Brnovich v. DNC: Election Litigation Migrates from Federal Courts to the Political Process

*Derek T. Muller**

We are in a time of public skepticism over elections. The losing side doubts the fairness of the outcome, attributing the loss to suppression, fraud, foreign influence, or late-breaking changes to laws—some "true reason" outside the legitimate political process why a preferred candidate failed. The winning side is a sour contest or a sore loser away from doubting the legitimacy of the election.

It's hard to tell whether the sharp rise in litigation over elections is the cause or the effect. Major political parties are spending more money than ever on lawyers and litigation in federal elections, from $7.5 million in 2012 to more than $66 million in 2020.[1] Seemingly minor changes to schedules, deadlines, or how forms are mailed immediately prompts the filing of a legal complaint. Every corner of election administration is up for a lawsuit as major political parties vie for the smallest competitive advantage—actual or perceived.

While *Brnovich v. Democratic National Committee* was a case about the Voting Rights Act, the hallmark voting legislation of the civil-rights era, it began as one of these efforts by a political party to litigate relatively minor issues of state election administration. A district court rejected the lawsuit. But on appeal, the case took on outsized

* Bouma Fellow in Law and Professor of Law, University of Iowa College of Law. Special thanks to Trevor Burrus and the Cato Institute for their invitation to write and for their assistance in publishing this piece. Portions are derived from two of my shorter articles in the aftermath of *Brnovich*: "Brnovich, Election-Law Tradeoffs, and the Limited Role of the Courts," SCOTUSblog, July 6, 2021, https://bit.ly/2TQ8HCY; and "Supreme Court Raised the Bar for Challenge to GA Election Law," RealClearPolitics, July 23, 2021, https://bit.ly/3irVkmd.

[1] Derek T. Muller, Reducing Election Litigation, Fordham L. Rev. (forthcoming), https://bit.ly/3xxnG2J.

importance as an appellate court found that Arizona enacted a statute with racially discriminatory intent, opening the door to judicial oversight of newly enacted election rules. That caught the attention of the Supreme Court, which in turn weighed in for the first time on an entire class of claims under the Voting Rights Act.

The decision in *Brnovich* likely limits opportunities for plaintiffs litigating certain classes of election-law cases, at least compared to the baseline of what some federal courts had permitted in the last few years. But it's also the latest in a 20-year string of Supreme Court cases emphasizing that the political process, not the federal courts, remains the principal place to address most election-law issues. Litigation continues to rise even as plaintiffs are increasingly likely to find themselves on the losing side of the case. And it remains unclear whether public confidence, through litigation or otherwise, will rise anytime soon.

I. Lower-Court Skirmishes

A. The DNC Initiates a Lawsuit

In March 2016, Arizona's presidential primary went off poorly. Significant numbers of unaffiliated or independent voters attempted to vote when they were not permitted to do so, and Maricopa County's move from specific precincts to vote centers caused long lines and significant confusion.[2]

Weeks later, the Democratic National Committee (DNC) sued the state. As Amy Dacey, the chief executive of the DNC, explained when justifying the lawsuit, "What Arizona voters experienced during the presidential primary goes beyond the bounds of what anyone would consider reasonable."[3] The DNC's lawsuit targeted two particular practices that would become the core of the dispute before the Supreme Court.

First, the DNC challenged a prohibition on out-of-precinct voting. Under a law stretching back to at least 1970, if a voter appeared in the wrong precinct, that voter ought to be directed to the proper precinct to cast a vote. If not, she might cast a provisional ballot.

[2] AJ Vicens, "The Election in Arizona Was a Mess," Mother Jones, Mar. 24, 2016, https://bit.ly/3rTDjjr.

[3] Amy Dacey, "This Is Why the Democratic Party Is Suing the State of Arizona," Medium, Apr. 14, 2016, https://bit.ly/3rTehAY.

But that ballot would not be counted if the voter was not from that precinct. If the voter was an eligible voter, no votes would be counted, even in statewide races like presidential or gubernatorial elections. Only if the voter actually resided in that precinct but was erroneously excluded from the voting roster would the ballot be counted.

Second, the DNC challenged a statute that Arizona had enacted only weeks earlier and that had not yet gone into effect, H.B. 2023. The bill limited third-party ballot collection, or "ballot harvesting." Only specified third parties (postal workers, election officials, caregivers, family members, or household members) could collect a completed and sealed vote-by-mail ballot. While Arizona had long limited which parties could deliver *blank* ballots to voters, H.B. 2023 was a new rule, one that extended a parallel prohibition to the collection of *completed* ballots. Opponents of ballot harvesting worried that collectors could exert pressure on voters or fraudulently alter or destroy ballots. Such instances are rare, but they have occurred around the country. After failed efforts to enact a similar law in 2011 and 2013, the Arizona legislature succeeded enacting the statute in 2016.

