal limitations on the right to vote and state-level religious and property requirements. See id. (providing history of U.S. voting rights). There was some liberalization in these laws, largely influenced by merchants and artisans who argued that possession of movable goods of specified value or the payment of taxes should suffice to fulfill the property requirements of voting. See Osmond K. Fraenkel, \textit{Restrictions on Voting in the United States}, 1 NAT’L LAW. GUILD Q. 135, 135 (1938) (stating suffrage “materially restricted” upon nation’s founding); Jamaal Makesi Chatman, Note, \textit{Abstention Against Will: The Perpetual Disenfranchisement of African Americans in Voting and Politics}, 3 J. RACE GENDER & POVERTY 43, 45 (2012) (describing history of property qualifications).

\textsuperscript{36} Proponents of property qualifications argued that it required voters to take an interest in their community’s success and that voters must be intelligent, independent thinkers. See Chatman, supra, at 45 (describing logic behind property qualifications).

\textsuperscript{37} See Friedland, supra note 33, at 693 n.26 (recognizing Constitution laid foundation for inevitable Civil War).

\textsuperscript{38} See Roy F. Nichols, \textit{American Democracy and the Civil War}, 91 PROCEEDINGS OF THE AM. PHILO. SOC’Y. 143, 143 (1947) (providing some political motivations behind Civil War).

\textsuperscript{39} See U.S. CONST. amend. XIII, § 1 (outlawing slavery and involuntary servitude unless punishment for crime).

\textsuperscript{40} See id. amend. XIV, § 1 (granting citizenship to former slaves); id. amend. XV, § 1 (preventing denial or abridgement of voting rights to Black Americans). Evidence from the post-Civil War era suggests that legislators intended the Fourteenth Amendment to address citizenship for former slaves—not Black suffrage. See Amar-Dolan, supra note 18, at 1480-81 (noting how question of Black suffrage left unresolved). Thus, Congress drafted the Fifteenth Amendment to address the issue of Black suffrage. See id. (explaining reasons underlying enactment of Fifteenth Amendment).
states where they were the majority of citizens.\footnote{See Chatman, supra note 35, at 47 (describing large population of Black Americans in southern United States during Reconstruction Period). For example, Black Americans consisted of over 40% of the population in Alabama, Florida, Georgia, and Virginia. Id. (stating Black Americans’ ability to vote ceased during Reconstruction).} Ambitious and anxious to shape their political futures, Black men registered and voted in elections, leading to a change in the electorate that lasted nearly twenty years.\footnote{See id. (stating Black Americans played dominant role in state governments during Reconstruction). In fact, Black American turnout during the 1867 elections was at least 70% in each state. See id. (acknowledging high political participation by Black Americans during Reconstruction). Following the Reconstruction Act of 1867, Black Americans joined Union Leagues and other political clubs across the South to educate themselves regarding the voting process. See Nieman, supra note 33, at 2129 (noting political education of Black Americans led to high voter turnout).} For the first time since its founding nearly 100 years prior, the United States showed potential for true social progress.\footnote{See Nieman, supra note 33, at 2129 (speculating potential social progress for Black Americans); Daniels, supra note 19, at 123 (describing positive changes during Reconstruction period). Some scholars have called this period of time a “laudable experiment in interracial democracy.” See Eric Foner, Reconstruction, ENCYC. BRITANNICA (Aug. 21, 2019), https://www.britannica.com/event/Reconstruction-United-States-history [https://perma.cc/H4R4-JLYK] (providing brief history of Reconstruction period). But see Lou Falkner Williams, Federal Enforcement of African American Voting Rights in the Post-Redemption South: Louisiana and the Election of 1878, 55 LA. HIST. J. LA. HIST. ASS’N 313, 315 (2014) (stating, even during Reconstruction, white Louisiana attempted to prevent Black Americans from voting). Many white Americans treated the enfranchisement of Black Americans as a wholesale threat to social and political order. See id. at 315-16 (noting political violence continued during Reconstruction attempting to prevent Black Americans from voting).}

Yet, as history shows, this social progress was merely temporary.\footnote{See Friedland, supra note 33, at 695-96 (describing backlash to Fifteenth Amendment). In many southern states, legislatures enacted “Black Codes” as a response to Congress’s commitment to protect the voting rights of Black Americans. See id. at 696 (explaining how white Americans rejected sharing political power with Black Americans). Some states even amended their own state constitutions to deny Black Americans the right to vote. See id. at 697 (considering these efforts successful).} By 1877, Reconstruction came to an abrupt end, leaving Black Americans stranded in the former Confederate states as victims of innumerable barriers to voting.\footnote{See Williams, supra note 43, at 313-14 (remarking 1877 election marked official end to federal efforts to enforce voting rights). State legislatures, like Louisiana, promised to uphold the Reconstruction Amendments “in letter and spirit,” yet a vast majority of southern states did not keep their promises. See id. at 316 (stating President Rutherford B. Hayes recalled federal troops once state legislatures accepted Reconstruction Amendments).} Outraged by the electoral successes of Black Americans, southern conservatives used voter-suppression tactics—such as poll taxes, grandfather clauses, and English language literacy requirements—to purge newly enfranchised Black Americans from the voter rolls and devastate their participation in the political system.\footnote{See Chatman, supra note 35, at 49 (mentioning various methods to suppress Black voters); Amar-Dolan, supra note 18, at 1482-83 (noting voter-suppression techniques vastly decreased Black-voter turnout in southern states).} States used poll taxes as a monetary barrier to prevent newly freed slaves and poor white males from voting.\footnote{See Chatman, supra note 35, at 50 (providing poll tax definition). White legislators targeted Black Americans for poll taxes because many lacked the financial resources to pay the poll tax or become literate. See id. (explaining consequences of poll taxes on Black Americans).} Literacy requirements, on the other hand,
mandated the voter possess the basic ability to read and write, and some also required the voter to understand the U.S. Constitution or state constitution.48

Abandoned by two branches of government, Black Americans sought an ally in the judicial branch.49 Yet the Supreme Court once again disappointed Black Americans when it validated literacy tests and struck down the Federal Civil Rights Act of 1875, which prohibited racial discrimination in public places and facilities, reasoning that Congress did not have the authority to ban discrimination in public accommodations.50

Threatened by political and economic violence, many Black Americans retreated from the political sphere, and by 1940, only 3% of voting-age Black people in the South were registered to vote.51 Furthermore, Black women, as well as Native women, were doubly disenfranchised, as their race or political designation prevented them in sharing in the recent successes of white suffragettes in the passage of the Nineteenth Amendment.52 The entry of white women into the political life of the country was sharply juxtaposed against the beginning of the Jim Crow era, which saw the rapid proliferation of state and local statutes that legalized racial segregation and attempted to isolate Black Americans from participation in American society.53

Motivated by their social, political, and economic oppression during the Jim Crow era, many Black Americans successfully challenged their treatment as second-class citizens by the United States government by taking part in numerous protests.54 The Civil Rights era was rich with consequential developments in the law that vastly improved the status of Black Americans, but perhaps the most

