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BLOCKING THE BALLOT BOX: THE REPUBLICAN WAR ON VOTING RIGHTS

BRENDAN WILLIAMS*

INTRODUCTION

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INTRODUCTION

*Today is a triumph for freedom as huge as any
victory that’s ever been won on any battlefield.*

—President Lyndon B. Johnson on signing
the Voting Rights Act of 1965¹

*The vote is the most powerful nonviolent change
agent you have in a democratic society. You must
use it because it is not guaranteed. You can lose it.*

—Civil rights icon and Georgia Congressman John Lewis²

Under the 15th Amendment to the U.S. Constitution, “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.”³ Yet, as one law professor recounts, “The powerful injunction of the amendment was, however, neutralized soon after its adoption by early judicial hostility.”⁴

* Brendan Williams is a prolific writer on civil rights and health care issues outside of his work as the president and CEO of the New Hampshire Health Care Association. Brendan earned his JD from the University of Washington School of Law, and a MA in Criminal Justice from Washington State University. He is the author of over 35 published law review articles, and the views expressed in this Article are his own. This Article is dedicated to those fighting to preserve our democracy. And we shall overcome.

1. *Text of Johnson’s Statement on Voting Rights Law*, N.Y. TIMES, Aug. 7, 1965, at 8, <https://www.nytimes.com/1965/08/07/archives/text-of-johnsons-statement-on-voting-rights-law.html> [https://perma.cc/3LXN-9HU2].

2. *John Lewis, Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html> [https://perma.cc/H7YV-GTVE].

3. U.S. CONST. amend. XV, § 1.

4. Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389, 391 (1985).

Civil rights activism in 1965 shone a bright national light on barriers to Black voting, with mass arrests in Alabama—including the Reverend Dr. Martin Luther King, Jr., who was jailed in Selma, Alabama.⁵ Upon his release he traveled to Washington, D.C. to press for a new voting rights law,⁶ and President Lyndon Johnson pledged support in a meeting with the civil rights leader.⁷ A month later, brutality against peaceful marchers in Selma, Alabama hurried the timetable for enacting such a law.⁸

In a March 15 address to Congress, Johnson, “[i]n his slow Southern accent,” urged immediate action and spoke of “a crippling legacy of bigotry and injustice.”⁹ Although Johnson was interrupted by applause and two standing ovations, the *New York Times* described what TV viewers saw—the displeasure of the Southern segregationists: “They saw Senator Sam Erwin of North Carolina sitting with folded arms in massive disapproval. They saw Senator Allen Ellender of Louisiana slumped gloomily in his seat.”¹⁰

5. See John Herbers, *Dr. King and 770 Others Seized in Alabama Protest*, N.Y. TIMES, Feb. 2, 1965, at 1, <https://www.nytimes.com/1965/02/02/archives/dr-king-and-770-others-seized-in-alabama-protest-dr-king-is-seized.html> [<https://perma.cc/V962-U4KC>]; John Herbers, *520 More Seized in Alabama Drive*, N.Y. TIMES, Feb. 3, 1965, at 1, <https://www.nytimes.com/1965/02/03/archives/520-more-seized-in-alabama-drive-dr-king-reads-bible-in-jail-as.html> [<https://perma.cc/6BBF-PTQG>] (“While the Rev. Dr. Martin Luther King Jr. lay on his jailhouse bunk reading the Bible today, about 520 of his followers were arrested in scattered clashes with the authorities.”); John Herbers, *Negroes Step Up Drive in Alabama; 1,000 More Seized*, N.Y. TIMES, Feb. 4, 1965, at 1, <https://www.nytimes.com/1965/02/04/archives/negroes-step-up-drive-in-alabama-1000-more-seized-students-arrested.html> [<https://perma.cc/42T6-NU2Z>] (“More than 1,000 Negro schoolchildren were arrested today here and in the nearby town of Marion, to which the Rev. Dr. Martin Luther King Jr.’s voter-registration campaign has spread in recent days.”).

6. See Roy Reed, *Dr. King to Seek New Voting Law*, N.Y. TIMES, Feb. 6, 1965, at 1, <https://www.nytimes.com/1965/02/06/archives/dr-king-to-seek-new-voting-law-freed-in-segregationist-will-fly-to.html> [<https://perma.cc/MAE5-C4CZ>].

7. See John D. Pomfret, *President Promises Dr. King Vote Move*, N.Y. TIMES, Feb. 10, 1965, at 1, <https://www.nytimes.com/1965/02/10/archives/president-promises-dr-king-vote-move-johnson-promises-dr-king-hell.html> [<https://perma.cc/YYN5-EGH9>].