Notably, neither of these practices caused problems in the 2016 presidential primary. Neither would fix long lines, undersized vote centers, or confusion among nonparty members. Arizona's new ballot harvesting law hadn't been enacted, much less taken effect. And Arizona's out-of-precinct voting rule might alter canvassed totals but would certainly not change anything about voter-facing election administration.

At the time, the *Washington Post* reported that it was "unclear" whether the Justice Department "has the evidence to file a lawsuit under Section 2 of the Voting Rights Act."[4] Attorneys in President Barack Obama's Justice Department did not file a lawsuit. Nor did attorneys at a civil rights organization like the NAACP or the Mexican American Legal Defense and Educational Fund.

The lawsuit was instead initiated by the DNC. Indeed, the DNC's complaint squarely framed the litigation on its own behalf

[4] Sari Horwitz, "Democratic Party, Clinton and Sanders Campaigns to Sue Arizona over Voting Rights," Wash. Post, Apr. 14, 2016, https://wapo.st/3ymKeEh.

as a matter of partisan advantage, only incidentally about racial effect.[5]

Among other plaintiffs, including individual voters and the Navajo Nation, the lawsuit was joined by Ann Kirkpatrick (a Democratic challenger to Sen. John McCain) and presidential candidate Hillary Clinton. These two individuals had an interest in challenging the out-of-precinct voting rule. The remedy asked for ballots cast in the wrong precinct to be counted for offices for which the voter was otherwise eligible. The Senate and presidential races were statewide elections—and the Democrats understandably hoped to secure an advantage for their candidacies.

The complaint was filed, and the stage was now set to challenge the statutes in federal court. But the choice to file under Section 2 of the Voting Rights Act merits further examination.

B. Recent Section 2 Litigation

The DNC alleged that Arizona's laws disproportionately affected racial minorities, and that H.B. 2023 was enacted with discriminatory intent. But why did the DNC bring an action under Section 2 of the Voting Rights Act? Although the DNC did bring other claims, the Section 2 claims ended up driving the case. It reflects litigation decisions after a pair of Supreme Court decisions in the decade before the 2016 presidential primary—*Crawford v. Marion County Election Board* and *Shelby County v. Holder.*

[5] Complaint at 12–13, Feldman v. Ariz. Secretary of State's Off. (D. Ariz. Apr. 15, 2016) (No. 16-01065) ("The DNC has members and constituents across the United States, including eligible voters in Arizona. To accomplish its mission, among other things, the DNC works closely with Democratic public officials and assists state parties and candidates by contributing money; making expenditures on their behalves; and providing active support through the development of programs benefiting Democratic candidates. The lack of oversight for Maricopa County's allocation of polling locations; Arizona's policy of not counting provisional ballots cast in a precinct or voting area other than the one to which the voter is assigned; and the State's recent criminalization of the collection of signed and sealed absentee ballots with the passage of H.B. 2023 directly harm the DNC, its members, and constituents by disproportionately reducing the turnout of Democratic voters and increasing the likelihood that those voters who do turnout will not have their vote counted. These practices and provisions further decrease the likelihood that the DNC will be successful in its efforts to help elect candidates of the Democratic Party to public office. . . . In particular, among the voters most harmed by Arizona's policies are some of the DNC's core constituencies, including Hispanic, Native-American, and African-American voters. . . .").

In 2008, the Supreme Court considered a challenge to Indiana's voter identification law. Its decision in *Crawford* concluded that the law passed constitutional scrutiny.[6] The Court drew upon its precedents that developed a balancing test to determine whether election laws excessively burdened voting rights under the Constitution. A slight burden on the right to vote generally survived judicial review when it advanced the state's "important regulatory interests."[7] A "severe" burden, however, must be "narrowly drawn" to achieve a "compelling interest."[8] In *Crawford*, the Court concluded that the voter-identification law did not place an excessive burden on any class of voters.[9] It did not create a "substantial" burden, "or even represent a significant increase over the usual burdens of voting."[10]

Plaintiffs trying to challenge election laws after *Crawford* would face barriers. The Court approved a voter-identification law, which, on the surface, seems like a more onerous regulation that an out-of-precinct voting rule or a limitation on the third-party collection of ballots. Litigants have had some success challenging some election laws post-*Crawford*.[11] But litigants would consider alternative claims.

Then, in 2013, the Supreme Court decided *Shelby County v. Holder*.[12] It concluded that part of Congress's 2006 extension of the Voting Rights Act was unconstitutional. Specifically, it concluded that Section 4(b), which identified a group of states and localities that would be subject to preclearance under Section 5 of the act, exceeded Congress's power because it no longer paralleled the incidence of racial discrimination in voting. Section 4(b) had not been materially updated since 1975, so the Court concluded that Congress no longer had constitutional justification for continuing to require the covered jurisdictions to preclear their election laws.

Section 4(b) identified a number of jurisdictions, mostly states in the South, that had lagged in voter registration or turnout. But after 50 years, the Court explained that "things have changed dramatically"

[6] 553 U.S. 181 (2008) (plurality op.).