49. See Chatman, supra note 35, at 50 (detailing creation of National Association for Advancement of Colored People to legally attack racial discrimination).
50. See id. at 48 (describing judicial acquiescence to oppression of Black Americans). Before Reconstruction formally ended, the Supreme Court remarked that “the right of suffrage is not a necessary attribute of national citizenship.” See United States v. Cruikshank, 92 U.S. 542, 555-56 (1875) (holding Fifteenth Amendment only exempts prohibited discrimination based on race); Nieman, supra note 33, at 2139 (arguing Supreme Court’s holdings left promises of equal citizenship “an empty shell”); George Rutherford, Textual Corruption in the Civil Rights Cases, 34 J. SUP. CT. HIST. 164, 164 (2009) (noting Court authorized public racial discrimination when struck down Civil Rights Act of 1875).
51. See Daniels, supra note 19, at 123 (connecting voter intimidation with low voter registration rates).
52. See U.S. CONST. amend. XIX (granting white women right to vote); Dreveskracht, supra note 8, at 193 (stating while women enfranchised in 1920, minority vote still violently suppressed).
53. See Black Civil Rights: Jim Crow Era, HOW. L. LIBRARY, https://library.law.howard.edu/civilrightshistory/blackrights/jimcrow [https://perma.cc/C9NS-B6B9] (providing history of Jim Crow period). The Jim Crow period entailed the adoption of laws that vastly reduced the number of Black voters, in combination with violence and intimidation tactics used by the white terrorist group, the Ku Klux Klan (KKK). See id. (explaining KKK resurgence during Jim Crow era).
54. See Maxwell, supra note 19, at 167 (describing discriminatory practices of literacy tests, poll taxes, and grandfather clauses). One of the most notable protests occurred in Selma, Alabama, where civil rights activists protested racially discriminatory practices that prevented Black Americans from registering to vote. See id. (detailing events of “Bloody Sunday”).
impactful legislation of the movement was the VRA.\textsuperscript{55} Congress passed the VRA to fight against voting barriers in many southern states by increasing voter registration for marginalized groups.\textsuperscript{56} Given the protections afforded by the VRA and lasting political momentum originating from the Civil Rights movement, Black Americans could finally contribute politically in the country.\textsuperscript{57} Much like Black Americans, Native Americans have made considerable advancements in attaining voting rights, though their history charts a slightly different path than Black voters.\textsuperscript{58}

\textbf{B. Conflicts and Contradictions: Native Americans Searching for Their Place in a New Nation}

Despite their distinguished status as the first true Americans, Native Americans were not recognized as U.S. citizens until 1924.\textsuperscript{59} Rather, the United States first acknowledged Native American tribes as extrajurisdictional—foreign sovereigns who held the status of domestic dependent nations.\textsuperscript{60} As the United States expanded westward, many Americans sought to enact Native American removal policies that would aid in their acquisition of new land.\textsuperscript{61} Given that the

\textsuperscript{55} See U.S. Comm. on C.R., 86th Cong., 1961 Commission on Civil Rights Report 195 (Comm. Print 1961) (finding notable denial of civil rights in twenty-one counties studied). In large part, the 1961 Commission on Civil Rights spurred the creation of the VRA when the Commission released findings showing that Black Americans suffered the effects of voter suppression in numerous southern counties. \textit{See id.} at 195-96 (finding voter suppression caused by fear of physical or economic violence and discrimination). Historical commentators have praised the VRA as one of the most consequential pieces of legislation in U.S. history. \textit{See} Daniels, \textit{supra} note 19, at 124 (expressing importance of VRA). President Lyndon B. Johnson noted that the VRA was one of his most rewarding achievements in his administration, despite significant competition from other consequential legislation passed during his term. \textit{See} The President’s News Conference at the National Press Club, Am. President’s Project (Jan. 17, 1969), https://www.presidency.ucsb.edu/node/238879 [https://perma.cc/P2E4-9TGM] (praising effects of VRA).

\textsuperscript{56} See Amar-Dolan, \textit{supra} note 18, at 1483 (stating VRA designed to tackle considerable inequities in voting); \textit{see also} 111 Cong. Rec. 10073 (1965) (statement of Rep. Javits) (noting, in VRA discussions, ban of poll tax necessary to uphold voting rights).

\textsuperscript{57} See Maxwell, \textit{supra} note 19, at 168 (describing positive effects of VRA). Since the passage of the VRA in 1965, 1.5 million Black Americans have been enfranchised. \textit{See id.} (stating positive long-term effects of VRA). By 1967, southern states, such as Mississippi, saw their voter registration among Black Americans grow from 6.7% pre-VRA to 59.8% post-VRA. \textit{See id.} (including examples of increase in Black voter registration). Further, despite the radical nature of the legislation, the Supreme Court initially expressed approval. \textit{See} South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (noting VRA extreme, but legitimate use of legislative power).

\textsuperscript{58} \textit{See infra} Section II.B (discussing evolution of Native American voting and citizenship rights in United States).

\textsuperscript{59} See Dreveskracht, \textit{supra} note 8, at 196 (discussing historical perceptions of Native Americans’ legal status); Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)) (extending citizenship to Native Americans). The Indian Citizenship Act grants citizenship to all Native Americans, as long as citizenship does not impair or affect their rights to tribal or other property. \textit{See} Indian Citizenship Act § 1401(b).


\textsuperscript{61} \textit{See} Wolley, \textit{supra} note 60, at 169 (noting settlers’ demands influenced removal from tribal lands).
policy of removal was largely unsuccessful, the government began to pursue policies of naturalization and citizenship to assimilate Native Americans in direct contravention of their initial view that Native tribes were foreign sovereigns. In Confusion regarding Native Americans’ political status in the nation following the passage of the Reconstruction Amendments prompted the Senate Judiciary Committee to report that Natives who maintained their tribal relations were not citizens under the Fourteenth Amendment. Later, in Elk v. Wilkins, the Supreme Court validated this view and held that the Fourteenth Amendment requires Native Americans to receive a definite response from the U.S. government before the United States may determine their citizenship status. The Court reasoned that, by extension, the Fifteenth Amendment was wholly inapplicable to Native Americans.

The Indian Citizenship Act of 1924 still left some uncertainty regarding Native Americans’ citizenship statuses. While Native American were granted U.S. citizenship—and thus federal voting rights—many states continued to deny the Native citizens within their borders the right to vote in state elections. States that opposed giving Native peoples the right to vote used a variety of arguments to justify their view, ranging from assertions that Natives failed to sever tribal ties, to arguments that Native Americans were still under guardianship and were exempt from state taxes. Arizona, Utah, and New Mexico were three chief offenders, continuing to deny Native Americans the right to vote throughout most of the 1960s, primarily through the use of English literacy tests.

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62. See id. at 168-70 (describing methods of assimilating Native Americans). For example, the federal government created a federal school system for Native Americans to attempt to assimilate them into American society. See id. at 170 n.13 (noting off-reservation boarding schools effective because children removed from their families).

63. See id. at 173 (describing motivating factors behind Senate Judiciary Committee’s report); CONG. GLOBE, 41st Cong., 2d Sess. 2479 (1870) (submitting resolution asking Committee to determine whether Native Americans considered citizens).

64. 112 U.S. 94 (1884).

65. See id. at 109 (quoting United States v. Osborn, 2 F. 58, 61 (D. Or. 1880)) (stating Native American citizenship requires “consent and co-operation” of government).

66. See id. at 109 (analyzing applicability of Fifteenth Amendment).

67. See supra note 59 and accompanying text (discussing Indian Citizenship Act).

68. See Ferguson-Bohnee, supra note 34, at 1104 (noting despite passage of Indian Citizenship Act, some states denied Natives right to vote).

69. See Wolfe, supra note 60, at 182 (naming five different arguments used to justify Native voter suppression). In some states, such as South Dakota, abandoning one’s tribal ties was a prerequisite to the right to vote. See id. at 182-83 (describing how to determine whether tribal ties severed). To vote in these states, a Native American would have to abandon their language, customs, and habits. See id. (including examples of state requirements in abandoning tribal ties). Other Americans, like Chief Justice Marshall, argued that tribes were merely wards under the guardianship of United States, thereby making them ineligible for political rights. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 10 (1831) (considering Native American tribes domestic dependent nations); see also United States v. Kagama, 118 U.S. 375, 379-80 (1886) (using similar language).