8. See Nan Robertson, *Johnson Pressed for a Voting Law*, N.Y. TIMES, Mar. 9, 1965, at 1, <https://www.nytimes.com/1965/03/09/archives/johnson-pressed-for-a-voting-law-members-of-congress-voice-disgust.html> [<https://perma.cc/PUD2-8R5D>] (“Congressional pressure for a new voting rights law mounted today as members of both parties expressed anger and disgust at Alabama’s violent repression of the Negro marchers in Selma, Ala.”). In an irony by today’s standards, some House Republicans criticized Johnson for not moving fast enough. See E.W. Kenworthy, *House G.O.P. Unit Says Johnson Lags on Selma*, N.Y. TIMES, Mar. 9, 1965, at 23, <https://www.nytimes.com/1965/03/10/archives/house-gop-unit-says-johnson-lags-on-selma-asserts-prompt-action.html> [<https://perma.cc/PU9X-GC96>].

9. Tom Wicker, *Johnson Urges Congress at Joint Session to Pass Law Insuring Negro Vote*, N.Y. TIMES, Mar. 16, 1965, at 1, <https://www.nytimes.com/1965/03/16/archives/johnson-urges-congress-at-joint-session-to-pass-law-insuring-negro.html> [<https://perma.cc/SH83-5EPC>].

10. *Id.* They would later have no success against the legislation itself: “Three times

Johnson laid out the framework for the legislation,¹¹ and in carrying it out, his attorney general, Nicholas deB. Katzenbach, worked closely with the Senate minority leader, Everett Dirksen (R., Ill.).¹² Drafted to effectuate the Fifteenth Amendment, the Voting Rights Act (VRA) of 1965 outlawed means used by Southern states to block voting participation, and implemented federal oversight.¹³

As was reported at the time:

The states and counties that will be automatically covered by the act are those that have literacy tests and had less than 50 per cent of their voting-age population registered or voting in the Presidential election of 1964.

This formula covers the states of Alabama, Mississippi, Louisiana, Georgia, South Carolina and Virginia, and about 34 counties in North Carolina.¹⁴

Although the VRA was born out of bipartisanship, partisan views on voter participation changed. As Myron B. Pitts, the Black opinion editor of a North Carolina newspaper, wrote, “barriers and attempts to put road blocks in the path of Black people’s voting rights stem from a single political reality: A big majority of African Americans tend to vote for Democratic candidates.”¹⁵ Or, as two law professors wrote in the *Iowa Law Review* in 2014, “The implications

today, Senator Sam J. Ervin Jr. of North Carolina led a Southern assault, on the voting section of the civil rights bill, and three times the Southerners were routed.” E.W. Kenworthy, *Rights Bloc Bars Curbs on Voting*, N.Y. TIMES, June 14, 1964, at 1, <https://www.nytimes.com/1964/06/14/archives/rights-bloc-bars-curbs-on-voting-southern-senators-beaten-again-in.html> [<https://perma.cc/HR58-46KB>].

11. See Wicker, *supra* note 9. As one account noted of Johnson’s speech, “Throughout the speech, Johnson’s sense of moral indignation is unmistakable—and worth noting in light of last year’s film ‘Selma,’ which portrayed Johnson as a more reluctant warrior in the fight for the Voting Rights Act than he actually was.” Jim Rutenberg, *The Speech That Defined the Fight for Voting Rights in Congress*, N.Y. TIMES (Aug. 6, 2015), <https://www.nytimes.com/2015/08/06/magazine/the-speech-that-defined-the-fight-for-voting-rights-in-congress.html> [<https://perma.cc/8VX9-36EC>].

12. See E.W. Kenworthy, *Dirksen Drafting a Broader Bill on Voting Rights*, N.Y. TIMES, Mar. 31, 1965, at 18, <https://www.nytimes.com/1965/03/31/archives/dirksen-drafting-a-broader-bill-on-voting-rights.html> [<https://perma.cc/TVG2-QS7A>] (“Mr. Dirksen and Mr. Katzenbach were the principal authors of the bill that President Johnson submitted to Congress March 17.”).

13. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

14. E.W. Kenworthy, *Johnson Signs Voting Rights Bill, Orders Immediate Enforcement 4 Suits Will Challenge Poll Tax*, N.Y. TIMES (Aug. 7, 1965), <https://archive.nytimes.com/www.nytimes.com/library/national/race/080765race-ra.html> [<https://perma.cc/HZ32-DZRN>].