[7] Burdick v. Takushi, 504 U.S. 428, 434 (1992).

[8] *Id.*

[9] Crawford, 553 U.S. at 202.

[10] *Id.* at 198.

[11] See Derek T. Muller, The Democracy Ratchet, 94 Ind. L.J. 451 (2019).

[12] 570 U.S. 529 (2013).

in the South when it came to racial discrimination and voting rights.[13] Section 5 required preclearance, or federal approval of all election laws for a jurisdiction covered under Section 4(b). It was a "stringent" and "potent" remedy when first introduced in 1965.[14] And it was a remedy that the Court concluded could not continue to target selected states in 2013.[15]

After *Shelby County*, preclearance no longer applied to the places that had been covered by Section 4(b). One of those places was Arizona. Litigants who disapproved of statutes that once-covered states enacted sought alternative litigation outlets. One of those outlets was Section 2.

In 2016, such Section 2 lawsuits were a novelty.[16] Academics had begun to build out interpretive mechanisms and evaluate how lower courts were beginning to use such tests in nascent litigation, but the Supreme Court had never applied the provision outside the redistricting context.[17]

The decision to use Section 2 as the basis of this litigation reflected a couple of strategic determinations. A decades-old statute like the out-of-precinct voting rule would never have faced Section 5 preclearance, even before *Shelby County*, as it was a longstanding rule rather

[13] *Id.* at 547.

[14] South Carolina v. Katzenbach, 383 U.S. 301, 308, 315 (1966).

[15] See generally Derek T. Muller, Judicial Review of Congressional Power Before and After Shelby County v. Holder, 8 Charleston L. Rev. 287 (2013) (scrutinizing effect of *Shelby County*).

[16] Daniel P. Tokaji, Applying Section 2 to the New Vote Denial, 50 Harv. C.R.-C.L. L. Rev. 439, 448 (2015) ("Historically, § 2 vote denial claims have been few and far between. . . . Section 2 vote denial claims have become more prominent since the Shelby County decision, which effectively ended § 5 preclearance."); Derek T. Muller, The Democracy Ratchet, *supra* note 11, at 465–69.

[17] Daniel P. Tokaji, *supra* note 16, at 464–65 (describing courts' tests and proposing a new test for Section 2 claims after *Shelby County*); Christopher S. Elmendorf & Douglas M. Spencer, Administering Section 2 of the Voting Rights Act after Shelby County, 115 Colum. L. Rev. 2143, 2147 (2015) ("This Article takes up the question of whether section 2 can be made to function like erstwhile section 5 in the post-*Shelby County* world."); Michael J. Pitts, Rescuing Retrogression, 43 Fla. St. U. L. Rev. 741, 749 (2016) ("The basic framework for rescuing retrogression is a simple one—make the retrogression test from section 5 a part of the substantive standard of section 2. I would propose to do that by adding a gloss on the current framework for finding a violation of section 2. . . ."); Gilda R. Daniels, Voting Realism, 104 Ky. L.J. 583, 595–97 (2015) (describing how lower courts have used Section 2 after *Shelby County*).

than a recent change. Section 2 thus allowed a new litigation opportunity, beyond what Section 5 would have permitted. And Section 2 applied nationwide, not just in jurisdictions that had once been covered, like Arizona. Additionally, parties had been having some success on matters like voter-identification laws or changes to early voting since *Crawford*—some, but not overwhelming, success. Section 2 might provide a useful outlet, particularly if there was evidence that racial minorities were disproportionately affected. Section 2 spoke of discriminatory effect, not simply discriminatory intent.

A finding of intentional discrimination would also provide a powerful remedial mechanism under Section 3 of the Voting Rights Act.[18] That provision allows for a jurisdiction to be "bailed in" for preclearance of all election laws for a period of time if the jurisdiction is found to have engaged in intentional discrimination.[19] Like preclearance under Section 5, no voting law would then take effect without federal approval. But unlike Section 4(b), which relied on a stale formula to identify covered jurisdictions, Section 3 turns on a recent finding of intentional discrimination and a judicially tailored remedy. For those who lamented that Arizona, among other states, was no longer subject to preclearance, a finding of intentional discrimination could subject Arizona to preclearance once again and restore a remedy lost after *Shelby County*.

Plaintiffs had begun to develop Section 2 as a promising opportunity to curtail disfavored laws that disproportionately affected racial minority voters. It might prove more powerful than the balancing tests used in other cases—and it might pick up some slack after *Shelby County*.

C. The Path to the Supreme Court

The DNC's complaint against Arizona made three claims that the Supreme Court would ultimately address. First, that the out-of-precinct rule excessively burdened racial minorities' opportunities to vote. Second, that H.B. 2023 excessively burdened minority voters. Third, that the Arizona legislature enacted H.B. 2023 with racially

[18] See Roseann R. Romano, Devising a Standard for Section 3: Post-Shelby County Voting Rights Litigation, 100 Iowa L. Rev. 387, 392, 405–07 (2014) (describing context and limitations of Section 2 litigation after *Shelby County*).