70. See Ferguson-Bohnee, supra note 34, at 1112 (noting English literacy tests obstacle for Native Americans in Arizona); Developments in the Law: Indian Law, supra note 4, at 1735 (noting Utah one of last states with formal exclusions for Native American voters); Roche, supra note 32, at 96 (mentioning New Mexico final state to grant voting rights to Native Americans in 1962).
like Black Americans in the post-Reconstruction period, the U.S. legislature granted Native Americans voting rights without the proper measures in place to enforce them against hostile states that openly derided those rights.\textsuperscript{71}

The VRA marked a pivotal point in the fight for Native American voting rights.\textsuperscript{72} Section 2 of the VRA—without regard to any discriminatory intent—bans voting practices that result in the denial or abridgment of the right to vote on account of race, color, or membership in a language minority, section 3 bans the use of “tests and devices” for voting, and section 4(b) includes a coverage formula that requires certain historically-noncompliant jurisdictions to attain approval from the federal government before instituting any voting law changes.\textsuperscript{73} Finally, section 5 required certain states, determined by the preclearance formula outlined in section 4(b), to seek approval from the federal government before instituting any changes to their voting laws.\textsuperscript{74} Importantly, the VRA specifically prohibits the use of literacy tests and requires that bilingual ballots be available in areas where at least 5% of the population cannot speak or understand English.\textsuperscript{75} The statute also requires that when the language of a minority population is unwritten, the jurisdiction must provide oral assistance, instructions, or information related to registration and voting.\textsuperscript{76} While the VRA has made vast improvements in moving Native Americans closer to political equality, many voting rights activists argue that state attacks on the Act, coupled with judicial deference towards discriminatory voting laws, have weakened the effectiveness of the once groundbreaking legislation.\textsuperscript{77}
C. The VRA: Deconstructed and Destroyed

1. The Supreme Court's Treatment of the Legislation Pre-Brown

Congress initially passed the VRA to bring the nation’s most marginalized citizens back into the broad currents of political life.\textsuperscript{78} Political and historical scholars alike agree that this goal was successful, as it increased Black voter turnout, resulted in the election of Black candidates to all levels of government, and contributed to the increase of public expenditures to Black communities.\textsuperscript{79} This success was a result of the legislation’s robust and powerful provisions that gave the federal government considerable power to control what laws states could enact.\textsuperscript{80}

Over twenty years following the passage of the VRA, the Supreme Court and Congress began to disagree regarding the function of certain provisions in the legislation.\textsuperscript{81} These disagreements first came to fruition in \textit{Mobile v. Bolden},\textsuperscript{82} in which the Court added a scienter requirement—a showing of discriminatory intent—for plaintiffs proving a section 2 violation.\textsuperscript{83} Congress quickly rejected this discriminatory-intent requirement, but \textit{Bolden} served as a foreshadowing of cases yet to be decided.\textsuperscript{84}

In \textit{Thornburg v. Gingles}, the Court put forth a new three-part test to prove vote dilution, making it even more difficult for a plaintiff to succeed on their claim.\textsuperscript{85} First, the plaintiff needs to prove that the minority group is adequately large and geographically dense enough to constitute a majority in a single-

\textsuperscript{79} See id. at 513-16 (describing positive effects of VRA upon Black Americans).
\textsuperscript{81} See Boris, supra note 16, at 2096 (detailing ideological differences in understanding of VRA between Supreme Court and Congress); Maxwell, supra note 19, at 169 (describing judicial branch “circumspect” in application of VRA).
\textsuperscript{82} 446 U.S. 55 (1980) (plurality opinion).
\textsuperscript{83} See id. at 74 (adding scienter requirement to section 2). The Court reasoned prior cases had established that racially neutral state action only violates the Fifteenth Amendment when motivated by a discriminatory purpose. See id. at 62 (rationalizing scienter requirement); see also Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (emphasizing discriminatory purpose necessary to prove Fifteenth Amendment violation); Wright v. Rockefeller, 376 U.S. 52, 56 (1964) (stating plaintiffs failed to prove intentional discrimination in state congressional reapportionment statute).
\textsuperscript{85} See 478 U.S. 30, 50-51 (1986) (articulating three preconditions to proving section 2 violation); see also Boris, supra note 16, at 2097 (noting Gingles Court established three preconditions for section 2 claim).
member district. The Court later refined this requirement in Bartlett v. Strickland to require the plaintiff to first prove, by a preponderance of the evidence, that the minority population of the potential district constitutes more than 50% of that district. Second, the plaintiff must prove that the minority group is politically cohesive. Finally, the plaintiff must demonstrate that the white majority votes sufficiently as a coalition, resulting in defeat for the minority’s preferred candidate. Assuming all three requirements are met, the court will evaluate the plaintiff’s claim under the totality of the circumstances to determine whether the plaintiff has been denied equal access to the electoral process.

Similarly, sections 4(b) and 5 of the VRA have come under scrutiny by the Court, which has constantly questioned the provisions’ constitutionality in light of their limitations upon states’ rights to pass certain voting laws. For example, in Georgia v. Ashcroft, the Court gave considerable discretion to states by holding that each state has the power to select a theory of representation for minority voters. Namely, states may choose to create either “safe” districts, where it is very likely that minority voters can elect the candidate of their choice, or

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86. See Gingles, 478 U.S. at 50 (setting forth first requirement for vote-dilution claims).
88. See id. at 19-20 (holding minority group must constitute over 50% of voting-age population).
89. See Gingles, 478 U.S. at 51 (providing second requirement for vote dilution). A plaintiff may prove political cohesiveness by demonstrating that a significant number of minority group members vote for the same candidate, thereby forming a racial bloc. See id. at 56-57 (explaining pattern of racial-bloc voting probative of racial-polarization claims).
90. See id. at 51 (articulating third precondition to proving section 2 violation). Gingles emphasizes that an occasional loss of an election is far different from structural dilution resulting in the usual predictability of the minority’s loss, as the former is not actionable, but the latter is. See id. (refining meaning of section 2 violation).
91. See Campos v. City of Baytown, 840 F.2d 1240, 1244-45, 1249 (5th Cir. 1988) (providing example to meet Gingles requirements). For example, in Campos, the Fifth Circuit held that the aggregate percentages of Black and Hispanic voters satisfied both Gingles, and by extension, Strickland’s aggregation requirements. See id. at 1244 (holding aggregation acceptable because groups shared historical and political repression); Strickland, 556 U.S. at 19-20 (requiring minority population constitute more than fifty percent of voting population). The plaintiffs satisfied the second step because the minority groups—together—voted for a minority candidate. See Campos, 840 F.2d at 1245, 1248 (emphasizing courts focus on political races in which minority candidate exists).
92. Third, the final prong was satisfied because, in the district, white voters consistently defeated the power of the minority, even when some white voters voted for the minority candidate. See id. at 1249 (holding third prong satisfied); see also S. REP. NO. 97-417, at 28-29 (1981) (listing seven factors considered in objective analysis).
93. The seven factors considered by courts include: (1) the history of voting-related discrimination in the state or district; (2) the extent of racially polarized voting in the state or district; (3) the extent to which the state or political subdivision has used discriminatory procedures in the past; (4) the exclusion of minorities from the candidate slate process; (5) the extent to which minority group members bearing the effects of discrimination makes it difficult to participate in the political process; (6) the use of “racial appeals” in political campaigns; and (7) the election of minority members in the past. Id.
94. See id. at 481 (remarking section 5 provides state latitude to determine representation type).
“influence” districts, where minority voters play a substantial role in the electoral process but may not always be able to elect a candidate of their choosing.95

Perhaps the Court’s most consequential decision in the area of voting law has been its holding in *Shelby County*.96 The case began when Shelby County, Alabama filed suit in federal district court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 of the VRA were unconstitutional.97 After granting certiorari, the Court struck down the coverage formula in section 4(b) as unconstitutional, reasoning that the discriminatory practices used by certain states that prompted the passage of the VRA were no longer present, yet section 4(b) continued to subject these states to preclearance requirements.98 In his majority opinion, Chief Justice Roberts emphasized the importance of the Tenth Amendment and how drafters designed it to give the states the power to regulate their elections, which is limited by section 4(b)’s coverage formula.99 After *Shelby County*, the VRA lost a central provision, and given that section 5 gains its power from the coverage formula contained in section 4(b), section 5 became ineffective as well.100

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95. See id. at 480 (defining “safe” and “influence” districts). The Court remarked that the choice of one type of district over another carries its “risks and benefits,” an analysis that the state must undertake in determining what form of representation would best serve minority electoral interest. See id. at 480-81 (describing pros and cons of particular form of representation).


