

# MAKING THE CASE FOR A THIRD RECONSTRUCTION BASED ON THE STATE OF VOTING RIGHTS IN AMERICA

*Alex Pilla\**

## I. INTRODUCTION

“Along the unbroken chain of racism that links America’s past to its present, there have been two points when the federal government—otherwise complicit or complacent—saw the mistreatment of African Americans as intolerable”: the Civil War and the Civil Rights Movement.<sup>1</sup> Although no provision of the Constitution or constitutional amendment directly prescribes the right to cast a vote, the Fifteenth Amendment prohibits discrimination on the basis of “race, color, or previous condition of servitude” wherever the right to vote exists.<sup>2</sup> The right to vote is pivotal, not just for its own sake but for what it represents and can create: equal dignity, access to education, economic opportunity, safety, and more. Despite the progress of the post-Civil War era and Civil Rights Movement, racial discrimination and the systemic deprivation of voting rights continue to plague this country, particularly in the last decade. Recent Supreme Court decisions, *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*, and state-government actions present modern-day analogs of the antidemocratic efforts undertaken after the post-Civil War Reconstruction to systematically deprive any non-White man of the

---

\*J.D. Candidate, 2024, Seton Hall University School of Law; B.A., Boston College. Thank you to my faculty advisor Professor Lori Borgen for the guidance and support through this process. Thank you, also, to Professor Ndjuoh MehChu for his help and advice. Lastly, thank you to Professor Jenny-Brooke Condon.

<sup>1</sup> Wilfred Codrington III, *The United States Needs a Third Reconstruction*, THE ATL. (July 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/united-states-needs-third-reconstruction/614293>.

<sup>2</sup> U.S. CONST. amend. XV, § 1 (“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.”).

power to vote.<sup>3</sup> *Shelby County* signified the start of this second retrenchment in voting rights in 2013, and *Brnovich* solidified it eight years later. Given the patterns and lessons from the post-Civil War Reconstruction and Second Reconstruction in the mid-twentieth century, this Comment argues that the current state of voting rights indicates that this country requires a Third Reconstruction to bring America closer to its founding ideals.

The United States of America began with the idea of a representative democracy and equality for all citizens,<sup>4</sup> yet the foundational documents of this nation protected the horror of chattel slavery and failed to explicitly guarantee all citizens the right to vote.<sup>5</sup> During the Founding era, most state legislatures only granted White, land-owning men the right to vote.<sup>6</sup> It is essential to understand the cycles of progress and setbacks in the fight for racial equality in the right to vote throughout our country's history. The right to vote is the basis for the rest of democracy; it is fundamental.<sup>7</sup> It provides citizens the ability to hold their government accountable and structurally confers equality among citizens where one person equals one vote.<sup>8</sup> The ability to choose elected officials who truly represent the values, interests, and goals of the people in turn shapes every other aspect of our lives and forms the basis from which our other rights derive. And once the right to vote is conferred on some people, equal protection

---

<sup>3</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021). This author notes that it is the practice of the *Seton Hall Law Review* to capitalize all races.

<sup>4</sup> *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969) ("This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.").

<sup>5</sup> U.S. CONST. art. I, § 2 (apportioning three-fifths of the number of slaves to the total number of state residents for representation purposes); U.S. CONST. art. I, § 9 (forbidding any Congressional regulations on the transatlantic slave trade until at least 1808); U.S. CONST. art. IV, § 2 (granting slave owners the right to recapture fugitive slaves from anywhere in the nation).

<sup>6</sup> *The Founders and the Vote*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/elections/right-to-vote/the-founders-and-the-vote> (last visited Nov. 15, 2023).

<sup>7</sup> *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); see also *Kramer*, 395 U.S. at 626 (analyzing the right to vote under the same strict scrutiny afforded to other fundamental interests).

<sup>8</sup> *Reynolds*, 377 U.S. at 558.

demands it be conferred on all citizens.<sup>9</sup> But that principle—equality—has not been true in practice. There has been a long road from the Founding era—where state legislatures conferred the franchise largely on White, land-owning men—through today, where voting rights, while expanded, face grave danger. Voting rights are important not for the sake of voting itself but for what they can create—equality and justice for all.

Part II of this Comment examines the historical development of voting rights for African American and Black voters from the post-Civil War Reconstruction era through the twentieth century Civil Rights Movement and Voting Rights Act of 1965. Part III analyzes the modern-day retrenchment in voting rights, specifically through the impact of two major Supreme Court decisions—*Shelby County v. Holder* and *Brnovich v. Democratic National Committee*—and state-level voting legislation. Part IV contends that the present state of voting rights mirrors previous retrenchment periods and therefore demands a Third Reconstruction that must start at the state level. Election subversion and gerrymandering, though similarly prescient threats to democracy, fall mostly outside the scope of this Comment. Part V briefly concludes.

## II. THE FIRST TWO RECONSTRUCTIONS

### A. *The First Reconstruction: Post-Civil War Era*

The decade of Reconstruction following the Civil War served as a “second founding” for America.<sup>10</sup> Congress took the most significant steps since the American Revolution toward equality and a true representative democracy.<sup>11</sup> The Thirteenth Amendment abolished slavery;<sup>12</sup> the Fourteenth Amendment granted all citizens equal protection of the law;<sup>13</sup> and, in 1870, the Fifteenth Amendment

---

<sup>9</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966).

<sup>10</sup> Codrington, *supra* note 1; Lincoln Caplan, *What Reconstruction-Era Laws Can Teach Our Democracy*, N.Y. TIMES: BOOK REV. (Sept. 18, 2019), <https://www.nytimes.com/2019/09/18/books/review/the-second-founding-eric-foner.html> (reviewing ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019)).

<sup>11</sup> Codrington, *supra* note 1.

<sup>12</sup> U.S. CONST. amend. XIII, § 1.

<sup>13</sup> U.S. CONST. amend. XIV, § 1.

granted Black men the right to vote.<sup>14</sup> “During this nation’s brief period of Reconstruction, from 1865 to 1877, formerly enslaved people zealously engaged with the democratic process.”<sup>15</sup> The Equal Rights League organized Black voters across the South to elect “formerly enslaved people into seats that their enslavers had once held.”<sup>16</sup> Sixteen Black men won election to Congress, including the first Black senator, Hiram Revels of Mississippi.<sup>17</sup> “More than [six hundred] black men served in” state legislatures across the South “and hundreds more in local positions.”<sup>18</sup> Together with White Republicans, these newly elected Black officials helped pass laws that created more equitable tax legislation, prohibited discrimination in public accommodations, and established public education.<sup>19</sup> Through the right to vote—and the protection federal troops provided in the South at the time—Black Americans propelled America toward its first true foray into an interracial democracy.<sup>20</sup>

Yet Reconstruction failed to solidify and preserve the progress of the Civil War Amendments for future generations of Americans. Throughout the South, White resistance caused “unthinkable violence against the formerly enslaved, wide-scale voter suppression, electoral fraud[,] and even, in some extreme cases, the overthrow of democratically elected biracial governments.”<sup>21</sup> Thus the first period of Black liberation, and coinciding expansion of voting rights, quickly collapsed after the Compromise of 1877, when the federal government

---

<sup>14</sup> U.S. CONST. amend. XV, § 1 (“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.”). The Fifteenth Amendment granted Congress the “power to enforce this article by appropriate legislation.” *Id.* § 2.

<sup>15</sup> Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

<sup>16</sup> *Id.*

<sup>17</sup> Becky Little, *The First Black Man Elected to Congress Was Nearly Blocked from Taking His Seat*, HIST., <https://www.history.com/news/first-black-congressman-hiram-revels> (Jan. 27, 2021).

<sup>18</sup> Hannah-Jones, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; *Reconstruction*, HIST., <https://www.history.com/topics/american-civil-war/reconstruction> (Apr. 24, 2023); EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865-1876, at 22, 23 (2020) [hereinafter EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA], <https://eji.org/wp-content/uploads/2020/07/reconstruction-in-america-report.pdf>.

<sup>21</sup> Hannah-Jones, *supra* note 15.

withdrew federal troops charged with protecting African Americans in the former Confederate states.<sup>22</sup> The federal government also withheld critical financial investments necessary to solidify the recent advances in voting rights, leaving racist actors free to claw back any power finally shared with Black voters and Black elected officials.<sup>23</sup> The aspirations “of Reconstruction quickly became a nightmare of unparalleled violence and oppression.”<sup>24</sup>

Southern states with a history of slavery—including Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia—quickly enacted laws “designed to prevent African Americans from voting.”<sup>25</sup> These barriers to voting included “[p]oll taxes, literacy tests, understanding clauses, pauper exclusions, and good character provisions.”<sup>26</sup> Campaigns of violence and intimidation accompanied these de jure efforts to prevent African Americans from voting.<sup>27</sup> Congress attempted to outlaw racially discriminatory voting laws piecemeal, but wherever the federal government knocked down one voter suppression tactic, state legislatures successfully—depending on the point of view—circumvented the law.<sup>28</sup> During this period, the Supreme Court further undermined racial equality by “eviscerating the Reconstruction Amendments in the name of states’ rights and constitutional color blindness.”<sup>29</sup>

---

<sup>22</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 39 (2017). The Compromise of 1877 occurred when President Rutherford B. Hayes “agreed to pull federal troops from the South” in exchange for enough electoral votes to secure the presidency. Hannah-Jones, *supra* note 15.

<sup>23</sup> Codrington, *supra* note 1 (“Reconstruction was an abysmal failure, subverted by policy makers whose acts and omissions made clear that America was giving up on Black people.”); *Shelby County v. Holder*, 570 U.S. 529, 536 (2013) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009)).

<sup>24</sup> EQUAL JUST. INITIATIVE, *RECONSTRUCTION IN AMERICA*, *supra* note 20, at 7.

<sup>25</sup> *Shelby County*, 570 U.S. at 536 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966)).

<sup>26</sup> Codrington, *supra* note 1.

<sup>27</sup> Vishal Agraharkar, *50 Years Later, Voting Rights Act Under Unprecedented Assault*, BRENNAN CTR. FOR JUST. (Aug. 2, 2015), <https://www.brennancenter.org/our-work/research-reports/50-years-later-voting-rights-act-under-unprecedented-assault>.

<sup>28</sup> *Shelby County*, 570 U.S. at 536. “Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place.” *Id.* at 560 (Ginsburg, J., dissenting).