15. Myron B. Pitts, *Black Votes Matter; Don’t Believe Anyone Who Says Otherwise*, FAYETTEVILLE OBSERVER (Oct. 10, 2020, 7:30 AM), <https://www.fayobserver.com/story/opinion/columns/2020/10/10/black-votes-matter-don-t-believe-anyone-who-says-otherwise/5934878002> [<https://perma.cc/HC5P-6JUJ>].

of . . . hyper-partisanship for voting rights policy is to transform a cause clothed in the moral righteousness of the civil rights movement to a cause defined only by partisan politics.”¹⁶

Thus, in 1982, in response to a lawsuit filed in 1981 by the Democratic National Committee (DNC), the Republican National Committee (RNC) entered a consent decree to prevent it from engaging in voter intimidation practices.¹⁷ The decree was updated in 1987, 1990, and 2004 after Republicans violated it.¹⁸ The decree expired December 2017.¹⁹ Since then, Republicans have made the most of their freedom to suppress votes, aided and abetted by a 2013 decision of the U.S. Supreme Court that effectively eviscerated the VRA,²⁰ damage that was expanded upon in a 2021 Court decision.²¹

This Article addresses threats to the right to vote that have arisen since 2018, when voter suppression efforts were key to denying Stacey Abrams, the Black Democratic nominee, victory over Republican Brian Kemp in the Georgia gubernatorial race, while Kemp, in administering his own election while Georgia’s Secretary of State, “laid out a chilling blueprint of voting suppression for other states to follow.”²²

This Article begins by examining the early Republican voter intimidation tactics that resulted in a consent decree, as these can be viewed as part of a continuum to the present day. It discusses the two U.S. Supreme Court cases, in 2013 and 2021, that have effectively nullified the Voting Rights Act. It examines the actions and rhetoric of President Donald Trump, which have had the effect of supersizing Republican voter suppression efforts. It shares the examples of unprecedented state actions in 2021 to block the ballot box. Finally, it discusses the feeble Democratic congressional efforts to prevent and reverse trends that threaten our very democracy.

I. THE CONSENT DECREE

The 1982 Consent Decree forbidding the RNC from engaging in voter suppression targeting racial minorities was born out of litigation

16. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1428 (2014).

17. See Van R. Newkirk II, *The Republican Party Emerges From Decades of Court Supervision*, ATLANTIC (Jan. 9, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-gop-just-received-another-tool-for-suppressing-votes/550052> [https://perma.cc/8ECL-EGVY].

18. See *id.*

19. See *id.*

20. See *Shelby County v. Holder*, 570 U.S. 529, 540 (2013).

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

22. Brendan Williams, *Forget Kanye: Minority Voter Suppression is on the March*, 62 HOW. L. J. 399, 417, 417 (2019).

based upon the following allegations of misconduct during the 1981 New Jersey gubernatorial election:

The RNC allegedly created a voter challenge list by mailing sample ballots to individuals in precincts with a high percentage of racial or ethnic minority registered voters and, then, including individuals whose postcards were returned as undeliverable on a list of voters to challenge at the polls. The RNC also allegedly enlisted the help of off-duty sheriffs and police officers to intimidate voters by standing at polling places in minority precincts during voting with “National Ballot Security Task Force” armbands. Some of the officers allegedly wore firearms in a visible manner.²³

In 1987 the decree was modified again, to settle litigation over alleged misconduct in Louisiana during the 1986 Congressional elections, where “the RNC allegedly created a voter challenge list by mailing letters to African-American voters and, then, including individuals whose letters were returned as undeliverable on a list of voters to challenge.”²⁴ In response to a discovery request, the RNC had produced a damning

memorandum in which its Midwest Political Director stated to its Southern Political Director that “this program will eliminate at least 60,000–80,000 folks from the rolls . . . If it’s a close race . . . which I’m assuming it is, this could keep the [B]lack vote down considerably.”²⁵

In 1990, the North Carolina Republican Party sent 150,000 postcards “to residents of predominantly African-American precincts. This program allegedly attempted to intimidate voters by warning that it is a ‘federal crime . . . to knowingly give false information about your name, residence or period of residence to an election official.’”²⁶ Moreover, “[t]he postcards falsely stated that there was a 30-day minimum residency requirement prior to the election during which voters must have lived in the precinct in which they cast their ballot.”²⁷ While the RNC was not proven responsible for the mailing, a U.S. District Court “found that the RNC violated the Consent Decree by failing to give the state parties guidance on unlawful practices under the Consent Decree or copies of the Decree

23. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 196 (3d Cir. 2012), *cert. denied*, 568 U.S. 1138 (2013).

24. *Id.* at 197.

25. *Id.*

26. *Id.* at 198.

