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Foreword: Voting Rights in a Politically Polarized Era

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Foreword: Voting Rights in a Politically Polarized Era

Maureen Edobor* & Christopher B. Seaman†

American democracy is under profound stress. Increasing polarization and a winner-take-all mentality to politics have led to increased conflict both within the halls of Congress and nationwide.[1] In an era of exceedingly close elections where control of the Presidency, Congress, and state governments can turn on a relative handful of votes,[2] the laws and processes governing democracy have themselves become a battleground.

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1. *See generally* Rachel Kleinfeld, *Polarization, Democracy, and Political Violence in the United States: What the Research Says*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 5, 2023), https://perma.cc/L4K5-EYPT; Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011).

2. For example, in 2016, the presidential election was effectively decided by slightly over 100,000 people in three swing states: Michigan, Pennsylvania, and Wisconsin. *See* Tim Meko et al., *How Trump Won the Presidency with Razor-Thin Margins in Swing States*, WASH. POST (Nov. 11, 2016), https://perma.cc/LF3K-HSWE. In the 2020 election cycle, control of the U.S. Senate turned on two runoff elections in Georgia that were both decided by 2 percent or less. *See Georgia Senate Runoff Election Results*, N.Y. TIMES https://perma.cc/N8QN-U4BK (last updated Jan. 15, 2021). And in 2022, the Republican Party retook control of the U.S. House by a total of just over 7,000 votes in several key races. *See* Julia Mueller, *How Close Were House Races? A Few Thousand Votes Could Have Swung Control*, THE HILL (Nov. 28, 2022), https://perma.cc/R9LV-NCFG.

At the state level, the Pennsylvania House flipped from Republican to Democratic control in November 2022 by a single seat; the closest margin of victory was fifty-eight votes. *See* Peter Hall, *Pa. House Democrats Secure Majority with Rep. Todd Stephens' Concession in Close House Race*, PA. CAPITAL-STAR (Nov. 17, 2022), https://perma.cc/B3CL-DSD4. Even more dramatically, in 2017, control of the Virginia House of Delegates came down

In recent years, numerous states with a history of racial discrimination have enacted new laws hindering access to voting,[3] even going so far as to prohibit giving food and water to voters stuck in hours-long lines under threat of criminal punishment.[4] Proponents of many of these laws have claimed, without evidence, that they are needed to prevent widespread voter fraud from affecting election outcomes.[5] Even more perniciously, false claims that the 2020 Presidential election was "stolen"—the so-called "Big Lie"[6]—led a mob of people to descend upon the U.S. Capitol on January 6, 2021 to interfere with the peaceful transition of power.[7] These false claims of election fraud persist nearly four years later,[8] upending the ongoing 2024 campaign and causing election workers to fear for

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to a single seat that ended in a tied race; the Republican incumbent won a random draw to retain the seat and control of the chamber. *See* Trip Gabriel, *Virginia Official Pulls Republican's Name from Bowl to Pick Winner of Tied Race*, N.Y. TIMES (Jan. 4, 2018), https://perma.cc/JR2D-LR4V.

3. *See generally* Jasleen Singh & Sara Carter, *States Have Added Nearly 100 Restrictive Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, BRENNAN CTR. FOR JUST. (June 23, 2023), https://perma.cc/59UU-W6U6.

4. *See* S.B. 202 (Ga. 2021), *enjoined by In re* Ga. Senate Bill 202, 688 F. Supp. 3d 1300 (N.D. Ga. 2023), *appeal docketed*, No. 23-13095 (11th Cir. filed Sept. 18, 2023); *see also* Brooklyn Branch NAACP v. Kosinski, 657 F. Supp. 3d 504, 511–12 (S.D.N.Y. 2024) (analyzing a similar provision in New York).

5. *See generally* Owen Averill et al., *Widespread Election Fraud Claims by Republicans Don't Match the Evidence*, BROOKINGS (Nov. 22, 2023), https://perma.cc/U4ZY-P6D4; Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST. (Nov. 9, 2007), https://perma.cc/DP8P-YXVP.