97. See id. at 540-41 (stating facts of case).


99. See Shelby County, 570 U.S. at 543 (noting autonomy of states in establishing election laws); see also U.S. Const. amend. X (leaving unenumerated powers to states or “the people”).

100. See Boris, supra note 16, at 2102 (marking section 5 became essentially moot); 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/VPA2-SBWC] (noting Shelby County made section 5 “effectively inoperable”). Hypothetically, Congress could enact a new coverage formula. See Shelby County, 570 U.S. at 557 (declaring Congress possesses power to enact new coverage formula). Yet, legal experts theorize this will be difficult in light of our current hyperpartisan political climate. See Maxwell, supra note 19, at 169 (predicting creation of new preclearance formula unlikely).
2. Brnovich’s Impact on Section 2 Jurisprudence

Finally, in Brnovich, the Court considered how section 2 applies to vote-denial claims.\(^{101}\) Brnovich addressed two provisions of Arizona voting law known as House Bill 2023 (H.B. 2023): an out-of-precinct (OOP) policy and a prohibition on third-party ballot collection.\(^{102}\) The OOP policy requires officials to reject ballots that have been cast at the wrong precinct, while the prohibition on third-party ballot collection makes it a crime to knowingly collect an early ballot—either before or after it has been completed—unless the collector is a qualified person.\(^{103}\)

In his majority opinion, Justice Alito declared that the touchstone of section 2 to determine if a voting law is constitutional is to ask whether voting is “equally open,” which requires a consideration of the totality of the circumstances.\(^{104}\) Justice Alito set forth five nonexhaustive considerations that future courts should consider to determine whether voting is truly “equally open”: the size of the burden imposed by a challenged voting rule; the degree to which a voting rule departs from what was standard practice when section 2 was amended in 1982; the size of any disparities in a rule’s impact on members of different racial or ethnic groups; the opportunities provided by a state’s entire system of voting; and the strength of the state interests served by a challenged voting rule.\(^{105}\) After

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101. See Brnovich v. DNC, 141 S. Ct. 2321, 2333 (2021) (noting first time, place, or manner section 2 case addressed by Court).

102. See id. at 2334 (describing two features of Arizona voting law at issue).

103. See id. (explaining two statutes in-depth). The OOP policy concerns counties in Arizona that use the precinct system, which requires that each voter must vote in their assigned precinct. See id. (noting Arizona counties may choose between precinct and voting-center systems). If a voter votes at the wrong precinct, their vote is not counted. See Ariz. Rev. Stat. Ann. § 16-584(E) (2022) (describing provisional ballot procedures). The second Arizona policy at issue, H.B. 2023, criminalizes collecting another voter’s ballot unless the person collecting the ballot is a postal worker, elections official, or a voter’s caregiver, family member, or household member. See Brnovich, 141 S. Ct. at 2334 (describing H.B. 2023); Ariz. Rev. Stat. Ann. § 16-1005(H)-(I) (2022) (detailing criminal consequences in handling another voter’s ballot).

104. See Brnovich, 141 S. Ct. at 2338 (remarking equal openness remains touchstone of section 2). Justice Alito argued that equal opportunity helps understand the meaning of equal openness, and he articulated that opportunity means “a combination of circumstances, time, and place suitable or favorable for a particular activity or action.” See id. at 2337-38 (explaining meaning of equal opportunity); see also Opportunity, Merriam-Webster, https://www.merriam-webster.com/dictionary/opportunity [https://perma.cc/X7S4-KQMC] (defining opportunity).

105. See Brnovich, 141 S. Ct. at 2338-40 (explaining each factor). The first factor (i.e., the size of the burden imposed by a voting rule) explicitly excludes a “mere inconvenience” hindering one from voting; rather, the obstacle must block or seriously hinder the individual’s ability to vote. See id. at 2338 (noting voting requires some, but not overly burdensome, effort). The second factor creates historical benchmarks that can be used to determine whether a challenged rule seriously blocks or hinders a voter’s ability to vote. See id. at 2338-39 (noting importance of historical benchmarking). In 1982, it was typical in many states to require in-person voting and only absentee voting in very particular occasions; therefore, it would be considered less suspect if a state enacted such laws given what was expected at the time. See id. at 2339 (mentioning state-by-state examples of voting laws in 1982). The third factor recognizes that some disparities in the impact of a voting law are possible and do not necessarily indicate a violation of section 2; thus, the size of the disparity is key in determining whether a section 2 violation has occurred. See id. (remarking disparities between minority and nonminority groups may result from variety of reasons). The fourth factor considers the multiple methods in which a state may provide
considering all five factors, the Court upheld the OOP policy and the prohibition on third-party ballot collection.\textsuperscript{106}

On the other hand, the disparate-impact test does not require evidence of intentional discrimination or disparate treatment.\textsuperscript{107} Rather, the test recognizes disparate impact does not invoke any questions regarding intent.\textsuperscript{108} Under the disparate-impact analysis, courts first consider whether the plaintiff has made a prima facie showing that the challenged policy disproportionately impacts a group based on their race, color, or national origin.\textsuperscript{109} This requires that the plaintiff (1) identify the policy at issue, (2) establish adversity or harm, (3) establish significant disparity, and (4) establish causation.\textsuperscript{110} Next, the court determines whether the policy harms a group of people enough to be actionable based on the potential negative effects of the policy, including economic and social harms.\textsuperscript{111} Further, this disparity must be significant; nevertheless, courts have declined to draw clear lines on what determines a significant disparity, and they will typically consider multiple sources of evidence to determine whether this

opportunities for a citizen to vote. See id. (using language of section 2(b) to argue state’s whole “political process” matters). Finally, the fifth factor concerns the legitimacy of the state’s interests in enacting certain voting laws, such as preventing voter fraud. See id. at 2339-40 (providing examples of legitimate state interests). In contrast, Justice Kagan’s dissent emphasized the principle asserted in Houston Lawyers’ Assn v. Attorney General of Texas: If a less racially biased law will not considerably harm the State’s interest, then the discriminatory voting rule will not survive. See id. at 2359 (Kagan, J., dissenting) (noting legal precedent); Hous. Laws.’ Assn v. Att’y Gen. of Tex., 501 U.S. 419, 427-28 (1991) (requiring less discriminatory means of serving state’s end).

106. See Bronwich, 141 S. Ct. at 2343-44 (holding neither law violates section 2 of VRA). Justice Alito asserted that the provisions of the Arizona statutes at issue produced “unremarkable burdens” that did not overcome the usual troubles of voting. See id. at 2344-45 (providing reasons why provisions of Arizona voting laws do not violate section 2).