27. *Id.*

when the RNC gave them ballot security instructional and informational materials.”²⁸

Finally, in 2004, a Black Ohio resident, Ebony Malone, brought an action against the RNC

alleging that the RNC had violated the Consent Decree by participating in the compilation of a predominantly-minority voter challenge list of 35,000 individuals from Ohio. Malone’s name was on the list. To compile the list, the RNC had sent a letter to registered voters in high minority concentration areas of Cleveland and the Ohio Republican Party sent a second mailing approximately a month later. Registered voters whose letters were returned as undeliverable were added to the challenge list.²⁹

A U.S. District Court “found that the RNC had violated the procedural and substantive provisions of the Consent Decree by participating with the Ohio Republican Party in devising and implementing the ballot security program and failing to obtain preclearance for the program.”³⁰

In 2012, the U.S. Third Circuit Court of Appeals upheld a U.S. District Court decision declining to lift the decree, writing,

[t]he RNC asks that our Court vacate a decree that has as its central purpose preventing the intimidation and suppression of minority voters. When, as here, a party voluntarily enters into a consent decree not once, but twice, and then waits over a quarter of a century before filing a motion to vacate or modify the decree, such action gives us pause.³¹

However, the District Court had set an expiration date for the decree of December 1, 2017.³²

II. EVISCERATING THE VOTING RIGHTS ACT

As one scholar wrote:

The “crown jewel” of the Voting Rights Act is Section 5, which requires jurisdictions that fall within a coverage formula laid out in Section 4(b) to obtain federal “preclearance” whenever they “enact or seek to administer” a change in any of their voting

28. *Id.*

29. *Democratic Nat’l Comm.*, 673 F.3d at 198.

30. *Id.* at 199.

31. *Id.* at 203.

32. *Id.* at 218.

practices or procedures. In order to obtain preclearance, a jurisdiction must demonstrate that the change in its law does not have the purpose and will not have the effect of discriminating on the basis of race, color, or membership in a language minority group.³³

In *Shelby County v. Holder*,³⁴ Chief Justice John Roberts wrote that “[t]he Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism.”³⁵ He dourly noted of the VRA’s protections that “[n]early 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031.”³⁶ Yet he asserted categorically that “[t]here is no denying . . . that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”³⁷

While Roberts found that Black voter registration had significantly increased since 1965, he acknowledged that “voting discrimination still exists; no one doubts that. The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements.”³⁸ He stated that “despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.”³⁹

Despite “great strides,” Roberts complained that “the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act’s unusual remedies have grown even stronger.”⁴⁰ The Court held it had “no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.”⁴¹

33. Cody Gray, *Savior Through Severance: A Litigation-Based Response to Shelby County v. Holder*, 50 HARV. C.R.-C.L. L. REV. 49, 50–51 (2015).

34. 570 U.S. 529 (2013).

35. *Id.* at 534–35.

36. *Id.* at 535.

37. *Id.* (emphasis added).

38. *Id.* at 536.

39. *Id.* at 544–45.

40. *Shelby County*, 570 U.S. at 549.

41. *Id.* at 557 (Thomas, J., concurring).

This meant states could enact discriminatory laws with no Department of Justice scrutiny, which seemed to make meaningless the majority's claim that the "decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2."⁴² The Court artfully stated that "[w]e issue no holding on § 5 itself, only on the coverage formula."⁴³ The Court punted to Congress to come up with a new preclearance coverage formula: "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."⁴⁴ Nothing has been done since.⁴⁵

For the four dissenting justices, Justice Ruth Bader Ginsburg wrote that "the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history."⁴⁶ She noted that its 2006 extension had passed overwhelmingly—unanimously in the Senate—and "President Bush signed it a week later, on July 27, 2006, recognizing the

42. *Id.*

43. *Id.* Justice Clarence Thomas would have struck down Section 5 altogether. See *id.* at 557 (Thomas, J., concurring) ("I would find § 5 of the Voting Rights Act unconstitutional as well."). Thomas had wanted to do this as far back as 2009. See *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 229 (2009) (Thomas J., concurring in part and dissenting in part) ("[T]he violence, intimidation, and subterfuge that led Congress to pass § 5 and this Court to uphold it no longer remains."). The wife of Thomas is conservative activist Ginni Thomas, who has attacked the "Black Lives Matter" movement. See Patricia Sullivan, *A Small, Mostly White Virginia Town Put Up a 'Black Lives Matter' Banner. Ginni Thomas Denounced It.*, WASH. POST (July 10, 2020), https://www.washingtonpost.com/local/virginia-politics/ginni-thomas-black-lives-matter-clifton/2020/07/09/c7b3bb98-c1f5-11ea-9fdd-b7ac6b051dc8_story.html [<https://perma.cc/4V8H-H8TV>] ("'BLM is a bit of a dangerous Trojan Horse and they are catching well-meaning people into dangerous posturing that can invite mob rule and property looting,' Ginni Thomas, who is white, wrote on June 24.").

44. *Shelby County*, 570 U.S. at 557 (Thomas, J., concurring).