6. *See generally* Anne Tindall, *What Is the Big Lie?*, PROTECT DEMOCRACY (Aug. 15, 2023), https://perma.cc/3UXA-E7RN; Doug Bock Clark et al., *Building the "Big Lie": Inside the Creation of Trump's Stolen Election Myth*, PROPUBLICA (Apr. 26, 2022), https://perma.cc/MN7R-JFEY.

7. *See* SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 231–33, 642–64 (2022), https://perma.cc/C4J6-FS2H (PDF); *see also* SEN. JOHN DANFORTH ET AL., LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION 1 (2022), https://perma.cc/83TJ-V9YA (PDF) (recounting and refuting claims of widespread election fraud in 2020 and concluding that "there is absolutely no evidence of fraud in the 2020 Presidential Election on the magnitude necessary to shift the result in any state, let alone the nation as a whole").

8. *See* Robert Yoon, *Trump's Drumbeat of Lies About the 2020 Election Keeps Getting Louder. Here Are the Facts,* ASSOCIATED PRESS (Aug. 27, 2023), https://perma.cc/H2Q3-KKEB (acknowledging the former President's "multiyear effort to undermine public confidence in the American electoral process as he seeks to chart a return to the White House in 2024").

their safety.[9] Moreover, rogue officials in a handful of jurisdictions have delayed or refused to certify election results by citing false claims of large-scale fraud and inaccurate conspiracy theories about rigged voting machines.[10]

These troubling developments did not occur overnight, however, nor did they spring from a vacuum. Instead, they are a product of numerous factors, including the decades-long polarization of the electorate, the erosion of legal protections for voting rights by the courts, and the breakdown of the bipartisan consensus in Congress that led to the enactment of the Voting Rights Act of 1965[11] and its subsequent renewals in 1970, 1975, 1982, and 2006.[12] This landmark law, sometimes called a "superstatute,"[13] was directly responsible for enfranchising millions of minority voters and transforming America into a truly multiracial democracy.[14] But the Voting Rights Act's enactment also led to a backlash among conservative white

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9. *See* Christine Zhu, *Threats, Harassment of Election Workers Have Risen, Poll Shows*, POLITICO (May 1, 2024), https://perma.cc/4HDU-QX3R (describing how "[m]ore than a third of surveyed local election officials have experienced threats, harassment or abuse due to their jobs").

10. *See* Lauren Miller & Will Wilder, *Certification and Non-Discretion: A Guide to Protecting the 2024 Election*, 35 STAN. L. & POL'Y REV. 1, 14–23 (2024) (recounting these incidents and subsequent legal action that compelled certification).

11. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (current version at 52 U.S.C. §§ 10101, 10301–14, 10501–08, 10701–02).

12. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315; Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat 131; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

13. *See* Guy-Uriel Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1390–91 (2015) ("A term of art, the word 'superstatute' describes a category of landmark legislation that addresses a significant public policy problem that if left unresolved would call into question a fundamental constitutional commitment.").

14. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 264 (2000) (noting that in the South "as a whole, roughly a million new voters were registered within a few years after the bill became law"); *see also* Andrea Bernini et al., *Race, Representation, and Local Governments in the US South: The Effect of the Voting Rights Act*, 131 J. POL. ECON. 994, 996 (2023) (finding that the enactment of the Voting Rights Act led to a dramatic increase in locally elected Black officials in the South from 1964 to 1980).

voters, especially in the South, that led to a political realignment which resulted in ideological polarization of the two major American political parties.[15] Since 2016, partisan hostility has increased to the point where a majority of both self-identified Republicans and Democrats believe members of the opposing party are "immoral," "dishonest," and "closed-minded."[16]

At the Supreme Court, the erosion of the Voting Rights Act began with *Shelby County v. Holder*,[17] which struck down the coverage formula for the preclearance requirement in Section 5 of the Act. The preclearance requirement required nine states and numerous local jurisdictions with a history of racial discrimination in voting to submit election-related changes to either the U.S. Department of Justice or a three-judge federal court located in Washington, D.C. for approval before enforcement.[18] The preclearance requirement was remarkably effective at blocking hundreds of voting-related laws with either a racially discriminatory intent or effect,[19] and it likely deterred

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15. *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 183–244 (2015); KEYSSAR, *supra* note 14, at 265–66.

