AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Voting/The Voting Rights Act

**Brnovich v. Democratic National Committee**, 141 S. Ct. 2321 (2021)

*Claiming concerns with fraud, the Arizona state legislature in 2020 passed new regulations for counting the vote and delivering the vote. Voters who by accident vote in the wrong precinct would no longer have their ballots counted. The state forbade third parties from collecting mail-in ballots. The Democratic National Committee, other organizations, and numerous individuals filed a lawsuit against Mark Brnovich, the Attorney General of Arizona, asking that these laws be enjoined under Section 2 of the Voting Rights Act. That provision forbids any state voting rule or practice “which results in a denial or abridgement which results in a denial or abridgement of the right . . . to vote on account of race or color.” The local federal district court found for Arizona as did a panel for the Court of Appeals for the Ninth Circuit, but that decision was reversed by an en banc panel of the Ninth Circuit. Arizona appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 6-3 vote reversed the en banc decision. Justice Samuel Alito’s majority opinion found that the Arizona laws did not add to the usual burdens of voting, that the discriminatory impact of the laws was insignificant, and that both laws were reasonable means for preventing fraud. How does Alito interpret Section 2? Why does he think the totality of circumstances supports Arizona’s policies on counting votes and delivering votes? Why does Justice Elena Kagan disagree? Who has the better of the argument? The divide in* Brnovich *was between the six Republican appointees and the three Democratic appointees. Did one coalition of judicial appoints place politics above the law? Did both? How would you go about determining the extent to which legal opinions are based on politics rather than law?*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)&analyticGuid=Ice2c0fd4d9d011eb89bcad1f1e4bcabb) delivered the opinion of the Court.

. . . .

Congress enacted the landmark Voting Rights Act of 1965 in an effort to achieve at long last what the Fifteenth Amendment had sought to bring about 95 years earlier: an end to the denial of the right to vote based on race. . . . Despite the ratification of the Fifteenth Amendment, the right of African-Americans to vote was heavily suppressed for nearly a century. States employed a variety of notorious methods, including poll taxes, literacy tests, property qualifications, “ ‘white primar[ies],’ ” and “ ‘grandfather clause[s].’ ”. . . [A]s late as the mid-1960s, black registration and voting rates in some States were appallingly low.

Invoking the power conferred by § 2 of the Fifteenth Amendment, Congress enacted the Voting Rights Act (VRA) to address this entrenched problem. . . . . As originally enacted, § 2 closely tracked the language of the Amendment it was adopted to enforce. Section 2 stated simply 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.”

. . . .

One Fourteenth Amendment vote-dilution case, *White v. Regester*, (1973), came to have outsized importance in the development of our VRA case law. . . . According to [*White*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126421&pubNum=0000780&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)), a vote-dilution plaintiff had 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.” . . .

A few years later, the question whether a VRA § 2 claim required discriminatory purpose or intent came before this Court in *Mobile v.* *Bolden* (1980). . . . The plurality then observed that prior decisions “ha[d] made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.” The obvious result of those premises was that facially neutral voting practices violate § 2 only if motivated by a discriminatory purpose. The plurality read [*White*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126421&pubNum=0000780&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)) as consistent with this requirement.

Shortly after [*Bolden*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980111419&pubNum=0000780&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)) was handed down, Congress amended § 2 of the VRA. The oft-cited Report of the Senate Judiciary Committee accompanying the 1982 Amendment stated that the amendment's purpose was to repudiate [*Bolden*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980111419&pubNum=0000780&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)) and establish a new vote-dilution test based on what the Court had said in [*White*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126421&pubNum=0000780&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)). . . . In place of the phrase “to deny or abridge the right ... to vote on account of race or color,” the amendment substituted “in a manner which *results in* a denial or abridgement of the right ... to vote on account of race or color.” The House bill “originally passed ... under a loose understanding that § 2 would prohibit all discriminatory ‘effects’ of voting practices, and that intent would be ‘irrelevant,’ ” but “[t]his version met stiff resistance in the Senate.” . . . What is now § 2(b) was added, and that provision sets out what must be shown to prove a § 2 violation. It requires consideration of “the totality of circumstances” in each case and demands proof that “the political processes leading to nomination or election in the State or political subdivision are not *equally open* to participation” by members of a protected class “*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.” . . . .

