

NOTE

VOTING RIGHTS AT THE INTERSECTION OF ELECTORAL LEGISLATION AND JUDICIAL THEORIES OF DEMOCRACY: LESSONS LEARNED FROM *BRNOVICH v. DEMOCRATIC NATIONAL COMMITTEE**

I. INTRODUCTION

Voting rights and the American electoral system in the 2020s stand in a precarious position.¹ While the Voting Rights Act of 1965² (the Act) served as a basis to protect minority voting rights throughout the latter half of the twentieth century, the jurisprudence of the Roberts Court has narrowed its protections and given much greater discretion to states to enact election laws that negatively impact voting rights.³ Most significant was the *Shelby County v. Holder*⁴ decision, which effectively rendered unconstitutional Section 5 of the Voting Rights Act (Section 5), a preclearance system that prohibited states with histories of voter abridgment from enacting election laws without oversight from the U.S. attorney general.⁵

The *Shelby County* decision paved the way for states to enact election laws that abridged the voting power of minority groups because Section 5 was the Voting Rights Act's primary and most effective mechanism of enforcement.⁶ Because these laws were enacted without explicit mention of race, states were further able to bypass challenges under the Equal Protection Clause of the Fourteenth Amendment, which requires plaintiffs challenging facially neutral laws to show that they were enacted with

* Maxwell Wamser, J.D. Candidate, Temple University Beasley School of Law, 2023. Thank you to Professor Jeffrey Dunoff for serving as faculty advisor and to all law review members who assisted in preparing this piece for publication.

1. See, e.g., *Block the Vote: How Politicians Are Trying To Block Voters from the Ballot Box*, ACLU (last updated Aug. 18, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/> [<https://perma.cc/4356-XTTZ>]; Nick Corasaniti, *Voting Rights and the Battle over Elections: What To Know*, N.Y. TIMES (Dec. 29, 2021), <https://www.nytimes.com/article/voting-rights-tracker.html> [<https://perma.cc/RD4C-MZSG>]; *The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color> [<https://perma.cc/5CG8-XZ8A>].

2. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–10702).

3. See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act after Shelby County*, 115 COLUM. L. REV. 2143, 2144–46 (2015).

4. 570 U.S. 529 (2013).

5. See *id.* at 556–57; Elmendorf & Spencer, *supra* note 3, at 2145.

6. See Elmendorf & Spencer, *supra* note 3, at 2145.

discriminatory intent.⁷ This left Section 2 of the Voting Rights Act (Section 2) as the last viable protective mechanism of voting rights.⁸

Section 2 provides a cause of action for individuals who have been harmed by laws that hamper their ability to vote based on race.⁹ Section 2 litigation is more costly and burdensome than the Section 5 preclearance system, but it saw some success in the wake of *Shelby County*.¹⁰ However, Section 2 faced its own challenge in the U.S. Supreme Court decision *Brnovich v. Democratic National Committee*.¹¹

The *Brnovich* decision addressed a challenge to two Arizona elections laws under Section 2.¹² The plaintiffs claimed that the enacted laws abridged the voting rights of Black, Hispanic, and Native American voters, thus violating Section 2.¹³ This Note analyzes the *Brnovich* decision and its significance for the future of voting rights litigation and legislation. It specifically analyzes the decision in light of theories of democracy. Theories of democracy are important in this context for the ways in which they can greatly inform an understanding of judicial decisionmaking regarding election law.¹⁴ *Brnovich* is a decision that rests upon the statutory interpretation of Section 2.¹⁵ Therefore, an analysis of the theories of democracy underpinning the decision is important for the conceptualization of the status of voting rights and election law in modern America.

Understanding theories of democracy in this context is particularly important to express reasoned policy recommendations and ensure intentional and theory-guided lawmaking. This Note dissects the majority and dissenting opinions from the perspective of democratic theory and ultimately provides a policy argument for future voting rights legislation. It argues that Justice Alito's majority opinion, while consistent with the literal text of Section 2, relies upon a restrictive theory of democracy that is contrary to the goals of the Voting Rights Act. The legislative and historical context of the Act, the current threats to voting rights, and the moral underpinnings of democracy all support the need for a theory of democracy based on ensuring the broadest possible access to the polls, especially for minority voters. This Note recommends that Congress explicitly enshrine in future voting rights legislation a theory of democracy that reflects these critical needs so that judges may not interpret away necessary protections through literalist textualism.

Section II briefly lays out the factual and procedural background of the *Brnovich* case by describing the Arizona laws at issue and the steps that brought the case before the Supreme Court.¹⁶ Section III provides an overview of the Voting Rights Act, with

7. See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

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

9. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (amended 1982).

10. See Ho, *supra* note 8 at 680–85; e.g. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 215 (4th Cir. 2016).

11. 141 S. Ct. 2321 (2021).

12. *Id.* at 2330.

13. *Id.* at 2334.

14. See DANIEL H. LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 398 (4th ed. 2008).

15. See *Brnovich*, 141 S. Ct. at 2330.

16. See *infra* Section II.

particular attention paid to Section 2, including its 1982 amendment—which created the results and totality of the circumstances tests—and the case law interpreting it.¹⁷ Section IV introduces the concept of theories of democracy and explains their relevance to election law.¹⁸ Section V analyzes the *Brnovich* majority and dissenting opinions and discusses their underlying theories of democracy.¹⁹ Lastly, Section VI lays out the argument and policy recommendation outlined above.²⁰

II. FACTS AND PROCEDURAL HISTORY

In 2016, the Arizona State Legislature passed House Bill 2023 (H.B. 2023).²¹ This bill criminalized the collection of early ballots by anybody other than a voter’s family member, household member, caregiver, or a postal officer.²² In addition, Arizona updated a policy in its election procedures manual known as the “out-of-precinct rule,” which required that election officials discard any provisional ballots cast outside of a voter’s registered precinct.²³ This was supported by a previous law that outlawed violating the elections procedures manual.²⁴ The Democratic National Committee brought a suit against Arizona in the United States District Court for the District of Arizona in 2016, claiming that both of these laws disparately impacted Black, Hispanic, and Native American voters in violation of Section 2.²⁵ The committee also claimed that these laws violated the First and Fourteenth Amendments by unjustifiably burdening voting rights.²⁶ Lastly, they claimed that the Arizona legislature passed the law with discriminatory intent in violation of Section 2 and the Fifteenth Amendment.²⁷

The District Court of Arizona heard the case and rejected all of the Democratic National Committee’s claims.²⁸ Judge Douglas Rayes found that the Democratic National Committee had failed to show that the election laws at issue unjustifiably burdened voting rights, disparately impacted minority voters’ opportunity to participate in the political process, or were enacted with discriminatory intent.²⁹ On appeal, a three-judge panel of the United States Court of Appeals for the Ninth Circuit affirmed

17. *See infra* Section III.

18. *See infra* Section IV.

19. *See infra* Section V.

20. *See infra* Section VI.

21. ARIZ. REV. STAT. ANN. §§ 16-1005(H)–(I) (2016).

22. *Id.*

23. *See* § 16-584(E); §§ 16-122, -135, -584; STATE OF ARIZONA, 2019 ELECTIONS PROCEDURE MANUAL 187–88, 205 (2019), https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf [<https://perma.cc/3RDL-AL46>].

24. *See* § 16-452(C).

25. *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 832 (D. Ariz. 2018), *rev’d on reh’g en banc*, *Democratic Nat’l Comm. v. Hobbs*, 348 F.3d 989, 1032 (9th Cir. 2020), *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

26. *Id.*

27. *Id.*

28. *Id.* at 882–83.

29. *Id.*

all of the district court's findings two to one.³⁰ A majority of the remaining Ninth Circuit judges then voted to rehear the case en banc.³¹ The Ninth Circuit reversed the district court's decision en banc on a finding of clear error, stating that both the out-of-precinct policy and H.B. 2023 violated Section 2.³²

Circuit Judge William Fletcher, writing for the majority, found that the out-of-precinct policy and H.B. 2023 imposed a significant disparate burden on Native American, Hispanic, and Black voters that was linked to historical and social conditions of inequality in election participation in Arizona.³³ He also found that H.B. 2023 violated the Fifteenth Amendment because it was enacted with discriminatory intent, stating that even though the majority of legislators voted for the law without racial enmity, the law was originally introduced with racial discrimination as a primary motivating factor.³⁴ The United States Supreme Court granted certiorari to review the Ninth Circuit's decision on October 2, 2020.³⁵

III. PRIOR LAW

This Section discusses the law underlying the Voting Rights Act, specifically Section 2. Part III.A discusses the history leading to the enactment of the Voting Rights Act in 1965, and its general structure. Part III.B looks more closely at case law interpreting Section 2 and its 1982 amendment. Lastly, Part III.C examines the place of Section 2 within the overall structure of the Voting Rights Act in the aftermath of *Shelby County v. Holder*.

A. *The Voting Rights Act of 1965*

The legal basis of the Voting Rights Act is the Fifteenth Amendment.³⁶ The Thirteenth, Fourteenth, and Fifteenth Amendments—together known as the Reconstruction Amendments—were adopted in the period immediately following the Civil War.³⁷ The Fifteenth Amendment orders that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”³⁸ It also provides that “Congress shall have power to enforce this article by appropriate legislation.”³⁹ This powerful Amendment, along with the Thirteenth and Fourteenth Amendments, allowed

30. Democratic Nat'l Comm. v. Reagan, 904 F.3d 686 (9th Cir. 2018), *rev'd and remanded sub nom.* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

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

32. Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1046 (9th Cir. 2020) (en banc), *rev'd and remanded sub nom.* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

33. *Id.* at 1032, 1037.

34. *Id.* at 1041–42.

35. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 222 (2020) (mem.).

36. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

37. *Landmark Legislation: Civil Rights Act of 1875*, U.S. SENATE (last visited Feb. 1, 2023), <https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm> [https://perma.cc/9DNH-CBC8].

38. U.S. CONST. amend. XV, § 1.

39. *Id.* § 2.

recently freed and naturalized Black Americans the right to vote and sought to protect that right from the threat of abridgment.⁴⁰

While there was some initial success for Black Americans in the electoral process, soon after the passing of the Reconstruction Amendments, state governments that sought to suppress the Black vote began to pass restrictive laws that limited their access to the polls, entrenching white control over politics.⁴¹ Such laws included, for example, literacy tests as a prerequisite to voting, poll taxes, and all-white primaries.⁴² These laws were passed simultaneously and in the same spirit as the Jim Crow laws that attacked the civil liberties and legal equality of Black citizens across the United States, but most notably in the South.⁴³

Southern lawmakers' primary approach to abridge Black voting power was to assault their ability to access the polls and cast their ballots.⁴⁴ Beyond legislation, more violent and direct approaches were taken to disenfranchise Black citizens with the rise of the Ku Klux Klan and lynch mobs.⁴⁵ These militant groups forcibly blocked Black voter registration and access to the polls.⁴⁶ The Supreme Court was able to effectively block several methods of legislative electoral discrimination with the Fifteenth Amendment.⁴⁷ However, as the Supreme Court struck down more and more laws, state legislators seeking to suppress Black voters crafted more indirect laws that were able to skirt the Fifteenth Amendment's strong prohibition.⁴⁸ Such laws were usually facially neutral and often attempted to dilute the voting power of minority groups rather than simply blocking their access to the polls.⁴⁹

Civil rights activists strongly advocated against the oppression of Black citizens during the civil rights movement by conducting protests, sit-ins, and other forms of civil disobedience.⁵⁰ Congress did not respond to this growing united movement until the

40. *Id.* § 1; U.S. CONST. amend. XIV.

41. See Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HIST. (May 13, 2021), <https://www.history.com/news/jim-crow-laws-black-vote> [https://perma.cc/AZD9-Q7P8].

42. See *id.*

43. See *id.*

44. See *id.*

45. See Brad Epperly, Christopher Witko, Ryan Strickler & Paul White, *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S.*, 18 PERSPS. ON POL. 756, 761 (2020).

46. See *id.*

47. See, e.g., *Guinn v. United States*, 238 U.S. 347, 360–65 (1915) (holding that grandfather clauses are in violation of the Fifteenth Amendment); *Lane v. Wilson*, 307 U.S. 268, 275–77 (1939) (holding that a registration scheme predicated on grandfather clauses is in violation of the Fifteenth Amendment); *Smith v. Allwright*, 321 U.S. 649, 659–66 (1944) (holding that white primaries are in violation of the Fifteenth Amendment); *Schnell v. Davis*, 336 U.S. 933, 933 (1949) (per curiam), *aff'g* 81 F. Supp. 872 (S.D. Ala. 1949) (holding that a test of constitutional knowledge is in violation of the Fifteenth Amendment); *Gomillion v. Lightfoot*, 364 U.S. 339, 348 (1960) (holding that racial gerrymandering is in violation of the Fifteenth Amendment).

48. See Alex Cohen & Wilfred U. Codrington III, *The Promise and Pitfalls of the 15th Amendment over 150 Years*, BRENNAN CTR. (Feb. 3, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/promise-and-pitfalls-15th-amendment-over-150-years> [https://perma.cc/BA7X-56ZE].