16. *As Partisan Hostility Grows, Signs of Frustration Within the Two-Party System,* PEW RSCH. CTR. (Aug. 9, 2022), https://perma.cc/B2SP-ML2B. Notably, some commentators argue that demonization of political opponents began well before this, dating back to at least the 1980s. *See* Norman J. Ornstein & Thomas E. Mann, *The Republicans Waged a 3-Decade War on Government. They Got Trump.*, VOX (July 18, 2016), https://perma.cc/WU4P-DHNX (contending that former Speaker Newt Gingrich "deployed a strategy to break the Democrats' stranglehold on power in the House by moving to polarize the parties, to use the ethics process to taint both the majority and the entire political process, and to get Americans so disgusted with politics and politicians that at the right moment, they would rise up and throw out the incumbent party").

17. 570 U.S. 529 (2013).

18. Voting Rights Act of 1965 §§ 4–5, 52 U.S.C. §§ 10303–04 (originally enacted as Pub. L. No. 89-110, 79 Stat. 437, 438–39 (1965)); *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T OF JUST., https://perma.cc/B2VC-HGMJ (last updated May 17, 2023).

19. *See* Peyton McCrary, Christopher Seaman & Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 292–99 (2006) (recounting evidence from 996 letters by the U.S. Department of Justice between 1965 and 1999, interposing objections to voting changes in jurisdictions covered by the preclearance requirement); *see also* Peyton McCrary, Christopher Seaman & Richard Valelly, *The Law of Preclearance:*

an even greater number of discriminatory changes by covered jurisdictions.[20]

But in 2013, a narrow 5–4 majority declared in *Shelby County* that "things have changed dramatically" and concluded that the geographic coverage formula for the preclearance requirement was outdated and therefore constitutionally invalid.[21] Writing in dissent, Justice Ginsburg argued that the "extraordinary" body of evidence amassed by Congress during the 2006 reauthorization process—consisting of twenty-one hearings involving scores of witnesses and over 15,000 pages of legislative records—contained "extensive evidence of continued discrimination" in the covered jurisdictions that amply justified its decision to renew the preclearance requirement.[22] Explaining that Section 5 was responsible for "catch[ing] discrimination before it causes harm," Justice Ginsburg said the majority's decision to "throw[] out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[23]

Shelby County had an immediate impact; within twenty-four hours, Texas announced that it would implement a strict photo identification law that had previously been blocked by Section 5, and several other states rapidly followed suit.[24] Eventually, nearly one-hundred restrictive voting laws were

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Enforcing Section 5, *in* THE FUTURE OF THE VOTING RIGHTS ACT 20–29 (David L. Epstein et al. eds., 2006) (recounting similar evidence).

20. *See* Luis Fraga & Maria Ocampo, *More Information Requests and the Deterrent Effect of Section 5*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER OF THE VOTING RIGHTS ACT 47, 56–67 (2007) (studying the impact of over 13,000 More Information Requests by the U.S. Department of Justice in the preclearance process and concluding that they "were likely to deter the pursuit of [voting] procedures and practices that could have a discriminatory effect").

21. *Shelby Cnty.*, 570 U.S. at 547, 577.

22. *Id.* at 565–66, 570–80 (Ginsburg, J., dissenting).

23. *Id.* at 590 (Ginsburg, J., dissenting).