45. Nor, given the results-oriented ruling in *Shelby County*, was it clear how a new enforcement regime could be fashioned. As one professor noted, the problem is that Shelby County is falsely minimalist in two ways. First, the opinion purports to decide less than it could have, pretending to leave room for Congress to respond to the decision with a new preclearance regime. Second, the opinion is brief and breezy, eliding rather than confronting serious jurisprudential hurdles in the way of its decision.

Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 726 (2014). Another commentator wrote that

[c]loaked in language of restraint, the Shelby County decision is actually a radical departure from how the Court reviews Congress's power to enforce the Fifteenth Amendment. It is not clear, then, that reviving Section 4's formula is a constitutionally viable avenue. Accordingly, Congress must focus on a more tangible solution, like lowering the burden of proof on plaintiffs seeking preliminary injunctions in voting-rights litigation.

McLean Crichton, *A Fool's Errand: Why Congress Should Amend the Voting Rights Act but Not Section 4's Coverage Formula*, 80 BROOK. L. REV. 223, 224 (2014).

46. *Shelby County*, 570 U.S. at 562 (Ginsburg, J., dissenting).

need for ‘further work . . . in the fight against injustice,’ and calling the reauthorization ‘an example of our continued commitment to a united America where every person is valued and treated with dignity and respect.’”⁴⁷

Justice Ginsburg would have deferred to the extensive record upon which Congress made its decision to extend the Act, writing that “[t]he basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, Congress shall have power to enforce this Article by appropriate legislation.”⁴⁸ She contended that “Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court’s opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled.”⁴⁹ As she put it: “Volumes 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 changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”⁵⁰

Chief Justice Roberts’s position was foreshadowed by the fact that as a Reagan Administration attorney, he

wrote several memoranda that attacked the VRA. In his writings, he argued the “widely accepted practices” used by states should not be subject to attack in federal courts. In other memoranda, Roberts contended that Congress’s effects based test would “provide a basis for the most intrusive interference imaginable by federal courts into the state and local processes.”⁵¹

Nor was Roberts the only justice with pre-existing bias. During oral argument, “Justice Antonin Scalia attributed Congress’s nearly unanimous vote in 2006 to reauthorize the Voting Rights Act to ‘a

47. *Id.* at 565 (Ginsburg, J., dissenting).

48. *Id.* at 567 (Ginsburg, J., dissenting).

49. *Id.* at 580 (Ginsburg, J., dissenting).

50. *Id.* at 590 (Ginsburg, J., dissenting). Under prior precedent, the Court had been deferential to the fact-finding role of Congress in establishing the VRA protections. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (“The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, *Congress explored with great care the problem of racial discrimination in voting.*”) (emphasis added).

51. Adam Bolotin, *Out Of Touch: Shelby County v. Holder and the Callous Effects of Chief Justice Roberts’s Equal State Sovereignty*, 49 J. MARSHALL L. REV. 751, 763–64 (2013). “As chief justice, Roberts’s judicial opinions on race seem to gloss over, and perhaps rewrite, history.” *Id.* at 768.

phenomenon that is called the perpetuation of racial entitlement,’ adding rather sardonically, ‘it’s been written about.’”⁵²

The idea promulgated by the *Shelby County* decision that all states should be treated equally, regardless of voting practices, has a dark history.⁵³ And the reality is that although the Court purported not to strike down Section 5 of the VRA, “[t]he effect of the Court’s ruling was nevertheless much the same—because section 5 requirements are determined by the section 4 coverage formula struck down by the Court, without section 4, there is no section 5.”⁵⁴

Writing in 2018, Vann R. Newkirk II wrote: “Just five years after the landmark *Shelby County v. Holder* decision, it’s become clear that the decision has handed the country an era of renewed white racial hegemony. And we’ve only just begun.”⁵⁵ He noted that

[j]ournalists now commonly say that the Court “gutted” the Voting Rights Act. The more appropriate terminology might be to say that it defanged federal enforcement of that act. But looking deeper, it might be even more appropriate to say that the *Shelby County v. Holder* decision committed violence against the Fourteenth Amendment itself, of which the Voting Rights Act is a distant descendant.⁵⁶

That “violence” continued in 2021.⁵⁷

In *Brnovich v. Democratic National Committee*,⁵⁸ the Supreme Court was “called upon for the first time to apply § 2 of the Voting

52. Kareem Crayton & Jane Junn, *Five Justices, Section 4, and Three Ways Forward in Voting Rights*, 9 DUKE J. CONST. L. & PUB. POL’Y 113, 114 (2013).