. . . .

. . . . [W]e think it prudent to make clear at the beginning that we decline in these cases to announce a test to govern all VRA § 2 claims involving rules, like those at issue here, that specify the time, place, or manner for casting ballots. . . . All told, no fewer than 10 tests have been proposed. But as this is our first foray into the area, we think it sufficient for present purposes to identify certain guideposts that lead us to our decision in these cases.

. . . .

The key requirement is that the political processes leading to nomination and election (here, the process of voting) must be “equally open” to minority and non-minority groups alike, and the most relevant definition of the term “open” . . . is “without restrictions as to who may participate” or “requiring no special status, identification, or permit for entry or participation.” . . . [E]qual openness and equal opportunity are not separate requirements. Instead, equal opportunity helps to explain the meaning of equal openness. . . . Putting these terms together, it appears that the core of the requirement that voting be “equally open.” The statute's reference to equal “opportunity” may stretch that concept to some degree to include consideration of a person's ability to *use* the means that are equally open. But equal openness remains the touchstone.

. . . . § 2(b) . . . requires consideration of “the totality of circumstances.” Thus, any circumstance that has a logical bearing on whether voting is “equally open” and affords equal “opportunity” may be considered. We will not attempt to compile an exhaustive list, but several important circumstances should be mentioned.

First, the size of the burden imposed by a challenged voting rule is highly relevant. The concepts of “open[ness]” and “opportunity” connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important. . . . . But because voting necessarily requires some effort and compliance with some 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.”

For similar reasons, the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982 is a relevant consideration. Because every voting rule imposes a burden of some sort, it is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared. The burdens associated with the rules in widespread use when § 2 was adopted are therefore useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally “open” or furnishing an equal “opportunity” to vote in the sense meant by § 2. Therefore, it is relevant that in 1982 States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots. We doubt that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States. . . .

The size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider. Small disparities are less likely than large ones to indicate that a system is not equally open. To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. . . .

Next, courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision. . . . Finally, the strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account. . . . One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome. Ensuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest. . . . .

. . . . We also do not find the disparate-impact model employed in Title VII and Fair Housing Act cases useful here. . . . For example, we think it inappropriate to read § 2 to impose a strict “necessity requirement” that would force States to demonstrate that their legitimate interests can be accomplished only by means of the voting regulations in question. Demanding such a tight fit would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate interests. It would also transfer much of the authority to regulate election procedures from the States to the federal courts. . . .

. . . .

Only after [an] extended effort at misdirection is the dissent's aim finally unveiled: to undo as much as possible the compromise that was reached between the House and Senate when § 2 was amended in 1982. . . . [T]he version enacted into law includes § 2(b), and that subsection directs us to consider “the totality of circumstances,” not, as the dissent would have it, the totality of just one circumstance. . . . According to the dissent, an interest served by a voting rule, no matter how compelling, cannot support the rule unless a State can prove to the satisfaction of the courts that this interest could not be served by any other means.  Such a requirement has no footing in the text of § 2 or our precedent construing it.

. . . .

With all other circumstances swept away, all that remains in the dissent's approach is the size of any disparity in a rule's impact on members of protected groups. As we have noted, differences in employment, wealth, and education may make it virtually impossible for a State to devise rules that do not have some disparate impact. But under the dissent's interpretation of § 2, any “statistically significant” disparity—wherever *that* is in the statute—may be enough to take down even facially neutral voting rules with long pedigrees that reasonably pursue important state interests.

. . . .

In light of the principles set out above, neither Arizona's out-of-precinct rule nor its ballot-collection law violates § 2 of the VRA. Arizona's out-of-precinct rule enforces the requirement that voters who choose to vote in person on election day must do so in their assigned precincts. Having to identify one's own polling place and then travel there to vote does not exceed the “usual burdens of voting.” . . .