24. Maureen Edobor, *Reconstruction's Last Monument*, 26 U. PA. J. CON. L. (forthcoming 2024) (manuscript at 31); *see also* Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), https://perma.cc/4MN4-64X6 (observing Texas, Mississippi, and Alabama acting "within hours" of the *Shelby County* ruling to enforce voter identification laws).

passed in the decade following the decision.[25] Notably, a new study found that the racial turnout gap—the difference in the voting rate between eligible white and nonwhite voters—has consistently grown since *Shelby County*, and jurisdictions formerly covered by Section 5's preclearance requirement have some of the largest racial turnout gaps.[26]

The other remaining pillar of the Voting Rights Act, Section 2, was significantly weakened by the Court in *Brnovich v. Democratic National Committee*.[27] Section 2 applies nationwide and prohibits any "standard, practice or procedure" that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color."[28] Congress revised Section 2 in 1982 to overrule the Court's decision in *City of Mobile v. Bolden*,[29] which required proof that a voting law had been enacted with a racially discriminatory purpose before being invalidated.[30] Overcoming resistance from the Reagan Administration, Congress adopted a totality-of-the-circumstances test to "make clear that a [Section 2] violation could be proved by showing discriminatory effect alone."[31]

Following this amendment, hundreds of lawsuits were filed alleging Section 2 violations for a wide variety of election-related

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25. *See* Singh & Carter, *supra* note 3 ("Since Shelby County was decided, at least 29 states have passed 94 restrictive voting laws.").

26. Kevin Morris & Coryn Grange, *Growing Racial Disparities in Voter Turnout, 2008–2022*, BRENNAN CTR. FOR JUST. (Mar. 2, 2024), https://perma.cc/ZBU8-3BDS.

27. 594 U.S. 647 (2021).

28. 52 U.S.C. § 10301. Section 2 also prohibits discrimination in voting against members of certain language minorities. *Id.* §§ 10301, 10303(f)(2).

29. 446 U.S. 55 (1980).

30. *See Brnovich*, 594 U.S. at 658 (explaining that *Bolden*'s controlling plurality opinion held that "facially neutral voting practices violate [Section] 2 only if motivated by a discriminatory purpose").

31. Thornburg v. Gingles, 478 U.S. 30, 35 (1986); *see also* Edobor, *supra* note 24 (manuscript at 28) ("In practice, the broad scope of the new Section 2 was written to prohibit any law, practice, or regulation that produced disparate voting opportunities across racial groups. Or, in other words, any law that makes it harder for one race to vote, given relevant sociopolitical and historical considerations."); *see generally* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments To The Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983) (recounting the legislative history of the 1982 amendments, including adoption of the results test in Section 2).

changes—including changes to at-large elections, redistricting plans, and majority vote requirements—and other election administration procedures such as requirements for registration, voting, and candidacy for public office.[32] Over 120 voting provisions were blocked due to litigation under Section 2's results-based test, many of which involved vote dilution that weakened the ability of minority voters to elect a candidate of their choice.[33]

In *Brnovich*, however, the Court articulated several "guideposts" that make it more difficult for voting rights plaintiffs to establish a Section 2 violation.[34] Specifically, the majority held that in evaluating vote denial claims regarding the "application of a facially neutral rule specifying the time, place, or manner of voting"—such as photo identification requirements, casting a ballot through early in-person voting, or voting by mail—plaintiffs must establish that the challenged rule(s) result in "voting that is not 'equally open'" to members of minority groups.[35] But the newly-announced "guideposts" for evaluating whether "voting is equally open"—which include "the size of the burden imposed" on voters, the "size of any disparities . . . on members of different racial or ethnic groups," "the degree to which a voting rule departs from . . . standard practice" in 1982, and other available options for voting—have no historical basis in either Section 2's text or its legislative history.[36] Notably, the Court identified "legitimate state

32. *See* Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 183, 191–92 (A Henderson ed. 2007) [hereinafter *Not Like the South?*]; *see generally* Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REF. 643 (2006) (detailing data on Section 2 litigation from 1982 through 2006).

33. Katz, *Not Like the South?*, *supra* note 32, at 215 tbl.8.1.

34. *Brnovich*, 594 U.S. at 666, 669–75.