49. See Evans, *supra* note 41 (providing the examples of literacy tests, poll taxes, and all-white primaries).

50. See Cohen & Codrington, *supra* note 48.

mid-1960s, when it passed sweeping legislation to guard the rights that the Thirteenth, Fourteenth, and Fifteenth Amendments sought and failed to fully protect.⁵¹ The Fifteenth Amendment right to vote, strengthened through the Voting Rights Act of 1965, led to significant surges in Black voter registration numbers.⁵²

The strongest tools that the Voting Rights Act supplied to counteract suppressive voting laws dwelled within Sections 2 and 5.⁵³ Section 2, as originally enacted, stated that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color,” closely mirroring the text of the Fifteenth Amendment.⁵⁴ Section 2 has been described as “the major statutory prohibition of all voting rights discrimination.”⁵⁵ Although Section 2 does not explicitly state that it provides a cause of action for those whose vote has been diluted or abridged, the Supreme Court assumes it does.⁵⁶

Section 5, on the other hand, created a preclearance system for states that have been marked as at risk of passing voting laws that would abrogate citizens’ rights to vote.⁵⁷ States were identified for this system using a formula based on the state’s history of passing restrictive election laws and utilizing practices that discriminatorily abrogated or diluted citizens’ rights to vote based on race.⁵⁸ States that had been identified by this formula needed to receive preclearance from the U.S. attorney general whenever they passed a law modifying their election practices.⁵⁹ For protectors of voting rights, Section 5 provided a strong and efficient method of enforcement because of the high burden placed on the state attempting to pass the election law and the simplicity of enforcement without costly or lengthy litigation.⁶⁰

Section 2, in a vein similar to the Fourteenth Amendment Equal Protection Clause, is enforced through litigation brought by injured plaintiffs who have the burden of proving that the law they are challenging is discriminatory.⁶¹ Such litigation is often lengthy, expensive, and burdensome on plaintiffs.⁶² For this reason, Section 5 was seen as the favored method of enforcing voting rights for the remainder of the twentieth century and the beginning of the twenty-first.⁶³ Regardless, Section 2 litigation was always an option, and an extensive jurisprudence developed, which determined what plaintiffs must show to prove that their right to vote had been diluted or abrogated.⁶⁴

51. *See id.*

52. *See id.*

53. 52 U.S.C. §§ 10301, 10304; *see also* Elmendorf & Spencer, *supra* note 3, at 2144–47.

54. § 10301(a); U.S. CONST. amend. XV, § 1.

55. S. REP. NO. 97-417, at 30 (1982).

56. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring).

57. § 10304.

58. *Id.*

59. *Id.*

60. *See* Elmendorf & Spencer, *supra* note 3, at 2152–55.

61. *See id.* at 2155–58.

62. *See id.*

63. *See id.*

64. *See id.* at 2158.

B. Section 2 and Its Amendment

This Part discusses Section 2 and its amendment in 1982. Part III.B.1 discusses the Supreme Court's interpretation of Section 2, its decision in *City of Mobile County v. Bolden*⁶⁵ to require a showing of discriminatory intent, and the resulting congressional amendment rejecting that requirement. Part III.B.2 then covers the case law that interpreted the amendment, most significantly *Thornburg v. Gingles*.⁶⁶

1. Section 2 Case Law and the 1982 Amendment

The most important decision for Section 2 jurisprudence is *White v. Regester*,⁶⁷ a Fourteenth Amendment Equal Protection vote dilution case.⁶⁸ In *White*, the Court found for plaintiff-appellees, who claimed that the use of multimember districts⁶⁹ was diluting the voting power of racial minority groups in Texas because the Black community had been effectively excluded from the primary selection process.⁷⁰ The Court held that plaintiffs pursuing a claim of vote dilution needed to show that “the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”⁷¹ *White*, although a Fourteenth Amendment case, defined how later courts would apply Section 2 analyses to claims of vote dilution.⁷²

The potential success of vote dilution claims under the Fourteenth Amendment steeply declined with the *Washington v. Davis*⁷³ decision, which required that plaintiffs challenging a facially neutral law show that it was enacted with discriminatory intent.⁷⁴ Four years after *Washington*, the question of discriminatory intent for facially neutral laws was brought to Section 2 litigation in *Bolden*.⁷⁵ In that case, a plurality of the Court applied a limiting interpretation to Section 2.⁷⁶ Justice Stewart, writing for the plurality, claimed that Section 2 provided no protection beyond the Fifteenth Amendment and that the Fourteenth Amendment requirement of discriminatory intent for facially neutral laws from *Washington* applied to Section 2 claims as well.⁷⁷

65. 446 U.S. 55 (1980).

66. 478 U.S. 30 (1986).

67. 412 U.S. 755 (1973).

68. *Id.*

69. Multimember electoral districts are those that provide multiple representatives to the respective legislative body in contrast to single-member electoral districts, which only send a single representative. John F. Banzhaf III, *Multi-Member Electoral Districts: Do They Violate the “One Man, One Vote” Principle*, 75 YALE L.J. 1309, 1309 (1966).

70. *White*, 412 U.S. at 765.

71. *Id.* at 766.

72. See Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2331 (2021).

73. 426 U.S. 229 (1976).

74. *Id.* at 238–45.

75. 446 U.S. 55 (1980).

76. *Id.* at 60–62.

77. *Id.*

The result in *Bolden*, and its requirement to show discriminatory intent, did not sit well with Congress.⁷⁸ It was dissatisfied with the burden that such a requirement placed on plaintiffs and the loophole it created for laws that had a discriminatory impact but were passed without racial enmity.⁷⁹ As a result, in 1982, Congress amended Section 2 to apply a new vote dilution test that discarded the discriminatory intent requirement and returned to the *White* jurisprudence.⁸⁰ The amendment added to the original language of Section 2 to clarify that laws cannot be “imposed . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section [4] of this title.”⁸¹ It also added a Subsection b, which defines that Section 2 is violated when “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation.”⁸² This amendment overruled the requirement from *Bolden* that plaintiffs need to show discriminatory intent in favor of a test that focuses on the broader discriminatory impact of a challenged law.⁸³ However, some circuit courts have stated that plaintiffs still can achieve a successful claim using the discriminatory intent test developed by the Supreme Court in *Arlington Heights v. Metropolitan Housing Development Corporation*.⁸⁴

The amended statute provides two different protections for voting rights: protection against vote dilution and participation injuries.⁸⁵ Vote dilution claims are quite common and derive from comparable Fourteenth Amendment case law, as evidenced by the influence of *White* on the amended test for Section 2.⁸⁶ These claims often deal with the broad and general impacts of election laws on an electoral process as a whole, usually revolving around the structuring of districts and its impact on the relative power that voters’ ballots hold.⁸⁷ On the other hand, participation injuries deal with the actual ability of an individual voter to cast their ballot.⁸⁸ As Professor Christopher Elmendorf states, “[p]articipation injuries occur whenever . . . biased decisions result in disparate burdens on minority participation in a *discrete* phase of the electoral process.”⁸⁹

Soon after Congress passed the 1982 amendment, the amended version of Section 2 was tested in the vote dilution case *Thornburg v. Gingles*.⁹⁰ This case concerned the

78. See S. REP. NO. 97-417, at 16 (1982).

79. See *id.* at 36.

80. See Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301.

81. § 10301(a).

82. § 10301(b).

83. See *Thornburg v. Gingles*, 478 U.S. 30, 43–44 (1986).

84. 429 U.S. 252, 266 (1977). See *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220–21 (4th Cir. 2016).

85. See Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 383–84 (2012).

86. See *id.* at 387.

87. See *id.* at 383–84 (“Dilution injuries arise . . . whenever *race-biased decisionmaking* by conventional state actors or the majority-group electorate results in minorities having less representational opportunity than they otherwise would.” (emphasis in original)).

88. See *id.*

89. *Id.* at 384 (emphasis added).

90. 478 U.S. 30 (1986).

use of multimember districts in a North Carolina legislative reapportionment.⁹¹ The Court decided that the structure of the multimember voting districts had diluted the voting power of all but one of the districts at issue.⁹² To reach this decision and establish the Section 2 claim for vote dilution, the Court held that plaintiffs bringing a vote dilution challenge must pass an initial threshold showing.⁹³ Plaintiffs must show that “under the totality of the circumstances, [electoral] devices result in unequal access to the electoral process.”⁹⁴

In addition to establishing this threshold test, the Court emphasized that the newly amended Section 2 requires a results test that focuses on the challenged law’s impact on minority voters.⁹⁵ The Section 2 results test does not require a plaintiff to show discriminatory intent in the law’s enactment, although plaintiffs can alternatively show discriminatory intent to assert a violation.⁹⁶ Additionally, the *Gingles* Court clarified how a plaintiff could perform a totality of the circumstances analysis to identify if an election law impacts the opportunity of minority voters to participate in an election.⁹⁷ Justice Brennan provided a nonexhaustive list of factors to be considered in this analysis, which he took from the Senate Judiciary Committee Report on the 1982 Amendment.⁹⁸ These factors included, among others, history of discrimination in the region, the current effects of discrimination in areas like education, and the extent to which minority groups hold political office.⁹⁹ The Senate Committee Report emphasized that this list is not exhaustive and plaintiffs need not prove every factor on the list.¹⁰⁰ Rather, the list creates an evidentiary basis by which plaintiffs can prove that their voting power had been diluted.¹⁰¹

91. *Id.* at 30–31.

92. *Id.* at 77–80.

93. *See id.* at 46.

94. *Id.*

95. *Id.* at 35.

96. *Id.*

97. *See id.* at 36–38.

98. *Id.*

99. *Id.* at 36–37 (quoting S. REP. NO. 97-417, at 28–29 (1982) (“1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.”)).

100. S. REP. NO. 97-417, at 29 (1982).

101. *See id.*

2. Section 2 after *Gingles*

After *Gingles* established the results test for Section 2 vote dilution litigation based on the 1982 amendment, Section 2 began to fall out of favor.¹⁰² Professor Christopher Elmendorf suggests that this is because of the conservative bent of the Court since 1982 and the conservative Justices' disfavor of results tests.¹⁰³ This disfavor has resulted in a significant number of losses for plaintiffs seeking Section 2 relief and a significant narrowing of its scope.¹⁰⁴

Despite these losses, there has been some development in Section 2 jurisprudence. Later cases clarified the totality of the circumstances analysis as "an intensely local appraisal,"¹⁰⁵ which acknowledges "the demonstrated ingenuity of state and local governments in hobbling minority voting power."¹⁰⁶ This appraisal requires an intense look at the local historical and social context, which the Court has described as a "searching practical evaluation of the past and present reality."¹⁰⁷ The Court has also addressed how the state's interest in enacting election laws should be factored into the analysis.¹⁰⁸ While the state's interest in enacting legislation to regulate its elections should be given weight, it will not overcome a plaintiff's showing that a less discriminatory law would equally fulfill that interest.¹⁰⁹ The Court has specifically stated that it will not allow any election law "safe harbor[s]," reemphasizing the importance of the law's effects and not merely its facial appearance.¹¹⁰

C. *Shelby County and the New Place of Section 2 Litigation*

It would not be possible to discuss the history and progress of Section 2 or any jurisprudence of the Voting Rights Act without addressing the *Shelby County v. Holder* decision.¹¹¹ Voting rights proponents favored Section 5 over Section 2 for its simplicity, efficiency, and affordability.¹¹² However, through a series of jurisprudential moves culminating in *Shelby County*, the Roberts Court substantially narrowed the scope of Section 5 on a constitutional basis.¹¹³

In *Shelby County*, the Court found that the formula that Congress had been using to classify which states fell under the Section 5 preclearance requirement was unconstitutional.¹¹⁴ It reasoned that the burdens the system created for the states were

102. See Elmendorf, *supra* note 85, at 379 ("[S]ince the 1986 decision in which the Supreme Court first interpreted the results test, civil rights advocates have suffered an almost unbroken string of defeats in the high court.").

103. *Id.* at 379–81.

104. See *id.* at 379–80.

105. Thornburg v. Gingles, 478 U.S. 30, 79 (1986) (quoting Rogers v. Lodge, 458 U.S. 613, 622 (1982)).

106. Johnson v. De Grandy, 512 U.S. 997, 1018 (1994).

107. *De Grandy*, 512 U.S. at 1018 (quoting S. REP. NO. 97–417, at 30 (1982)) (internal quotation marks omitted).

108. See Hous. Laws. Ass'n v. Att'y Gen. of Tex., 501 U.S. 419, 427 (1991).

109. See *id.* at 427–28.

110. *De Grandy*, 512 U.S. at 1018.

111. 570 U.S. 529 (2013).