<sup>29</sup> Codrington, *supra* note 1; *see also* *Slaughter-House Cases*, 83 U.S. 36, 78–83 (1872); EQUAL JUST. INITIATIVE, *RECONSTRUCTION IN AMERICA*, *supra* note 20, at 87 (“The

B. *The Second Reconstruction: Civil Rights Movement*

By the mid-twentieth century, the United States desperately needed a Second Reconstruction.<sup>30</sup> The Civil Rights Movement of the 1960s pushed Congress to finally take sweeping action and address racial discrimination in voting rights wholesale.<sup>31</sup> The civil rights era ushered in a Second Reconstruction period, which built upon the vestiges of the first.<sup>32</sup> In 1954, *Brown v. Board of Education* marked the beginning of the federal government's renewed focus on equality and the Fourteenth and Fifteenth Amendments.<sup>33</sup> But the advocates and activists of the Civil Rights Movement must receive credit for demanding equality and pushing the government in the right direction. In particular, John Lewis led activists in a march across the Edmund Pettus Bridge in Selma, Alabama, on what later became known as Bloody Sunday, less than six months before President Johnson signed the Voting Rights Act of 1965.<sup>34</sup> Horrific scenes of police officers beating and tear-gassing the peaceful marchers reached millions of Americans across the country and increased pressure on lawmakers to codify voting rights for Black Americans.<sup>35</sup> The Voting Rights Act of 1965 dramatically expanded the right to vote at a national level.<sup>36</sup> Within a decade the federal government enfranchised Black Americans and abolished "nearly all remaining limits on the right to vote," including poll taxes, literacy tests, and good character requirements.<sup>37</sup> At the same time, the Supreme Court took strides

---

Slaughterhouse Cases marked the [thirteenth] time in seven years that the Supreme Court struck down federal laws designed to protect freedmen and the decision greatly limited the Fourteenth Amendment's reach.").

<sup>30</sup> Codrington, *supra* note 1.

<sup>31</sup> *Shelby County*, 570 U.S. at 536.

<sup>32</sup> Codrington, *supra* note 1; A *Second Revolution*, LEARNING FOR JUST. (2011), <https://www.learningforjustice.org/magazine/fall-2011/a-second-revolution>; Cary Franklin, *Separate Spheres*, 123 YALE L.J. 2878, 2884–85 (2014).

<sup>33</sup> Franklin, *supra* note 32, at 2884–85; *see generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>34</sup> *See* Agraharkar, *supra* note 27; Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1411–12 (1995), <https://doi.org/10.2307/797134>; Jay Reeves, *John Lewis' Legacy Shaped in 1965 on 'Bloody Sunday'*, ASSOCIATED PRESS (July 18, 2020, 12:56 AM), <https://apnews.com/article/eda3ffe8fbfcf7727270e67bba1c9566>.

<sup>35</sup> Agraharkar, *supra* note 27.

<sup>36</sup> *Id.*

<sup>37</sup> Codrington, *supra* note 1 (quoting Harvard historian Alexander Keyssar); *see, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (upholding a constitutional prohibition on a poll tax); *South Carolina v. Katzenbach*, 383 U.S. 301,

toward racial equality and outlawed discrimination in public accommodations.<sup>38</sup> “With the federal government and civil society working in tandem, the gains of the Second Reconstruction [became] more durable than those of the first.”<sup>39</sup>

### C. *The Voting Rights Act of 1965*

Congress passed the Voting Rights Act of 1965 (VRA) to “ensure state and local governments do not pass laws or policies that deny American citizens the equal right to vote based on race.”<sup>40</sup> The VRA sought to finally eliminate “entrenched racial discrimination in voting.”<sup>41</sup> The law “employed extraordinary measures to address an extraordinary problem” and cited racial discrimination in voting as “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”<sup>42</sup>

#### 1. Key Provisions of the Voting Rights Act

Section 5 of the VRA established a “preclearance” system that required qualifying jurisdictions to obtain prior approval from the US Department of Justice to ensure a change in “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”<sup>43</sup> The preclearance formula detailed in section 4—which determined the covered jurisdictions—included any state or political subdivision that used any racially discriminatory test or device in the prior year, such as literacy tests, education requirements, and good character certifications, and where less than 50 percent of eligible voters either registered or cast a ballot in the last presidential election

---

337 (1966) (finding section 5 of the VRA a valid exercise of Congressional enforcement power to remedy past voting discrimination).

<sup>38</sup> Codrington, *supra* note 1.

<sup>39</sup> *Id.*

<sup>40</sup> *Shelby County v. Holder*, BRENNAN CTR. FOR JUST., [hereinafter BRENNAN CTR. FOR JUST., *Shelby County v. Holder*], <https://www.brennancenter.org/our-work/court-cases/shelby-county-v-holder> (June 25, 2023).

<sup>41</sup> *Shelby County v. Holder*, 570 U.S. 529, 535 (2013).

<sup>42</sup> *Id.* at 534–35 (quoting *Katzenbach*, 383 U.S. at 309).

<sup>43</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304); BRENNAN CTR. FOR JUST., *Shelby County v. Holder*, *supra* note 40.

in 1964.<sup>44</sup> As a result, the federal government had the power to deny voter rule changes in states of the former confederacy that had a clear history of race-based voter discrimination.<sup>45</sup>

Meanwhile, section 2 of the VRA established a permanent, nationwide prohibition on voting practices or procedures that “deny or abridge the right of any citizen of the United States to vote on account of race or color.”<sup>46</sup> Fifteen years later, the Supreme Court decision in *Mobile v. Bolden* required a plaintiff to “prove that the standard, practice, or procedure was enacted or maintained, at least in part, by an invidious *purpose*.”<sup>47</sup> In response, Congress amended the VRA to explicitly allow plaintiffs to bring section 2 claims specifically based on a discriminatory *result*.<sup>48</sup> The 1982 amendment to section 2, in effect, lowered the burden for plaintiffs to a more realistic, attainable standard and reinforced Congress’s goal “to protect against even subtle or hidden forms of racial discrimination” in the language of the law.<sup>49</sup> As the VRA procedurally required, Congress also reaffirmed the coverage formula of section 4 four times, but section 2 could remain in effect without Congressional extensions.<sup>50</sup> And, in response to shifting demographics, Congress later added voter

---

<sup>44</sup> § 4(b), 79 Stat. at 438 (codified as amended at 52 U.S.C. § 10303). Section 4 also provided a process for covered jurisdictions to “bail out” of the preclearance process by demonstrating compliance with the VRA for ten consecutive years. *Id.* § 4(a).

<sup>45</sup> See generally 52 U.S.C. §§ 10303–10304.

<sup>46</sup> Voting Rights Act § 2, 79 Stat. at 437 (codified as amended at 52 U.S.C. § 10301(a)).

<sup>47</sup> *Section 2 of the Voting Rights Act*, U.S. DEP’T OF JUST. [hereinafter DEP’T OF JUST., *Section 2 of the Voting Rights Act*] (emphasis added), <https://www.justice.gov/crt/section-2-voting-rights-act> (Apr. 5, 2023); *Mobile v. Bolden*, 446 U.S. 55, 55, 60–61 (1980) (plurality opinion).

<sup>48</sup> DEP’T OF JUST., *Section 2 of the Voting Rights Act*, *supra* note 47; see *Bolden*, 446 U.S. at 55, 60–61; *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2357 (2021) (Kagan, J., dissenting) (explaining that Congress amended section 2 in response to *Bolden*); Case Comment, *Brnovich v. Democratic National Committee*, 135 HARV. L. REV. 481, 487 & n.77–78 (2021) [hereinafter Harvard Case Comment].

<sup>49</sup> Davin Rosborough & Tish Gotell Faulks, *Voting Rights Are Center Stage This Supreme Court Term*, ACLU (Oct. 4, 2022), <https://www.aclu.org/news/voting-rights/voting-rights-are-center-stage-this-supreme-court-term>.

<sup>50</sup> See DEP’T OF JUST., *Section 2 of the Voting Rights Act*, *supra* note 47 (noting later court decisions resulted in an amendment to section 2).



protections for language minorities through an amendment in 1975 to section 2.<sup>51</sup>

## 2. Impact of the Voting Rights Act

When the VRA passed in 1965, it became the country's preeminent voting rights legislation.<sup>52</sup> Upon its passage, preclearance applied to states in the South—Alabama, Georgia, Mississippi, Louisiana, South Carolina, Virginia, and forty counties in North Carolina—in addition to Alaska, Arizona, and Texas.<sup>53</sup> In the following four decades, the VRA “stood as a bulwark against racially discriminatory voting practices” in those states and expanded to cover jurisdictions in California, Florida, Michigan, New York, and South Dakota.<sup>54</sup> Overall, voter registration increased by more than twenty million people, and turnout for people of color in the South “skyrocketed.”<sup>55</sup> Crucially, sections 2 and 5 prevented changes to polling locations, identification (ID) requirements, and voting district lines that would improperly dilute the power of Black voters.<sup>56</sup> For example, the number of registered Black voters in Mississippi increased from 7 percent to 67 percent of eligible voters in the first five years after the VRA alone.<sup>57</sup> The Black-White voter registration gap decreased from a 30 percent difference before the VRA to just 8

---

<sup>51</sup> *Language Minority Citizens: Section 203 of the Voting Rights Act*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/language-minority-citizens> (Nov. 22, 2023).

<sup>52</sup> Kaitlin Barnes, Comment, *On the Road Again: How Brnovich Steers States Toward Increased Voter Restrictions*, 81 MD. L. REV. 1265, 1267 (2022).

<sup>53</sup> James C. Cobb, *The Voting Rights Act at 50: How It Changed the World*, TIME (Aug. 6, 2015, 9:30 AM), <https://time.com/3985479/voting-rights-act-1965-results-jurisdictions-previously-covered-by-section-5>, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (May 17, 2023).

<sup>54</sup> Sophia Lin Lakin, *Fifty-Seven Years After Its Enactment, the Voting Rights Act Is in Peril*, ACLU (Aug. 5, 2022), <https://www.aclu.org/news/voting-rights/fifty-seven-years-after-its-enactment-the-voting-rights-act-is-in-peril>; *Jurisdictions Previously Covered by Section 5*, *supra* note 53; Eliza Sweren-Becker, *Filling the Voting Rights Hole Left by SCOTUS in Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (June 22, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/filling-voting-rights-hole-left-scotus-shelby-county-v-holder>.

<sup>55</sup> Barnes, *supra* note 52, at 1265; Codrington, *supra* note 1; *see also* Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight Under the Voting Rights Act*, 11 AM. ECON. J. 1, 3 (2019), <https://doi.org/10.1257/app.20170572> (finding that the VRA led to gains in voter participation that persisted for forty years).

<sup>56</sup> Agraharkar, *supra* note 27.