53. See James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*: *Shelby County v. Holder*, 8 HARV. L. & POL’Y REV. 39, 39 (2014). As the authors assert:

The Supreme Court’s decision in *Shelby County v. Holder* revitalizes the oldest and most demeaning official insult to African Americans in American constitutional history. Written by Chief Justice Roberts, the majority opinion relies on an unwritten principle that Roberts calls states’ “equal sovereignty” to justify the Court’s decision to topple a landmark piece of legislation: Section 4 of the Voting Rights Act . . . Chief Justice Roberts fails, however, to acknowledge the origin story of this “equal sovereignty” principle, which can be traced back to the Court’s infamous decision in *Dred Scott v. Sandford*.

Id.

54. Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 GEO. WASH. L. REV. 1928, 1932 (2013).

55. Van R. Newkirk II, *How Shelby County v. Holder Broke America*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707> [<https://perma.cc/JD49-29DW>].

56. *Id.*

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

58. *Id.* at 2321.

Rights Act of 1965 to regulations that govern how ballots are collected and counted.”⁵⁹ Arizona had enacted a law making “it a crime for any person other than a postal worker, an elections official, or a voter’s caregiver, family member, or household member to knowingly collect an early ballot—either before or after it has been completed.”⁶⁰ The state also refused to count ballots cast in a precinct other than the one where a voter resided.⁶¹

The DNC and others sued, and

claimed that both the State’s refusal to count ballots cast in the wrong precinct and its ballot-collection restriction “adversely and disparately affect Arizona’s American Indian, Hispanic, and African American citizens,” in violation of § 2 of the VRA In addition, they alleged that the ballot-collection restriction was “enacted with discriminatory intent” and thus violated both § 2 of the VRA and the Fifteenth Amendment.⁶²

Writing for the Court, Justice Alito added a new VRA analysis factor:

One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.⁶³

Elsewhere, Alito, as if channeling Trump, warned darkly that “it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders *Fraud is a real risk that accompanies mail-in voting* even if Arizona had the good fortune to avoid it.”⁶⁴

This is an *extraordinary* statement. Where was the substantiation for Justice Alito’s assertion that fraud accompanies mail-in voting?⁶⁵

59. *Id.* at 2330.

60. *Id.* at 2325.

61. *Id.*

62. *Id.* at 2334 (citing *Democratic Nat. Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020) (en banc)).

63. *Brnovich*, 141 S. Ct. at 2340.

64. *Id.* at 2348 (emphasis added).

65. See Mike Baker, *The Facts About Mail-In Voting and Voter Fraud*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/article/mail-in-vote-fraud-ballot.html> [https://perma.cc/8XVM-AZD4] (“In states that have long embraced mail voting—such as Washington State, which has been mainly using mail balloting since 2005—those running elections see no evidence of widespread fraud.”).

Comparatively, the Court minimized the effects of the “rule’s impact on members of different racial or ethnic groups” writing that “[s]mall disparities are less likely than large ones to indicate that a system is not equally open.”⁶⁶ The Court found “it inappropriate to read § 2 to impose a strict ‘necessity requirement’ that would force States to demonstrate that their legitimate interests can be accomplished only by means of the voting regulations in question.”⁶⁷ Accordingly, it overturned the U.S. Ninth Circuit Court of Appeals’ finding that the laws violated the VRA.⁶⁸

Writing for three dissenters, Justice Kagan wrote that “[w]hat is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America’s greatness, and protects against its basest impulses.”⁶⁹

As Kagan wrote: “On the very day *Shelby County* issued, Texas announced that it would implement a strict voter-identification requirement that had failed to clear Section 5.”⁷⁰ In addition to other states that “fell like dominoes,” she wrote that “[t]he North Carolina Legislature, starting work the day after *Shelby County*, enacted a sweeping election bill eliminating same-day registration, forbidding out-of-precinct voting, and reducing early voting, including souls-to-the-polls Sundays.”⁷¹ However, at least “[t]hat law went too far even without Section 5: A court struck it down because the State’s legislators had a racially discriminatory purpose.”⁷² In addition to the “first wave” of voting restrictions *Shelby County* unleashed, Justice Kagan took judicial notice of the fact that “[i]n recent months, State after State has taken up or enacted legislation erecting new barriers to voting.”⁷³

As to Section 2 of the VRA, Justice Kagan stated that

[t]he first thing to note about Section 2 is how far its prohibitory language sweeps. The provision bars any “voting qualification,” any “prerequisite to voting,” or any “standard, practice, or procedure” that “results in a denial or abridgement of the right” to “vote on account of race.” The overlapping list of covered state actions makes clear that Section 2 extends to every kind of voting or election rule.⁷⁴

66. *Brnovich*, 141 S. Ct. at 2339.

67. *Id.* at 2341.

68. *Id.* at 2350.

69. *Id.* at 2351 (Kagan, J., dissenting).