112. See Elmendorf & Spencer, *supra* note 3, at 2152–55.

113. See *id.* at 2144–46.

114. *Shelby County*, 570 U.S. at 550–51.

not required by any current need to curtail discriminatory voting practices.¹¹⁵ Chief Justice Roberts stated that the formula was based on outdated data and the problems that Section 5 was responding to in state election laws were no longer relevant because of America's strides in racial equality.¹¹⁶ Many commentators identified that this result effectively defanged Section 5 and removed one of the most prominent means that minority voters had for protecting their voting rights.¹¹⁷

Justice Ginsburg wrote a dissenting opinion in which she criticized Chief Justice Roberts's assessment of the current state of voting rights and the purpose of Section 5.¹¹⁸ She portrayed Section 5 as a necessary and effective protection against discriminatory voting systems.¹¹⁹ She also saw the great strides in the lessening of minority voter abridgment that Chief Justice Roberts championed as directly emanating from Section 5 and thus in need of its continuing support.¹²⁰ She further opined that Congress' determination that Section 5's continued existence was necessary was based on sufficient data and experience warranting deference.¹²¹

After the *Shelby County* decision, many of the states that formerly fell under the Section 5 preclearance requirement passed election laws that resulted in more extensive legislative voter suppression than had been seen when Section 5 controlled the process.¹²² This left Section 2 as the most promising method for minority voters to protect their voting rights.¹²³

115. *Id.* (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

116. *Id.*

117. See Elmendorf & Spencer, *supra* note 3, at 2145.

118. *Shelby County*, 570 U.S. at 560 (Ginsburg, J., dissenting).

119. See *id.* at 563.

120. *Id.* at 566.

121. *Id.*

122. Professors Elmendorf and Spencer explain the aftermath of the *Shelby County* decision:

Shelby County's impact was felt immediately. A number of states that had been subject to the preclearance process quickly adopted or implemented new, restrictive voting laws. For example, the day *Shelby County* was decided, Texas announced that it was implementing its strict voter-ID (identification) requirement, which Section 5 had previously blocked. Voter-ID laws recently adopted in Alabama and Virginia were also freed to take effect. Two months later, North Carolina enacted a sweeping election reform bill that the president of the state's National Association for the Advancement of Colored People (NAACP) chapter called, "the worst voter suppression law since the days of Jim Crow." During the same month, Mississippi passed new ID requirements for voting. Local governments freed from preclearance also made some important changes. The city of Pasadena, Texas, replaced two district council seats in predominately Latino neighborhoods with two at-large seats elected from the majority-white city. Galveston County, Texas, cut in half the number of constable and justice-of-the-peace districts, eliminating virtually all of the seats currently held by Latino and black incumbents. And the city of Macon, Georgia, moved the date of city elections from November to July, when black turnout has traditionally been low.

Elmendorf & Spencer, *supra* note 3, at 2145–46 (quoting Zachary Roth, *N.C. Wants Voting Law Emails Kept Secret*, MSNBC (Jan. 9, 2014), <https://www.msnbc.com/msnbc/nc-wants-voting-law-emails-kept-secret-msna243666> [http://perma.cc/4VNY-2GUK]).

123. See *id.* at 2146–47.

IV. THEORIES OF DEMOCRACY AND ELECTION LAW

This background adequately sets the legal basis for the *Brnovich* decision. However, a brief overview of theories of democracy and their relation to election law is necessary to understand the analysis and critique of the case that this Note provides. Of particular importance is the distinction between normative and pragmatic theories of democracy.

Democracies do not take on identical forms.¹²⁴ While democratic governments necessarily share certain specific overarching principles that define them as democracies, such as “collective decision-making” and “formal equality,” those principles only lay a theoretical foundation for the day-to-day exercise of democratic governance.¹²⁵ In practice, governments that may fall under the broad umbrella of democracy can and do take on different forms in the exercise of democracy.¹²⁶ It is at the points of difference between individual democratic governments that democratic theory comes into play as a means by politicians and citizens to understand and guide their self-governance.¹²⁷

This Section provides an overview of theories of democracy and their relation to election law. Part IV.A discusses the two most common theories of democracy: normativism and descriptivism. It describes how the two theories differ and what that means for their different conceptions of democracy. Part IV.B then places this discussion of theories of democracy in the context of election law. It explains how varying theories of democracy can significantly impact decisions in election litigation using examples from Supreme Court case law.

A. Normative and Descriptive Theories of Democracy

Democratic theories can generally be separated into two categories: normative and descriptive.¹²⁸ The goal of both types of theories is to understand how the foundational roots of democracy are applied in practice, albeit from different angles.¹²⁹ A normative theory of democracy attempts to explain how a democracy *should* function based on the moral and political theories that explain why democracy is desirable.¹³⁰ As Professor Thomas Christiano has stated, normative democratic theory “aims to provide an account of when and why democracy is ethically desirable as well as ethical principles for guiding the design of democratic institutions.”¹³¹

124. See Rikki Dean, Jean-Paul Gagnon & Hans Asenbaum, *What is Democratic Theory?*, 6 DEMOCRATIC THEORY v, vi (2019).

125. *See id.*

126. *See id.*

127. *See id.*

128. Tom Christiano & Sameer Bajaj, *Democracy*, in STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2022) (last updated Mar. 3, 2022), <https://plato.stanford.edu/entries/democracy/> [<https://perma.cc/85U3-46F3>]; *see also* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 130 (2003); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 289–302 (1996).

129. Dean et al., *supra* note 124, at vi.

130. *See* Thomas D. Christiano, *Democracy: Normative Theory*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 3413, 3413 (James D. Wright ed., 2d ed. 2015).

131. *Id.*

One example of a normative democratic theory is deliberative democracy.¹³² Deliberative democracy focuses on the question of collective decisionmaking.¹³³ It emphasizes that the foundation of democracy is the equality of citizens' political expression and the legitimacy achieved through the people voicing their collective interests through reasoned discourse.¹³⁴ In this way, proponents of deliberative democracy argue that democratic institutions should be crafted to foster reasoned discourse by supporting "education, information, and organization."¹³⁵ Therefore, deliberative democracy is inherently normative because it argues that democratic institutions *should* be based on the moral principles undergirding democracy.¹³⁶

Descriptive theories of democracy focus primarily on how democratic institutions function in practice.¹³⁷ While normative theorists attempt to apply the grand moral and philosophical theories of democracy with the assumption that democracy is an inherent good, descriptive theorists will often take a more cynical eye to the issue.¹³⁸ Richard Posner's democratic theory of pragmatism exemplifies descriptive theories of democracy in its underlying themes.¹³⁹ Posner states, "pragmatists do not begin with moral or political theory but with the actual practice of democracy in its various instantiations From this history and their observations of human nature and social institutions these pragmatists infer that [normative] democracy is unworkable."¹⁴⁰ This theory views human society as weak and in need of a form of control that the utopian ideals of the normativists cannot provide.¹⁴¹ Thus, Posner's view of democracy and its institutions is, as he himself suggests, elitist.¹⁴² His view and rejection of normative theories can be summed up in his statement that "[pragmatists] do [not] regard democracy as a creation of political theory and so as an apt candidate for improvement by it."¹⁴³ Thus, the disagreement between normative and descriptive theorists runs not only to the application of democratic principles, but to the underlying principles of democracy themselves, including their meaning, origin, and value in the actual practice of democracy.¹⁴⁴

132. See HABERMAS, *supra* note 128, at 289–302.

133. Joshua Cohen, *Deliberative Democracy*, in DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN? 219, 219–20 (Shawn W. Rosenberg ed., 2007).

134. *See id.*

135. *Id.* at 220.

136. *See id.* at 219–20.

137. FRANK CUNNINGHAM, THEORIES OF DEMOCRACY: A CRITICAL INTRODUCTION 11 (2002).

138. *See* POSNER, *supra* note 128, at 143–44.

139. *See id.*

140. *Id.*

141. *See id.*

142. *See id.* at 130 (referencing that his theory of democracy is "an approximation to Joseph Schumpeter's theory of 'elite democracy'").

143. *Id.* at 144.

144. Compare Cohen, *supra* note 133, at 220 ("Deliberative democracy . . . is about making collective decisions and exercising power in ways that trace to the reasoning of the equals who are subject to the decisions: not only to their preferences, interests, and choices, but to their reasoning."), with POSNER, *supra* note 128, at 143–44 (explaining that "Concept 2 democrats," characterized as "pragmatists," "see politics as a competition among self-interested politicians, constituting a ruling class, for the support of the people, also assumed to be self-interested, and to be none too interested in or well informed about politics").

B. *The Importance of Theories of Democracy for Election Law*

Theories of democracy are not limited to the realm of political discourse, but rather reflect a multidisciplinary approach.¹⁴⁵ The initial question is often framed as one of political theory, but these theories often integrate fields such as philosophy, morality, psychology, and history.¹⁴⁶ One highly relevant field for democratic theory is law, particularly election law.¹⁴⁷ Judges play an enormous role in shaping American democracy.¹⁴⁸ This is evidenced by the major impacts the Supreme Court can have on how state and federal elections play out.¹⁴⁹

When judges decide election law cases, they are usually analyzing the U.S. Constitution through the Fourteenth or Fifteenth Amendments or the Voting Rights Act.¹⁵⁰ While they may apply certain standards of constitutional and statutory interpretation that appear separate from their personal political or moral views in these analyses, those views often come through in their decisions.¹⁵¹ Personal views on democracy and its underlying vision may significantly influence how judges decide election law cases—especially if a given state election law violates individual or group voting rights.¹⁵² Professor David Schultz has criticized modern courts for a deficiency in explicit democratic theory that has resulted in an “election law ad hocism” that fails to appreciate the influence of the judiciary on democracy.¹⁵³ Yet, even without applying an explicit theory of democracy, judges’ political ideologies and personal views on democracy can convey an implicit theory of democracy in their decisions.¹⁵⁴

To elucidate this concept, it will be useful to examine two jurisprudential principles developed in Supreme Court case law: the one person, one vote principle and the independent state legislature theory. The best representation of the one person, one vote principle can be found in *Reynolds v. Sims*.¹⁵⁵ In that case, plaintiffs challenged the apportionment of the seats in the Alabama State Legislature, claiming that it diluted their legislative representation because the relied-upon census data had not been updated to

145. See Dean et al., *supra* note 124, at xi.

146. See *id.*

147. See James A. Gardner, *Election Law as Applied Democratic Theory*, 56 ST. LOUIS U. L.J. 689, 689–90 (2012).

148. See Jeffrey Rosen, *The Court and Democracy*, THIRTEEN (Dec. 2006), <https://www.thirteen.org/wnet/supremecourt/democracy/history.html> [<https://perma.cc/BK9Q-2UBV>].

149. See, e.g., *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/55VX-7QYV>].

150. See Bruce E. Cain, *Election Law as a Field: A Political Scientist’s Perspective*, 32 LOY. L.A. L. REV. 1105, 1106–07 (1999).

151. See Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 1 (1991) (“A good deal of the debate over the meaning and application of various constitutional doctrines is in fact a dialogue about the scope and meaning of American democracy.”).

152. Cf. David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259, 261 (2016) (“While the Supreme Court has no explicit democratic theory guiding its decisions, there is an implicit one that guides a (conservative) majority of the Supreme Court, if not perhaps others.”).

153. *Id.* at 261.

154. See *id.* at 261–62.

155. 377 U.S. 533 (1964).

reflect current population demographics.¹⁵⁶ The Court found that Alabama’s electoral apportionment violated the Equal Protection Clause in failing to apportion on a population basis.¹⁵⁷ The justification for this holding was that apportionment not based on population would inherently dilute certain citizens’ voting power in relation to others simply based on where they lived.¹⁵⁸

In supporting its argument, the Court relied on *Gray v. Sanders*.¹⁵⁹ In that case, the Court found that a county unit system employed in a primary election that resulted in rural votes being weighted more heavily than urban votes violated the Equal Protection Clause.¹⁶⁰ The principle that the *Gray* Court used to justify its decision, and which the *Reynolds* Court quoted, was “one person, one vote.”¹⁶¹ Invoking this principle, the *Gray* Court stated, “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”¹⁶² This principle stands for the proposition that, in an election, each voter must have equal say, and if any law were to undermine that electoral equality, it would violate the Equal Protection Clause.¹⁶³

The principle of “one person, one vote” used to justify *Reynolds* and *Gray* represents the employment of a normative theory of democracy.¹⁶⁴ In citing the Declaration of Independence and the Gettysburg Address in supporting the principle of “one person, one vote,” the *Gray* Court invoked an ideal of democracy based on the foundations of the American system as an understanding of how democracy *should* function.¹⁶⁵ While the ultimate decision was based on the Equal Protection Clause, the principle held deeper roots, those tied to the fundamental principles of democracy as viewed by the majority of the Court.¹⁶⁶ This expression of democracy and protection of equal representation in voting thus is normative and shows how a normative theory of democracy can shape the practice of democracy through election law decisions.¹⁶⁷

However, the “one person, one vote” principle was not universally accepted by the Court, as can be seen in Justice Harlan’s dissents in both decisions.¹⁶⁸ In his *Reynolds* dissent, Justice Harlan would have upheld the Alabama Legislature’s apportionment because “the Equal Protection Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures.”¹⁶⁹ Further, he worried that the decision in *Reynolds* and the case law it was built on,

156. *Id.* at 540.

157. *See id.* at 568.

158. *Id.*

159. *Id.* at 557 (citing *Gray v. Sanders*, 372 U.S. 368 (1963)).

160. *See Gray*, 372 U.S. at 370, 381.

161. *Id.* at 381; *Reynolds*, 377 U.S. at 558.

162. *Gray*, 372 U.S. at 381.

163. *See id.*

164. *See Reynolds*, 377 U.S. at 558; *Gray*, 372 U.S. at 381.

165. *See Gray*, 372 U.S. at 381.

166. *See id.*

167. *See Christiano, supra* note 130, at 3413.