<sup>57</sup> Cobb, *supra* note 53.

percent by the 1970s; in Southern states, the turnout gap dropped from 50 percent in the mid-1950s to nearly zero, surpassing the rest of the country by the 1980s.<sup>58</sup> Covered states elected nearly one thousand Black candidates in the decade after the VRA, compared to the seventy-two Black elected officials nation-wide in 1965. “By the mid-1980s there were more black people in public office across the South than in the rest of the nation combined.”<sup>59</sup> Then in 2008, decades later, the most racially and ethnically diverse electorate in American history elected the first Black president of the United States, Barack Obama.<sup>60</sup> While the election of President Obama did not launch America into a “post-racial” society by any means, it demonstrated what a multiracial democracy could achieve.<sup>61</sup>

### III. PRESENT DAY DISMANTLING OF VOTING RIGHTS

In the last decade, voting rights—previously protected by the VRA—suffered major losses at the Supreme Court and endured a relentless stream of attacks at the state level.<sup>62</sup> These combined threats indicate a backlash to the progress of the Second Reconstruction and set the stage for a Third Reconstruction era.

#### A. *The Supreme Court’s Attack on Voting Rights*

Two landmark Supreme Court decisions have dismantled key provisions of the VRA: *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*. Their collective impact has rendered the VRA nearly obsolete, but understanding the impact is critical to build a stronger defense of democracy in the next reconstruction effort.<sup>63</sup>

---

<sup>58</sup> Agraharkar, *supra* note 27; Cobb, *supra* note 53.

<sup>59</sup> Cobb, *supra* note 53 (noting that while the number of Black elected officials increased during this period, the number of Black people in public office across the country has never been proportional to the Black share of the population).

<sup>60</sup> *Dissecting the 2008 Electorate: Most Diverse in U.S. History*, PEW RSCH. CTR. (Apr. 30, 2009), <https://www.pewresearch.org/hispanic/2009/04/30/dissecting-the-2008-electorate-most-diverse-in-us-history>. Pew found the greatest increase in voter turnout came from “Southern states with large black eligible voter populations,” and that the Black-White voter turnout gap was virtually nonexistent nationwide. *Id.* Demographic shifts, including growing Latinx and Asian populations, also increased the diversity of the electorate. *Id.*

<sup>61</sup> Codrington, *supra* note 1.

<sup>62</sup> Lakin, *supra* note 54.

<sup>63</sup> See Myrna Pérez & Tim Lau, *How to Restore and Strengthen the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Jan. 28, 2021), <https://www.brennancenter.org/our-work/research-reports/how-to-restore-and-strengthen-voting-rights-act>.

1. *Shelby County v. Holder*

The Supreme Court landed a major blow against the VRA in 2013 with its decision in *Shelby County v. Holder*.<sup>64</sup> The opinion invalidated the section 4 formula designed to determine which jurisdictions were subject to preclearance under section 5.<sup>65</sup> The Court pointed to the increase in non-White candidates and virtual elimination of the Black-White race gap in both voter registration and turnout in covered states and determined, therefore, that the preclearance formula outlived its utility.<sup>66</sup> The Court claimed that continued application of section 5 improperly discriminated against certain states and local jurisdictions because it required preclearance for some jurisdictions across the country and not others.<sup>67</sup> But the covered jurisdictions earned that preclearance distinction by denying people equal access to their right to vote on the basis of their skin color.<sup>68</sup> Therefore Congress is justified in treating those jurisdictions differently. Further, the VRA provides both opt-in and opt-out provisions, so that the jurisdictions covered change over time as state voting laws change.<sup>69</sup>

The Court instructed Congress to create a new formula that “speaks to *current* conditions” when section 4 once again required renewal.<sup>70</sup> But voter discrimination was current at the time of the decision: from 1998 to 2013, “[s]ection 5 blocked [eighty-six] discriminatory changes,” and in the eighteen months before *Shelby County* alone, the Justice Department stopped thirteen discriminatory voting rules through preclearance.<sup>71</sup> As Justice Ginsburg wrote in her dissent, “[v]olumes of evidence supported Congress’ determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory

---

<sup>64</sup> *Id.*

<sup>65</sup> *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

<sup>66</sup> *Id.* at 547–48, 556.

<sup>67</sup> *Id.* at 551 (“In 1965, the [s]tates could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.”).

<sup>68</sup> *Shelby County*, 570 U.S. at 575 (Ginsburg, J., dissenting).

<sup>69</sup> PAIGE WHITAKER, CONG. RSCH. SERV., LSB10771, VOTING RIGHTS ACT: SECTION 3(C) “BAIL-IN” PROVISION 2 (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10771>.

<sup>70</sup> *Shelby County*, 570 U.S. at 557 (emphasis added); Sweren-Becker, *supra* note 54.

<sup>71</sup> Sweren-Becker, *supra* note 54.

changes is like *throwing away your umbrella in a rainstorm because you are not getting wet*.”<sup>72</sup> One hundred years after the Civil War Amendments granted African Americans citizenship and the right to vote, “racial discrimination in voting [still] infect[s] the electoral process in parts of our country,”<sup>73</sup> making the Civil Rights Movement and VRA necessary. Thus, any belief by the *Shelby County* majority that the VRA could eliminate the vestiges of four hundred years of racism and discrimination in America in just fifty years was naïve and short-sighted. To that end, Justice Ginsburg highlighted how Congress’s renewal of the VRA differentiated new efforts—such as racial gerrymandering and at-large voting districts—to “reduce the impact of minority votes” from earlier, more explicit, voter suppression rules that the VRA outlawed, such as literacy tests, poll taxes, and White primaries.<sup>74</sup> Congress determined that the VRA “directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials.”<sup>75</sup> These “second generation barriers constructed to prevent minority voters from fully participating in the electoral process” mirror state efforts after the First Reconstruction to circumvent the Fifteenth Amendment.<sup>76</sup> Therefore, section 5 was still necessary at the time the Court decided *Shelby County*.

*Shelby County* rendered section 5 “inoperable” without a new coverage formula from Congress and “put America back on the road to voter suppression by striking down the VRA’s most effective provision.”<sup>77</sup> *Shelby County* signaled to the states that federal courts would not protect voting rights against future restrictions.<sup>78</sup> Predictably, states previously prevented by the US Department of Justice “from passing restrictive voting legislation rushed to enact laws

---

<sup>72</sup> *Shelby County*, 570 U.S. at 590 (Ginsburg, J., dissenting) (emphasis added).

<sup>73</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

<sup>74</sup> *Shelby County*, 570 U.S. at 563 (Ginsburg, J., dissenting).

<sup>75</sup> *Id.* at 565–66 (Ginsburg, J., dissenting) (citing Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b) (1), 120 Stat. 577, 577).

<sup>76</sup> *Id.* (Ginsburg, J., dissenting) (quoting §2(b) (2), 120 Stat. at 577).

<sup>77</sup> Barnes, *supra* note 52, at 1266; BRENNAN CTR. FOR JUST., *Shelby County v. Holder*, *supra* note 40.

<sup>78</sup> 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://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights>.

that made it more difficult for voters of color to cast a ballot.”<sup>79</sup> Within hours of the decision, “Texas implemented a strict photo ID law,” previously rejected under section 5 because “African American and Hispanic registered voters are two to four times more likely than white registered voters to lack photo ID.”<sup>80</sup> Within months, North Carolina imposed stricter photo identification requirements, eliminated same-day voter-registration, and reduced access to early voting—all voting restrictions that preclearance would have prevented because they disproportionately impact voters of color.<sup>81</sup> Eleven states with jurisdictions subjected to preclearance at the time of the decision collectively passed twenty-nine restrictive voting laws: Alabama, Arizona, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, South Dakota, and Texas.<sup>82</sup> Since *Shelby County*, at least twenty-nine states have implemented ninety-four restrictive voting laws while Congress has failed to pass a new coverage formula to revive the power of section 5.<sup>83</sup> Significant evidence shows “that these kinds of laws fall hardest on communities of color, and a number have been struck down by courts as racially discriminatory” in either purpose or effect.<sup>84</sup> But even where legal challenges succeed, voters suffer disenfranchisement in the meantime.<sup>85</sup>

## 2. *Brnovich v. Democratic National Committee*

The 2021 Supreme Court decision in *Brnovich v. Democratic National Committee* further undermined the ability of the VRA to stop racial discrimination in voting.<sup>86</sup> After *Shelby County* eliminated the preclearance requirement, section 2 provided one of the last remaining bulwarks against racial discrimination in voting practices,

---

<sup>79</sup> Barnes, *supra* note 52, at 1266.

<sup>80</sup> Agraharkar, *supra* note 27.

<sup>81</sup> *Id.* (“African Americans used early voting and same-day registration at much higher rates than white[] [voters].”).

<sup>82</sup> Singh & Carter, *supra* note 78.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Strengthening the Voting Rights Act*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-reform/strengthening-voting-rights-act> (last visited Nov. 15, 2023); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

election procedures, and redistricting.<sup>87</sup> This decision dealt another significant blow to the VRA, voting rights advocates, and Black voters.

In the July 2021 decision, the Supreme Court held that two restrictive voting laws in Arizona did not discriminate on the basis of race and, therefore, did not violate section 2 of the VRA.<sup>88</sup> The two challenged laws included an out of precinct policy (“OOP”) and a prohibition on third-party ballot collection (“H.B. 2023”).<sup>89</sup> The OOP required the state to disregard entire ballots cast by voters in the wrong precinct, even though the precinct is irrelevant for counting votes in presidential, gubernatorial, and senate races.<sup>90</sup> It stated that “[n]o person shall be permitted to vote unless such person’s name appears as a qualified elector in both the general county register and in the precinct register.”<sup>91</sup> H.B. 2023 criminalized returning an early ballot on behalf of anyone besides a family member or person under one’s care.<sup>92</sup>

The Democratic National Committee (DNC) argued that both provisions violated section 2 of the VRA by disproportionately burdening minority voters and, further, that lawmakers passed H.B. 2023 with discriminatory intent.<sup>93</sup> The district court disagreed and

---

<sup>87</sup> See Frances Krupkin, Comment, *Making the VRA Great Again: Arizona Discriminatory Voting Restrictions Cannot Stand After Brnovich*, 71 AM. U. L. REV. F. 14, 23 (2021); *Court Case Tracker: Brnovich v. Democratic National Committee*, BRENNAN CTR. FOR JUST. (July 1, 2021) [hereinafter BRENNAN CTR. FOR JUST., *Court Case Tracker*], <https://www.brennancenter.org/our-work/court-cases/brnovich-v-democratic-national-committee>.

<sup>88</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021).