Not only are these unremarkable burdens, but the District Court's uncontested findings show that the State made extensive efforts to reduce their impact on the number of valid votes ultimately cast. The State makes accurate precinct information available to all voters. . . . The secretary of state's office operates websites that provide voter-specific polling place information and allow voters to make inquiries to the secretary's staff. . . . But even if it is marginally harder for Arizona voters to find their assigned polling places, the State offers other easy ways to vote. Any voter can request an early ballot without excuse. Any voter can ask to be placed on the permanent early voter list so that an early ballot will be mailed automatically. Voters may drop off their early ballots at any polling place, even one to which they are not assigned. And for nearly a month before election day, any voter can vote in person at an early voting location in his or her county. The availability of those options likely explains why out-of-precinct votes on election day make up such a small and apparently diminishing portion of overall ballots cast—0.47% of all ballots in the 2012 general election and just 0.15% in 2016.

Next, the racial disparity in burdens allegedly caused by the out-of-precinct policy is small in absolute terms. The District Court accepted the plaintiffs' evidence that, of the Arizona counties that reported out-of-precinct ballots in the 2016 general election, a little over 1% of Hispanic voters, 1% of African-American voters, and 1% of Native American voters who voted on election day cast an out-of-precinct ballot.  For non-minority voters, the rate was around 0.5%.  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.

. . . .

. . . . Not counting out-of-precinct votes induces compliance with the requirement that Arizonans who choose to vote in-person on election day do so at their assigned polling places. And as the District Court recognized, precinct-based voting furthers important state interests. It helps to distribute voters more evenly among polling places and thus reduces wait times. It can put polling places closer to voter residences than would a more centralized voting-center model. In addition, precinct-based voting helps to ensure that each voter receives a ballot that lists only the candidates and public questions on which he or she can vote, and this orderly administration tends to decrease voter confusion and increase voter confidence in elections. . . . .

. . . .

Section 2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives. . . . .

. . . . Arizonans who receive early ballots can submit them by going to a mailbox, a post office, an early ballot drop box, or an authorized election official's office within the 27-day early voting period. They can also drop off their ballots at any polling place or voting center on election day, and in order to do so, they can skip the line of voters waiting to vote in person. Making any of these trips—much like traveling to an assigned polling place—falls squarely within the heartland of the “usual burdens of voting.”  And voters can also ask a statutorily authorized proxy—a family member, a household member, or a caregiver—to mail a ballot or drop it off at any time within 27 days of an election.

. . . .

The plaintiffs were unable to provide statistical evidence showing that HB 2023 had a disparate impact on minority voters. Instead, they called witnesses who testified that third-party ballot collection tends to be used most heavily in disadvantaged communities and that minorities in Arizona—especially Native Americans—are disproportionately disadvantaged. But from that evidence the District Court could conclude only that prior to HB 2023's enactment, “minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties.”  How much more, the court could not say from the record.  Neither can we. And without more concrete evidence, we cannot conclude that HB 2023 results in less opportunity to participate in the political process.

. . . . “A State indisputably has a compelling interest in preserving the integrity of its election process.” Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence. . . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.” . . .

. . . .

The District Court's finding on the question of discriminatory intent had ample support in the record. . . . Proponents of the bill repeatedly argued that mail-in ballots are more susceptible to fraud than in-person voting.  The bill found support from a few minority officials and organizations, one of which expressed concern that ballot collectors were taking advantage of elderly Latino voters. And while some opponents of the bill accused Republican legislators of harboring racially discriminatory motives, that view was not uniform. One Democratic state senator pithily described the “ ‘problem’ ” HB 2023 aimed to “ ‘solv[e]’ ” as the fact that “ ‘one party is better at collecting ballots than the other one.’ ” . . . The spark for the debate over mail-in voting may well have been provided by one Senator's enflamed partisanship, but partisan motives are not the same as racial motives. . . .