109. See Section VII- Proving Discrimination, supra note 107 (discussing steps in using disparate-impact test).

110. See id. (setting out steps for proving adverse disparate impact).

111. See id. (observing how investigating agencies typically use “low bar” in determining adversity). Courts have also reasoned that, at least in the Title VI context, plaintiffs meet the adversity/harm prong when they have access to fewer benefits/services. See id. (discussing how access to fewer services and resulting stigmatization possibly actionable).
requirement is met.\textsuperscript{112} Finally, the plaintiff must prove that the state’s action was the cause of the disparate impact.\textsuperscript{113}

Even after making such a showing, the plaintiff has not proven their disparate-impact claim.\textsuperscript{114} The burden shifts to the defendant, who has an opportunity to demonstrate that the policy has a substantial legitimate justification.\textsuperscript{115} If the defendant successfully makes this showing, the court shifts the burden back to the plaintiff, who must prove there is a less discriminatory alternative that would achieve the same legitimate objective but create a lesser discriminatory effect.\textsuperscript{116}

The majority and dissenting opinions in \textit{Brnovich} showcase an emerging issue in section 2 vote-denial claims—what legal test to apply when the voting statute at issue involves a time, place, or manner restriction.\textsuperscript{117} As Justice Alito remarked in his opinion, the area is open to debate, and many different tests have been proposed.\textsuperscript{118} Justice Alito specifically rejected the disparate-impact model employed in Title VII and FHA cases and remarked that it would be unreasonable

\textsuperscript{111} See \textit{id.} (stating no “one-size-fits-all” way to measure disparity). In determining whether there is an actionable disparity, the factfinder identifies the protected class; determines and uses relevant, available statistical evidence; evaluates upon what population the adverse disparate impact must be shown; and, lastly, determines whether the disparity is of “practical significance” or is large enough to impose legal liability. \textit{See id.} (outlining steps to establish disparity). Most disparate-impact claims do involve some utilization of statistical evidence, as it can provide a helpful indicator of disparate impact. \textit{See Darenburg v. Metro. Transp. Comm’n}, 636 F.3d 511, 519-20 (9th Cir. 2011) (explaining importance of statistical evidence). \textit{But see Thomas v. Wash. Cnty. Sch. Bd.}, 915 F.2d 922, 926 (4th Cir. 1990) (suggesting statistical evidence not always necessary). Even so, circumstantial evidence, or the experience of specific individuals, is often a critical supplement. \textit{See Section VII- Proving Discrimination, supra note 107} (explaining statistics unnecessary at times). Even a series of discrete episodes of a challenged practice may create a reasonable presumption that the policy is discriminatory. \textit{See McCoy v. Canterbury}, No. 10-0368, 2010 WL 5349288, at *5 (S.D.W. Va. Dec. 20, 2010) (finding plaintiff failed to provide evidence of discrete episodes of discrimination).

\textsuperscript{113} See Elston v. Talladega Cnty. Bd. of Educ., 997 F.2d 1394, 1415 (11th Cir. 1993) (explaining factor not met if same disparate impact happens without challenged practice). Plaintiffs often meet the causation prong by using statistics, which must be significant enough that an inference of causation is evident. \textit{See Section VII- Proving Discrimination, supra note 107} (describing how to meet causation prong with statistics).

\textsuperscript{114} \textit{See Section VII- Proving Discrimination, supra note 107} (describing next steps of disparate-impact test after burden shifts to defendant).

\textsuperscript{115} \textit{See id.} (allowing state leeway to explain important interests served by their policies); \textit{Tex. Dep’t of Hous. and Cnty. Affs. v. Inclusive Cntyts. Project, Inc.}, 576 U.S. 519, 541 (2015) (recognizing state justification step used to give leeway in explaining valid policy goals).

\textsuperscript{116} \textit{See Section VII- Proving Discrimination, supra note 107} (explaining importance of last step of disparate-impact analysis). In the past, courts have generally been willing to analyze alternatives, with the exception of broad, institutional decisions. \textit{See id.} (explaining how courts address alternative options); \textit{see also White v. Regester}, 412 U.S. 755, 769-70 (1973) (noting disparate-impact test considers unique historical circumstances of discrimination).

\textsuperscript{117} \textit{See Brnovich v. DNC}, 141 S. Ct. 2321, 2336 (2021) (stating case “first foray into the area” of time, place, manner voting restrictions). The Court has previously addressed a variety of section 2 vote-dilution cases and has held that where the statute at issue interacts with certain historical and social conditions to cause inequality in the ability for minority and nonminority voters to elect their preferred representatives, then the statute may be invalid under section 2. \textit{See id.} at 2333 (noting Supreme Court decided many voter-dilution cases since \textit{Gingles}); \textit{see also Thornburg v. Gingles}, 478 U.S. 30, 47 (1986) (describing core of section 2 voter-dilution claim).

\textsuperscript{118} \textit{See Brnovich,} 141 S. Ct. at 2336 (remarking at least ten tests proposed to address section 2’s time, place, manner restrictions).
to employ because it would invalidate many neutral voting regulations.\textsuperscript{119} Additionally, he remarked that the dissent, in advocating for the disparate-impact model, blatantly disregarded the legislative history of section 2—namely, how Congress compromised in their amendment of section 2 by adding the totality-of-the-circumstances language.\textsuperscript{120}

In her dissent, Justice Kagan noted that the majority’s opinion “inhabits a law-free zone” and weakens a once-powerful statute that contributed to great social progress in the country.\textsuperscript{121} Justice Kagan, upon analyzing the Arizona policies, reasoned that both policies violated section 2 of the VRA because they had a disparate impact on minority voters.\textsuperscript{122} She emphasized that section 2 inquiries intended to be focus on effects, or rather, whether a statute results in racial discrimination.\textsuperscript{123} In Justice Kagan’s opinion, the totality-of-the-circumstances inquiry was intended to recognize that equal voting opportunity is a result of both background conditions and the law.\textsuperscript{124} Therefore, when an election law interacts with certain historical and social conditions to create a race-based inequality in voting opportunities, the law is invalid under section 2.\textsuperscript{125} Even when legitimate state interests may support the election law, a court must invalidate the statute if a less racially biased alternative law would not significantly impair the state’s interest.\textsuperscript{126}

\textsuperscript{119} See id. at 2340-41 (describing application of disparate impact model “inappropriate”).

\textsuperscript{120} See id. at 2341 (noting dissent’s opinion uses logic from original House version prohibiting any discriminatory effects).

\textsuperscript{121} See id. at 2351, 2361 (Kagan, J., dissenting) (criticizing Court’s rewriting of VRA). The dissent notes the totality-of-the-circumstances test requires courts to analyze how seemingly race-neutral laws may interact with certain societal, economic, and historical conditions to create racial inequalities in voting. See id. at 2362 (explaining historical roots of totality-of-circumstances test). Kagan’s opinion of the totality-of-the-circumstances test is in sharp contrast to the majority’s understanding of the test because the majority created factors to consider that did not previously exist in section 2 of the VRA. See id. (explaining majority-created provisions not present in section 2).

\textsuperscript{122} See Brnovich, 141 S. Ct. at 2366 (Kagan, J., dissenting) (reasoning both Arizona policies violate straightforward reading of section 2). In her dissent, Justice Kagan stated the OOP policy results in minority votes being discarded at a statistically higher rate than white votes and that H.B. 2023 makes voting considerably more difficult for Native American citizens. See id. (stating totality-of-circumstances proves minorities possess less opportunity than others to vote). Given that many Native Americans live far from mail-collection services, they often receive assistance from third parties to return their ballots. See id. at 2370 (explaining returning ballots by mail poses considerable challenge for Arizona’s rural Native Americans). Thus, as Justice Kagan argues, H.B. 2023 results in discriminatory consequences for Native American voters. See id. at 2371 (remarking H.B. 2023 prevents Native Americans from exercising right to vote).