[19] 52 U.S.C. § 10302(c).

discriminatory intent. The district court and the Ninth Circuit grappled over how to construe and apply Section 2, but this part will focus on the evidence the lower courts considered and the inferences to be drawn from that evidence.

The district court took evidence over a 10-day trial to weigh the merits of the allegations. It considered statistical and anecdotal evidence. It ultimately issued a lengthy and detailed opinion carefully rejecting the claims. For example, the district court noted that the percentage of ballots invalidated under the "out of precinct" rule was 0.15 percent of all ballots cast in 2016 (3,970 ballots of 2,661,497 cast statewide), and that this number was decreasing.[20] Even though the district court found that racial minorities cast such ballots at a disproportionately higher rate, that disparity was not "meaningfully disparate" given how small the numbers were.[21] "As a practical matter," the court concluded, it did not "result in minorities having unequal access to the political process."[22] The district court made similar findings with regard to H.B. 2023, as there was "no quantitative or statistical evidence" of how the rule might affect minority voters.[23]

The district court also rejected the claim that Arizona enacted H.B. 2023 with racially discriminatory intent. The majority of the bill's supporters were "sincere" in their beliefs that it would reduce the risk of fraud.[24] Some proponents had partisan motivations, but partisan motives differ from racial motives, and the district court was careful to distinguish between the two.[25]

The DNC appealed the case to the Ninth Circuit. A divided three-judge panel affirmed, in an opinion written by Judge Sandra Ikuta.[26] But an *en banc* panel reversed, in an opinion by Judge William Fletcher.[27] The court concluded that both bills constituted impermissible vote

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

[21] *Id.*

[22] *Id.*

[23] *Id.* at 886.

[24] *Id.* at 879.

[25] *Id.* at 882.

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

[27] Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989 (9th Cir. 2020) (en banc).

denial under the Voting Rights Act, and that Arizona had acted with discriminatory intent when it enacted H.B. 2023.

Judge Fletcher's opinion traced Arizona's history of discrimination back to the Treaty of Guadalupe Hidalgo in 1848, well before statehood in 1912.[28] And it also provided a different framing of how to consider the disparate burden on voters. The *en banc* court considered disparate impact with a much narrower focus. For example, "The proper baseline to measure [out of precinct] ballots to is thus not all ballots, but all *in-person* ballots."[29] In extreme cases, "Section 2 is violated based on [a] single denial."[30] A "facially neutral" policy might require a larger number of voters affected—a "substantial number"—and a couple of thousand voters affected could invalidate the policy.[31] The court found that plaintiffs had advanced sufficient evidence to demonstrate an unlawful disparate impact, and the district court clearly erred in concluding otherwise.

A majority of the Ninth Circuit *en banc* panel also concluded that Arizona had acted with discriminatory intent, although one judge dropped off the majority opinion on this point.[32] The majority embraced a theory known as the "cat's paw" to get there.

One of Aesop's fables tells of a monkey that persuades a cat to use its paws to take chestnuts from hot coals for the monkey to eat. The monkey's malice causes the cat to burn its paws. In the employment context, the "cat's paw" is an analogy for when a supervisor's bias can be attributed to the ultimate decision to terminate employment, even if the supervisor was not a part of the final decision. Likewise, the Ninth Circuit concluded that the racially charged allegations from one of the bill's proponents could be attributed to the rest of the legislature, even if those legislators argued for the bill on its merits in good faith. Indeed, the court acknowledged that many of the legislators argued sincerely in support of the law but traced

[28] *Id.* at 1017–18.

[29] *Id.* at 1015.

[30] *Id.*

[31] *Id.* at 1016 (comparing potential voting margin to 537-vote margin for George W. Bush in Florida in 2000).

[32] *Id.* at 1046 (Watford, J., concurring) ("I join the court's opinion to the extent it invalidates Arizona's out-of-precinct policy and H.B. 2023 under the results test. I do not join the opinion's discussion of the intent test.").

the legislature's discriminatory intent back to one member.[33] That, in turn, doomed HB 2023.

II. The Supreme Court

Immediately after the Ninth Circuit's *en banc* decision, election observers predicted that the Supreme Court would take up the case, largely driven by the intentional-discrimination finding.[34] *Brnovich* might simply be called an "overreach of a case,"[35] and the Supreme Court took the case at the very least to correct that finding. Even the Justice Department under President Joe Biden agreed ahead of oral argument that Arizona's laws did not have an unlawful discriminatory effect, let alone discriminatory intent.[36] But the Court also took the opportunity for a broader construction of Section 2, construction designed to guide lower courts in the future.