168. *See Gray*, 372 U.S. at 382 (Harlan, J., dissenting); *Reynolds*, 377 U.S. at 589 (Harlan, J., dissenting).

169. *Reynolds*, 377 U.S. at 590–91 (Harlan, J., dissenting).

including *Gray*, would “have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary.”¹⁷⁰ Justice Harlan was more concerned with protecting states’ abilities to govern their own elections than supporting the normative conception of equal representation that the majority viewed as essential to American democracy.¹⁷¹

Justice Harlan’s dissenting opinions show that the majority decisions in *Reynolds* and *Gray* were not necessary and, in many ways, based on the progressive makeup of the majority of Justices in those cases and their shared vision of American democracy. Had the Court been structured differently, with more Justices holding viewpoints consistent with Justice Harlan, it is not difficult to imagine a different outcome to these cases. This idea is supported by the current Court and its more recent decisions that patently prioritize the pragmatic theory of democracy of Justice Harlan over the normative one championed by the *Reynolds* and *Gray* majorities.

One example that supports this assertion is the possible resurgence of the independent state legislature theory.¹⁷² The theory was first addressed by Chief Justice Rehnquist in his concurring opinion in *Bush v. Gore*.¹⁷³ In that case, the Court reversed the Florida Supreme Court’s order to recount ballots cast in the 2000 presidential election because the situation in question did not fall under any of the circumstances that the Florida Legislature had established by law to trigger a recount.¹⁷⁴ The Court found that the Florida Supreme Court’s order violated the Equal Protection Clause because it would compel “standardless manual recounts.”¹⁷⁵

Chief Justice Rehnquist, in a concurring opinion joined by Justices Scalia and Thomas, argued further that the Florida Supreme Court’s decision should have been reversed because the U.S. Constitution insulates state legislatures’ regulations of federal elections through the Electors Clause.¹⁷⁶ That clause states that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,” electors for President and Vice President.¹⁷⁷ Chief Justice Rehnquist found that this clause required that “the text of the election law itself, and not just its interpretation by the courts of the States, take[] on independent significance.”¹⁷⁸ By this theory, Chief Justice Rehnquist would have denied the Florida Supreme Court the ability to override the recount system established by the state legislature on its own whim.¹⁷⁹ Chief Justice Rehnquist’s opinion is based on the structure of government that is required by his interpretation of the Constitution,

170. *Id.* at 589.

171. *See id.* at 624–25 (“These decisions . . . cut deeply into the fabric of our federalism.”).

172. *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Theory*, 53 ST. MARY’S L.J. 445, 448–50 (2022); Ethan Herenstein & Thomas Wolf, *The ‘Independent State Legislature Theory,’ Explained*, BRENNAN CTR. JUST. (June 6, 2022), <https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained> [https://perma.cc/CZH6-AJ9H].

173. 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring).

174. *Bush*, 531 U.S. at 100–03, 110–11.

175. *Id.* at 103.

176. *Id.* at 112–15 (Rehnquist, C.J., concurring).

177. U.S. CONST. art. II, § 1, cl. 2–3.

178. *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

179. *See id.* at 112–15.

one defined by separation of powers.¹⁸⁰ As he concluded, “[t]his inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*.”¹⁸¹

After *Bush*, the Court addressed the independent state legislature theory as a majority in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.¹⁸² In that case, the Arizona State Legislature argued that a redistricting commission independent of the legislature—created by a citizen-voted proposition to curtail gerrymandering—was unconstitutional per the Elections Clause of the Federal Constitution.¹⁸³ The Court found that the Elections Clause, which states that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,”¹⁸⁴ did not require that state legislatures have sole control over redistricting processes.¹⁸⁵ The Court specifically held that the use of “legislature” in the Elections Clause is not limited to the legislative body, but encompasses any “power that makes laws,” including the citizen body when it legislates through voted proposition.¹⁸⁶

Arizona State Legislature was not the end of the independent state legislature theory. In two cases in the wake of the 2020 presidential election, Justices Thomas, Alito, Gorsuch, and Kavanaugh expressed support for the theory.¹⁸⁷ In *Democratic National Committee v. Wisconsin State Legislature*,¹⁸⁸ the Court denied an application to vacate a stay of a federal district court that found unconstitutional a Wisconsin election law limiting when absentee voters could return their ballots.¹⁸⁹ In a concurring opinion, Justice Gorsuch, joined by Justice Kavanaugh, conveyed his support for the independent state legislature theory, stating, “[t]he Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules,” and citing the Elections Clause as support for this assertion.¹⁹⁰ His justification for this was grounded in his conception of separation of powers and the unique position of the legislature as a politically accountable body with great capacity for broad fact finding.¹⁹¹

In *Moore v. Harper*,¹⁹² the Court denied an application for a stay of a North Carolina Supreme Court decision that rejected two congressional districting maps created by the state legislature.¹⁹³ After rejecting the state legislature’s maps, the North

180. *See id.* at 115.

181. *Id.* (emphasis in original).

182. 576 U.S. 787 (2015).

183. *Id.* at 791–92.

184. U.S. CONST. art. I, § 4, cl. 1.

185. *Arizona State Legislature*, 576 U.S. at 813–14.

186. *Id.*

187. *See Democratic Nat’l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020) (Gorsuch, J., concurring); *Moore v. Harper*, 142 S. Ct. 1089, 1089–92 (2022) (Alito, J., dissenting).

188. 141 S. Ct. 28 (2020) (mem.).

189. *Id.* at 28.

190. *Id.* at 29 (Gorsuch, J., dissenting).

191. *Id.* at 29–30.

192. 142 S. Ct. 1089 (2022) (mem.).

193. *Id.* at 1089.

Carolina Supreme Court then created new maps to replace them.¹⁹⁴ Justice Alito, joined by Justices Thomas and Gorsuch, dissented.¹⁹⁵ He sided with members of the North Carolina Legislature, who challenged the decision at issue, citing to both the Elections Clause and Justice Rehnquist's concurring opinion in *Bush*.¹⁹⁶ He stated, "if the language of the Elections Clause is taken seriously, there must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections."¹⁹⁷ *Wisconsin State Legislature* and *Moore* show that the independent state legislature theory, previously rejected by the Court in *Arizona State Legislature*, has significant support in the present makeup of the Court and could very likely ground future decisions.

The independent state legislature theory, while based on constitutional text, stems from an understanding of American democracy with great emphasis on separation of powers and federalism.¹⁹⁸ The most important aspect of the theory is a specific understanding of the relationship between the judiciary and legislature and the situations in which the latter can be insulated from the former on the state level. The decision in *Arizona State Legislature* indicates that this is not merely a question of a plain text understanding of the Constitution, but of the broader scope of American democracy and how elections and election regulation should play out.¹⁹⁹ As it prioritizes separation of powers and federalism over the pursuit of the normative principles undergirding democracy, the independent state legislature theory falls squarely within the category of descriptive democratic theory.²⁰⁰ Further, its implications could be enormous as it could serve as a shield for legislatures seeking to gerrymander or otherwise regulate elections in a way that could narrow the voting power of certain categories of voters.

The "one person, one vote" principle and the independent state legislature theory express that democratic theory lies at the heart of election law. Both principles reflect differing interpretations of the constitutional structure of American government as informed by democratic theory that serve as the basis for legal decisionmaking. Further, the shifting of favored theories depending on the given makeup of the Court has a substantial impact on the practical execution of American democracy.²⁰¹ The normative "one person, one vote" principle convinced a majority of Justices to require a specific method of apportionment for all state legislatures,²⁰² and the independent state legislature theory convinced at least three Justices to reach a decision that decided the outcome of a presidential election.²⁰³ The way elections take place and are regulated today differs from

194. *Id.* Although it denied the application to stay the decision, the Court did grant *certiorari* to hear the issue a few months later. *Moore v. Harper*, 142 S. Ct. 2901 (2022) (mem.).

195. *Moore*, 142 S. Ct. at 1089 (Alito, J., dissenting).

196. *Id.* at 1091 (citing *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring)).

197. *Id.* (emphasis in original).

198. *See id.* at 1090 (Alito, J., concurring); *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring).

199. *See* *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm.*, 576 U.S. 787, 813–14.

200. *See infra* Part IV.A.

201. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964); *Bush v. Gore*, 531 U.S. 98, 112–15 (2000) (Rehnquist, C.J., concurring).

202. *Reynolds*, 377 U.S. at 558, 568.

203. *See Bush*, 531 U.S. at 112–15 (Rehnquist, C.J., concurring).

the Warren Court era. These theories of democracy are the key to understanding this shift and its implications.²⁰⁴ For these reasons, understanding democratic theories and their contours is important for predicting and analyzing the trajectory of election law jurisprudence.²⁰⁵

V. COURT'S ANALYSIS

This Section provides an overview of the *Brnovich* majority and dissenting opinions. Part V.A discusses Justice Alito's majority opinion and its finding that neither of the Arizona election laws at issue violated Section 2.²⁰⁶ Part V.B discusses Justice Kagan's dissenting opinion and its critique of Justice Alito's execution of the totality of the circumstances test.²⁰⁷

A. Justice Alito's Majority Opinion

This Part outlines Justice Alito's majority opinion in the *Brnovich* case. Part V.A.1 discusses Justice Alito's broader legal conclusions. Part V.A.2 dissects the theory of democracy implicit in Justice Alito's majority opinion and analyzes how it informs his legal conclusions.

1. Justice Alito's Legal Conclusions

To start his interpretation of Section 2, Justice Alito began with the text.²⁰⁸ The two phrases that he picked out as especially relevant to this analysis were "equally open" and "opportunity . . . to participate in the political process."²⁰⁹ After listing the dictionary definitions of "open" and "opportunity,"²¹⁰ he stated that the "equally open" requirement is the "touchstone" of the analysis and that "opportunity" will define that analysis by considering the voter's "ability to use the means that are equally open."²¹¹

The basis of this analysis is the totality of the circumstances test.²¹² To start this test, Justice Alito laid out the factors from *Gingles* and the 1982 Amendment Senate Report, excluding those that were irrelevant.²¹³ The factors he considered included the size of the burden the law placed on the voter, the extent to which the law departed from the status of voting rights in 1982, any disparate impact on minority groups caused by the law, any safeguards the state's election system provides, and the state's interests in enacting the law.²¹⁴

204. Compare *Reynolds*, 377 U.S. at 568, with *Bush*, 531 U.S. at 112–15 (Rehnquist, C.J., concurring).

205. See Schultz, *supra* note 152, at 261–62.

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

207. *Id.* at 2361–66 (Kagan, J., dissenting).

208. *Id.* at 2336.

209. *Id.* at 2337.

210. *Id.* at 2337–38 (first citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1008, 1010 (J. Stein ed., 1966); and then citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1579, 1583 (1976)).

211. *Id.* at 2338 (emphasis in original).

212. *Id.*

213. *Id.* at 2337–40 (citing *Gingles*, 478 U.S. at 36–37, 41, 43 n.7).

214. *Id.*

Justice Alito then applied these factors to the Arizona election laws.²¹⁵ First, he addressed the out-of-precinct rule.²¹⁶ He stated that the requirements that voters find the precinct to which they belong and go there on Election Day are “unremarkable burdens” and no different from “the usual burdens of voting.”²¹⁷ Further, these burdens were substantially alleviated by safeguards put in place by Arizona, including providing information to voters identifying what precinct they belong to, sending notice when polling places or precincts are changed, and making early voting more accessible.²¹⁸ These and other safeguards lessened any possible difficulty that might come with frequent changes of polling places or precincts, which is particularly common in Arizona.²¹⁹

Next, Justice Alito identified that the claimed disparate burden on minority voters was “small in absolute terms.”²²⁰ He claimed that the data indicating disparate impact was statistically skewed because only approximately 1% of Hispanic, Black, and Native American voters and 0.5% of white voters cast out-of-precinct ballots on Election Day.²²¹ In Justice Alito’s view, because this rule only impacted 1% of the relevant minority groups, its disparate impact was not statistically significant.²²²

Justice Alito then considered the state interest of the out-of-precinct rule.²²³ He found that its stated goal of ensuring people vote in their proper voting precinct is very important to increase voting efficiency, create a more centralized voting model, and ensure that voters receive correct information about their specific local elections.²²⁴ Further, he rejected the Ninth Circuit’s argument that Arizona needs to show that there was no less-restrictive alternative that would have served the same interests.²²⁵ In sum, Justice Alito argued that the out-of-precinct rule does not violate Section 2 when considering the totality of the circumstances because the burdens were typical, the actual size of the disparate impact was small, and there existed a compelling state interest.²²⁶

Justice Alito next applied the factors to the ballot collection law, H.B. 2023.²²⁷ Similar to the out-of-precinct rule, he determined that the difficulties that result from not being able to use a third-party ballot collection service are negligible and fall within the “usual burdens of voting.”²²⁸ There also existed safeguards to lessen the burden of the law—for example, the ability of proxies like family members to deliver the voter’s

215. *Id.* at 2343–44.

216. *Id.* at 2344.

217. *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008)).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 2344–45.

222. *Id.* at 2345 (“A policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open.”).

223. *Id.*

224. *See id.*

225. *Id.* at 2345–46.

226. *Id.* at 2346.