\textsuperscript{123} See Brnovich v. DNC, 141 S. Ct. 2321, 2357-58 (2021) (Kagan, J., dissenting) (reasoning “results in” language prevents difficulties in proving intent). In amending section 2, Congress noted many facially neutral rules, such as voter-purging policies, that would violate section 2 by resulting in racial disparities in voting. See S. Rep. No. 97-417, at 10 n.22 (1981) (noting inconvenient registration hours and purging voters bar minority participation in voting).

\textsuperscript{124} See Brnovich, 141 S. Ct. at 2359 (Kagan, J., dissenting) (explaining totality-of-circumstances test concerns how statute interacts with local conditions).

\textsuperscript{125} See id. (explaining totality-of-circumstances test meant to discover challenged rule’s effect on minority voters).

\textsuperscript{126} See id. (citing Hous. Laws.’ Assn. v. Att’y Gen. of Tex., 501 U.S. 419, 428 (1991)).
D. Consequences of a Weakened VRA: Recent State Legislation and Effects on Marginalized Groups

The Supreme Court, through its prior holdings, has made it more difficult for plaintiffs to establish a section 2 violation, invalidated section 4(b), and essentially nullified section 5 in the process.127 The Court’s increasing leniency toward state voting laws has led to a proliferation of restrictive voting laws, as seen through a state-by-state analysis.128 Between January 1 and December 7, 2021, nineteen states passed a combined total of thirty-four laws restricting access to voting, while legislators introduced over 400 bills with restrictive voting provisions in forty-nine states during 2021 state legislative sessions.129 The Arizona legislature alone passed three restrictive voting bills during 2021.130 Restrictive voting laws other states have passed include imposing voter-ID requirements, restricting assistance in returning a voter’s mail ballot, reducing polling place availability, and banning the distribution of snacks and water to voters who wait

127. See supra note 100 and accompanying text (describing how Court invalidated section 4 and made section 5 inoperable); Brnovich, 141 S. Ct. at 2372-73 (Kagan J., dissenting) (marking majority created extratextual exceptions and additional considerations to weaken section 2); Ian Millhiser, The Supreme Court Leaves the Voting Rights Act Alive — But Only Barely, Vox (July 1, 2021), https://www.vox.com/2021/7/1/22559046/supreme-court-voting-rights-act-brnovich-dnc-samuel-alito-eleena-kagan-democracy [https://perma.cc/R69W-JFC4] (describing VRA “shadow of its former self” after cases like Shelby County and Brnovich); 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/P59L-RH6B] (noting Brnovich’s holding makes it harder to challenge discriminatory laws). Most recently, the Court attacked the power of the VRA to address gerrymandering, which dilutes the voting strength of minority groups, in Merrill v. Milligan. See Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (mem.) (granting application for stay of district court injunction); see also Mark Joseph Stern, SCOTUS Just Blew Up the Voting Rights Act’s Ban on Racial Gerrymandering, SLATE (Feb. 7, 2022), https://slate.com/news-and-politics/2022/02/supreme-court-alabama-racial-gerrymander-roberts-kavanaugh.html [https://perma.cc/VES9-SQN] (describing specific facts of Merrill); Carol Anderson, The US Supreme Court Is Letting Racist Discrimination Run Wild in the Election System, GUARDIAN (Feb. 12, 2022), https://www.theguardian.com/commentisfree/2022/feb/12/us-supreme-court-racist-discrimination-election-system [https://perma.cc/ZBS2-63MX] (criticizing grant of stay in Merrill). The case concerned a congressional map, drawn by Alabama Republicans, that packed a considerable number of Black voters into a single district stretching from Birmingham to Montgomery. See Stern, supra (explaining political dilution consequences when majority Black voters packed into one district). The Court rejected a lower court order that found Alabama had violated section 2; thus, the Court required the State to revert to its original, gerrymandered congressional map. See id. (reasoning Court’s order necessitated by “Purcell principle,” which counsels against last-minute election changes). In her dissent, Justice Kagan remarked that the State of Alabama had the burden of proving it was likely to succeed on the merits and that the majority erroneously shifted this burden to the plaintiffs. See Merrill, 142 S. Ct. at 889 (Kagan, J., dissenting) (stating reversal of district court decision upsets way section 2 plaintiffs prove vote-dilution claims); Stern, supra (arguing Justice Kavanaugh’s flawed logic essentially immunizes gerrymanderers from judicial review).


129. See id. (providing research regarding restrictive voting laws states introduced in 2021).

130. See id. (identifying significance of Arizona’s restrictive statutes, making it key state to watch).
Political commentators have also noted many laws restricting voting have been enacted in battleground states, foreshadowing controversy for future elections.

Native Americans are uniquely impacted by restrictive voting laws. Despite convincing evidence of voting discrimination, the VRA is rarely enforced to protect Native American voting rights, partly due to a lack of resources and access to legal assistance for the Native American community, their geographical isolation, and the Department of Justice’s lax approach. For example, the physical geography of where many Native Americans live often impedes their ability to vote. Given that proof of residence is required to prove identification, voter registration may be difficult, given that many tribal communities are not assigned street addresses. Assuming Native Americans can hurdle the challenge of registration, they may additionally lack access to physical voting centers. Some Native American communities are more than one hundred miles from the nearest polling place, and early or absentee voting may only slightly relieve this burden. Similarly, Native Americans who possess limited English proficiency may face additional challenges in securing identification or registration.

131. See id. (providing table of restrictive voting laws by state and detailing how they restrict voting). Unfortunately, restrictive voting laws are not a novel creation; in 2008, for example, the Supreme Court upheld a state voter ID law against a plaintiff’s claims that the law violated the Fourteenth Amendment. See Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 187-89 (2008) (explaining evidence in record insufficient to invalidate statute). The dissent, on the other hand, argued that the law is unconstitutional because it posed an “unreasonable and irrelevant burden” on both elderly and economically marginalized people. See id. at 237 (Souter, J., dissenting) (explaining dissent’s conclusion).


133. See Dreveskraft, supra note 8, at 205 (noting Native Americans lack de facto right to vote in many places).


135. See supra note 4 (explaining physical geography impedes Native Americans’ ability to vote). While Native Americans are not the only ones impeded by the problem of remoteness, it does disproportionately impact their communities. See Developments in the Law: Indian Law, supra note 4, at 1739 (explaining Native Americans disproportionately suffer from low rates of vehicle ownership and dire socioeconomic circumstances). Given that many Native Americans live in remote areas, this also presents unique issues in obtaining an ID. See Sally Harrison, Comment, May I See Your ID?: How Voter Identification Laws Disenfranchise Native Americans’ Fundamental Right to Vote, 37 AM. INDIAN L. REV. 597, 616 (2012) (stating many Native Americans lack necessary documentation to obtain photo ID).

136. See Harrison, supra note 135, at 617 (noting reservations may lack street addresses due to poor road conditions).

137. See Developments in the Law: Indian Law, supra note 4, at 1738 (emphasizing many Native Americans live considerably far from nearest polling place).