Arizona "generally makes it quite easy for residents to vote."[37] That line early in Justice Samuel Alito's opinion for the Supreme Court set the path for the six-justice majority to reject the challenges to Arizona's laws. Justice Alito's opinion was joined by Chief Justice John Roberts and Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Justice Elena Kagan wrote a dissenting opinion, joined by Justices Stephen Breyer and Sonia Sotomayor. Apart from a brief concurring opinion from Justice Gorsuch, joined by Justice Thomas, these two opinions provided the Court with clean alliances and direct battle between the Court's wings.

The majority opinion framed the case as a "neutral time, place, and manner" rule, and not, as plaintiffs had often characterized it, as a "vote denial" case. This framing squarely puts the Court's analysis in terms of state power: When has the state violated the Voting Rights Act? What are the appropriate bounds of state power to regulate elections?

[33] *Id.* at 1039–40.

[34] Kimberly Strawbridge Robinson, "Arizona Ballot Laws Tossed, U.S. Supreme Court Review Likely," Bloomberg Law, Jan. 27, 2020, https://bit.ly/3fDQn7K.

[35] Richard L. Hasen, "A Partisan Battle in an Overreach of a Case," SCOTUSblog, Feb. 22, 2021, https://bit.ly/3rYx269.

[36] Letter from Edwin S. Kneedler, Deputy Solicitor General, U.S. Dep't of Justice, to Scott S. Harris, Clerk, U.S. Sup. Ct. (Feb. 16, 2021) (on file with U.S. Supreme Court), https://bit.ly/3AlkwAW.

[37] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2333 (2021).

A. Textualism and Open-Ended Language in Statutes

The statutory language the Court construed is open-ended. Consider the text at issue in Section 2(b) of the Voting Rights Act: "A violation of subsection (a) is established if, based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not *equally open* to participation by members of a class of citizens protected by subsection (a) *in that* its members have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice."[38]

The Court's opinion is textualist in nature. Admittedly, not everyone agrees with that characterization, including Justice Kagan, who in her dissent called the majority opinion a "law-free zone."[39] A fair reading of the majority opinion reveals otherwise; the critique that it is not textualist is misplaced.

The Court spends a couple of pages of its opinion parsing the meaning of "equally open," the phrase "in that," and the subsequent reference "less opportunity" as it relates to "equally open." It employs traditional tools of statutory interpretation, including dictionary definitions and contextual interpretation.[40]

First, "equally open" means "without restrictions," or "requiring no special status," according to contemporary dictionary definitions.[41] The phrase "in that," the Court continued, gives the respect in which the political processes may not be "equally open," in an ensuing clause: "in that its members have less opportunity."[42] The Court reasoned that "equal opportunity helps to explain the meaning of equal openness."[43] And "opportunity" means a favorable time, place, occasion, or circumstance.[44]

This parsing of the statute—looking at dictionary definitions, context, and phrasing—continued with perhaps the most challenging phrase: "totality of circumstances." Another lengthy portion of

[38] 52 U.S.C. § 10301(b) (emphasis added).

[39] 141 S. Ct. 2321, 2361 (Kagan, J., dissenting).

[40] *Id.* at 2337–38 (majority op.).

[41] *Id.* at 2337.

[42] *Id.*

[43] *Id.* at 2338.

[44] *Id.*

the opinion opens by noting that Section 2 "requires consideration of 'the totality of circumstances.'"[45] The Court defines "totality of circumstances" as "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered."[46]

This definition of "totality of circumstances" and its place within the statute is consistent with the text of Section 2—and, significantly, it is extremely generous. The Court says that "any" circumstances "may be considered," as long as a circumstance has "a logical bearing" on the ensuing words in the statute. "Equally open" could have been placed into the statute without the qualification of "totality of circumstances," but the phrase "totality of circumstances" phrase must perform independent work.[47]

"Any," of course, is exceedingly broad, so the Court's next move is to say that it will "not attempt to compile an exhaustive list, but several important circumstances should be mentioned." The five ensuing guideposts all meet the definition of circumstances that have a logical bearing. The five guideposts are:

1. "the size of the burden imposed by a challenged voting rule";
2. "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982";
3. "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups";
4. "the opportunities provided by a State's entire system of voting"; and
5. "the strength of the state interests."[48]

Lower courts, litigants, and law professors drafting future law review articles may well develop more factors to consider, factors that have "a logical bearing" on "equally open" and "less opportunity." Undoubtedly, however, when the Supreme Court enumerates five "guideposts," these guideposts will influence how lower courts frame their discussion of ensuing cases. They will be the starting

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 2338–39.

point, the focus of judicial analysis. And they will dominate how litigants frame their cases.

Three moves that the Court made merit special attention. First, the Court looked back to its 2008 decision in *Crawford*. Even though *Crawford*, as discussed earlier, did not examine the Voting Rights Act but a constitutional balancing test, the plurality opinion in *Crawford* acknowledged that the right to vote must allow for the "usual burdens of voting," including, in some cases, presenting identification. That language—the "usual burdens of voting"—appeared repeatedly in the Court's *Brnovich* opinion as a factor among the "totality of circumstances."