<sup>89</sup> BRENNAN CTR. FOR JUST., *Court Case Tracker*, *supra* note 87; see H.R. 2023, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

<sup>90</sup> *Id.*

<sup>91</sup> ARIZ. REV. STAT. ANN. § 16-122 (2023); Joseph Palandrani & Danika Watson, Comment, *Racial Gerrymandering, the For the People Act, and Brnovich: Systemic Racism and Voting Rights in 2021*, 89 FORDHAM L. REV. ONLINE 124, 133 n.53 (2021) (“[The Arizona statute] permit[ted] voting by provisional ballot where a voter’s name does not appear in a precinct’s voter register only if the voter’s ‘residence address [is] within the precinct in which the voter is attempting to vote.’” (quoting ARIZ. REV. STAT. ANN. § 16-584(C) (2023))).

<sup>92</sup> See BRENNAN CTR. FOR JUST., *Court Case Tracker*, *supra* note 87; ARIZ. REV. STAT. ANN. § 16-1005(H) (2023). The law includes exceptions for election officials, postal workers, caregivers, and family members. See § 16-1005(H)–(I) (2).

<sup>93</sup> *Brnovich*, 141 S. Ct. at 2334; Harvard Case Comment, *supra* note 48, at 482.

upheld both of Arizona's policies.<sup>94</sup> The Ninth Circuit panel delivered a split opinion that affirmed the district court,<sup>95</sup> but the Ninth Circuit's en banc majority reversed and remanded.<sup>96</sup> Rehearing the case en banc, the Ninth Circuit held that both the OOP policy and H.B. 2023 "violated [s]ection 2 because they resulted in discrimination against Native American, Latino, and Black voters,"<sup>97</sup> and that the Arizona legislature enacted H.B. 2023 with discriminatory intent in violation of both the VRA and the Fifteenth Amendment.<sup>98</sup>

When the Supreme Court later reversed the Ninth Circuit's decision, the majority upheld both Arizona provisions and also significantly weakened section 2's ability to prevent racial discrimination in voting rights.<sup>99</sup> As a threshold matter, the Court raised the "plaintiffs' evidentiary burden to establish disparate impact" in VRA claims.<sup>100</sup> Further, the Court held that "a state's compelling interest in election integrity can overcome section 2 liability" even where plaintiffs manage to meet the newly heightened evidentiary standard.<sup>101</sup> This decision undermines the 1982 amendment to section 2, which explicitly states that a discriminatory *result*—not just intent—violates the VRA.<sup>102</sup> Since Congress passed the amendment in response to the Court's decision in *City of Mobile v. Bolden*, which required plaintiffs prove some measure of a jurisdiction's discriminatory purpose,<sup>103</sup> Congress clearly intended a discriminatory

---

<sup>94</sup> *Brnovich*, 141 S. Ct. at 2334; *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 882–83 (D. Ariz. 2018), *rev'd en banc sub nom.* *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020).

<sup>95</sup> *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 697 (9th Cir. 2018).

<sup>96</sup> *Hobbs*, 948 F.3d at 1046. The en banc majority did not reach the First and Fourteenth Amendment claims. *Id.* at 999.

<sup>97</sup> BRENNAN CTR. FOR JUST., *Court Case Tracker*, *supra* note 87; *Hobbs*, 948 F.3d at 999, 1046.

<sup>98</sup> BRENNAN CTR. FOR JUST., *Court Case Tracker*, *supra* note 87; *Hobbs*, 948 F.3d at 999, 1005–06.

<sup>99</sup> *Brnovich*, 141 S. Ct. at 2350.

<sup>100</sup> Harvard Case Comment, *supra* note 48, at 487.

<sup>101</sup> *Id.*; *Brnovich*, 141 S. Ct. at 2347.

<sup>102</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a)); DEP'T OF JUST., *Section 2 of the Voting Rights Act*, *supra* note 47.

<sup>103</sup> DEP'T OF JUST., *Section 2 of the Voting Rights Act*, *supra* note 47; *see City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (plurality opinion).

effect to be sufficient for a section 2 claim.<sup>104</sup> Instead of following the clarifying amendment, Justice Alito imposed a five-factor test on the totality of the circumstances analysis for section 2 cases: (1) “the size of the burden imposed”; (2) “the degree to which a voting rule departs from what was the standard practice when [section] 2 was amended in 1982”; (3) the degree of “disparities in a rule’s impact on members of different racial or ethnic groups”; (4) other opportunities to vote in the state besides the challenged policy; and (5) “strength of the state interests.”<sup>105</sup> Applying these new criteria to the impossibly high burden of proof, the Court determined that Arizona’s policies did not violate section 2 and greenlit a new wave of voter discrimination.<sup>106</sup>

Once again, the Court overrode Congress’s clear intent to protect voting rights.<sup>107</sup> Whereas in *Shelby County*, the Court required Congress to rewrite the preclearance formula it just reauthorized five years prior.<sup>108</sup> Later, in *Brnovich*, the Court “further muddled the analytical waters” and disregarded the 1982 amendment Congress already passed to correct the Court’s prior misinterpretation of section 2.<sup>109</sup> Justice Kagan, dissenting in *Brnovich*, asserted that the Court had “rewritten—in order to weaken—a statute that stands as a monument to America’s greatness, and protects against its basest impulses.”<sup>110</sup> The language of section 2 includes “results in,” which means “the consequences of electoral practices, as opposed to the motives by which they were enacted.”<sup>111</sup> But an equal opportunity to vote cannot exist when members of one racial group have a harder time casting their ballots than another group.<sup>112</sup> Legal scholars have attacked Justice Alito’s five

---

<sup>104</sup> SAM GARRETT, CONG. RSCH. SERV., R47520, THE VOTING RIGHTS ACT: HISTORICAL DEVELOPMENT AND POLICY BACKGROUND 21 (2023), <https://crsreports.congress.gov/product/pdf/R/R47520/2>.

<sup>105</sup> *Brnovich*, 141 S. Ct. at 2338–40.

<sup>106</sup> Harvard Case Comment, *supra* note 48, at 485; *see also Brnovich*, 141 S. Ct. at 2366 (Kagan, J., dissenting); DEP’T OF JUST., *Section 2 of the Voting Rights Act*, *supra* note 47.

<sup>107</sup> *See* Erica L. Laroux, *Voting Rights Suspended Under the Guise of Federalism and Voter Fraud in the Wake of Shelby and Brnovich*, 49 S.U. L. REV. 441, 461–62 (2022); Richard L. Hasen, *The Supreme Court’s Latest Voting Rights Opinion Is Even Worse than It Seems*, SLATE (July 8, 2021, 10:16 AM), <https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html>.

<sup>108</sup> *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

<sup>109</sup> Laroux, *supra* note 107, at 444.

<sup>110</sup> *Brnovich*, 141 S. Ct. at 2351 (Kagan, J., dissenting).

<sup>111</sup> Harvard Case Comment, *supra* note 48, at 486 (citing *Brnovich*, 141 S. Ct. at 2357 (Kagan, J., dissenting)).

<sup>112</sup> *Brnovich*, 141 S. Ct. at 2358 (Kagan, J., dissenting).



guideposts test by arguing that it lacks consideration of facts on the ground: “[t]he majority ignore[d] the lessons of history and [failed to] appreciate that discriminatory laws are often packaged as facially neutral and disguised in important state interest.”<sup>113</sup> The poll taxes and literacy tests strictly outlawed by section 2 appeared neutral in their plain language, and, historically, states attempted to justify such measures by invoking compelling governmental interests.<sup>114</sup> But in practice, those seemingly neutral laws disproportionately burden voters of color, and the majority once again failed to understand that “[v]oting is about the interests of people,” not the abstract interests of the states.<sup>115</sup>

*Brnovich* dealt the most significant blow to voting rights since *Shelby County*.<sup>116</sup> With the new guideposts test, *Brnovich* created a much higher standard for plaintiffs to bring section 2 challenges to discriminatory voting laws, putting almost any successful challenge out of reach.<sup>117</sup> *Brnovich* effectively subordinated racial equality in voting to state interests and limited voting rights advocates’ ability to protect voting rights with successful discrimination claims.<sup>118</sup> But the consequences of *Brnovich* “for American democracy extend far beyond the ballot box.”<sup>119</sup> The *Brnovich* majority opinion “recognized the prevention of voter fraud as a ‘strong and entirely legitimate’ interest that could justify passing a law that may place additional burdens on voters” and gave an alarming level of legitimacy to far-fetched concerns about voter fraud.<sup>120</sup> Credibility from the Court gives states permission to use voter fraud as an excuse to further restrict voting rights.<sup>121</sup> Claims about widespread voter fraud imperiling our elections and

---

<sup>113</sup> Laroux, *supra* note 107, at 462; *see also Brnovich*, 141 S. Ct. at 2358 (Kagan, J., dissenting).

<sup>114</sup> *Brnovich*, 141 S. Ct. at 2352, 2359 (Kagan, J., dissenting).

<sup>115</sup> Kareem Crayton & Kendall Karson, *Shelby County v. Holder Turns 10, and Voting Rights Continue to Suffer from It*, BRENNAN CTR. FOR JUST. (June 20, 2023), <https://www.brennancenter.org/our-work/research-reports/shelby-county-v-holder-turns-10-and-voting-rights-continue-suffer-it>.

<sup>116</sup> Harvard Case Comment, *supra* note 48, at 481.

<sup>117</sup> *See* Hasen, *supra* note 107; BRENNAN CTR. FOR JUST., *Court Case Tracker*, *supra* note 87.

<sup>118</sup> *See* Hasen, *supra* note 107; BRENNAN CTR. FOR JUST., *Court Case Tracker*, *supra* note 87.

<sup>119</sup> Harvard Case Comment, *supra* note 48, at 490. The Court’s interpretation of section 2 could also have negative consequences for other anti-discrimination cases.

<sup>120</sup> Barnes, *supra* note 52, at 1266 (quoting *Brnovich*, 141 S. Ct. at 2340).

<sup>121</sup> *Id.* at 1297.

democracy are incredibly overblown and have been credibly debunked.<sup>122</sup>

B. *The States' Attacks on Voting Rights Following Shelby County and Brnovich*

1. State Laws

Despite the majority's assertion in *Shelby County* that the days of racial discrimination in voting disappeared after the VRA, state-level attacks on voting rights indicate the need for federal protections. Then *Brnovich* doubled down and made it harder for plaintiffs to prove racial discrimination in voting rights under federal law. In the decade since *Shelby County*, "voters have faced an unprecedented slew of restrictive and often discriminatory laws, and the courts have offered little in way of protection."<sup>123</sup> The turnout gap between White and Black voters—a key metric the *Shelby County* majority relied upon to justify invalidating section 5—grew significantly in the years since, "including in jurisdictions previously covered by preclearance."<sup>124</sup> Overall, restrictive voting laws "passed in the last [ten] years target every aspect of voting, including making voter registration more difficult, curtailing early voting opportunities, closing polling places, and limiting voter assistance."<sup>125</sup>

State legislatures have shown renewed interest in strict voter identification laws and vote by mail restrictions, which disproportionately impact voters of color.<sup>126</sup> Since the 2020 presidential election, "there has been an unprecedented wave of anti-voter legislation introduced and passed across the country."<sup>127</sup> In total, state legislatures across the country introduced nearly four hundred bills restricting access to voting by May 2021 (two months before *Brnovich*), and Vermont was the only state whose legislature had not introduced a restrictive voting rights bill at that time.<sup>128</sup> Voter

---

<sup>122</sup> See *id.* at 1291–92, 1296–97.