138. See id. (noting absentee mail service viable only if mail service reliable).

139. See id. at 1740 (describing how limited English proficiency hinders voting capabilities).
advocates emphasize that Native Americans require the protections afforded by section 2 to exercise their right to vote. 140

III. ANALYSIS

As evident in numerous Supreme Court decisions from the last decade, a newly conservative Court and an opposition to the policies embodied by the VRA have created the perfect opportunity to dismantle many of the VRA’s one-powerful provisions that made it effective in fighting discriminatory voting practices.141 Taken together, Shelby County and Brnovich represent how the Court—once a staunch defender of voting rights—has slowly whittled down the VRA in the name of state sovereignty.142 Additionally, the deconstruction of the VRA is a prime example of how the Court has become unconcerned with the realities of voter suppression upon American citizens.143 The Court has found it easy to deny the existence of voter suppression because the practice no longer takes the overt form of poll taxes and grandfather clauses; instead, facially neutral practices like voter ID laws allow the Court to turn a blind eye and feign ignorance at their ability to intervene.144 In applying weak, state-friendly tests to VRA


143. See Brnovich, 141 S. Ct. at 2344 (majority opinion) (stating identification of polling place and traveling there does not exceed “usual burdens of voting”). Justice Alito’s remarks that the Arizona laws at issue do not exceed the “usual burdens of voting” are simply out of touch with the realities of voter suppression. See id. at 2363 (Kagan, J., dissenting) (noting judges lack objective way to determine “mere” obstacles). In concluding that the ballot-collection rule is not a mere obstacle, Justice Kagan noted that only 18% of Native voters in rural counties receive mail home delivery while 86% of white voters in the same counties receive mail home delivery. See id. at 2370-71 (concluding state law interacts with local conditions to produce severe hardship for Native citizens). Thus, the majority suggests that traveling over an hour to access a mailbox—a task they, the most privileged in the nation, do not have to do—is a mere inconvenience. See id. at 2371 (discussing majority’s failure to acknowledge facts proving disparate impact); see also supra note 4 (detailing additional challenges to voting for Native Americans in rural Montana).

144. See Boris, supra note 16, at 2094 (noting Court began to narrowly construe VRA over past decade); Developments in the Law: Indian Law, supra note 4, at 1737 (explaining “new vote denial” uses vote-dilution and denial methods); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189, 202 (2008) (upholding state voter ID law because requirement not “excessively burdensome”).
challenges, the Supreme Court legitimizes voter suppression. Therefore, to prevent the complete destruction of the VRA and protect minority voting rights against suppression tactics, courts need to modify, or completely replace, the test used to address statutes that are challenged under section 2 that operate to cause vote denial.

A. Why the Test Announced in Brnovich Fails: A Misunderstanding of the Original Statute and an Overemphasis of States’ Rights

As announced in Brnovich, the current test to determine if a time, place, or manner voting restriction violates section 2 involves determining whether voting is “equally open” to members of all races under a totality-of-the-circumstances analysis. Ultimately, a system is not equally open when citizens of one race have less opportunity to vote or participate politically in their communities. Therefore, any test used to determine the discriminatory nature of a voting law must intimately focus on its effects upon voters.

To determine the proper statutory test, one must examine the legislative history of section 2; yet, as Kagan acknowledged in her dissent, the majority chose to ignore the statutory intent of the drafters and instead chose to recreate a narrowed version of section 2. Congress intended section 2 to eliminate discriminatory voting laws or election systems that function, intentionally or not, to diminish or completely erase the voting power and political efficacy of minority groups. In contrast, as Kagan remarked, the majority crafted a list of “mostly made-up factors” that are “at odds with Section 2 itself.” Essentially, the Court created a list of extratextual exceptions—such as a strong emphasis on state’s rationales behind a voting law and consideration of historical conditions of voting—that serve to limit the power of section 2 by making it more difficult for a plaintiff to prove a section 2 violation, which was not the intent of the statute’s drafters.

145. See Morales-Doyle, supra note 127 (describing implication of Brnovich—“a little bit” of discrimination acceptable).
146. See Stephanopoulos, supra note 107106, at 1570-71 (arguing disparate impact should apply to section 2 vote-denial challenges).
147. See supra note 105 and accompanying text (describing totality-of-circumstances test set forth by Court to address vote-denial claims).
149. See id. (emphasizing section 2 concerned with legislation’s impact upon voters).
150. See Brnovich v. DNC, 141 S. Ct. 2321, 2360 (2021) (Kagan, J., dissenting) (asserting applying section 2 requires consideration of “a lot of law”). Thus, as Justice Kagan quipped, it is strange that the long, complicated history of the law is only recounted in the dissenting opinion and not the majority’s opinion. See id. (criticizing majority’s ignorance of section 2’s history).
152. See Brnovich, 141 S. Ct. at 2362 (Kagan, J., dissenting).
153. See id. (declaring majority’s list “set of extra-textual restrictions” on section 2); see supra note 105 (including extratextual factors addressed by majority opinion); S. Rep. No. 97-417, at 17-18 (explaining original legislative intent to ban voting laws with discriminatory purpose or effect).
To understand the majority’s creation of extratextual factors, one should consider the emphasis that Alito placed upon the importance of state interests in the totality-of-the-circumstances analysis. 154 While a court may consider a state’s interests in determining whether an election rule violates section 2, the rule must still be narrowly tailored to achieve the statute’s end. 155 The Court’s pronouncement that a state voting law needs to only “reasonably pursue important state interests” is concerning, as it gives state election officials considerable discretion to pass, with only minor restraints, discriminatory voting laws. 156 This is contrary to the initial intent of the law because the Court’s holding gives too much deference to states, which the drafter would simply offer a non-racial rationalization for laws that purposely discriminate against people of color. 157 Thus, given how the Court has added extratextual requirements to proving a section 2 violation and has contravened the initial purpose of the VRA, the Court must correct the standard by which section 2 time, place, and manner voting restrictions are adjudged. 158

To better effectuate the intent of the drafter of the VRA, the Court should apply the disparate-impact test in a way that makes it easier for plaintiffs to prove a section 2 claim. 159 The first step of this analysis—identifying the statute at issue—would be the same as the totality-of-the-circumstances test. 160 Next, the Court would need to determine whether the statute causes vote denial harms enough individuals to be actionable—here, the adverse effects would likely be political, or more specifically, whether minority voters would not be able to participate in the political process as effectively as their white counterparts. 161 At

154. See Brnovich, 141 S. Ct. at 2364 (Kagan, J., dissenting) (noting majority’s discussion of state interests in reducing states’ section 2 liability).


156. See Brnovich v. DNC, 141 S. Ct. 2321, 2343 (2021) (majority opinion) (setting forth lax standard for state voting laws); Anderson, supra note 127 (arguing Court content to let discrimination run rampant in state election systems).


158. See id. at 28 (describing goal of section 2). As the majority recognizes, statutory interpretation begins with an in-depth consideration of the text. See Brnovich, 141 S. Ct. at 2337 (majority opinion) (describing new consideration of statutory text given novel topic). Given the importance of the Senate Report in outlining the purpose of section 2, it is concerning that the majority only addressed the Report a few times throughout their opinion. See id. at 2332-33, 2342 n.15 (mentioning Senate Report in selective contexts).

159. See supra notes 146, 151 (arguing for application of disparate-impact test and explaining original legislative intent of VRA).

160. See Brnovich, 141 S. Ct. at 2368-69 (Kagan, J., dissenting) (connecting both Arizona voting laws to disparate impact on minority voters).

161. See supra note 110 and accompanying text (explaining disparate-impact test first requires identification of policy at issue). But see Stephanopoulos, supra note 107, at 1582-83 (discussing whether to start by challenging particular electoral practice or entire system of election administration). Jurisdictions vary regarding whether to make a constitutional challenge to a discrete voting law or the entire system of election administration itself. See Stephanopoulos, supra note 107, at 1582-83 (discussing circuit split regarding issue). Most recently, in Justice Kagan’s Brnovich dissent, she addressed each voting statute at issue separately, perhaps showing her
this stage, it would be useful to consider statistics, as well as the experiences of marginalized citizens who must overcome the negative impacts of these restrictive voting laws. Finally, in the context of vote-denial claims, the plaintiff would need to prove that the discriminatory voting statute caused the disparate impact, rather than other unrelated causes. If an initial showing of disparate impact is met, the burden would then shift to the state to demonstrate a substantial, legitimate justification for the voting law, and finally, if this is shown, the plaintiff must show there is a less discriminatory alternative for the law. This last part of the test would likely satisfy judges like Justice Alito, who unnecessarily fear that utilizing the disparate-impact test would lead to the wholesale destruction of state voting laws.