70. *Id.* at 2355 (Kagan, J., dissenting).

71. *Id.*

72. *Brnovich*, 141 S. Ct. at 2355 (Kagan, J., dissenting).

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

74. *Id.* at 2357 (Kagan, J., dissenting).

In contrast to that broad sweep, Justice Kagan accused the Court's majority of basing "its decision on a list of mostly made-up factors, at odds with Section 2 itself."⁷⁵ She asserted that "[t]he list—not a test, the majority hastens to assure us, with delusions of modesty—stacks the deck against minority citizens' voting rights. Never mind that Congress drafted a statute to protect those rights—to prohibit any number of schemes the majority's non-test test makes it possible to save."⁷⁶

Justice Kagan would have found that both of Arizona's challenged

policies disproportionately affect minority citizens' opportunity to vote. The first—the out-of-precinct policy—results in Hispanic and African American voters' ballots being thrown out at a statistically higher rate than those of whites. And whatever the majority might say about the ordinariness of such a rule, Arizona applies it in extra-ordinary fashion: Arizona is *the* national outlier in dealing with out-of-precinct votes, with the next-worst offender nowhere in sight. The second rule—the ballot-collection ban—makes voting meaningfully more difficult for Native American citizens than for others. And nothing about how that ban is applied is "usual" either—this time because of how many of the State's Native American citizens need to travel long distances to use the mail. Both policies violate Section 2, on a straightforward application of its text.⁷⁷

For example, Justice Kagan wrote, "the out-of-precinct policy operates unequally: Ballots cast by minorities are more likely to be discarded. In 2016, Hispanics, African Americans, and Native Americans were about twice as likely—or said another way, 100% more likely—to have their ballots discarded than whites."⁷⁸ As to the third-party ballot collection policy, she noted:

Most Arizonans vote by mail. But many rural Native American voters lack access to mail service, to a degree hard for most of us to fathom. Only 18% of Native voters in rural counties receive home mail delivery, compared to 86% of white voters living in those counties. . . . And for many or most, there is no nearby post office.⁷⁹

Justice Kagan asserted that

Arizona enacted—with full knowledge of the likely discriminatory consequences—the near-blanket ballot-collection ban challenged

75. *Id.* at 2362 (Kagan, J., dissenting).

76. *Id.*

77. *Id.* at 2366 (Kagan, J., dissenting).

78. *Brnovich*, 141 S. Ct. at 2368 (Kagan, J., dissenting).

79. *Id.* at 2370 (Kagan, J., dissenting).

here. The first version of the law—much less stringent than the current one—passed the Arizona Legislature in 2011. But the Department of Justice, in its *Section 5* review, expressed skepticism about the statute’s compliance with the Voting Rights Act, and the legislature decided to repeal the law rather than see it blocked (and thereby incur statutory penalties).⁸⁰

Subsequently, the *Shelby County* decision gutting the VRA cleared the way, and Justice Kagan observed that “[w]ith Section 5 gone, the State Legislature felt free to proceed with a new ballot-collection ban, despite the potentially discriminatory effects that the preclearance process had revealed.”⁸¹

Indeed, Republicans were unabashed about their aims:

Arizona Republicans were candid about the partisan nature of their efforts when the Supreme Court heard the case in March. A lawyer for the Arizona Republican Party told the justices that the restrictions were needed because without them, Republicans in the state would be “at a competitive disadvantage relative to Democrats.”⁸²

As the *New York Times* reported: “The larger message of the ruling was that the Voting Rights Act of 1965, hobbled after the Supreme Court in 2013 effectively struck down its central provision, retains only limited power to combat voting restrictions said to disproportionately affect minority voters’ access to the polls.”⁸³

Matt Ford wrote in the *New Republic* that “[t]he result is hard to distinguish from a blank check for Republican state lawmakers: So long as they invoke voter fraud and don’t say anything too egregious, the Supreme Court will have their back.”⁸⁴

80. *Id.*

81. *Id.* at 2371 (Kagan, J., dissenting).

82. Reid J. Epstein & Nick Corasaniti, *Proving Racist Intent: Democrats Face High New Bar in Opposing Voting Laws*, N.Y. TIMES (July 2, 2021), <https://www.nytimes.com/2021/07/02/us/politics/supreme-court-arizona-voting.html> [<https://perma.cc/EU47-UQJB>].

83. Adam Liptak, *Supreme Court Upholds Arizona Voting Restrictions*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/us/politics/supreme-court-arizona-voting-restrictions.html> [<https://perma.cc/2JEG-7SZ7>].