Every voting rule, the court explained, places some burden on voters. Voting inevitably takes time and travel, even when going to the mailbox; there is no constitutional right to have election administrators read a voter's brain waves, or allow voters to text or tweet their votes. And the Court embraced the argument that "mere inconvenience" alone will not be sufficient to win under the Voting Rights Act.[49] An open process that has the "usual burdens of voting" will typically not violate Section 2. The "usual burdens of voting" will be an important framing for litigants moving forward.

Second, the present version of Section 2 was amended by Congress in 1982, and the Supreme Court instructed lower courts to look at voting burdens as they existed that year as the baseline. States had narrow absentee-voting rules in 1982, and voting opportunities are dramatically more generous today. That means few rules will depart significantly from the 1982 baseline, and it means more laws will pass muster under Section 2. Intriguingly, few states had voter identification laws back then, so it's an open question whether Section 2 offers more opportunity for plaintiffs who seek to challenge such provisions.

Third, the relationship of the third and fourth prongs deserves particular attention. The Court rejected the Ninth Circuit's framing, which focused on how a particular law in isolation affects even a small group of voters. Instead, it looked at the place of the law in the overall voting system, as the district court did. Laws that affect a very small percentage of voters, or laws that affect voters who have myriad opportunities to vote in a different fashion,

[49] *Id.* at 2338.

likely survive Section 2 scrutiny. Again, "mere inconvenience" alone is not enough.

The Court went on to reject the challenge to Arizona's laws. The two rules affected a tiny fraction of voters and there was little disparity between how minority and nonminority voters behaved. The rules were well within the "usual burdens of voting," especially given ample opportunities to vote. The "totality of circumstances" included 27 days of vote-by-mail and early in-person voting, coupled with voting in person on election day. The Court approved of the district court's holding—but in doing so, offered an important gloss on Section 2.

Justice Kagan called the majority's analysis "extra-textual"[50] or "remak[ing]"[51] the statute, but the analysis above shows a fairly robust textualist approach. She, instead, simply has a different method of statutory interpretation—purposivism, not textualism. She approaches the interpretation of the Voting Rights Act by citing why Congress "mainly added"[52] the language of "totality of circumstances." In her view, "The totality inquiry requires courts to explore how ordinary-seeming laws can interact with local conditions—economic, social, historical—to produce race-based voting inequalities."[53]

Justice Alito's opinion does not disagree: he notes that factors like racial polarization, racially tinged campaign appeals, and election of minority-group candidates can inform whether the minority group has suffered discrimination in the past and whether it persists.[54] These do have "any" logical bearing, after all.

The "totality of circumstances," Justice Kagan continues, looks at "law and background conditions," including "facts on the ground." It also allows courts to "take into account strong state interests supporting an election rule."

Justice Kagan's dissent argues that the gloss of "equally open" and "less opportunity" should be "whenever the law makes it harder for

[50] *Id.* at 2362, 2372 (Kagan, J., dissenting).

[51] *Id.* at 2373.

[52] *Id.* at 2362.

[53] *Id.*

[54] *Id.* at 2340 (majority op.).

citizens of one race than of others to cast a vote."[55] But then she introduces some caveats in footnote four of her opinion: "very small differences" do not matter (she agrees with Justice Alito here), including those that are "not statistically significant," or those that are statistically significant but not of "practical significance."[56] "Equal," then, is a legal term of art.

In a way, Justices Alito and Kagan are talking past each other. Both opinions agree that "totality of circumstances" involves looking at items not expressly enumerated in the text. And both agree that even statistically significant variance in the voting practices of racial groups is insufficient to win on a Section 2 claim. But, I think, there is a sharp difference in approach to statutory interpretation. Justice Kagan's approach is avowedly purposivist, as her antepenultimate paragraph makes clear in her critique of the majority opinion:

> One does not hear much in the majority opinion about that promise. One does not hear much about what brought Congress to enact the Voting Rights Act, what Congress hoped for it to achieve, and what obstacles to that vision remain today. One would never guess that the Act is, as the President who signed it wrote, "monumental." . . . For all the opinion reveals, the majority might be considering any old piece of legislation—say, the Lanham Act or ERISA.[57]

Justice Kagan looks at the historical context, the congressional "vision," and the reflections of the president who signed the original version of the act—hallmarks of a purposivist approach.

B. "Intentional" Discrimination?

While the Court split 6-3 on whether Arizona's statutes had a discriminatory *effect*, the lineup looked slightly different on the question of whether H.B. 2023 was enacted with discriminatory *intent*. On that question, the Court, by a 6-0 vote—with the three dissenters not addressing the question—concluded that Arizona did not act with discriminatory intent.

[55] *Id.* at 2358 (Kagan, J., dissenting).