B. Adoption of the Disparate-Impact Test: Effectuating Intent and Creating Equitable Outcomes

The disparate-impact test both effectuates Congress’s original intent in the creation of the VRA and has the potential to produce more equitable outcomes for litigants claiming section 2 violations. As previously discussed, the totality-of-the-circumstances test that the Court has fashioned has taken a too deferential approach to potentially discriminatory state voting laws. The disparate-impact test has the potential to correct this failure by utilizing a burden-shifting approach, which provides more deference to plaintiffs seeking to prove a section

preference for that form of analysis. See Brnovich, 141 S. Ct. at 2368-69 (Kagan, J., dissenting) (considering each state election law separately).

162. See supra note 112 and accompanying text (mentioning multiple sources of data may prove disparate impact). While statistics are often essential to proving any disparate-impact claim, they are not the exclusive means of proof. See Thomas v. Wa. Cnty. Sch. Bd., 915 F.2d 922, 926 (4th Cir. 1990) (emphasizing statistics not always necessary). This is especially important in the voting rights context, as the analysis of individual voter experiences is often important in establishing a claim of disparate impact. See White v. Regester, 412 U.S. 755, 769-70 (1973) (noting totality-of-circumstances analysis requires “blend of history and intensely local appraisal”).

163. See supra note 111 (explaining causation aspect of disparate-impact test). In addition to performing causation analysis, a court will inquire into whether the law interacts with social and historical discrimination. See Stephanopoulos, supra note 107, at 1579 (outlining factors considered in causation analysis).

164. See supra notes 114-116 and accompanying text (discussing shifting of burden after plaintiff makes initial showing of disparate impact).

165. See Brnovich v. DNC, 141 S. Ct. 2321, 2341 (2021) (majority opinion) (expressing concerns regarding application of “strict necessity requirement”).

166. See Stephanopoulos, supra note 107, at 1601-04 (arguing legislative histories of various civil rights legislation suggests application of disparate-impact test). Justice Kagan, a staunch defender of the VRA, has also remarked in her Brnovich dissent that to apply section 2 correctly (i.e., utilize the correct test for vote-denial claims) is to give every American “an equal chance to participate in our democracy.” See Brnovich, 141 S. Ct. at 2372-73 (Kagan, J., dissenting) (arguing broad language of statute necessitates invalidation of any law resulting in disparate voting opportunities).

167. See supra notes 156-157 and accompanying text (noting application of state-friendly tests legitimizes voter suppression); supra note 105 and accompanying text (describing how Court interfered with original purpose of VRA by creating extratextual requirements).
2 violation. 168 This burden-shifting approach aligns with the initial intent of the VRA: to “replace state and local election rules that needlessly make voting harder” for Hispanic, Black, and Native American voters. 169 This intent is also reflected in the legislative histories of Title VII and the FHA, which Congress passed temporally close to the VRA. 170 Title VII and the FHA both use a disparate-impact test to determine whether a violation has occurred, showing that this type of test is what Congress intended when section 2 was written. 171

The disparate-impact test also has the potential to create more equitable outcomes for plaintiffs alleging section 2 violations concerning a time, place, or manner voting statute. 172 As Justice Scalia has remarked, the disparate-impact test may be used as a powerful evidentiary tool to uncover intentional, but difficult to prove, discrimination. 173 While the Brnovich majority rejected the plaintiff’s claim that the Arizona laws were discriminatory using the totality-of-the-circumstances test, the dissent’s test would result in a conclusion that both laws are unconstitutional. 174 In contrast, the dissent’s approach, which utilizes the disparate-impact test, would hold both statutes unconstitutional after considering both remarkable disparities in the impact of the law between white and Native American citizens, as well as local conditions in which the two laws interact. 175

In all likelihood, courts will not abandon the totality-of-the-circumstances inquiry in its entirety. 176 Though courts should, at the very least, remember the

168. See supra notes 114-116 (discussing shifting of burden after plaintiff makes initial showing of disparate impact).

169. See Brnovich, 141 S. Ct at 2366 (Kagan, J., dissenting) (noting VRA not created to uphold state rights, rather to ensure equal voting opportunities).

170. See Stephanopoulos, supra note 107, at 1602 (remarking all three pieces of legislation construed to allow disparate-impact claims). During the 1960s, Congress passed Title VII, the FHA, and the VRA, which embodied the legislative desire to deconstruct the racial oppression present in American society. See id. (connecting three pieces of impactful legislation).

171. See Section VII-Proving Discrimination, supra note 107, § C.1 (including discussion regarding how to establish disparate impact in Title VI cases); Schwemm & Bradford, supra note 107, at 688 (noting lower courts began recognizing FHA disparate-impact claims in 1970s); Stephanopoulos, supra note 107, at 1602 (noting Title VII, FHA, and VRA close in “spirit and time”).


174. See supra note 106 and accompanying text (providing holding of Brnovich—both laws held entirely legal under totality-of-circumstances test); supra note 122 and accompanying text (including Kagan’s reasoning for considering both state laws invalid).

175. See supra note 122 (noting both laws disproportionately impact Native Americans).

176. See The Contemporary Debate, supra note 10, at 1 (noting, historically, Court acted to “undermine[] federal attempts to eliminate hierarchies” like race and wealth). In other words, given the current political composition of the Court, and the majority’s desire to give deference to state election laws, the current test to evaluate section 2 vote-denial claims is unlikely to change completely. See Brnovich v. DNC, 141 S. Ct. 2321, 2341 (2021) (majority opinion) (critiquing dissent’s usage of disparate impact).
legislative history of section 2 and recognize that state interests should not be at the forefront of determining whether there has been a section 2 violation. Nevertheless, if a court does utilize the burden-shifting framework of the disparate-impact test, the court may begin to delve deeper into facially neutral—yet secretly discriminatory—voting laws. By utilizing the disparate-impact test, section 2’s focus on whether an election process is “equally open” to all members may be finally realized.

IV. CONCLUSION

Throughout its history, the United States has made steady progress towards achieving political equality among its citizens and has gradually abolished voting barriers based on property qualifications, race, and sex. Over the past two decades, however, the Supreme Court has taken a sharp turn in its voting rights jurisprudence by weakening the powerful voter protections embodied in the VRA and empowering states to pass time, place, or manner voting restrictions that, while facially neutral, work insidiously to disproportionately affect minority voters. Native Americans are one group at risk of losing their voting protections due to the emphasis placed on state sovereignty and disproportionate impact of time, place, and manner voting restrictions upon them.

To fully realize Congress’s intent to protect marginalized groups from discrimination, the Supreme Court should overrule Brnovich and adopt the disparate-impact test to evaluate claims made under section 2 of the VRA. Nevertheless, given the current political composition of the Supreme Court, this seems unlikely. Thus, it is Congress’s responsibility to amend the VRA once more to protect marginalized voters against the depredations of states that seek to weaken certain voters’ political power. If the United States aims to uphold the founding ideals embodied in the Constitution, there is only one appropriate path to take, yet this conclusion was not one that the majority in Brnovich recognized.

177. See supra notes 156-157 and accompanying text (arguing Court erroneously prioritized state interests in response to discriminatory voting laws).
178. See Brnovich, 141 S. Ct. at 2360 (Kagan, J., dissenting) (noting disparate impact effects inquiry addresses facially neutral laws). These facially neutral laws, upon interacting with the nation’s discriminatory historical, social, and economic conditions, creates a disparate impact that courts can more effectively evaluate using the disparate-impact test. See id. (Kagan, J., dissenting) (describing considerations in section 2 vote-denial claim).
179. See id. at 2358 (Kagan, J., dissenting) (arguing electoral system not equally open if political opportunity absent).