35. *Id.* at 659, 667; *see also id.* at 668 ("[T]he core of [Section] 2(b) is the requirement that voting be 'equally open.'").

36. *See* Edobor, *supra* note 24 (manuscript at 41–49) (critiquing the ultra vires guideposts as created "from whole cloth" by the majority and inconsistent with Section 2's statutory language requiring a totality of circumstances inquiry); *see also* Case Comment, *Brnovich v. Democratic Nat'l Comm.*, 135 HARV. L. REV. 481, 487 (2021) ("[T]he *Brnovich* Court's interpretation was contrary to [S]ection 2's text and purpose.").

interests" like "prevention of fraud" as a relevant guidepost, even though lower courts conclusively found "there was no evidence of fraud" within the defendant's borders.[37]

In a scorching dissent, Justice Kagan criticized the majority opinion for "undermin[ing] Section 2 and the right it protects" by "writ[ing] its own set of rules, limiting Section 2 from multiple directions."[38] In particular, the dissent took aim at the new "guideposts," which it called "a list of mostly made-up factors, at odds with Section 2 itself."[39] It explained that these "invent[ed]" guideposts "all cut in one direction—toward limiting liability for race-based voting inequalities" and "stack[] the deck against minority citizens' voting rights."[40] Ultimately, the dissent concluded that *Brnovich* undermined "the right of every American, of every race, to have equal access to the ballot box."[41]

An even more significant threat to voting rights potentially looms on the horizon. In 2022, an Arkansas district court sua sponte raised the issue of whether the Voting Rights Act created a private right of action to enforce Section 2.[42] After briefing, it concluded that—despite almost forty years of private plaintiffs (often represented by public interest organizations) bringing Section 2 claims with nary a complaint from either Congress or the Supreme Court—the Voting Rights Act did not contain a private right of action and therefore the court lacked jurisdiction.[43] Even though the district court acknowledged "binding precedent" held that other provisions of the Voting Rights Act were privately enforceable,[44] it refused to reach the same conclusion for Section 2, blithely asserting that one key

37. Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 685–86 (2021).

38. *Id.* at 691–92 (Kagan, J., dissenting).

39. *Id.* at 710 (Kagan, J., dissenting).

40. *Id.* at 711 (Kagan, J., dissenting).

41. *Id.* at 718 (Kagan, J., dissenting).

42. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893, 905 (E.D. Ark. 2022).

43. *Id.* at 921–22.

44. Specifically, Sections 5 and 10 of the Voting Rights Act. *Id.* at 912–15 (discussing Allen v. State Bd. of Elections, 393 U.S. 544 (1969) and Morse v. Republican Party of Va., 517 U.S. 186 (1996)). *But cf. Brnovich*, 594 U.S. at 690 (Gorsuch, J., concurring) ("Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under [Section] 2.").

Court decision had "been relegated to the dustbin of history" and that another had been effectively abrogated by later decisions.[45]

On appeal, a panel of the Eighth Circuit affirmed in a 2–1 decision, although it gently chided the lower court for raising the issue sua sponte.[46] The full Eighth Circuit recently declined to rehear the case en banc (over three dissents),[47] setting up a circuit split.[48] If this decision is heard and ultimately affirmed by the Supreme Court, it would effectively gut voting rights litigation as the overwhelming majority—over 90 percent—of Section 2 cases are brought by private plaintiffs rather than the U.S. Department of Justice.[49]

Turning to the legislative branch, the once bipartisan consensus in favor of protecting voting rights has broken down. The Voting Rights Act of 1965 was passed by overwhelming

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45. *Ark. State Conf. NAACP*, 586 F. Supp. 3d at 912–14. The district court also declined to follow an Eighth Circuit decision that concluded Congress had "amended the Voting Rights Act in 1975 to reflect the standing of 'aggrieved persons' to enforce their right to vote." *See* Roberts v. Wamser, 883 F.2d 617, 621 (8th Cir. 1989).

46. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1205, 1217–18 (8th Cir. 2023) (noting that the plaintiffs "have a point" in their objection to the district court's sua sponte decision to raise the issue).

47. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 91 F.4th 967 (8th Cir. 2024) (denying petition for rehearing en banc).

48. *Compare Ark. State Conf. NAACP*, 86 F.4th at 1206–07, *with* Mixon v. Ohio, 193 F.3d 389, 406 (6th Cir. 1999) ("An individual may bring a private cause of action under Section 2 of the Voting Rights Act . . . ."), *and* Ala. State Conf. NAACP v. Alabama, 949 F.3d 647, 652 (11th Cir. 2020), *cert. granted and judgment vacated,* 141 S. Ct. 2618 (2021) ("Congress recognized that private rights of action were available under the VRA when it reenacted and extended the life of the Voting Rights Act in 1975. In line with this understanding, private parties have sued States and state officials under [Section] 2 of the VRA for decades." (internal citations and quotations omitted)); *see also* Singleton v. Merrill, 582 F. Supp. 3d 924, 1031 (N.D. Ala. 2022) (per curiam) ("Since the passage of the Voting Rights Act, federal courts across the country, including . . . the Supreme Court . . . have considered numerous Section Two cases brought by private plaintiffs.").

49. Brief of the United States as Amicus Curiae in Support of Plaintiffs-Appellants at 12, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment (8th Cir. 2022) (No. 22-1395) (noting that private plaintiffs have brought more than 350 cases alleging violations of Section 2 and have resulted in judicial decisions); *see also* Brief of Amici Curiae Former Department of Justice Attorneys in Support of Plaintiffs-Appellants at 22, *Ark. State Conf. NAACP* (No. 22-1395) (explaining that "without a private right of action to raise Section 2 claims, most enforcement of the [Voting Rights Act] would grind to a halt").

majorities of both Republicans and Democrats,[50] and subsequent amendments in 1970, 1985, 1982, and 1992 were enacted with similarly large margins.[51] Despite resistance from some conservative Republicans, the most recent revision of the Voting Rights Act in 2006 ultimately passed by even larger margins than the original law.[52] But since then, voting rights legislation has languished at the federal level. Repeated efforts to amend the coverage formula for the preclearance requirement after *Shelby County* died in committee.[53] After Democrats recaptured the House of Representatives in 2018, that body passed both the John R. Lewis Voting Rights Advancement Act,[54] which would have created a new coverage formula based on a more recent record of voting rights violations, and the broader For the People Act,[55] which would have, inter alia, expanded voter registration options, increased voter access to the polls through early vote and vote-by-mail alternatives, and required states to establish independent redistricting commissions.[56] However, both bills ultimately were killed by a Senate filibuster.[57]

To help address the future of voting rights in the United States in light of these ongoing challenges, the *Washington and Lee Law Review* organized and hosted the annual Lara D. Gass

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50. *See* GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION 159–67 (2013) (noting that the House approved the Voting Rights Act in a 328–74 vote and the Senate overcame a filibuster and passed the bill by a final vote of 79–18).

51. R. SAM GARRETT, CONG. RSCH. SERV., R47520, THE VOTING RIGHTS ACT: HISTORICAL DEVELOPMENT AND POLICY BACKGROUND 18 tbl.5 (2023), https://perma.cc/NJ9H-LRMG (PDF).

52. *Id.* (citing the House passage by 390–33 vote and Senate passage by a unanimous 98–0 vote); *see also* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 179–92 (2007) (recounting the legislative history of the 2006 amendments).

53. *See* Voting Rights Amendments Act of 2014, H.R. 3899, 113th Cong.; Voting Rights Amendment Act of 2014, S. 1945, 113th Cong.; Voting Rights Amendments Act of 2015, H.R. 2867, 114th Cong.; Voting Rights Advancement Act of 2017, H.R. 2978, 115th Cong.

54. *See* John R. Lewis Voting Rights Act of 2020, H.R. 4, 116th Cong.; John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong.