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Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)&analyticGuid=Ice2c0fd4d9d011eb89bcad1f1e4bcabb), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)&analyticGuid=Ice2c0fd4d9d011eb89bcad1f1e4bcabb) joins, concurring.

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Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)&analyticGuid=Ice2c0fd4d9d011eb89bcad1f1e4bcabb), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)&analyticGuid=Ice2c0fd4d9d011eb89bcad1f1e4bcabb) and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)&analyticGuid=Ice2c0fd4d9d011eb89bcad1f1e4bcabb) join, dissenting.

If a single statute represents the best of America, it is the Voting Rights Act. It marries two great ideals: democracy and racial equality. And it dedicates our country to carrying them out. . . .If a single statute reminds us of the worst of America, it is the Voting Rights Act. Because it was—and remains—so necessary. Because a century after the Civil War was fought, at the time of the Act's passage, the promise of political equality remained a distant dream for African American citizens. . . . The Voting Rights Act is ambitious, in both goal and scope. . . . “The end of discrimination in voting” is a far-reaching goal. . . .

Today, the Court undermines Section 2 and the right it provides. The majority fears that the statute Congress wrote is too “radical”—that it will invalidate too many state voting laws. So the majority writes its own set of rules, limiting Section 2 from multiple directions. . . . What is tragic is that the Court has damaged a statute designed to bring about “the end of discrimination in voting.” I respectfully dissent.

. . . . To take the measure of today's harm, a look to the Act's past must come first. The idea is not to recount, as the majority hurriedly does, some bygone era of voting discrimination. It is instead to describe the electoral practices that the Act targets—and to show the high stakes of the present controversy.

. . . .

Momentous as the Fifteenth Amendment was, celebration of its achievements soon proved premature. The Amendment's guarantees “quickly became dead letters in much of the country.” . . . . By 1965, only 27% of black Georgians, 19% of black Alabamians, and 7%—yes, 7%—of black Mississippians were registered to vote. The civil rights movement, and the events of a single Bloody Sunday, created pressure for change. . . . A galvanized country responded. . . . “After a century's failure to fulfill the promise” of the Fifteenth Amendment, “passage of the VRA finally led to signal improvement.”  In the five years after the statute's passage, almost as many African Americans registered to vote in six Southern States as in the entire century before 1965. The crudest attempts to block voting access, like literacy tests and poll taxes, disappeared. Legislatures often replaced those vote denial schemes with new measures—mostly to do with districting—designed to dilute the impact of minority votes. . . .

Yet efforts to suppress the minority vote continue. No one would know this from reading the majority opinion. It hails the “good news” that legislative efforts had mostly shifted by the 1980s from vote denial to vote dilution.

And then it moves on to other matters, as though the Voting Rights Act no longer has a problem to address—as though once literacy tests and poll taxes disappeared, so too did efforts to curb minority voting. But as this Court recognized about a decade ago, “racial discrimination and racially polarized voting are not ancient history.”  Indeed, the problem of voting discrimination has become worse since that time—in part because of what this Court did in [*Shelby County*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030863748&pubNum=0000780&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)). Weaken the Voting Rights Act, and predictable consequences follow: yet a further generation of voter suppression laws.

Much of the Voting Rights Act's success lay in its capacity to meet ever-new forms of discrimination. Experience showed that “[w]henever one form of voting discrimination was identified and prohibited, others sprang up in its place.” [*Shelby County*, 570 U.S. at 560, 133 S.Ct. 2612](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030863748&pubNum=0000780&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&fi=co_pp_sp_780_560&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)#co_pp_sp_780_560) (GINSBURG, J., dissenting). Combating those efforts was like “battling the Hydra”—or to use a less cultured reference, like playing a game of whack-a-mole. [*Ibid*.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030863748&pubNum=0000780&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)) So Congress, in Section 5 of the Act, gave the Department of Justice authority to review all new rules devised by jurisdictions with a history of voter suppression—and to block any that would have discriminatory effects. See [52 U.S.C. §§ 10304(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=52USCAS10304&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RB&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)#co_pp_8b3b0000958a4)–[(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=52USCAS10304&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RE&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)#co_pp_a83b000018c76). In that way, the Act would prevent the use of new, more nuanced methods to restrict the voting opportunities of non-white citizens.