<sup>123</sup> Singh & Carter, *supra* note 78.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Kevin Morris, *Patterns in the Introduction and Passage of Restrictive Voting Bills Are Best Explained by Race*, BRENNAN CTR. FOR JUST. (Aug. 3, 2022) [hereinafter Morris, *Patterns of Restrictive Voting Bills*], <https://www.brennancenter.org/our-work/research-reports/patterns-introduction-and-passage-restrictive-voting-bills-are-best>.

<sup>128</sup> *Id.*

identification laws are a common form of deceptively “neutral” voting restrictions.<sup>129</sup> “Like their Jim Crow predecessors, strict voter [identification] laws are often defended by reference to a racially neutral need to defend the ‘integrity’ of elections. Specifically, defenders claim that voter ID laws are needed to combat voter impersonation fraud.”<sup>130</sup> But numerous studies have shown “voter impersonation fraud is vanishingly rare.”<sup>131</sup> Nevertheless, states still try to justify strict voter identification requirements by claiming they place a low burden on individuals to carry the requisite identification documents, “but the reality is that millions of Americans [do not], and they are disproportionately people of color.”<sup>132</sup> For example, voters in Texas can use a handgun license as voter identification but not a student identification card issued by a state university.<sup>133</sup> This regulation does not mention race, but in practice, “[m]ore than 80 percent of handgun licenses issued to Texans in 2018 went to white Texans, while more than half of the students in the University of Texas system are racial or ethnic minorities.”<sup>134</sup> Also in Texas, during the 2022 primary election, a vote-by-mail law requiring photocopies of certain identification documents resulted in thousands of rejections; “non-white voters were at least 30 percent more likely to have an application or mail ballot rejected than white voters.”<sup>135</sup> This problem extends beyond the South. When North Dakota enacted a more restrictive voter identification law in 2017, a federal court found that “19 percent of Native Americans lacked qualifying ID compared to less than 12 percent of other potential voters.”<sup>136</sup>

---

<sup>129</sup> Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>. Voter ID laws “require voters to present a government-issued photo ID in order to vote.” *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*; BRENNAN CTR. FOR JUST., *DEBUNKING THE MYTH OF VOTER FRAUD 1* (2017), [https://www.brennancenter.org/sites/default/files/analysis/Briefing\\_Memo\\_Debunking\\_Voter\\_Fraud\\_Myth.pdf](https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf); see also *Resources on Voter Fraud Claims*, BRENNAN CTR. FOR JUST. (June 26, 2017), <https://www.brennancenter.org/our-work/research-reports/resources-voter-fraud-claims>.

<sup>132</sup> Johnson & Feldman, *supra* note 129.

<sup>133</sup> *Identification Requirements for Voting*, VOTETEXAS.GOV, <https://www.votetexas.gov/mobile/id-faqs.htm> (last visited Nov. 16, 2023).

<sup>134</sup> Johnson & Feldman, *supra* note 129.

<sup>135</sup> Singh & Carter, *supra* note 78.

<sup>136</sup> Johnson & Feldman, *supra* note 129; *Brakebill v. Jaeger*, 932 F.3d 671, 684 (8th Cir. 2019).

Voter purging—the process of deleting supposedly outdated or duplicate names from voter registration lists—also gained popularity in the last decade.<sup>137</sup> This practice often prevents eligible voters from casting their ballots.<sup>138</sup> The Brennan Center for Justice (“Brennan Center”), a preeminent voting rights organization, calculated that if jurisdictions covered by section 4 before *Shelby County* purged voters “at the same rates as uncovered jurisdictions between 2012 and 2018, 3.1 million fewer voters would have been purged.”<sup>139</sup> For example, in the leadup to the 2018 election, approximately 80 percent of the voters blocked by Georgia’s 2017 “exact match” law were people of color.<sup>140</sup> Exact match laws, such as Georgia’s, require a perfect match between the voter registration record and government-issued identification—a missing “hyphen, an initial instead of a complete middle name,” or even a single-letter spelling discrepancy can doom a voter.<sup>141</sup> Fortunately, voting rights groups and activists filed suit and forced the Georgia legislature to abandon the policy in 2018.<sup>142</sup> Since *Shelby County*, “the median purge rate in counties previously covered by [section 5 preclearance] was 40 percent higher than the purge rate in other jurisdictions.”<sup>143</sup> But this does not mean voter rolls were ripe with ineligible voters or outdated information. Voter role purges are often error prone or set arbitrary requirements under the guise of preventing voter fraud. Beyond voter identification requirements and voter purging, limits on voter registration drives and polling place closures in previously covered jurisdictions also disproportionately impact Black and Latinx voters.<sup>144</sup> For example, in North Carolina,

---

<sup>137</sup> KEVIN MORRIS ET AL., BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1 (2018), <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote>.

<sup>138</sup> *Id.*

<sup>139</sup> Sweren-Becker, *supra* note 54; MORRIS ET AL., *supra* note 137.

<sup>140</sup> Johnson & Feldman, *supra* note 129.

<sup>141</sup> Ted Enamorado, *Georgia’s ‘Exact Match’ Law Could Potentially Harm Many Eligible Voters*, WASH. POST (Oct. 20, 2018, 7:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/20/georgias-exact-match-law-could-disenfranchise-3031802-eligible-voters-my-research-finds>.

<sup>142</sup> *Id.*; see also Complaint for Injunctive and Declaratory Relief, Ga. Coal. for the Peoples’ Agenda, Inc. v. Kemp, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (No. 18-CV-04727).

<sup>143</sup> Johnson & Feldman, *supra* note 129.

<sup>144</sup> Amy Gardner, *How a Large-Scale Effort to Register Black Voters Led to a Crackdown in Tennessee*, WASH. POST (May 24, 2019, 7:50 AM), <https://www.washingtonpost.com/politics/how-a-large-scale-effort-to-register-black>

where 64 percent of Black voters cast their ballot early in the 2012 presidential election, compared to 49 percent of White voters, the state reacted to *Shelby County* with further restrictions on early voting.<sup>145</sup> Once again, the law limiting early voting made no mention of race, but the impact fell disproportionately on people of color.

After *Shelby County*, Arizona has passed eight restrictive voting laws—the highest of any one state previously subjected to preclearance.<sup>146</sup> Following the most diverse electorate turnout in state history in 2020<sup>147</sup> and *Brnovich* in 2021, the Arizona state legislature passed more restrictive voting legislation, including adding strict voter identification laws, decreasing ballot drop boxes, and purging people from the voter rolls voter.<sup>148</sup> At the same time, Arizona has also become the epicenter of meritless voter fraud claims, a key concern of Justice Alito’s five guideposts analysis in *Brnovich*.<sup>149</sup> Arizona lawmakers have accelerated election interference bills to “allow the legislature to directly overturn election results” and criminally punish “election officials for minor mistakes such as failing to update their computer passwords.”<sup>150</sup>

In 2021, the Arizona state legislature and Governor Doug Ducey passed S.B. 1485, which removes voters from the vote-by-mail list “if they go four years without casting a mail ballot” without any indication of any other issues with their registration.<sup>151</sup> Previously, “registered voters could sign up to automatically receive a mail ballot for every election,” regardless of past participation.<sup>152</sup> Now, voters who sit out

---

voters-led-to-a-crackdown-in-tennessee/2019/05/24/9f6cee1e-7284-11e9-8be0-ca575670e91c\_story.html; Sweren-Becker, *supra* note 54; HANNAH KLAIR ET AL., BRENNAN CTR. FOR JUST., WAITING TO VOTE 4 (2020), <https://www.brennancenter.org/our-work/research-reports/waiting-vote>.

<sup>145</sup> Johnson & Feldman, *supra* note 129; N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214, 216 (4th Cir. 2016).

<sup>146</sup> Singh & Carter, *supra* note 78.

<sup>147</sup> See Will Wilder, *Arizona Is the Epicenter of the Fight for Voting Rights Today*, BRENNAN CTR. FOR JUST. (June 2, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/arizona-epicenter-fight-voting-rights-today>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; see *supra* notes 105–06 and accompanying text.

<sup>150</sup> Wilder, *supra* note 147.

<sup>151</sup> Kevin Morris, *New State Laws Hit Voters of Color Hardest*, BRENNAN CTR. FOR JUST. (Aug. 16, 2022) [hereinafter Morris, *New State Laws*], <https://www.brennancenter.org/our-work/analysis-opinion/new-state-laws-hit-voters-color-hardest>. This law went into effect after the 2022 midterm elections. *Id.*

<sup>152</sup> *Id.*

too many elections in a row will lose the ability to vote by mail starting in 2025.<sup>153</sup> The bill also eliminated Arizona's permanent early voting list.<sup>154</sup> Vote-by-mail makes voting easier by requiring less travel time, no time off from work on Election Day, reduces confusion about polling place locations, and allows voters to spend considerable time with their ballot to choose if necessary. Lowering the barrier to voting increases an individual's propensity to vote. Further, the above considerations are more likely to be a burden on voters of color, and regardless of whether they are able to surmount that burden and cast a ballot, the hurdle itself is unacceptable.<sup>155</sup> "Latino and Black voters on the mail voting list are more than twice as likely to be at risk of removal as white voters."<sup>156</sup> Arizona also has a large Native American population, who live on tribal lands further from polling locations, and are "twice as likely to be at risk of being dropped from the mail voting list as those living elsewhere."<sup>157</sup> While voters will still be able to vote in person, the knowledge about how and where to vote is an obstacle to navigate that can prevent equal voting access.