227. *Id.*

228. *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008)).

ballot.²²⁹ Further, a special election board must be created to assist voters who are unable to leave their houses, and employees must be given time off to vote when they are scheduled to work on election day.²³⁰ These safeguards made H.B. 2023's burdens negligible.²³¹

Justice Alito then emphasized that the plaintiffs did not provide enough "concrete evidence" that H.B. 2023 created a disparate impact on minority voters.²³² Additionally, he found that Arizona had a valid state interest in protecting the integrity of its elections and preventing voter fraud.²³³ There existed a legitimate concern that third-party ballot collection services could be used to influence voters to vote for a certain candidate, especially because the people who most often use such services are the most susceptible to influence.²³⁴ It did not matter that there was no evidence of fraud occurring within Arizona because it is valid for state legislators to seek to prevent it before it ever occurs.²³⁵ In sum, H.B. 2023 did not violate Section 2 because the burdens were very light when considered in relation to the broader election system's safeguards, the evidence of disparate impact was insufficient, and the state had a valid interest in fighting against fraud and voter influence.²³⁶

Justice Alito's ultimate conclusion was that neither the out-of-precinct rule nor H.B. 2023 violated Section 2 because they did not disproportionately impact minority voters' opportunity and open access to vote.²³⁷

2. Justice Alito's Theory of Democracy

Justice Alito never indicated that he was following any theory of democracy, instead presenting his opinion as objective textual analysis of Section 2.²³⁸ However, a highly pragmatic and federalist theory of democracy is evident throughout the opinion, especially in the weight given to particular factors in the totality of the circumstances test.²³⁹ Part V.A.2 analyzes how this theory of democracy reveals itself in Justice Alito's totality of the circumstances analysis and how it informs his ultimate decision and overall interpretation of Section 2. Part V.A.2.a discusses Justice Alito's emphasis on the typical burdens of voting and their relation to concerns for practical governance. Part V.A.2.b examines Justice Alito's prioritization of state interests from the perspective of federalism.

229. *Id.*

230. *Id.*

231. *See id.*

232. *Id.* at 2346–47.

233. *Id.* at 2347 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)).

234. *See id.* (citing COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 46 (2005)).

235. *Id.* at 2348.

236. *Id.*

237. *Id.* at 2343–50.

238. *See id.* at 2337–38.

239. *See id.* at 2343–48.

a. *The Typical Burdens of Voting*

It is in the weighing of factors within the highly discretionary totality of the circumstances test that Justice Alito's implicit theory of democracy reveals itself. The first factor he discussed was the size of the burden that the law imposed on minority voters.²⁴⁰ For this factor, it is highly relevant that he cited Justice Stevens's opinion in *Crawford v. Marion County Election Board*.²⁴¹ In *Crawford*, the Court rejected a Fourteenth Amendment Equal Protection challenge to an Indiana voter ID law, claiming that requiring voters to provide identification to submit a ballot was within "the usual burdens of voting."²⁴² Justice Alito used this phrase to temper the requirements of openness and opportunity, stating that "because voting necessarily requires some effort and some compliance with rules, the concept of a voting system that is 'equally open' and that furnishes an equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.'"²⁴³

For Justice Alito, the limitation that the usual burdens of voting holds over openness and opportunity represents the more pragmatic and descriptive approach to elections.²⁴⁴ This pragmatic and descriptive approach rejects the contention that voting laws should be crafted to give the most amount of people the greatest access to the ballot because such an approach is not practical or worth the cost.²⁴⁵ The ultimate weight of this argument is that, realistically, some barriers to voting are inevitable, and the onus is on the challenger of the law to show that the restriction at issue is beyond such inevitable consequences of a realistic voting system.²⁴⁶ For this approach, access is less important than the practicalities of running an election.²⁴⁷

Justice Alito's alignment with the pragmatic and realistic approach to the typical burdens of voting can be seen clearly in his further explanation in footnote eleven.²⁴⁸ He used the illustrations of a museum and a college course to explain the difference between an open voting system with equal opportunity and a system free from any burdens at all.²⁴⁹ He conjured the image of a museum offering free admission to its exhibit, which some people choose not to attend because of "the problem of finding parking, dislike of public transportation, anticipation that the exhibit will be crowded, a plethora of weekend chores and obligations, etc."²⁵⁰ Justice Alito next provided a similar example of a college course in which students may decide not to enroll because of the course's schedule or the teacher's reputation for tough grading.²⁵¹

240. *Id.* at 2338.

241. 553 U.S. 181 (2008) (Stevens, J., opinion).

242. *Id.* at 198.

243. *Brnovich*, 141 S. Ct. at 2338 (quoting *Crawford*, 553 U.S. at 198).

244. *See id.*

245. *See id.*

246. *See id.* at 2339–40.

247. *See id.*

248. *See id.* at 2338 n.11.

249. *Id.*

250. *Id.*

251. *Id.*

These metaphors demonstrate that Justice Alito believes that it is fruitless and overly burdensome to attempt to create a burden-free voting system, given both the reality of the situation and his pragmatic understanding of human behavior.²⁵² The democratic ideal of collective decisionmaking by all citizens is implicitly rejected as overly utopian through these images.²⁵³ Rather than seeking to remove all barriers, Justice Alito permits some to remain because the onus should be on the voter to overcome obstacles necessary for the exercise of elections.²⁵⁴ As a privilege rather than an undeniably guaranteed right, it is up to the voter to jump through the necessary hoops if they want to vote.²⁵⁵ In this way, Justice Alito clearly allied himself with the more descriptive and pragmatic theory of democracy espoused by Posner.²⁵⁶

This argument is further bolstered by his brief reference to the disparate impact on racial minority groups.²⁵⁷ Justice Alito's emphasis that this factor will only weigh in the plaintiffs' favor if there is a *substantial* disparate impact is pragmatic in its view that laws that only have a minimum impact are permissible.²⁵⁸ It recognizes that necessary election rules may inevitably cause some impact on minority voters, but this is acceptable unless too many people are impacted for the sake of cost, efficiency, and state sovereignty.²⁵⁹ The effort it would take to create a truly burden-free election system is too costly and is perhaps impossible in the first place.²⁶⁰

b. State Interests and Federalism

The three other factors Justice Alito weighed played a much more significant role in his analysis.²⁶¹ These factors include the state of voting rights in 1982, the safeguards provided by a state's electoral system, and the state's interests in passing these laws.²⁶² The weight that Justice Alito placed on each of these factors shows that his prime consideration is maintaining a proper balance between the federal and state governments in alignment with principles of federalism.

Justice Alito's consideration of voting mechanisms in 1982 reflects this in his understanding of the relationship between the states and the 1982 Congress.²⁶³ Under his analysis, the state of election laws in 1982 should serve as a benchmark to understand what will fall into the category of impermissible vote abridgment.²⁶⁴ This system of measurement assumes an intention by Congress to maintain election laws in a state consistent with that of 1982.²⁶⁵ If the state of election laws at that time should serve as a

252. *See id.*

253. *See id.*

254. *See id.* at 2338.

255. *See id.*

256. *See id.*

257. *See id.* at 2339.

258. *Id.* at 2344–45.

259. *See id.*

260. *See id.* at 2343.

261. *See id.* at 2338–40.

262. *Id.*

263. *See id.* at 2338–39.

264. *Id.*

265. *See id.*

measurement for how elections laws should be crafted, then that would mean that the 1982 Congress intended to maintain a status quo.²⁶⁶

Such a formulation rejects the idea that the 1982 Congress would want to make any significant changes to the state of election laws beyond that status quo and thus place greater burdens on state legislatures in running their elections.²⁶⁷ As in *Shelby County*, this reasoning furthers the argument that the current state of election law and access to the ballots is sufficiently protective of voting rights, so the interest should be shifted back to ensuring that states have sufficient control over their elections.²⁶⁸ In fact, Justice Alito's argument goes many steps further than *Shelby County* in its implication that the troubles of minority voter abridgment had been solved not only in 2013 but as far back as 1982.²⁶⁹ This shows Justice Alito's preferred balance between individual voting rights and state legislature control over elections, with the thumb firmly placed upon the latter.²⁷⁰

The last two factors on which Justice Alito placed greatest emphasis reflect his strong interest in federalism.²⁷¹ First, he gave great weight to the safeguards of the Arizona election system.²⁷² In this way, he reasoned that even if states abridge minority voter rights, they can cure that abridgment by showing they protect minority voter rights in other ways.²⁷³ This reasoning gives the benefit of the doubt greatly to the states.²⁷⁴

Lastly, Justice Alito highlighted the most important factor: the state's interests.²⁷⁵ If the state has a sufficiently compelling reason to create a law that burdens minority voters, the reasoning may justify the impact so long as it is not too substantial. In this case, as in the case of many challenged election laws, the justification was voter fraud.²⁷⁶ Putting aside the question of the validity of the concerns of those who cry voter fraud, it is significant that Justice Alito concluded his analysis with this factor and gave it the most weight. No factor could better represent federalist legal ideology than state interest because it represents, in its purest form, the desire of the state to be free from control by the federal government. The importance of this factor in his analysis, combined with his rejection of the need for narrow tailoring of a law with some disparate impact to meet the specific interests sought, clearly displays that his preferences weigh strongly towards state sovereignty.²⁷⁷

This emphasis on states' interests aligns with the descriptive theory of democracy. It expresses a view of democracy where states' interests in governing their elections free from federal intervention overcome the rights of individual voters, so long as those rights

266. *See id.* at 2363–64 (Kagan, J., dissenting).

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

268. *See id.*

269. *See id.*

270. *See id.* at 2345–48.

271. *See id.* at 2339–40, 2346.

272. *Id.* at 2346.

273. *Id.* at 2339.

274. *See id.*

275. *See id.* at 2339–40.

276. *Id.* at 2340; *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196–98 (2008) (Stevens, J., opinion).

277. *See Brnovich*, 141 S. Ct. at 2341.

are not *substantially* impacted. This view prioritizes maintaining a specific government structure over ensuring the widest possible access to the polls in the name of democracy. Such a prioritization, combined with the emphasis on the need to accept some burdens as part of the due course of governance, firmly places Justice Alito in the camp of the pragmatists.

B. Justice Kagan's Dissenting Opinion

Justice Alito's theory of democracy directly contrasts with Justice Kagan's in the dichotomy between pragmatic and normative theories of democracy. This Part outlines Justice Kagan's dissenting opinion and opposition to Justice Alito's pragmatism. Part V.B.1 discusses her legal conclusions and critiques of Justice Alito's majority opinion. Part V.B.2 then details her more explicit normative theory of democracy and how it relates to the broader context of the Voting Rights Act.

1. Justice Kagan's Legal Conclusions

Justice Kagan's framing of the issues of openness and opportunity varied significantly from Justice Alito's.²⁷⁸ Instead of examining the literal meaning of the words, Justice Kagan examined them in the context of the goals and principles of Section 2 and the Voting Rights Act as a whole.²⁷⁹ For her, the basis of opportunity is whether or not different racial groups have different levels of accessibility to voting.²⁸⁰ She views *any* inequality in access as inconsistent with the stringent prohibitions of the Voting Rights Act and does not limit the prohibitions only to substantial inequalities.²⁸¹ She based this construction of the concept of opportunity on her understanding of the Voting Rights Act and its vision for an absolutely equal electoral system.²⁸²

Justice Kagan's structure of the totality of the circumstances analysis also took guidance from the underlying principles of the Act.²⁸³ She emphasized that the analysis must consider the "social and historical conditions"²⁸⁴ of the enacting state and primarily ensure that there exists no "safe harbor"²⁸⁵ for discrimination. Additionally, "the demonstrated ingenuity of state and local governments in hobbling minority voting power"²⁸⁶ must always be kept in the back of the deciding judge's mind. In line with this vision, she supported the approach that allows a plaintiff to succeed if they can show that an alternative law could accomplish the same state interest with less racially disparate impact.²⁸⁷ Justice Kagan concluded her analysis of Section 2 by averring that the point

278. *See id.* at 2358–59 (Kagan, J., dissenting).

279. *See id.*

280. *Id.* at 2358 (“[I]f a law produces different voting opportunities across races—if it establishes rules and conditions of political participation that are less favorable (or advantageoufs) for one racial group than for others—then Section 2 kicks in. It applies, in short, whenever the law makes it harder for citizens of one race than of others to cast a vote.”).

281. *Id.* at 2356.

282. *Id.*

283. *See id.* at 2359.

284. *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

285. *Id.* (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994)).

286. *Id.* (quoting *De Grandy*, 512 U.S. at 1018).