And for decades, Section 5 operated as intended. Between 1965 and 2006, the Department stopped almost 1200 voting laws in covered areas from taking effect. . . . Once Section 5's strictures came off, States and localities put in place new restrictive voting laws, with foreseeably adverse effects on minority voters. On the very day [*Shelby County*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030863748&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)) issued, Texas announced that it would implement a strict voter-identification requirement that had failed to clear Section 5. Other States—Alabama, Virginia, Mississippi—fell like dominoes, adopting measures similarly vulnerable to preclearance review. . . .

. . . .

So the Court decides this Voting Rights Act case at a perilous moment for the Nation's commitment to equal citizenship. It decides this case in an era of voting-rights retrenchment—when too many States and localities are restricting access to voting in ways that will predictably deprive members of minority groups of equal access to the ballot box. If “any racial discrimination in voting is too much,” as the [*Shelby County*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030863748&pubNum=0000780&originatingDoc=Ice2c0fd4d9d011eb89bcad1f1e4bcabb&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default)) Court recited, then the Act still has much to do. . . .

Section 2, as drafted, is well-equipped to meet the challenge. Congress meant to eliminate all “discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups.” . . .  So I start by showing how Section 2's text requires courts to eradicate voting practices that make it harder for members of some races than of others to cast a vote, unless such a practice is necessary to support a strong state interest. I then show how far from that text the majority strays. Its analysis permits exactly the kind of vote suppression that Section 2, by its terms, rules out of bounds.

. . . .

The first thing to note about Section 2 is how far its prohibitory language sweeps. The provision bars any “voting qualification,” any “prerequisite to voting,” or any “standard, practice, or procedure” that “results in a denial or abridgement of the right” to “vote on account of race.” The overlapping list of covered state actions makes clear that Section 2 extends to every kind of voting or election rule. . . . So, for example, the provision “covers all manner of registration requirements, the practices surrounding registration,” the “locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process that might be manipulated to deny any citizen the right to cast a ballot and have it properly counted.” . . . And the “denial or abridgement” phrase speaks broadly too. “[A]bridgment necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden.” . . .

The “results in” language, connecting the covered voting rules to the prohibited voting abridgement, tells courts that they are to focus on the law's effects. Rather than hinge liability on state officials' motives, Congress made it ride on their actions' consequences. That decision was as considered as considered comes. . . . An intent test, the Senate Report explained, “asks the wrong question.” If minority citizens “are denied a fair opportunity to participate,” then “the system should be changed, regardless of ” what “motives were in an official's mind.” . . .

. . . . The key demand . . . is for equal political opportunity across races. That equal “opportunity” is absent when a law or practice makes it harder for members of one racial group, than for others, to cast ballots. . . . In using that word, Congress made clear that the Voting Rights Act does not demand equal outcomes. If members of different races have the same opportunity to vote, but go to the ballot box at different rates, then so be it—that is their preference, and Section 2 has nothing to say. But if a law produces different voting opportunities across races—if it establishes rules and conditions of political participation that are less favorable (or advantageous) for one racial group than for others—then Section 2 kicks in. . . . And that is so even if (as is usually true) the law does not single out any race, but instead is facially neutral. . . .

Congress also made plain, in calling for a totality-of-circumstances inquiry, that equal voting opportunity is a function of both law and background conditions—in other words, that a voting rule's validity depends on how the rule operates in conjunction with facts on the ground. . . . . [S]ometimes government officials enact facially neutral laws that leverage—and become discriminatory by dint of—pre-existing social and economic conditions. The classic historical cases are literacy tests and poll taxes. . . . Congress knew how those laws worked: It saw that “inferior education, poor employment opportunities, and low incomes”—all conditions often correlated with race—could turn even an ordinary-seeming election rule into an effective barrier to minority voting in certain circumstances.  So Congress demanded, as this Court has recognized, “an intensely local appraisal” of a rule's impact—“a searching practical evaluation of the ‘past and present reality.’” . . .