[56] *Id.* at 2358 n.4.

[57] *Id.* at 2372.

The Court emphasized that the district court, which concluded that the state legislature did not act with discriminatory intent, should have received deference on its factual findings. The majority cited the ample support in the record to sustain the district court's findings in rebuking the Ninth Circuit.

The Court also looked at the historical context of H.B. 2023. Arizona had considered similar measures in 2011 and 2013, so its efforts in 2016 were nothing new or the product of some recent racial animus. The Court further emphasized that racial divides often overlap with partisan divides, and lower courts should not conflate the two. Lower courts must "carefully distinguish[]" between these distinct motives.[58]

Finally, the Court rejected the "cat's paw" theory as applied to legislatures. Legislators are not "agents" of a bill's sponsor or proponents. Legislators "have a duty to exercise their judgment." It was "insulting" for the Ninth Circuit to conclude that legislators could be "mere dupes or tools."[59] The six justices in the majority on the matter of discriminatory effect thus also agreed that there was no intentional discrimination.

In her dissenting opinion, Justice Kagan had concluded that H.B. 2023 had an unlawful discriminatory effect. But in a footnote, she explained that she "need not pass" on the holding that the laws were enacted with discriminatory intent.[60]

It is a curious footnote. A finding of intentional discrimination is not merely an alternative basis for relief. Indeed, the finding might entitle litigants to "bail in" Arizona under Section 3 of the Voting Rights Act. It is a significant and different remedy. The three dissenting justices really ought to have weighed in on the finding of intentional discrimination.

There are at least a few plausible, if speculative, reasons for Justice Kagan's move. It might be that the three dissenters disagreed about how to handle the intentional-discrimination claim, so they deferred the matter to provide a united front. Or it might be that they agreed that there was no intentional discrimination, but worried that such

[58] *Id.* at 2349 (majority op.).

[59] *Id.* at 2350.

[60] *Id.* at 2366 n.10 (Kagan, J., dissenting).

agreement with the majority would soften the impact of the biting dissent. Or maybe it's simply a tacit acknowledgement that the Ninth Circuit should not have reversed on these grounds and should have just stuck with the discriminatory effect holding.

III. A Return to Politics

It is perhaps only a small overstatement to say that the Court is less interested in plaintiffs' election law challenges than at any point since the 1940s and 50s. That was an era of the Court's decisions in *Colegrove v. Green*, concluding that federal courts would not enter the "political thicket" of remedying malapportioned districts; and *Lassiter v. Northampton County Board of Elections*, in which the Court unanimously concluded that a literacy test for prospective voters—at least one "fair on its face"—passed constitutional muster.[61]

By 1962, the Court's decision in *Baker v. Carr* opened the door to "one person, one vote" challenges;[62] and its decisions in cases spanning poll taxes to ballot access rules were plentiful.[63] The Court broadly approved and broadly construed the Voting Rights Act.[64] Plaintiffs successfully challenged state voting laws for decades.

Since *Bush v. Gore*, however, when the Court intervened in Florida's recount in the 2000 presidential election, one is hard-pressed to find a significant victory for plaintiffs challenging election rules (and even in *Bush v. Gore* the Court sided with the defendant).[65] There is a risk of oversimplifying the history, of course, but a few cases will illustrate the concept.

In 2006, the Court issued a brief opinion in *Purcell v. Gonzalez*, warning that federal courts should disfavor late changes to election laws: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk

[61] Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45 (1959); Colegrove v. Green, 328 U.S. 549 (1946) (plurality op.).

[62] Baker v. Carr, 369 U.S. 186 (1962).

[63] See, e.g., Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968).

[64] See, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966); Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

[65] 531 U.S. 91 (2000) (per curiam).

will increase."[66] The "*Purcell* principle" has been the basis, explicitly or implicitly, for myriad decisions of the federal courts in general, and the Supreme Court in particular, in recent years refusing to enjoin election laws close in time to an election.[67] That includes a decision in 2020, when the Court turned back a challenge to the timing of Wisconsin's primary election in the middle of the novel coronavirus pandemic in *Republican National Committee v. Democratic National Committee*.[68]

In the 2008 decision in *Crawford*, discussed above, the Court approved Indiana's photo identification law in elections. In 2015, it rejected a challenge to Arizona's independent redistricting commission in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[69] In 2016, it considered a challenge to Texas's state legislative map that had been drawn on the basis of total population, and its decision in *Evenwel v. Abbott* rejected the argument that Texas needed to draw districts on some basis more closely approximating voting population.[70]

In 2019, in *Rucho v. Common Cause*, the Court concluded that partisan gerrymandering claims arising under the Constitution were not to be heard in federal courts.[71] And it fended off a tranche of plaintiffs' challenges to the 2020 presidential election, including *Republican Party of Pennsylvania v. Degraffenreid*, concerning Pennsylvania courts' alteration of mail-in voting deadlines;[72] and *Texas v. Pennsylvania*, as states sued other states about how they chose presidential electors.[73]

These cases were brought by Democrats and Republicans. They were brought by states and civic organizations. They put their arguments in terms of state power or in terms of individual rights. All failed. And this is by no means an exhaustive list.