287. *Id.* (citing *Hous. Laws. Ass'n. v. Att'y Gen.*, 501 U.S. 419, 427 (1991)).

of the provision is to prohibit all election laws that burden minority voters' access to the polls unnecessarily, a much higher burden on the states than Justice Alito's interpretation.²⁸⁸

Justice Kagan then criticized Justice Alito's interpretation of Section 2 and application of the totality of the circumstances factors, claiming that his narrow reading does not reflect the broad scope that Congress intended.²⁸⁹ While Justice Kagan accepted that the totality of the circumstances test affords courts wide discretion for analyzing election laws, she found that the factors considered must conform to the purpose of Section 2, that is, to eliminate all discriminatory election practices.²⁹⁰ Contrary to this purpose, Justice Alito's factors instead "stack[] the deck against minority citizens' voting rights."²⁹¹ His acceptance of the usual burdens, permissiveness with regard to overall safeguards, and deference to the state of election laws in 1982 all disturbed Justice Kagan in their apparent contradiction of the guiding principles of the Voting Rights Act.²⁹²

Lastly, Justice Kagan reproached Justice Alito's rejection of the need for the election laws to be "the closest possible fit between means and end" of the state's interest.²⁹³ She argued that departing from such a standard would allow for too much leeway for state legislators to wiggle out of Section 2's strict requirements in patent contravention of Congress' intent to provide no safe harbor for laws with discriminatory impact.²⁹⁴ Justice Kagan stated that Justice Alito's approach in this regard is a clear preference for greater deference to state authority in creating election laws, whereas Congress intended that Section 2 grant federal courts strict review over this process to ensure openness of all elections and equal opportunity for minority voters.²⁹⁵

Justice Kagan next applied her broader interpretation of Section 2 to the Arizona laws at issue.²⁹⁶ She rejected Justice Alito's conclusion that the out-of-precinct policy had a minor effect.²⁹⁷ She specifically noted that Arizona has a substantially higher number of discarded out-of-precinct ballots than any other state, enough to potentially swing elections.²⁹⁸ Further, Justice Kagan rejected the argument that this policy's disparate impact on minority voters was statistically insignificant and based on misleading data.²⁹⁹ She found statistical significance—as did the district court—in the fact that Black, Hispanic, and Native American voters were twice as likely to cast out of precinct ballots.³⁰⁰ Under Justice Kagan's interpretation, the fact that this policy did not affect a large population does not matter to Section 2.³⁰¹

288. *See id.* at 2361.

289. *Id.*

290. *Id.* at 2356–57.

291. *Id.* at 2362.

292. *Id.* at 2362–64 (citing H.R. REP. NO. 97-227, at 14 (1981)).

293. *Id.* at 2364–65.

294. *Id.*

295. *Id.* at 2365–66.

296. *Id.* at 2366.

297. *Id.* at 2366–67.

298. *Id.*

299. *Id.* at 2368.

300. *Id.*

301. *Id.*

Justice Kagan then looked to the “past and present reality” of the circumstances and noted that Maricopa County very frequently changed polling places, with minority voters being the most impacted.³⁰² Lastly, she found that the state’s interest in ensuring that people vote in their proper precinct is insufficient to support the law because the less burdensome, feasible alternative of partially counting votes cast out of the voter’s designated precinct would meet the same goals.³⁰³

With respect to H.B. 2023, Justice Kagan emphasized the extent to which it disparately impacted Native American voters, chiding the majority for ignoring this social context.³⁰⁴ She noted that Native American voters living in rural counties often do not have access to mail services and frequently rely on third-party collection services.³⁰⁵ The state interest in protecting against fraud was insufficient to support H.B. 2023 because of the various existing safeguards against fraud and the absence of proof of actual fraud occurring in Arizona.³⁰⁶ To Justice Kagan, this law did not create a typical burden of voting as Justice Alito claimed, but a discriminatory effect with significant local impact on Native American voters.³⁰⁷ Because they disparately impacted minority voters without sufficiently closely tied state interests to support them, Justice Kagan viewed that both the out-of-precinct ballot policy and H.B. 2023 violated Section 2.³⁰⁸

2. Justice Kagan’s Theory of Democracy and the Voting Rights Act

Justice Kagan’s opinion reflects the opposite of the pragmatic approach taken by Justice Alito.³⁰⁹ While Justice Alito’s opinion stressed the importance of practical state governance free from overbearing federal control,³¹⁰ Justice Kagan’s prioritized the voting rights of individuals and frowned upon any obstacle to the polls.³¹¹ Whereas Justice Alito was willing to accept some disparate burden on minority voters, Justice Kagan was unwilling to accept any, unless necessarily supported by a compelling state interest that could not be otherwise achieved with less discriminatory impact.³¹² She read Section 2 and the Voting Rights Act as a whole to be a broad prohibition on any abridgment of minority voting rights and her role as to enforce that command.³¹³ In this way, Justice Kagan’s approach takes on a normative flavor.³¹⁴ Her defense of the individual’s role in the political process exhibits concern for the basic principles of civic participation and collective decisionmaking.³¹⁵

302. *Id.* at 2368–69 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994)).

303. *Id.* at 2369.

304. *Id.* at 2369–71.

305. *Id.* at 2370.

306. *Id.* at 2370–71.

307. *Id.* at 2371–72.

308. *Id.* at 2366–72.

309. *See id.* at 2372–73.

310. *See id.* at 2343 (majority opinion).

311. *Id.* at 2356 (Kagan, J., dissenting).

312. *Id.* at 2343 (majority opinion); *id.* at 2356 (Kagan, J., dissenting).

313. *Id.*

314. *See id.* at 2372–73.

315. *See id.*

The most important aspect of Justice Kagan's interpretation is its basis in the relationship between the text of Section 2, the intent of the 1982 Congress, and the historical underpinning of the Act as a whole.³¹⁶ Rather than interpreting the meaning of opportunity and openness based on their literal dictionary definitions, Justice Kagan considered them in the context of the 1982 Senate Report and its "broad intent."³¹⁷ The intent represented by the language of the Senate Report informed her understanding of the amended Section 2.³¹⁸ She understood the rejection of the narrow discriminatory intent test for the broader and more inclusive results test paired with the sweeping language of the Senate Report as representing the clear basis for a broad interpretation of Section 2 that seeks "to eliminate all 'discriminatory election systems.'"³¹⁹

The history and current status of the Voting Rights Act also informed Justice Kagan's opinion.³²⁰ Her opinion included an extensive history of the Act, from the Fifteenth Amendment to the civil rights movement.³²¹ She cited legislative history, statements by President Lyndon B. Johnson, and the resulting sweeping reforms to indicate how broad and monumental the Voting Rights Act was as a curtailment of all discriminatory voting practices.³²² These sources gave context for her subsequent argument regarding the broad intent of Section 2. She then addressed the current state of the Voting Rights Act, with specific reference to *Shelby County* and Justice Ginsburg's dissent, to indicate the need for strong voting rights protections given the effective dismemberment of the Section 5 preclearance system.³²³ The wave of state legislation enacting more stringent and less inclusive voting policies in response to *Shelby County* was of particular importance to Justice Kagan.³²⁴ This introduction to Justice Kagan's dissent, which Justice Alito described as "hav[ing] little bearing on the questions before us,"³²⁵ indicated her understanding of the broader purposes of the Voting Rights Act and the need for Section 2 to fill the void of voting rights protections left after *Shelby County*.

Justice Kagan's broad rejection of any discriminatory election practices to protect the greatest inclusivity and accessibility to the polls clearly represents a normative theory of democracy. Under this approach, the bases of democracy are collective decisionmaking and the clearest representation of the will of the people. Justice Kagan's opinion and its representation of the Voting Rights Act prioritizes these principles over the pragmatic and descriptive interests of practical governance and federalism preferred

316. *See id.* at 2356.

317. *Id.* (quoting S. REP. NO. 97-417, at 28 (1982)).

318. *See id.* (quoting S. REP. NO. 97-417, at 28).

319. *Id.* (quoting S. REP. NO. 97-417, at 28).

320. *See id.* at 2351-53.

321. *Id.*

322. *Id.* at 2353 (first quoting H.R. DOC. NO. 120, at 1 (1965); then quoting HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 337 (1983); and then quoting Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 21 (Bernard Grofman & Chandler Davidson eds., 1992)).

323. *Id.* at 2354-55 (citing *Shelby County v. Holder*, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting)).

324. *See id.* at 2355-56 (citing Elmendorf & Spencer, *supra* note 3, at 2145-46).

325. *Id.* at 2341 (majority opinion).

by Justice Alito. This championing of the underlying normative principles of democracy stands for a normative theory of democracy.³²⁶

VI. PERSONAL ANALYSIS

Justice Alito's majority opinion in *Brnovich* runs counter to the normative theory of democracy embedded in the Voting Rights Act.³²⁷ Through his acceptance of the usual burdens of voting, he prioritized the pragmatic view of democracy in his totality of the circumstances analysis, which he deemed necessary for practical governance and the states' interests in a federalist system.³²⁸ This Section argues against Justice Alito's pragmatic theory of democracy and provides a policy recommendation that responds to and reflects on the *Brnovich* decision.

Part VI.A argues that a normative theory of democracy similar to the one expressed by Justice Kagan is far preferable to Justice Alito's pragmatic theory based on the historical context of the Voting Rights Act and its 1982 amendment, the risks that voting rights face today, and the moral and ideological support that a normative theory holds. Part VI.B then explains how, although Justice Kagan's normative theory is more compelling, Justice Alito's pragmatic theory is still permissible within the textual scope of Section 2. This Part poses the problem that defenders of voting rights face in the wake of *Brnovich* given the support that the pragmatic theory, evident in Justice Alito's opinion, holds in the Roberts Court. Part VI.C then addresses a possible solution to this problem, informed by the lessons learned from the *Brnovich* decision. It recommends that Congress enshrine an explicit and binding theory of democracy in future voting rights legislation to avoid the great discretion afforded by Section 2's totality of the circumstances test that allowed its own narrowing.

A. *An Argument for a Normative Interpretive Theory of Democracy*

As demonstrated by the strongly indicated intent of both the 1965 and 1982 Congresses,³²⁹ the present need for similar protections,³³⁰ and its moral and ideological ties to the foundations of democracy, Justice Kagan's Section 2 interpretation—an expression of a normative theory of democracy—is far more compelling than Justice Alito's.

Justice Kagan's focus on the legislative history and historical context of the Voting Rights Act supports her normative theory and the idea that the Act itself and its 1982 amendment embody such a theory. As Justice Kagan asserted, the Voting Rights Act was enacted at a time when voting rights and accessibility to the polls faced significant threats, so broad normative principles of democracy were used in legislation to counteract those threats.³³¹ The Act's explicit rejection of those most invidious legal

326. See Christiano, *supra* note 130.

327. See *Brnovich*, 141 S. Ct. at 2339–40.

328. See *id.*

329. See *id.* at 2353, 2356 (Kagan, J., dissenting) (first quoting H.R. DOC. NO. 120, at 1 (1965); then quoting RAINES, *supra* note 322, at 377 (1983); then quoting Davidson, *supra* note 322, at 21; and then quoting S. REP. NO. 97-417, at 28 (1982)).

330. See *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, *supra* note 1.

331. See *Brnovich*, 141 S. Ct. at 2352–53 (Kagan, J., dissenting).

methods of attacking the Black vote reflects a strong desire for accessible elections in the name of the strongest fundamental principle of democracy: collective political decisionmaking that reflects the interests of the people.³³²

The ties the Act held to the civil rights movement and its cry for civic equality express its desire to hold up the promises of American democracy: to ensure that the American government truly be “a government of the people.”³³³ This close connection was also expressed by the presence of Martin Luther King, Jr. at the signing of law³³⁴—a man who denounced as unjust and antidemocratic any law passed in a state that did not provide an “unhampered right to vote” to all.³³⁵ President Lyndon B. Johnson evocatively echoed these purposes in his speech to Congress upon the signing of the Act into law.³³⁶ He stated: “Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to insure [sic] that right.”³³⁷ These words spoken at the enactment of the Voting Rights Act make clear the normative principles that undergird it—principles that evoke the moral foundations of democracy.³³⁸

Further, the 1982 Congress also sought to guard these principles from what it saw as an attack against them.³³⁹ Congress rejected the discriminatory intent test from *Bolden* and renewed the principles set forth in the original Act through its amendment to Section 2.³⁴⁰ *Bolden*’s requirement of discriminatory intent gave the benefit of the doubt to the states in a clear prioritization of state sovereignty over the goal of absolute electoral equality.³⁴¹ The results test embedded in the amended Section 2 reaffirmed the need to protect the rights of Black and other minority voters in the face of abrogative but facially neutral laws.³⁴² By focusing on the impact of the laws on actual voting practices rather than relying on an abstract notion of discriminatory intent, the amended Section 2 attempted to place accessibility at the forefront.³⁴³ Thus, the legislative, historical, and social context of the Voting Rights Act and its 1982 amendment all express normative principles of democracy.

Justice Alito’s pragmatic theory of democracy runs counter to these expressed principles.³⁴⁴ His emphasis on accepting the typical burdens of voting and prioritization of states’ interests speaks to a federalist rejection of the Voting Rights Act.³⁴⁵ The federalist fear that national legislation protecting voting rights will unreasonably

332. See Voting Rights Act of 1965, 52 U.S.C. § 10301(b).

333. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404–05 (1819).

334. *Voting Rights Act of 1965*, HIST. (last updated Jan. 11, 2022), <https://www.history.com/topics/black-history/voting-rights-act#voting-rights-act-signed-into-law> [<https://perma.cc/HFF7-WGKM>].

335. Martin Luther King, Jr., Letter from a Birmingham Jail (1963).

336. See President Lyndon B. Johnson, We Shall Overcome (Mar. 15, 1965).

337. *Id.*

338. See *id.*

339. See S. REP. NO. 97-417, at 36–37 (1982).

340. See *id.*

341. See *City of Mobile v. Bolden*, 446 U.S. 55, 75–77 (1980).

342. See S. REP. NO. 97-417, at 36–37.

343. See *id.*

344. See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2343–48 (2021).

345. See *id.*

interfere with the sovereignty of the states in their exercise of electoral practices is at odds with the purpose of the Voting Rights Act.