At the same time, the totality inquiry enables courts to take into account strong state interests supporting an election rule. An all-things-considered inquiry, we have explained, is by its nature flexible. . . . State interests do not get accepted on faith. And even a genuine and strong interest will not suffice if a plaintiff can prove that it can be accomplished in a less discriminatory way.

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The majority instead founds its decision on a list of mostly made-up factors, at odds with Section 2 itself. To excuse this unusual free-form exercise, the majority notes that Section 2 authorizes courts to conduct a “totality of circumstances” analysis. . . . The totality inquiry requires courts to explore how ordinary-seeming laws can interact with local conditions—economic, social, historical—to produce race-based voting inequalities. That inquiry hardly gives a court the license to devise whatever limitations on Section 2's reach it would have liked Congress to enact. But that is the license the majority takes. The “important circumstances” it invents all cut in one direction—toward limiting liability for race-based voting inequalities. . . .

Start with the majority's first idea: a “[m]ere inconvenience[ ]” exception to Section 2.  Voting, the majority says, imposes a set of “usual burdens”: Some time, some travel, some rule compliance.  And all of that is beneath the notice of Section 2—even if those burdens fall highly unequally on members of different races. But that categorical exclusion, for seemingly small (or “[un]usual” or “[un]serious”) burdens, is nowhere in the provision's text. To the contrary (and as this Court has recognized before), Section 2 allows no “safe harbor[s]” for election rules resulting in disparate voting opportunities.  The section applies to *any*discriminatory “voting qualification,” “prerequisite to voting,” or “standard, practice, or procedure”—even the kind creating only (what the majority thinks of as) an ordinary burden. . . .

And what is a “mere inconvenience” or “usual burden” anyway? . . . What does not prevent one citizen from casting a vote might prevent another. . . . Consider a law banning the handing out of water to voters. No more than—or not even—an inconvenience when lines are short; but what of when they are, as in some neighborhoods, hours-long? . . .

The majority's “multiple ways to vote” factor is similarly flawed. . . . [A] State's electoral process is not equally open if, for example, the State “only” makes Election Day voting by members of one race peculiarly difficult. . . .

. . . . The oddest part of the majority's analysis is the idea that “what was standard practice when § 2 was amended in 1982 is a relevant consideration.”  The 1982 state of the world is no part of the Section 2 test. An election rule prevalent at that time may make voting harder for minority than for white citizens; Section 2 then covers such a rule, as it covers any other. . . . Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber. . . .

. . . . In the past, this Court has stated that a discriminatory election rule must fall, no matter how weighty the interest claimed, if a less biased law would not “significantly impair[ that] interest.” . . . [T]he majority falls back on the idea that “[d]emanding such a tight fit would have the effect of invalidating a great many neutral voting regulations.” . . . Apparently, the majority does not want to “invalidate [too] many” of those actually discriminatory rules. But Congress had a different goal in enacting Section 2.

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In that regard, the past offers a lesson to the present. Throughout American history, election officials have asserted anti-fraud interests in using voter suppression laws. . . . A raft of election regulations—including “elaborate registration procedures” and “early poll closings”—similarly excluded white immigrants (Irish, Italians, and so on) from the polls on the ground of “prevent[ing] fraud and corruption.” . . . Congress enacted Section 2 to prevent those maneuvers from working. It knew that States and localities had over time enacted measure after measure imposing discriminatory voting burdens. And it knew that governments were proficient in justifying those measures on non-racial grounds. So Congress called a halt. It enacted a statute that would strike down all unnecessary laws, including facially neutral ones, that result in members of a racial group having unequal access to the political process.

. . . . The Voting Rights Act was meant to replace state and local election rules that needlessly make voting harder for members of one race than for others. The text of the Act perfectly reflects that objective. The “democratic” principle it upholds is not one of States' rights as against federal courts. The democratic principle it upholds is the right of every American, of every race, to have equal access to the ballot box. . . .