55. For the People Act of 2021, H.R. 1, 117th Cong. (2021).

56. *Id.*

57. Barbara Sprunt, *Senate Republicans Block Democrats' Sweeping Voting Rights Legislation*, NPR (June 22, 2021), https://perma.cc/K8RJ-8EN4.

Symposium on February 16, 2024, featuring prominent scholars and distinguished litigators from across the country.[58] The Symposium was organized into four panels, each covering an important and timely topic: The Future of the Voting Rights Act; Current Issues in Election Administration and Voter Suppression; Litigating Voting Rights; and Remedies in Election Law. The Symposium's keynote speaker was Deuel Ross, Deputy Director of Litigation, NAACP Legal Defense and Education Fund, Inc., who successfully litigated and argued *Allen v. Milligan*[59] before the Supreme Court, which affirmed a lower court ruling that Alabama's 2021 congressional map was racially discriminatory.

A number of Symposium participants submitted written contributions to the *Law Review*'s Symposium issue. Each piece is briefly summarized below, organized alphabetically by the author's last name.

In *Protecting Minority Representation in an Era of Political Polarization and the Hollowing Out of Voting Rights Protections*,[60] Professor Henry L. Chambers, Jr., considers the Supreme Court's willingness to hollow out voter protections in the context of a politically polarized county. It explains how the Court has permitted extreme partisan gerrymanders,[61] enabled the purging of voters from voters' rolls,[62] and hobbled the Voting Rights Act.[63] In the article's final section, Professor Chambers suggests two interventions—reinvigorating the Fifteenth Amendment and revisiting multimember districting—that may help protect representation for minority voters.[64]

In *Unprincipled All the Way Down*,[65] Professor Wilfred U. Codrington III examines two essential dimensions of the

58. For the full list of Symposium participants, please refer to Law Communications, *Law Review Symposium to Explore Voting Rights*, THE COLUMNS (Jan. 26, 2024), https://perma.cc/2LPT-FAGH.

59. 599 U.S. 1 (2023).

60. 81 WASH. & LEE L. REV. 1047 (2024).

61. *Id.* at 1052–55 (discussing *Rucho v. Common Cause*, 588 U.S. 684 (2019)).

62. *Id.* at 1057–60 (discussing *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756 (2018)).

63. *Id.* Part II.

64. *Id.* Part III.

65. 81 WASH. & LEE L. REV. 1087 (2024)

so-called *Purcell* principle, which the Court has transformed from a brief per curiam opinion on the so-called "shadow docket"[66] into a hard-and-fast rule prohibiting federal courts from invalidating state election laws in the days, weeks, and even months before an election. It first explains that while in theory federalism offers some meaningful constraints on *Purcell* by allowing state courts to act instead of federal courts, there is a concerning trend of *state* courts also following *Purcell*'s non-intervention rule,[67] even though the Court itself has said that the doctrine only binds "lower federal courts."[68] Second, Professor Codrington notes that—in contrast to federal courts that treat the *Purcell* principle as "an increasingly categorical rule that election laws cannot be changed close to an election"[69]—some state courts have rejected the absolutist manner the Court has implemented *Purcell* in practice, instead treating it as part of the broader equitable analysis in determining whether to grant relief.

In *A Major Wrong on a Private Right of Action Under the Voting Rights Act*,[70] Professor Joshua A. Douglas and Macin Graber critically analyze how a brief concurring opinion by Justices Gorsuch and Thomas in *Brnovich* led to the district court and Eighth Circuit's unprecedented decision holding that Section 2 of the Voting Rights Act lacked a private cause of action. After explaining why the Eighth Circuit's decision is deeply concerning for enforcement of the Voting Rights Act, Professor Douglas and Ms. Graber contend that this case represents "a cautionary tale to the Justices" that "they should not ignore side comments or suggestions from their colleagues."[71]

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66. Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam); *see generally* STEPHEN VLADECK, THE SHADOW DOCKET (2023) (critically evaluating the Supreme Court's emergency docket).

67. *See* Codrington, *supra* note 65, Part II.

68. Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. 423, 423 (2020) (per curiam).

69. *See* Codrington, *supra* note 65, at 1109 (quoting Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123, 136 (2021)).

70. 81 WASH. & LEE L. REV. 1127 (2024).

71. *Id.* at 1151.

In *Legal Support for Local Election Officials*,[72] Professor Rebecca Green addresses the pressures placed on local election officials ("LEOs") since the 2020 election, explaining that they must deal with personal attacks, threats of violence, chronic underfunding, and difficulty navigating frequent changes in election law. In this challenging environment, the assistance of competent legal counsel is crucial, but there has been little analysis of who supplies legal services to LEOs and their level of knowledge and competency in providing legal advice. Professor Green's article helps explore some of these crucial questions and concludes by offering preliminary recommendations to improve legal support to LEOs.[73]

In *The Scope of Election Litigation*,[74] Professor Michael Morley focuses on an aspect of election litigation that has received increasing attention in court rulings but has drawn little academic scrutiny: the scope of the lawsuit in challenges to election-related provisions such as statutes, regulations, processes, and procedures. Specifically, Professor Morley's article explores recent developments that impact the range of plaintiffs and defendants that some federal courts have required to participate for the case to be justiciable, such as associational standing, the reach of statewide political parties and voting rights groups, class actions under Federal Rule of Civil Procedure 23(b)(2), and naming proper defendant(s) to obtain effective relief in voting rights litigation.[75] The article ultimately concludes that "[c]ourts should be leery of construing Article III justiciability requirements in ways that dramatically expand the range of plaintiffs and defendants who are necessary parties in election cases."[76]

In *Voting Rights in a Politically Polarized Era . . . and Beyond*,[77] Professor Mark Rush suggests that, political polarization notwithstanding, it is time for scholars and practitioners to alter their focus when addressing voting rights challenges and seek to work within the constraints imposed by

72. 81 WASH. & LEE L. REV. 1017 (2024).
73. *Id.* at 1044–46.
74. 81 WASH. & LEE L. REV. 1153 (2024).
75. *Id.* at 1168–71.
76. *Id.* at 1181.
77. 81 WASH. & LEE L. REV. 1183 (2024).

political realities. The article contends that absent congressional dysfunction, an updated Voting Rights Act would have appropriately responded to the *Shelby County* decision, but due to political gridlock, the Court effectively has had the final word.[78] Instead, Professor Rush argues that advocates should look to alternative electoral systems such as multimember districting, ranked-choice voting, or limited voting, as well as practices like automatic voter registration and mandatory voting to enhance minority participation and turnout.[79] The article concludes by asserting that *Shelby County* "demonstrates the need for a more powerful national government and executive branch for taking militant steps to defend democracy."[80]

In *Finding Condorcet*,[81] Professor Nicholas O. Stephanopoulos presents the results of a novel empirical study regarding the performance of Instant Runoff Voting ("IRV") based on a dataset of voting records from nearly 200 foreign elections that used IRV. Professor Stephanopoulos uses this data to address an important question: how often does IRV results in a non-Condorcet winner? Notably, it finds that "[e]ven though IRV can elect a non-Condorcet winner in theory, it seldom does so in practice."[82] Based on the collected data, IRV elected the Condorcet winner in 191 out of 193 foreign races, for a Condorcet efficiency of 99 percent.[83] Professor Stephanopoulos concludes that "[t]his impressive record undermines arguments that IRV should be replaced by one or another Condorcet-consistent voting method."[84]

We are grateful for these scholars' contributions to the *Washington and Lee Law Review*'s Symposium issue and for all the 2024 Lara D. Gass *Law Review* Symposium participants and the student editors of the *Law Review* who helped make it a tremendous success.

78. *See id.* at 1187–88.
79. *See id.* at 1192–93.
80. *Id.* at 1195.
81. 81 WASH. & LEE L. REV. 981 (2024).
82. *Id.* at 984–95.
83. *Id.* at 1005.
84. *Id.* at 1006.