The conclusion that minority voters must accept some voting burdens in the name of practical governance does not align with the Act's intention to end all discriminatory election practices.³⁴⁶ To limit the Voting Rights Act from this perspective without a constitutional basis is to impose the pragmatic theory of democracy where it does not belong. To undermine individual rights for the sake of practical governance and state sovereignty in this context is to ignore the strong prohibitions of the Voting Rights Act's drafters and the explicit problems they sought to solve. For Justice Alito, there does exist a "duty which weighs more heavily . . . than the duty . . . to insure [sic] [an equal right to vote],"³⁴⁷ namely, the duty to allow states to run their elections free from the strictures of the federal government. His support for this duty completely ignores the goals of the Voting Rights Act.

The inappropriateness of Justice Alito's decision is perhaps best reflected in his analogy in footnote eleven of his opinion.³⁴⁸ His comparison of voting to a museum exhibit or college course stands completely opposed to the vision of democracy and its importance as expressed in President Johnson's speech.³⁴⁹ Voting is the most fundamental aspect of civic life in a democracy.³⁵⁰ To compare it to such a casual and leisurely activity as attending a museum misses the point of why activists were fighting so adamantly for voting rights from the Fifteenth Amendment to the civil rights movement and beyond. The you snooze, you lose attitude towards voting rights that Justice Alito asserted in footnote eleven³⁵¹ does a severe disservice to the most basic ideas of democracy upheld through the Voting Rights Act.

Justice Alito's flippant attitude and his deflection of individual voting rights in the name of practical governance and a federalist vision of government also fail to meet the needs of post-*Shelby County* America, where voting rights face another significant threat.³⁵² In a vein similar to the Arizona laws at issue in *Brnovich*, many states have been passing laws that make voting increasingly inaccessible to voters throughout America, with special burdens often placed on minority citizens.³⁵³ Such restrictions are especially dangerous given that many have intersected with the COVID-19 pandemic, during which in-person voting could put voters' lives at risk.³⁵⁴ Further, the attack on

346. See Voting Rights Act of 1965, 52 U.S.C. § 10301(b).

347. Johnson, *supra* note 336.

348. See *Brnovich*, 141 S. Ct. at 2338 n.11.

349. Compare *id.*, with Johnson, *supra* note 336.

350. See *Democracy*, *supra* note 130 (explaining that voting is a central part of normative democracy).

351. See *Brnovich*, 141 S. Ct. at 2338 n.11.

352. See *The Effects of Shelby County v. Holder*, *supra* note 149; *Block the Vote: How Politicians Are Trying To Block Voters from the Ballot Box*, *supra* note 1.

353. See *The Impact of Voter Suppression on Communities of Color*, *supra* note 1; Solomon Jones, *Attempts To Suppress Black Voters Have Evolved, but Not Ceased*, WHY (July 12, 2021), <https://why.org/articles/attempts-to-suppress-black-voters-have-evolved-but-not-ceased/> [<https://perma.cc/97BW-57XY>].

354. See generally *The Impact of COVID-19 on Voting Rights and Election Administration: Ensuring Safe and Fair Elections: Hearing Before the Subcomm. on Elections*, 116th Cong. (2020); Leah Croll, *COVID-19 Pandemic Amplifying Voter Disenfranchisement*, ABC NEWS (Oct. 7, 2020), <https://abcnews.go.com/Health/covid-19-pandemic-amplifying-voter-disenfranchisement/story?id=73323400> [<https://perma.cc/N56W-53GD>].

voting accessibility throughout the COVID-19 pandemic only exacerbated the racial aspect of the threat to voting rights.³⁵⁵

The highly contested 2020 presidential election has also brought election practices to the public's attention.³⁵⁶ At a time when elections are greatly scrutinized, and democracy as a political institution faces significant division, it is more important than ever that elections hold the legitimacy that comes when accessibility is made a priority. When the most people possible have their say as to who should represent them, the chosen elected officials will be best able to express the citizenry's needs and desires for America's political future. These issues are at their most pressing in American elections where certain outcomes are so tight that they could be swayed by tens of thousands of votes.³⁵⁷

It is this moral principle, namely that political representatives should be selected using a process that reflects the people's will to the greatest extent possible, that provides the strongest argument for a normative interpretive theory of democracy. Practical governance and each state's ability to run its government as it sees fit are important factors that should be given some weight. However, when they come up against the principle of collective decisionmaking that undergirds all democratic institutions, the federalist and pragmatic factors inherent in Justice Alito's theory of democracy must move aside. For it is the fundamental principles of democracy that shape how a democratic government should play out in its individual instantiation; it is the people's decision as to how democracy should function.

It may very well occur that a majority of people in a given electoral body prefer a federalist and pragmatic theory of democracy when it comes to individual policies. However, they deserve an opportunity to express those opinions fully. And if policies supported by politicians who do not represent the will of the majority due to abrogation of voting rights become law, the very legitimacy of democracy is questionable. Without the normative principles of democracy such as collective decisionmaking and accessible voting underpinning election law, the voice of the people will not see its fullest expression in its government. For these reasons, the federalist and pragmatic principles of Justice Alito's theory of democracy should not play a central role in deciding election

355. See *The Impact of COVID-19 on Voting Rights and Election Administration: Ensuring Safe and Fair Elections: Hearing Before the Subcomm. on Elections*, supra note 354, at 47–59 (statement of Sherrilyn Ifill, President, NAACP Legal Defense Fund); James E. Wright, II & Cullen C. Merritt, *Social Equity and COVID-19: The Case of African Americans*, 80 PUB. ADMIN. REV. 820, 822–23 (2020).

356. See Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, WASH. POST (last updated Mar. 11, 2021), <https://www.washingtonpost.com/elections/interactive/2020/election-integrity/> [<https://perma.cc/H8NU-622W>].

357. See *Raphael Warnock (D) Won the Race for Georgia Senate Runoff*, POLITICO (last updated Jan. 12, 2023, 1:38 PM), <https://www.politico.com/2022-election/results/georgia/senate/> (reporting that in the 2022 U.S. Senate race in Georgia, there was a differential of 36,465 votes between Democratic candidate Raphael Warnock and Republican Candidate Herschel Walker); *Catherine Cortez Masto (D) Won the Race for Nevada Senate*, POLITICO (last updated Jan. 12, 2023, 12:16 PM), <https://www.politico.com/2022-election/results/nevada/senate/> (reporting that in the 2022 U.S. Senate race in Nevada, there was a differential of 9,007 votes between Democratic candidate Catherine Cortez Masto and Republican candidate Adam Laxalt); *Katie Hobbs (D) Won the Race for Arizona Governor*, POLITICO (last updated Jan. 12, 2023, 2:52 PM), <https://www.politico.com/2022-election/results/arizona/statewide-offices/> (reporting that in the 2022 Governor race in Arizona, there was a differential of 17,116 votes between Democratic candidate Katie Hobbs and Republican candidate Kari Lake).

law cases and interpreting election legislation such as the Voting Rights Act. An unelected official, such as a Supreme Court justice, should pay special attention to these principles as they decide election law cases and shape the very structure of American democracy.

B. The Permissibility of the Totality of the Circumstances Test

Compared with Justice Alito’s majority opinion, Justice Kagan’s dissenting opinion falls much more in line with the legislative, historical, and social context of the Voting Rights Act.³⁵⁸ Her extensive discussion of the historical background and legislative history of the original Voting Rights Act and its 1982 amendment reflects a commitment to the normative principles that undergird this legislation.³⁵⁹ She expressed this commitment by interpreting Section 2 and its totality of the circumstances test in a way that prioritizes broad accessibility to the polls and rejects even the most limited forms of abrogation.³⁶⁰

However, while Justice Kagan’s arguments have the contextual support of the history of the Voting Rights Act and the moral force that undergirds normativism as expressive of the fundamental underpinnings of democracy, her interpretation is not explicitly necessitated by the text of Section 2. While she may aver that the sources she relies on provide “[r]eal law,”³⁶¹ the actual text of Section 2 does not explicitly require such an approach.³⁶² Section 2 merely states that it is violated “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.”³⁶³

Section 2 itself provides scant information as to what this means or how it should be understood.³⁶⁴ The most clarity is provided in the Senate Report, which saw the primary purpose of the amendment as rejecting *Bolden* in support of the Section 2 jurisprudence based on the *White* opinion.³⁶⁵ The rejection of *Bolden*’s discriminatory intent requirement by the 1982 Congress indicates a clear favoring of the normative principles represented by the Act as originally drafted; however, it is insufficient on its own to require that those normative principles be applied in future interpretations without express textual support.³⁶⁶

Further, the totality of the circumstances test established in Section 2 only provides suggestions as to how a Section 2 case should be handled.³⁶⁷ The relevant factors delineated in the Senate Report and *Gingles* do not require one approach over another.³⁶⁸

358. See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2361–66 (2021) (Kagan, J., dissenting).

359. See *id.* at 2372–73.

360. See *id.*

361. *Id.* at 2360.

362. See Voting Rights Act of 1965, 52 U.S.C. § 10301 (amended 1982).

363. § 10301(b).

364. See *id.*

365. See S. REP. NO. 97-417, at 2 (1982).

366. See § 10301.

367. See § 10301(b).

368. See S. REP. NO. 97-417, at 2 (“The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*.”); *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986).

Interpreting judges have great discretion given that they are free to ignore, limit, and prioritize individual factors in their balancing as they see fit.³⁶⁹ While this broad discretion is understandable, especially given the contested nature of the 1982 amendment and the compromise inherent in its drafting,³⁷⁰ it fails in enforcing the strong normative principles undergirding Section 2 and the Act as a whole. Judges with viewpoints and theories of democracy at odds with those expressed implicitly in the Voting Rights Act can manipulate the totality of the circumstances test to achieve a result that may run contrary to the normative goals of the Act.³⁷¹

For these reasons, Justice Kagan's highly compelling interpretation based on the history and preparatory documents of the Voting Rights Act is not required by the text of Section 2 itself.³⁷² When the text of the Act is viewed from the narrow scope of a textualist, it cannot be denied that Justice Alito's interpretation is permissible, despite Justice Kagan's assertion that she is applying "[r]eal law."³⁷³ A textualist like Justice Alito can dismiss the legislative history and historical context of Section 2 and the 1982 amendment as external distractions, as he in fact does.³⁷⁴ Further, the language that Justice Kagan identifies as broad and sweeping can be narrowed through literalism. Section 2, as written, does not express a clear and cognizable theory of democracy that interpreting judges must follow because of this broad room for interpretation.³⁷⁵ For this reason, Justice Kagan's normative arguments, despite their strong moral and historical support, do not have the necessary legal backing to bind the highly pragmatic and textualist Justice Alito to protect voting rights.

The failure of Section 2 to enforce the normative principles underlying the Voting Rights Act, which are necessary for the effective defense of voting rights, is a serious problem in the age of the Roberts Court. The *Brnovich* decision should not be viewed in isolation but as part of a trajectory that the Roberts Court has traced in its attack on the Voting Rights Act. In many ways, the theory of democracy underlying Justice Alito's opinion in *Brnovich* conforms to the Roberts Court's general approach to election law decisions and the Voting Rights Act in particular.³⁷⁶ Scholars have made many attempts to characterize the Roberts Court's approach to democracy within election law jurisprudence.³⁷⁷ Its approach has been referred to as "neoliberal jurisprudence,"³⁷⁸ "free

369. See S. REP. NO. 97-417, at 29; *Gingles*, 478 U.S. at 45.

370. See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2332 (2021).

371. See S. REP. NO. 97-417, at 29; *Gingles*, 478 U.S. at 45.

372. See S. REP. NO. 97-417, at 2; *Gingles*, 478 U.S. at 45.

373. *Brnovich*, 141 S. Ct. at 2360 (Kagan, J., dissenting).

374. *Id.* at 2341 ("[Justice Kagan] spends 20 pages discussing matters that have little bearing on the questions before us. [She] provides historical background that all Americans should remember . . . but that background does not tell us how to decide these cases." (citation omitted)).

375. See S. REP. NO. 97-417, at 2; *Gingles*, 478 U.S. at 45.

376. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (Stevens, J., opinion); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Shelby County v. Holder*, 570 U.S. 529 (2013).

377. See Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395, 397 (2011); Schultz, *supra* note 152, at 261; Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 ST. LOUIS UNIV. L.J. 609, 609 (2020).

378. Kuhner, *supra* note 377, at 397.

market democracy,”³⁷⁹ and “election law originalism.”³⁸⁰ Some scholars have further identified the Roberts Court as taking an ad hoc approach to election law.³⁸¹ Much of this analysis has referred to the Roberts Court’s approach to campaign financing in the wake of *Citizens United v. FEC*,³⁸² but the general understanding of its approach to matters of law regarding principles of American democracy apply across the board.