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Although the majority portrays Arizona's use of the rule as “unremarkable,” the State is in fact a national aberration when it comes to discarding out-of-precinct ballots. In 2012, about 35,000 ballots across the country were thrown out because they were cast at the wrong precinct. Nearly one in three of those discarded votes—10,979—was cast in Arizona. *Id*., at 52. As the Court of Appeals concluded, and the chart below indicates, Arizona threw away ballots in that year at 11 times the rate of the second-place discarder (Washington State). . . . [​](https://1.next.westlaw.com/Link/Document/Blob/I04d61d60dabc11ebaab8f242c1bdf564.png?originationContext=document&transitionType=DocumentImage&uniqueId=3637e490-d11c-4eae-98a5-17e11963a142&ppcid=da901368c9354d2f9e70ddb81d87f54a&contextData=(sc.History*oc.Default))Consider the number of votes separating the two presidential candidates in the most recent election: 10,457. That is fewer votes than Arizona discarded under the out-of-precinct policy in two of the prior three presidential elections. . . . And the out-of-precinct policy operates unequally: Ballots cast by minorities are more likely to be discarded. In 2016, Hispanics, African Americans, and Native Americans were about twice as likely—or said another way, 100% more likely—to have their ballots discarded than whites. . . . Arizona's policy creates a statistically significant disparity between minority and white voters: Because of the policy, members of different racial groups do not in fact have an equal likelihood of having their ballots counted. Suppose a State decided to throw out 1% of the Hispanic vote each election. Presumably, the majority would not approve the action just because 99% of the Hispanic vote is unaffected. . . .

. . . . Arizona moves polling places at a startling rate. Maricopa County (recall, Arizona's largest by far) changed 40% or more of polling places before both the 2008 and the 2012 elections. And, critically, Maricopa's relocations hit minority voters harder than others. In 2012, the county moved polling stations in African American and Hispanic neighborhoods 30% more often than in white ones. . . . Hispanic and Native American voters had to travel further than white voters did to their assigned polling places. And all minority voters were disproportionately likely to be assigned to polling places other than the ones closest to where they lived. . . .

Facts also undermine the State's asserted interests, which the majority hangs its hat on. . . . 20 other States combine precinct-based systems with mechanisms for partially counting out-of-precinct ballots. . . . A State that makes compliance with an election rule so unusually hard is in no position to claim that its interest in “induc[ing] compliance” outweighs the need to remedy the race-based discrimination that rule has caused.

. . . . Arizona's ballot-collection ban violates Section 2. The ban interacts with conditions on the ground—most crucially, disparate access to mail service—to create unequal voting opportunities for Native Americans. Recall that only 18% of rural Native Americans in the State have home delivery; that travel times of an hour or more to the nearest post office are common; that many members of the community do not have cars. Given those facts, the law prevents many Native Americans from making effective use of one of the principal means of voting in Arizona. What is an inconsequential burden for others is for these citizens a severe hardship. And the State has shown no need for the law to go so far. Arizona . . . already has statutes in place to deter fraudulent collection practices. Those laws give every sign of working. Arizona has not offered any evidence of fraud in ballot collection, or even an account of a harm threatening to happen. . . .

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. . . . The Court always says that it must interpret a statute according to its text—that it has no warrant to override congressional choices. But the majority today flouts those choices with abandon. The language of Section 2 is as broad as broad can be. It applies to any policy that “results in” disparate voting opportunities for minority citizens. It prohibits, without any need to show bad motive, even facially neutral laws that make voting harder for members of one race than of another, given their differing life circumstances. That is the expansive statute Congress wrote, and that our prior decisions have recognized. But the majority today lessens the law—cuts Section 2 down to its own preferred size. The majority creates a set of extra-textual exceptions and considerations to sap the Act's strength, and to save laws like Arizona's. No matter what Congress wanted, the majority has other ideas.

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