## 2. The Introduction and Passage of Restrictive Voting Laws Can be Explained by Race

Historical patterns and recent data show these attacks on voting rights are racially motivated.<sup>158</sup> "The unmitigated injury of slavery and racism did not end with abolition or the [civil rights] era; instead, like interest on debt, its impact has compounded."<sup>159</sup> A Brennan Center study that evaluated the impact of race on sponsorship of restrictive voting laws by state legislators revealed that "[t]he recent trend of restrictive voting laws lies at the intersection of race and partisanship."<sup>160</sup> The study analyzed "every restrictive voting provision introduced in every state legislature in 2021," identified the sponsors of the bills, and "then examine[d] which district-level characteristics [were] most correlated with whether a lawmaker sponsored a

---

<sup>153</sup> Stephanie Becker & Caroline Kelly, *Arizona Governor Signs Bill that Would Stop Some Voters from Automatically Receiving Mail-in Ballots*, CNN (May 11, 2021, 4:41 PM), <https://www.cnn.com/2021/05/11/politics/arizona-mail-in-voting-bill/index.html>.

<sup>154</sup> ARIZ. REV. STAT. ANN. §16-544 (2022); Wilder, *supra* note 147.

<sup>155</sup> See Morris, *New State Laws*, *supra* note 151.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See Morris, *Patterns of Restrictive Voting Bills*, *supra* note 127.

<sup>159</sup> See Codrington, *supra* note 1.

<sup>160</sup> See Morris, *Patterns of Restrictive Voting Bills*, *supra* note 127 (emphasis omitted).

restrictive voting bill.”<sup>161</sup> By comparing the racial composition of each district that a sponsor represented and the state as a whole with the level of “racial resentment” in that district, the study revealed “racial backlash” is “driving [the] surge of restrictive legislation.”<sup>162</sup> Racial backlash describes “how white Americans respond to a perceived erosion of power and status by undermining the political opportunities of minorities.”<sup>163</sup> This connection is hardly surprising given the racially motivated Jim Crow laws that precipitated the need for the VRA in the first place.<sup>164</sup>

While partisanship often serves as a proxy for race, “racial demographics are a powerful factor *independent of party* in determining where restrictive voting laws are introduced and passed.”<sup>165</sup> At a legislative district level, the study found (1) “[r]epresentatives from the whitest districts in the most racially diverse states were the most likely to sponsor anti-voter bills” and (2) “[d]istricts with higher racial resentment were more likely to be represented by lawmakers who sponsored restrictive bills.”<sup>166</sup> At the state level, “racially diverse states controlled by Republicans [were] far more likely to introduce and pass restrictive provisions.”<sup>167</sup> These findings interact to create a situation where state legislators in Whiter districts within racially diverse states introduce anti-voter laws, and the state legislature only passes them if Republicans have control of the state government. But where Republicans have control of the state legislature in non-diverse states, they do not bother to introduce or enact laws restricting voting because there is less incentive to constrain the political power of racial minorities. Unfortunately, racial resentment further explains this correlation: “districts with higher racial resentment scores were far more likely to be represented by a legislator who sponsored one of these [restrictive voting] bills.”<sup>168</sup> In fact, “the districts with the highest

---

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* The 2020 Cooperative Election Study (“CES”) measured racial resentment by evaluating “how [W]hite Americans think about the role of race in politics.” *Id.* The study noted, “it is generally a good proxy—in the aggregate—for how racially conservative Americans are.” *Id.*; see generally *Cooperative Election Study*, HARV. UNIV., <https://cces.gov.harvard.edu> (last visited Nov. 15, 2023).

<sup>163</sup> Morris, *Patterns of Restrictive Voting Bills*, *supra* note 127.

<sup>164</sup> See Codrington, *supra* note 1.

<sup>165</sup> See Morris, *Patterns of Restrictive Voting Bills*, *supra* note 127.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (defining diverse states as 50 percent or less White).

<sup>168</sup> *Id.* (“[T]hese slopes are *steep*, indicating a very strong relationship.”).

resentment scores were many times more likely to be represented by one of these lawmakers.”<sup>169</sup> So, while it is true that restrictive voting rights legislation is shaped by the interaction of race and partisanship, the regressions conducted by the Brennan Center in this study show that the lawmakers who introduced restrictive voting bills from the previously described racially diverse states, in White districts, in Republican-controlled legislatures, “also represent districts with high racial resentment scores,” even when accounting for partisanship and competitiveness of that state’s elections.<sup>170</sup> Race appeared as a driving factor for “voting rights backlash in Republican-dominated states *even when those states are not electorally competitive*.”<sup>171</sup> For example, among the most uncompetitive Republican states, the four Whitest states (Wyoming, North Dakota, Montana, and West Virginia) proposed twenty-eight restrictive laws in 2021 and the four least-White states (Mississippi, Alaska, South Carolina, and Oklahoma) introduced sixty-three.<sup>172</sup>

When enacted, these racially motivated laws have their intended effect of disproportionately and negatively impacting voters of color.<sup>173</sup> The racial-turnout gap widened across the country when states enacted stricter voter identification requirements following the *Shelby County* decision.<sup>174</sup> When states limit vote-by-mail and cut early voting hours, precincts in neighborhoods with more racial and ethnic minorities wait in longer lines to vote than in Whiter neighborhoods.<sup>175</sup> Even with vote-by-mail options, greater restrictions, in Texas, for example, made “non-white voters at least 30 percent more likely to have an application or mail ballot rejected than white voters” in the 2022 primary.<sup>176</sup> These

---

<sup>169</sup> *Id.* (emphasis omitted).

<sup>170</sup> *Id.*

<sup>171</sup> Morris, *Patterns of Restrictive Voting Bills*, *supra* note 127.

<sup>172</sup> *Id.*

<sup>173</sup> See *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>.

<sup>174</sup> See John Kuk et al., *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, 10 POL. GRPS. & IDENTITIES 126, 132 (2020), <https://doi.org/10.1080/21565503.2020.1773280>.

<sup>175</sup> See M. Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 26487, 2020), [https://www.nber.org/system/files/working\\_papers/w26487/w26487.pdf](https://www.nber.org/system/files/working_papers/w26487/w26487.pdf).

<sup>176</sup> See Kevin Morris & Coryn Grange, *Records Show Massive Disenfranchisement and Racial Disparities in 2022 Texas Primary*, BRENNAN CTR. FOR JUST. (Oct. 20, 2022), <https://www.brennancenter.org/our-work/research-reports/records-show-massive->



laws, along with racial gerrymandering, are the second generation of voter suppression Justice Ginsburg warned about in her *Shelby County* dissent.<sup>177</sup> And, to effectively confront their effects, voting rights advocates, including lawyers, must honestly contend with their racial motivations.

C. *Federal Solutions, While Ideal, Prove Unrealistic*

In 2021, the 117th Congress took steps to restore the power of the VRA to prevent racial discrimination in voting and bring the nation closer to equal representation. In March, the Democratically controlled House of Representatives passed the For the People Act of 2021 (“FPA”) as H.R. 1, which aimed to “restore the strength of the Voting Rights Act of 1965 by expressly banning partisan gerrymandering,” but the bill failed in the Senate.<sup>178</sup> Still, the FPA provides a model for the goals of a Third Reconstruction: it would have created “the first federal statutory cause of action for voters to bring claims challenging partisan gerrymandering,” and counteract the voter restrictions passed in states by setting national voting standards.<sup>179</sup>

Later that year, the John Lewis Voting Rights Advancement Act, which contains an updated preclearance formula for section 5, also passed the House of Representatives, but the bill similarly stalled in the Senate.<sup>180</sup> Alabama Representative Terri Sewell reintroduced the bill into the 118th Congress on September 19, 2023.<sup>181</sup> Despite the bill’s popularity and comprehensive approach to restoring voting rights

---

disenfranchisement-and-racial-disparities-2022-texas; Nick Corasaniti, *Mail Ballot Rejections Surge in Texas, With Signs of a Race Gap*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/us/politics/texas-primary-ballot-rejections.html>.

<sup>177</sup> See *Shelby County v. Holder*, 570 U.S. 529, 563, 566–67 (2013) (Ginsburg, J., dissenting).

<sup>178</sup> See Palandrani & Watson, *supra* note 91, at 124; For The People Act, H.R. 1, 117th Cong. § 2403(b) (2021); *Actions Overview: H.R. 1—117th Cong. (2021-2022)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1/actions> (last visited Nov. 25, 2023).

<sup>179</sup> Palandrani & Watson, *supra* note 91, at 124; Sweren-Becker, *supra* note 54.

<sup>180</sup> John R. Lewis Voting Rights Advancement Act, H.R. 4, 117th Cong. § 6 (2021).

<sup>181</sup> See Hansi Lo Wang, *Restoring the Voting Rights Act Is Still on This Alabama Democrat’s Agenda*, NPR (Sept. 19, 2023, 5:00 AM), <https://www.npr.org/2023/09/19/1199617896/john-lewis-voting-rights-act-terri-sewell>.

protections from the damage inflicted by the Supreme Court, it shows little to no hope of passing the Republican controlled House.<sup>182</sup>

The John Lewis Voting Rights Advancement Act would stop state laws that make it harder to vote from taking effect.<sup>183</sup> The John Lewis Voting Rights Advancement Act takes the *Shelby County* majority up on its offer to create a new preclearance formula.<sup>184</sup> Even in its absence, the VRA has remained “as important to democracy today as it was nearly [sixty] years ago.”<sup>185</sup> The new coverage formula would create a moving target that examines a jurisdiction’s twenty-five-year history from the point of the new voting law’s introduction, which automatically keeps the law current to avoid criticism as “outdated” in the future. The law seeks to always subject voter identification laws and limits on polling locations “to preclearance regardless of where the policies are implemented.”<sup>186</sup> The bill provides an opportunity for states or local jurisdictions to individually demonstrate preclearance is no longer necessary.<sup>187</sup> Many nongovernmental groups have called on Congress to pass the For the People Act and the John Lewis Voting Rights Advancement Act to restore the guarantees of the Fifteenth Amendment and eliminate discrimination at the ballot box.<sup>188</sup>

In the interim, the Supreme Court’s use of the so-called “Purcell Principle” makes it even harder for claimants to get relief from voting laws that violate the remaining provisions of the VRA at the precise time when relief is most important—right before an election.<sup>189</sup> The Purcell Principle states that courts should refrain from any decisions or actions, such as injunctions or stays, regarding election rules in the

---

<sup>182</sup> Andrew Garber, *Pass the John R. Lewis Voting Rights Advancement Act*, BRENNAN CTR. FOR JUST. (Sept. 19, 2023), <https://www.brennancenter.org/our-work/research-reports/pass-john-r-lewis-voting-rights-advancement-act> (“Almost 70 percent of voters support it, including 60 percent of independents and half of Republicans.”).

<sup>183</sup> See Sweren-Becker, *supra* note 54.

<sup>184</sup> See *Shelby County*, 570 U.S. at 547–54; H.R. 4.

<sup>185</sup> Rosborough & Faulks, *supra* note 49.