The Roberts Court has decided many election law cases applying the same underlying understanding of democracy that Justice Alito applied in *Brnovich*.³⁸³ The stress has been on more leniency to state execution of elections at the expense of individual voting rights and access to the polls.³⁸⁴ The aforementioned explicit reference by Justice Alito to Justice Stevens’s opinion in *Crawford* regarding the usual burdens of voting is a prime example of this phenomenon.³⁸⁵ However, *Shelby County* is the most illustrative precedent of which *Brnovich* is a continuation.

Chief Justice Roberts’s majority opinion in *Shelby County* expressed the same basic principles on which Justice Alito based his opinion in *Brnovich*.³⁸⁶ His opinion suggests a mindset that it is acceptable to relieve the states of the burden of Section 5’s preclearance system, even if that means placing a greater burden on voters, especially minority voters.³⁸⁷ This approach to the principles of the Voting Rights Act is neither isolated nor newly found.³⁸⁸ Chief Justice Roberts strongly attacked Section 2 and the entire basis of the Voting Rights Act in a memo while serving as an aide to former U.S. Attorney General William French Smith.³⁸⁹ All of this is merely to say that Justice Alito’s majority opinion in *Brnovich* is not unique but rather reflects the conservative wing of the Supreme Court’s approach to election law and the Voting Rights Act as a whole. The validity of his arguments, and those of Chief Justice Roberts, reflect the current state of Supreme Court judicial review of election law in America.

It is because of the trajectory of pragmatism and textualism of the Roberts Court that the weakness of Section 2 represents a great failure for voting rights. The lack of explicitly required normativism in Section 2’s totality of the circumstances test has allowed the Roberts Court to assert its own view of democracy in *Brnovich*, even if it is contrary to the underlying goals and principles of the Voting Rights Act. Additionally,

379. Schultz, *supra* note 152, at 261.

380. Dawood, *supra* note 377, at 609.

381. Schultz, *supra* note 152, at 261.

382. 558 U.S. 310 (2010).

383. *See, e.g., Shelby County v. Holder*, 570 U.S. 529 (2013); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (Stevens, J., opinion).

384. *See, e.g., Shelby County*, 570 U.S. at 529 (2013); *Crawford*, 553 U.S. at 181.

385. *See Crawford*, 553 U.S. at 198 (“For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” (internal citations omitted)).

386. *Compare Shelby County*, 570 U.S. at 529, with *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

387. *See Shelby County*, 570 U.S. at 557.

388. *See Ian Millhiser, Chief Justice Roberts’s Lifelong Crusade Against Voting Rights, Explained*, VOX (Sept 18, 2020, 8:00 AM), <https://www.vox.com/21211880/supreme-court-chief-justice-john-roberts-voting-rights-act-election-2020> [https://perma.cc/68AB-YCZR].

389. *Id.*

any other legislation that leaves so much discretion to the deciding judge could easily be narrowed in the same way Section 2 has been narrowed in *Brnovich*. The broad discretion afforded by Section 2's totality of the circumstances test poses a significant problem for those who wish to defend the worthy principles enshrined in the Voting Rights Act.

C. *An Explicit Theory of Democracy for the Future of Voting Rights*

With Section 2 having been narrowed in *Brnovich*, the inevitable question remains: What lessons can defenders of voting rights take away? The best solution would be to tailor future voting rights legislation, such as the proposed John Lewis Voting Rights Advancement Act,³⁹⁰ For the People Act,³⁹¹ or Freedom to Vote Act,³⁹² to prevent the type of narrow reading applied by Justice Alito in *Brnovich*. Justice Alito could look past the strong principles and purposes of the amended Section 2 because of the vagueness and great discretion afforded to judges through the totality of the circumstances test.³⁹³ One way to prevent the textualist and pragmatic reading that the Roberts Court would inevitably seek to apply to interpretations of future normativist voting rights legislation is to be explicit in defining the theories and principles of democracy that undergird it. While the Voting Rights Act possessed such principles, as shown by Justice Kagan,³⁹⁴ it did not contain them explicitly and unambiguously in the original or amended text of Section 2 such that it could force the hand of interpreting judges.

Some scholars have recommended similar approaches.³⁹⁵ One renowned argument is found in *The Democracy Canon* by Professor Richard Hasen.³⁹⁶ Hasen supports a method of statutory construction following the principle that “[a]ll statutes tending to limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor.”³⁹⁷ His basic argument is that judges should read these statutes to support the most access possible to polls and voting.³⁹⁸ This canon supports an underenforced constitutional right to vote and tends to elicit preferences from legislatures by forcing them to respond to important constitutional issues if they disagree with a judicial decision.³⁹⁹ This approach is highly normative in that it supports a method of analysis that bolsters individual access to the polls in the name of democratic participation.⁴⁰⁰

Hasen's approach, however, involves merely creating a suggestion for judges in their interpretation of election law.⁴⁰¹ While Hasen's arguments would be incredibly persuasive to a normative-minded judge like Justice Kagan, pragmatic-minded judges like Justice Alito would likely look less kindly upon them. Section 2 already gives such

390. H.R. 4, 117th Cong. (2021).

391. H.R. 1, 117th Cong. (2021).

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

393. See S. REP. NO. 97-417, at 2 (1982); *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986).

394. See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2352–56 (2021) (Kagan, J., dissenting).

395. See, e.g., Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

396. *Id.*

397. *Id.* at 71 (2009) (alterations in original) (quoting *Owens v. State ex rel. Jennett*, 64 Tex. 500, 509 (1885)).

398. See *id.* at 93.

399. See *id.* at 96, 100–01.

400. See *id.*

401. See *id.* at 93.

great discretion to deciding judges.⁴⁰² While the creation of a canon of interpretation that encourages a normative theory of democracy takes a step in the right direction, it does not sufficiently compel judges to protect voting rights to the greatest extent possible. Just as Justice Alito effectively stepped around the normative theory of democracy implicit in Section 2, any deciding judge could just as easily wave away a canon of interpretation similar to the one suggested by Hasen.

The promise of a democracy canon is further clouded by the significant support that the pragmatic, federalist approach to democracy and election law currently holds on the Supreme Court, as evidenced by the result of *Brnovich*, which rallied six justices together.⁴⁰³ While it may be effective for a more normative-minded court such as the Ninth Circuit, it would not shift the minds of the Roberts Court majority. Hasen's theory is potentially persuasive but would be unable to sufficiently support the norms it champions. Those judges who would be persuaded by it would already use such an interpretation, while those unpersuaded could just use a different means of interpretation. Those latter judges are free to dismiss Hasen's canon as they could any other substantive canon of interpretation they dislike.

The main problem, as seen in *Brnovich*, is the permissiveness of Section 2's totality of the circumstances test. Suggestions and recommendations will not suffice for the protection of voting rights through legislation. In this vein, Hasen's approach could be much more effective for compelling an interpretation in line with a normative theory of democracy if it were explicitly codified in future voting rights legislation. This approach, or otherwise clearly stating the theory of democracy or desired principles of interpretation, could allow a Congress with a strong interest in promoting the highest accessibility of voting to preempt any attempts at pragmatic narrowing interpretations similar to those applied in *Brnovich*. Such an approach would not be perfect, especially if the legislation itself provides a multifaceted balancing or totality of the circumstances test that still leaves discretion to the deciding judge. However, it would certainly provide greater support for an argument similar to Justice Kagan's than the plain meaning of Section 2's text does as it presently stands.

Professors Christopher Elmendorf and Douglas Spencer recommend another approach—a rebuttable evidentiary presumption placed upon the state government whose election law is being challenged as discriminatory.⁴⁰⁴ This approach would require the state government to show that its law is not discriminatory, shifting the burden away from the plaintiffs and creating a legal process that is structurally similar to the Section 5 preclearance system.⁴⁰⁵ While this approach would not create an explicit theory of democracy, it still represents an interest in access to the polls and provides an effective mechanism for challenging discriminatory election practices that, if explicitly included in future legislation, would force the hands of interpreting judges. In this way, it invokes the normative democratic principles underlying the Voting Rights Act and the desire for accessibility and ensuring the broadest democratic participation possible. Such a method would go a long way to compel judges to apply specific democratic principles

402. See S. Rep. No. 97-417, at 29 (1982); *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986).

403. See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021).

404. Elmendorf & Spencer, *supra* note 3, at 2160.

405. *Id.*

representing a specific democratic theory desired by Congress. However, the danger of another *Shelby County* constitutional challenge could still undermine such an attempt.

Regardless of the method, for the protection of voting rights, future legislation must both create an effective system to limit states' ability to apply discriminatory election practices and stay the hands of judges who prioritize pragmatic democratic principles and the balance of federalism. Naturally, such a task is not easy. This is especially true in 2022, given the widening divide in American politics, particularly with respect to the politicization of voting rights.⁴⁰⁶ The totality of the circumstances test from the 1982 amendment was a product of hard-fought compromise between conflicting political ideologies and theories of democracy.⁴⁰⁷ Given the difficulties Congress has had with passing voting rights legislation, such as the For the People Act and the John Lewis Voting Rights Advancement Act,⁴⁰⁸ it seems less realistic that it would be able to include an express theory of democracy that would guide judges and force their hands in interpreting and applying the legislation. Any legislation created in such a political atmosphere would necessarily require compromise and sacrifice.

However, if Congress, as a representative of the American people, truly values the fundamental principles of democracy, it must do everything in its power to create an explicit interpretive limitation with democratic theories sharply in mind. It has been suggested that the *Brnovich* decision has had a significantly negative impact on the Voting Rights Act.⁴⁰⁹ It is likely that states will have responses similar to those after *Shelby County*;⁴¹⁰ many already have.⁴¹¹ To uphold the principles that undergird the Voting Rights Act and counteract the pragmatic and textualist Roberts Court for the

406. See Vianney Gomez and Carrol Doherty, *Wide Partisan Divide on Whether Voting Rights Is a Fundamental Right or a Privilege with Responsibilities*, PEW RES. CTR. (July 22, 2021), <https://www.pewresearch.org/fact-tank/2021/07/22/wide-partisan-divide-on-whether-voting-is-a-fundamental-right-or-a-privilege-with-responsibilities/> [<https://perma.cc/2V2Q-G6R6>]; compare Domenico Montanaro, *Poll: More Americans Are Concerned About Voting Access than Fraud Prevention*, NPR (July 2, 2021), <https://www.npr.org/2021/07/02/1012302107/poll-more-americans-are-concerned-about-voting-access-than-fraud-prevention> [<https://perma.cc/GA2U-3WL9>], with Eli Yokley, *More Americans Think It's Too Easy To Vote Than Too Hard To Vote*, MORNING CONSULT (Sept. 27, 2021), <https://morningconsult.com/2021/09/27/voting-rights-elections-polling/> [<https://perma.cc/HB7F-4C7D>].

407. See *Brnovich*, 141 S. Ct. at 2332.

408. See Mike DeBonis, *Senate Republicans Block Debate on Elections Bill, Dealing Blow to Democrats' Voting Rights Push*, WASH. POST (Jun. 22, 2021), https://www.washingtonpost.com/politics/senate-voting-rights-bill/2021/06/22/d63f6a46-d35a-11eb-ae54-515e2f63d37d_story.html [<https://perma.cc/V3Q7-9DGH>].

409. See *Court Case Tracker: Brnovich v. Democratic National Committee*, BRENNAN CTR. FOR JUST. (last updated July 1, 2021), <https://www.brennancenter.org/our-work/court-cases/brnovich-v-democratic-national-committee> [<https://perma.cc/J9GQ-NEKC>]; Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, ATLANTIC (July 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-sctus-decision-arizona-voting-right/619330/> [<https://perma.cc/NG7V-NBRU>]; *Brnovich v. Democratic National Committee*, 165 HARV. L. REV. 481, 490 (2021).

410. See Elmendorf & Spencer, *supra* note 3, at 2145–46; *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 117th Cong. (2021) (statement of Ezra D. Rosenberg, Co-director, Voting Rights Project).

411. See *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (last updated Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [<https://perma.cc/2TKW-3UFD>].

protection of voting rights, Congress must overcome these hurdles and explicitly express a clear and binding theory of democracy in future voting rights legislation.

VII. CONCLUSION

Justice Alito's interpretation of Section 2 in *Brnovich* is not consistent with the theory of democracy underlying the Act expressed in its legislative history and historical context. However, because the text's totality of the circumstances test provides such great discretion to interpreting judges, Justice Alito's interpretation is technically permissible and so cannot be critiqued on a legally binding basis. To protect against such interpretations in the future, it is imperative that Congress enshrine an explicit theory of democracy in forthcoming voting rights legislation, either through an interpretive canon, an evidentiary presumption, or a more restrictive results test.

This is not a structuralist argument. This Note does not argue that courts should never have leeway in making decisions or that Congress should never utilize totality of the circumstances tests in legislation because of separation of powers. Rather, this argument is a practical one. It recommends that Congress attempt to restrict judicial power in the specific context of voting rights because of the pressing need for their defense and their disfavor in the Roberts Court.

Such an effort will certainly be difficult given the politicization of the issue and the division of Congress and American political discourse. Still, it is necessary if the underlying principles of democracy are to be protected for all American citizens. Such an effort would be the greatest step toward furthering the legacy of the waning Voting Rights Act. Voting rights must be properly enforced through effective legislation. Explicitly enshrining a normativist theory of democracy that would bind the deciding judge would be a great step in the right direction. This must be the lesson that defenders of voting rights take away from *Brnovich*.