[66] 549 U.S. 1, at 4–5 (2006) (per curiam).

[67] See, e.g., Richard L. Hasen, Reining in the Purcell Principle, 43 Fla. St. U. L. Rev. 427 (2016) (chronicling cases).

[68] 140 S. Ct. 1205 (2020) (per curiam).

[69] 576 U.S. 787 (2015).

[70] 577 U.S. 937 (2016). See generally Derek T. Muller, Perpetuating "One Person, One Vote" Errors, 39 Harv. J.L. & Pub. Pol'y 371 (2016).

[71] 139 S. Ct. 2484 (2019).

[72] 141 S. Ct. 732 (2021) (mem.).

[73] 141 S. Ct. 1230 (2021) (mem.).

That's not to say litigants haven't had some success—*Alabama Legislative Black Caucus v. Alabama*[74] and *Cooper v. Harris*[75] come to mind. But the former was a dying interpretation of Section 5 of the Voting Rights Act, and the latter a fact-specific racial gerrymandering case in a decades-long dispute. Litigants have had tremendous success challenging campaign finance rules, too.[76] And of course plaintiffs may succeed in lower courts in cases the Supreme Court never hears.

Even these cases could be parsed more carefully. *RNC v. DNC*, for instance, may well have come out the way it did precisely because the RNC only appealed certain aspects of the DNC's lower court victory.[77] Supreme Court cases are only a fraction of overall election litigation. And its "shadow docket,"[78] or its refusal to take up cases or summary reversal of a lower court's interim relief or relief close in time to an election, further complicates the portrait.

That's not to say that litigants will stop trying to bring such cases in the federal courts. Days before the Court's decision in *Brnovich*, the Justice Department sued Georgia on several provisions of its recently enacted S.B. 202. Among its many provisions, this omnibus election law prohibits mailing unsolicited absentee ballot applications, requires an identification number or proof of identification to request an absentee ballot, shortens the absentee ballot period, limits "drop boxes" to collect ballots, prohibits third-party distribution of food and water to voters who wait in line, and forbids counting ballots cast outside a voter's precinct unless cast after 5 p.m. on election day. Whether a federal court agrees that some portions of S.B. 202

[74] 575 U.S. 254 (2015).

[75] 137 S. Ct. 1455 (2017).

[76] See, e.g., McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014) (holding that aggregate contribution limit in federal elections violated the First Amendment); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (concluding that ban on independent campaign expenditures by corporation violated the First Amendment).

[77] See Republican Nat'l Comm., 140 S. Ct. at 1206 (describing lower court's extension of the deadline to receive absentee ballots and emphasizing, "[t]hat extension, which is not challenged in this Court, has afforded Wisconsin voters several extra days in which to mail their absentee ballots").

[78] See William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1 (2015).

were enacted with racially discriminatory intent, as the Justice Department alleges, remains to be seen.[79]

But I think it is fair to say that *Brnovich* is the latest in a line of cases suggesting that the federal courts should play a smaller role in the patrolling of how states administer elections. *Brnovich* means that future plaintiffs will have greater difficulty raising similar challenges under Section 2 of the Voting Rights Act. This key provision will, however, continue to play a role in redistricting, its important place in recent decades—at least, unless and until the Supreme Court chooses to weigh in further on this part of the statute.

Voting rights proponents and election law challengers do have other outlets to press against state statutes besides the federal courts. State courts might review election laws under state constitutions. The people can act by ballot initiative in many states. Congress can enact specific rules on these matters if it desires, at least in federal elections. Some such specific rules are a part of H.R. 1, the "For the People Act."[80]

The long-term impact of *Brnovich* remains to be seen, but it is perhaps fairly small. First, it continues the Court's path away from federal judicial involvement in election rules and toward a greater deference to state power. That now includes certain questions of racial discrimination. Second, and relatedly, it reflects the perils of short-sighted litigation strategy or federal court overreach in the face of a Supreme Court that has had a fairly consistent approach for two decades. And finally, it trims little litigation, as such cases were nonexistent even a decade ago. Instead, it tightens up how federal courts should scrutinize these claims that had been churning about the lower courts for the last few years. How lower courts handle *Brnovich*'s totality-of-circumstances test remains to be seen. But it seems unlikely that even these trends will stem the tide of litigation in the politically polarized years ahead.

[79] For a nonacademic argument that the answer is "no," see Ilya Shapiro, "The Voter Suppression Lie," Wash. Exam'r, Apr. 22, 2021, https://washex.am/3CjZ4y1.

[80] H.R. 1, 117th Cong., 1st Sess. (2021), https://bit.ly/3yuc0i9.