<sup>186</sup> Sweren-Becker, *supra* note 54.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See Fabiola Cineas, *High Voter Turnout Doesn’t Cancel Out Voter Suppression*, VOX (Sept. 9, 2022, 6:00 AM), <https://www.vox.com/policy-and-politics/2022/9/19/23356904/voter-suppression-midterm-elections> (reporting on an interview with Sean Morales-Doyle, the director of voting rights for the Brennan Center for Justice).

period of time immediately before an election.<sup>190</sup> Notwithstanding the undefined period of time the court would consider too close to an election to change the rules, this principle allows state legislatures, that are already no longer subject to preventative preclearance measures, to prevent any reversal of restrictive voting rules simply based on the timing of the decision.<sup>191</sup> Critics of the Purcell Principle point out that the judicially created rule has no basis in the Constitution or federal statutes, yet parties hostile to voting rights employ this principle to prevent the Court from granting relief from racially discriminatory voting practices.<sup>192</sup> Without the preclearance requirement of section 5 in effect, states and other political jurisdictions can move forward with voting rule changes, and by the sheer glacial pace of litigation, a rule that would otherwise violate the VRA could remain in place for the next election and impact the results.

## VI. THIRD RECONSTRUCTION

Constitutional law scholar, Wilfred Codrington III, said it best: “Today, another Reconstruction is needed to avoid wasting the promise of its predecessors.”<sup>193</sup> The present state of voting rights indicates that America needs a Third Reconstruction to build upon the imperfect progress of the past two and bring America closer to its founding ideals.

### A. *Parallels to Past Retrenchment Show Why a Third Reconstruction Is the Only Sufficient Solution*

“We like to think of American history as a continuous march of progress toward greater freedom, greater equality, and greater justice. But sometimes we move backward, dramatically so.”<sup>194</sup> The Supreme Court’s *Shelby County* and *Brnovich* decisions and voter restrictions at the state level parallel the actions and events that preceded the Second

---

<sup>190</sup> See *The Purcell Principle: A Presumption Against Last-Minute Changes to Election Procedures*, SCOTUSBLOG [hereinafter *Last Minute Changes*], <https://www.scotusblog.com/election-law-explainers/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures> (last visited Nov. 25, 2023).

<sup>191</sup> See *The Purcell Principle: How Close Is Too Close to an Election?*, DEMOCRACY DOCKET (May 20, 2022), <https://www.democracydocket.com/analysis/the-purcell-principle-how-close-is-too-close-to-an-election>.

<sup>192</sup> *Last Minute Changes*, *supra* note 190.

<sup>193</sup> See Codrington, *supra* note 1.

<sup>194</sup> See ROTHSTEIN, *supra* note 22, at 39.

Reconstruction.<sup>195</sup> Just as the Court eviscerated the Civil War Amendments, rendering the Fourteenth and Fifteenth Amendments “dead letters,” the *Shelby County* and *Brnovich* decisions dramatically undercut the VRA.<sup>196</sup>

The current pattern of restrictive voting rights restrictions in states across the country parallels the backlash of the Jim Crow era and mass incarceration following the Civil Rights Movement. The Court’s majority in *Shelby County* expected that the declining racial turnout gap would continue, but this was “a key error.”<sup>197</sup> After *Shelby County*, the new voting restrictions that surged in previously covered localities had a disparate impact on communities of color.<sup>198</sup> Every year since *Shelby County*, except for 2018, the White-Black turnout gap increased.<sup>199</sup> And now, facially neutral laws with both a racist cause and effect lingering below the surface, just like the Jim Crow voting laws, can satisfy the *Brnovich* standard.<sup>200</sup> In the first period of retrenchment, Redemptionists denied Black voting rights “[t]o reclaim their lost power, they perfected the use of organized terror, fraudulent election claims, and Black labor exploitation through contracts designed to compel permanent servitude.”<sup>201</sup> The racial discrimination in voting laws today may appear more subtle than those of the Jim Crow era, but they are similarly motivated and effective.<sup>202</sup> In both *Shelby County* and *Brnovich*, the Court ignored the point of the VRA: “ending state

---

<sup>195</sup> See Codrington, *supra* note 1; Jackie Salinger, *A Third Reconstruction: Cornell William Brooks Calls for a New Protest Movement*, THE POL. (Apr. 5, 2015), <https://thepolitic.org/article/a-third-reconstruction-cornell-william-brooks-calls-for-a-new-protest-movement> (describing the Yale Law School address by then NAACP President Cornell William Brooks titled “Civil Rights in America, from Selma to Ferguson: Captives or Creators of History”).

<sup>196</sup> See Codrington, *supra* note 1; Salinger, *supra* note 195.

<sup>197</sup> Coryn Grange & Kevin Morris, *10 Years After SCOTUS Gutted Voting Rights Act, Alabama Turnout Gap Is Worse*, BRENNAN CTR. FOR JUST. (June 22, 2023) [hereinafter Grange & Morris, *10 Years After SCOTUS Gutted VRA*], <https://www.brennancenter.org/our-work/analysis-opinion/10-years-after-scotus-gutted-voting-rights-act-alabama-turnout-gap-worse>.

<sup>198</sup> See Sweren-Becker, *supra* note 54; KLAIN ET AL., *supra* note 144, at 4.

<sup>199</sup> Grange & Morris, *10 Years After SCOTUS Gutted VRA*, *supra* note 197.

<sup>200</sup> See Johnson & Feldman, *supra* note 129.

<sup>201</sup> See Peniel E. Joseph, *The Perils and Promise of America’s Third Reconstruction*, TIME (Sept. 15, 2022, 6:00 AM), <https://time.com/6211887/america-third-reconstruction>.

<sup>202</sup> See *id.*

resistance that had disregarded the dignity of people since Reconstruction.”<sup>203</sup>

B. *What Will the Next Reconstruction Look Like?*

“America’s Third Reconstruction offers the opportunity for democratic renewal that centers racial justice as the beating heart of a new civic nationalism capable of restoring our national honor.”<sup>204</sup> Similar to the Second Reconstruction, which started anywhere between when President Truman desegregated the military in 1948 and President Johnson signed the Civil Rights Act in 1964,<sup>205</sup> the beginning of the Third Reconstruction is unclear. “Whereas the Compromise of 1877 marked the swift and dramatic demise of the First Reconstruction, the Second faded away slowly and quietly,” but the cycle of progress and retrenchment is still evident.<sup>206</sup> Some scholars contend the Third Reconstruction began with the election President Barack Obama in 2008,<sup>207</sup> but the Court decided *Shelby County* during his second term, and his successor appointed three conservative Supreme Court justices hostile to voting rights.<sup>208</sup> The election of Donald Trump represented racial backlash and signaled that this period of retrenchment is ongoing.<sup>209</sup> Wilfred Codrington III argues the historic Black Lives Matter protests during the summer of 2020 could have also started the Third Reconstruction, but just one year later the Court eviscerated the remaining federal safeguard against racial discrimination in voting in *Brnovich*.<sup>210</sup>

The Supreme Court delivered a surprise win for voting rights in its 2023 *Allen v. Milligan* decision, which invalidated Alabama’s

---

<sup>203</sup> Crayton & Karson, *supra* note 115.

<sup>204</sup> Joseph, *supra* note 201.

<sup>205</sup> See Codrington, *supra* note 1.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*; Yael Bromberg, *The Future Is Unwritten: Reclaiming the Twenty-Sixth Amendment*, 74 RUTGERS U. L. REV. 1671, 1693 (2023); Joseph, *supra* note 201.

<sup>208</sup> See Ian Millhiser, *Why Trump’s Attempt to Steal the Election Was Too Much Even for Republican Judges*, VOX (Dec. 15, 2020, 8:30 AM), <https://www.vox.com/22168109/trump-coup-steal-election-judges-judiciary-supreme-court-gorsuch-kavanaugh-barrett>; Ariane de Vogue, *Donald Trump’s Lasting Impact on the Supreme Court*, CNN POL. (Dec. 7, 2022, 5:32 PM), <https://www.cnn.com/2022/12/07/politics/trump-supreme-court-influence-moore-harper/index.html>.

<sup>209</sup> Codrington, *supra* note 1; Harvard Case Comment, *supra* note 48, at 481.

<sup>210</sup> Codrington, *supra* note 1.

congressional maps for violating section 2 of the VRA.<sup>211</sup> Alabama's redistricting—the state's first since *Shelby County* removed Alabama's preclearance requirement and the 1982 amendment clarified the section 2 standard—diluted the voting power of voters of color, a direct violation of section 2.<sup>212</sup> The Court ordered the Alabama legislature to redraw the map to create two majority-minority districts, but state lawmakers continued to refuse to comply; the Court then ordered a special master to oversee the process.<sup>213</sup> The NAACP described this decision as “a historic win in the fight for voting rights in the face of countless continued attacks on democracy.”<sup>214</sup> Still, voting rights remain vulnerable, and it is unclear if the Third Reconstruction has begun.<sup>215</sup> Notably for this Comment, the decision only protects “against racial gerrymandering, not against voting restrictions.”<sup>216</sup> Two possible challenges currently percolating through lower courts that the Court did not consider include (1) temporal limitations on the constitutionality of race-conscious redistricting, and (2) whether the VRA actually includes a private right of action.<sup>217</sup>

While *Milligan* provided “a welcome pause,” the attacks on voting rights continue on all sides.<sup>218</sup> More recently, the Eighth Circuit held that section 2 does not provide a private right of action for individuals or groups to sue for violations of the law.<sup>219</sup> For a half-century, the Supreme Court has acknowledged a private right of action under section 2 and decided VRA cases with private plaintiffs—both for and

---

<sup>211</sup> See *Allen v. Milligan*, 143 S. Ct. 1487, 1498 (2023); Richard L. Hasen, *There Are Still Two Major Legal Threats to the Voting Rights Act*, SLATE (June 12, 2023, 5:45 AM) [hereinafter Hasen, *Legal Threats*], <https://slate.com/news-and-politics/2023/06/supreme-court-term-voting-rights-act-threats.html>.

<sup>212</sup> *Milligan*, 143 S. Ct. at 1503, 1506; see *Allen v. Milligan FAQ*, LEGAL DEF. FUND, <https://www.naacpldf.org/case-issue/merrill-v-milligan-faq> (last visited Nov. 16, 2023).

<sup>213</sup> *Id.*; Hasen, *Legal Threats*, *supra* note 211 (“[T]he [C]ourt upheld [s]ection 2’s constitutionality against Alabama’s claim that Congress only has the power to ban intentional discrimination, not just those voting laws with discriminatory effects. Citing earlier precedents, the [C]ourt concluded that Congress had the power through the 15th Amendment to dismantle laws with racially discriminatory effects as well.”).

<sup>214</sup> See *Allen v. Milligan FAQ*, *supra* note 212.

<sup>215</sup> See Hasen, *Legal Threats*, *supra* note 211.

<sup>216</sup> Singh & Carter, *supra* note 78.

<sup>217</sup> See Hasen, *Legal Threats*, *supra* note 211.

<sup>218</sup> *Id.*

<sup>219</sup> *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 22-1395, 2023 WL 8011300, at \*1 (8th Cir. Nov. 20, 2023).

against those plaintiffs.<sup>220</sup> Nevertheless, in *Brnovich*, Justice Gorsuch (joined by Justice Thomas) indicated an appetite to consider this issue in future cases writing, “[o]ur cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under [section] 2.”<sup>221</sup> This legal argument is dangerous because “[r]ights so foundational to self-government and citizenship should not depend solely on the discretion or availability of the government’s agents for protection.”<sup>222</sup> And even with enough federal government resources, if only the attorney general can file VRA challenges, “it could sharply limit their number and make challenges largely dependent on partisan politics.”<sup>223</sup> Meanwhile, other circuit courts continue to follow the Supreme Court’s tradition of recognizing private rights of action under section 2.<sup>224</sup>

Regardless of when the Third Reconstruction starts, *where* it starts must be in the states. During both prior Reconstruction periods, federal laws changed to fix problems in the states. Unfortunately, given the current political reality, federal action on voting rights cannot save the day this time. The Republicans in Congress refuse to support voting rights legislation to restore the VRA and strengthen our democracy.<sup>225</sup> Even if Democrats manage to flip the House of Representatives and retain control of the Senate and White House in 2024, the John Lewis Voting Rights Restoration Act and For The People Act cannot pass through the Senate because of the filibuster and insufficient Republican support. Further, until the composition of the Court changes, voting rights advocates will reach a dead end with litigation challenging racial discrimination in voting regulations. Besides, while federal action made significant strides in the nineteenth

---

<sup>220</sup> *Id.* at \*12–13 (Smith, J., dissenting) (listing numerous cases decided by the Court).

<sup>221</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring).

<sup>222</sup> *Ark. State Conf. NAACP*, 2023 WL 8011300, at \*12 (Smith, J., dissenting).

<sup>223</sup> Christina A. Cassidy & Ayanna Alexander, *Federal Appeals Court Deals a Blow to Voting Rights Act, Ruling that Private Plaintiffs Can’t Sue*, ASSOCIATED PRESS (Nov. 20, 2023, 7:06 PM), <https://apnews.com/article/voting-rights-federal-court-private-lawsuits-00b9c4bb2174aa8077db296c3edf7c79>.

<sup>224</sup> *See, e.g., Robinson v. Ardoin*, No. 22-30333, 2023 WL 7711063, at \*4–5 (5th Cir. Nov. 10, 2023).

<sup>225</sup> Lisa Hagan, *Republicans Block Voting Rights Bill Again, Triggering Action on Filibuster Reform*, U.S. NEWS & WORLD REP. (Jan. 19, 2022, 8:58 PM), <https://www.usnews.com/news/politics/articles/2022-01-19/republicans-block-voting-rights-bill-again-triggering-action-on-filibuster-reform>.

and twentieth centuries, the progress of each subsequently crumbled.<sup>226</sup>

Ultimately, the data shows that the once-shrinking racial turnout gap relied upon in *Shelby County* did not actually indicate “the eradication of race discrimination in elections.”<sup>227</sup> States have enacted more restrictive voting laws between January 1 and October 10 of 2023 than any year since *Shelby County*, except for 2021, the year of *Brnovich*.<sup>228</sup> For example, a new vote-by-mail law in North Carolina invalidates all mail-in ballots mailed before but received after Election Day.<sup>229</sup> This law alone would have invalidated more than 11,600 ballots in the 2020 presidential election.<sup>230</sup> More recently, several polling locations in Hinds County, Mississippi, where 83 percent of the population is Black, ran out of ballots multiple times on Election Day in November 2023.<sup>231</sup> Mississippi was previously covered by preclearance, but multiple laws passed since *Shelby County* eliminated early voting and severely restricted absentee voting, so most voters cast their ballots on Election Day itself.<sup>232</sup> The shortage of ballots, along with the restrictive voting practices, created long wait times, and many voters did not vote.<sup>233</sup> On the election subversion front, Texas intensified the secretary of state’s control over day-to-day election administration in pro-voter jurisdictions like Houston in Harris County.<sup>234</sup> Looking ahead to the 2024 general elections, new state laws in effect will include at least seventeen restrictive laws in fourteen states and seven election interference laws across six states.<sup>235</sup> Meanwhile, at

---

<sup>226</sup> See Codrington, *supra* note 1.

<sup>227</sup> Grange & Morris, *10 Years After SCOTUS Gutted VRA*, *supra* note 197.

<sup>228</sup> *Voting Laws Roundup: October 2023*, BRENNAN CTR. FOR JUST. (Oct. 19, 2023) [hereinafter *October 2023 Roundup*], <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2023>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Paige Anderholm, *Hinds County, Mississippi Experiences Election Day Polling Location Meltdown*, DEMOCRACY DOCKET (Nov. 8, 2023), <https://www.democracymeltdown.com/news-alerts/hinds-county-mississippi-experiences-election-day-polling-location-meltdown>.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *October 2023 Roundup*, *supra* note 228.

<sup>235</sup> *Id.* Restrictive laws include legislation that makes it harder for eligible voters “to register, stay on voter rolls, or cast a ballot as compared to existing state law.” *Voting Laws Roundup: June 2023*, BRENNAN CTR. FOR JUST. (June 14, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-june-2023>.



least forty-six expansive laws to protect voting access will be in effect across twenty-three states.<sup>236</sup>

“There remains a stark divide between states” who are expanding or restricting voting rights.<sup>237</sup> Even while states continue to enact restrictive voting and election subversion laws, expansive voting laws outnumbered them three to one in 2023.<sup>238</sup> All fifty state legislatures collectively introduced at least 606 voter expansion bills in 2023.<sup>239</sup> And in the 2022 midterms, “voters largely rejected election-denying candidates in swing states.”<sup>240</sup> As of December 2023, at least “six states have passed state level Voting Rights Acts and four more are moving in legislatures.”<sup>241</sup>

Thus, America can, and must, break this cycle and create change at the state level first; and it may have already begun. State legislators are introducing more vote expansion bills than vote suppression bills. In the first weeks of their 2023 legislative sessions, “lawmakers in at least [thirty-four] states have pre-filed or introduced at least 274 bills that would expand voting access.”<sup>242</sup> In April 2023, progressive Judge Janet Protasiewicz won a Wisconsin Supreme Court seat, tipping the balance of the court away from conservative control for the first time in fifteen years.<sup>243</sup> This election marked a huge win for voting rights advocates at a crucial moment because new litigation could overturn the partisan-gerrymandered state district maps the conservative court recently allowed.<sup>244</sup> It could be a leading indicator of what will become

---

june-2023. Election interference laws include legislation that “either threatens the people and processes that make elections work or increase opportunities for partisan interference in election administration or outcomes.” *Id.*

<sup>236</sup> *October 2023 Roundup*, *supra* note 228.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Garber, *supra* note 182.

<sup>242</sup> *Voting Laws Roundup: February 2023*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2023> (Feb. 27, 2023) (outnumbering the 150 restrictive voting bills introduced by legislators in at least thirty-two states).

<sup>243</sup> Shawn Johnson, *For The First Time in 15 Years, Liberals Win Control of the Wisconsin Supreme Court*, NPR (Apr. 4, 2023, 9:57 PM), <https://www.npr.org/2023/04/04/1167815077/wisconsin-supreme-court-election-results-abortion-voting-protasiewicz-kelly>.

<sup>244</sup> See Dustin Brown, *The Stakes in Wisconsin’s Supreme Court Election*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/analysis-opinion/stakes-wisconsin-supreme-court-election> (Apr. 5, 2023).

the Third Reconstruction. Also, in many states, voters are taking matters into their own hands—bypassing state legislatures and approving ballot measures on issues like reproductive health care, recreational marijuana, taxes, and even voting.<sup>245</sup> Ballot initiatives may be a viable path forward for state level voting rights protection. Although progress is never a straight line, America may look back on these moments as a breadcrumb beginning and do our part to propel the movement forward.<sup>246</sup>

The Black Lives Matter movement that gained steam in the summer of 2020 also signaled that America may be on the precipice of a third pivotal period of advancing racial equality in America's life.<sup>247</sup> The moment is ripe for a Third Reconstruction, and the present lack of voting rights calls for urgent change at the state level. As civil rights activist Rev. William Barber II said, "Jim Crow did not retire: he went to law school and launched a second career. Meet James Crow, Esquire."<sup>248</sup> In response, members of the legal community can help jumpstart the Third Reconstruction. Members of the legal community should strive to be part of the solution. As demonstrated by the Civil War Amendments and the VRA, the law should be a tool for building a multiracial democracy. We can draw from social justice lawyering tools, understand the different power dynamics at play, and turn to grassroots mobilization at the state level.<sup>249</sup> "We have, just as we did during two earlier periods of reconstruction, a grave moral and political choice to make."<sup>250</sup>

---

<sup>245</sup> See Helen Brewer, *Voters Approve Ballot Measures on Abortion Rights, Recreational Cannabis*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 8, 2023), <https://www.ncsl.org/state-legislatures-news/details/voters-approve-ballot-measures-on-abortion-rights-recreational-cannabis>.

<sup>246</sup> See Hasen, *Legal Threats*, *supra* note 211. This fragmented start evokes the back-and-forth at the start of the Second Reconstruction, for example, when the *Brown* opinion ordered the desegregation of public schools and public backlash followed.

<sup>247</sup> See Keeanga-Yamahtta Taylor, *Did Last Summer's Black Lives Matter Protests Change Anything?*, THE NEW YORKER (Aug. 6, 2021), <https://www.newyorker.com/news/our-columnists/did-last-summers-protests-change-anything>.

<sup>248</sup> See William J. Barber II & Jonathan Wilson-Hartgrove, *The Strange Career of James Crow, Esquire*, THE ATL. (Feb. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/02/jim-crows-new-legal-career/459879>.

<sup>249</sup> Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 155 (2016).

<sup>250</sup> Joseph, *supra* note 201.

## V. CONCLUSION

America needs to reckon with its past to enshrine basic voting rights, and there is a role for lawyers in this process. Understanding the patterns of voting rights retrenchment following the first and second Reconstruction eras indicates the country needs a major legal and political movement to bring it closer to a more perfect union.