84. Matt Ford, *The Supreme Court Gives a Green Light to Voter Suppression*, NEW REPUB. (July 1, 2021), <https://newrepublic.com/article/162698/alito-brnovich-vra-voter-suppression> [<https://perma.cc/2GLJ-747U>]. Another commentator agreed:

What Justice Alito was doing was writing a road map for like-minded judges on the lower courts who will soon be getting the Section 2 cases generated by current Republican efforts. Here is how you do it, the majority opinion says to them. Here is how you uphold the new laws.

Linda Greenhouse, *On Voting Rights, Justice Alito Is Stuck in the 1980s*, N.Y. TIMES

Harvard Law School Professor Nicholas Stephanopoulos maintained that while “conservative judges pride themselves on being textualists” the Court had gone well outside of the VRA’s text and “invented several limits that will make it harder for plaintiffs to win future Section 2 cases—and that appear nowhere in Section 2’s language.”⁸⁵ Professor Richard L. Hasen argued that “a state can now assert an interest in preventing fraud to justify a law without proving that fraud is actually a serious risk, but at the same time, minority voters have a high burden: They must show that the state has imposed more than the ‘usual burdens of voting.’”⁸⁶

It seemed the Court had gone back in time. In 1883, the Court had ruled that

[w]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a *mere citizen*, and *ceases to be the special favorite of the laws*, and when his rights as a citizen, or a man, *are to be protected in the ordinary modes by which other men’s rights are protected*.⁸⁷

In dissent, Justice Harlan asked:

If, then, exemption from discrimination, in respect of civil rights, is a new constitutional right, secured by the grant of State citizenship to colored citizens of the United States—and I do not see how this can now be questioned—why may not the nation, by means of its own legislation of a primary direct character, guard, protect, and enforce that right? *It is a right and privilege which the nation conferred*. It did not come from the States in which those colored citizens reside.⁸⁸

In Justice Harlan’s perspective “It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws.”⁸⁹

(July 15, 2021), <https://www.nytimes.com/2021/07/15/opinion/Voting-rights-supreme-court.html> [<https://perma.cc/3V9Q-Z2YB>].

85. Nicholas Stephanopoulos, Opinion, *The Supreme Court Showcased Its ‘Textualist’ Double Standard on Voting Rights*, WASH. POST (July 1, 2021, 8:47 PM), <https://www.washingtonpost.com/opinions/2021/07/01/supreme-court-alito-voting-rights-act> [<https://perma.cc/DPY7-TWR7>].

86. Richard L. Hasen, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> [<https://perma.cc/XB74-BSQ5>].

87. Civil Rights Cases, 109 U.S. 3, 25 (1883) (emphasis added).

88. *Id.* at 50 (Harlan, J., dissenting) (emphasis added).

89. *Id.* at 61 (Harlan, J., dissenting).

III. PRESIDENT TRUMP AND THE “BIG LIE”

Even after his 2016 presidential election victory, President Donald Trump was a sore loser, creating a commission in May 2017 to investigate the 2016 election.⁹⁰ As was reported at the time:

The commission allows Trump to make good on a promise he made via Twitter shortly after his inauguration to seek “a major investigation into VOTER FRAUD, including those registered to vote in two states, those who are illegal and even, those registered to vote who are dead (and many for a long time). Depending on results, we will strengthen up voting procedures!”⁹¹

After just two meetings the commission was dissolved, although the Trump Administration’s position continued to be that fraud had occurred: “‘Despite substantial evidence of voter fraud, many states have refused to provide the Presidential Advisory Commission on Election Integrity with basic information relevant to its inquiry,’ White House press secretary Sarah Huckabee Sanders said in a statement.”⁹²

Yet, in fact, the commission found no evidence of widespread voter fraud.⁹³ Instead, reportedly, “much of the commission’s correspondence and activities were part of efforts by a tight circle of Republican officials, activists, researchers, and journalists to identify noncitizen voters. Their efforts seem to have focused less on a number of other serious issues around election integrity than on a broader anti-immigration agenda.”⁹⁴

Undaunted by his failure to discover election fraud, Trump warned of it prior to the 2018 election.⁹⁵ On the eve of the election, for example, he tweeted: “Law Enforcement has been strongly notified to watch closely for any ILLEGAL VOTING which may take place in Tuesday’s Election (or Early Voting). Anyone caught will be subject to the Maximum Criminal Penalties allowed by law. Thank

90. See Luis Nelson, *Trump Signs Executive Order Creating Voter Fraud Commission*, POLITICO (May 11, 2017, 2:22 PM), <https://www.politico.com/story/2017/05/11/trump-voter-fraud-commission-238263> [<https://perma.cc/8LM3-VSSU>].

91. *Id.*

92. Jessica Taylor, *Trump Dissolves Controversial Election Commission*, NPR (Jan. 3, 2018, 8:06 PM), <https://www.npr.org/2018/01/03/575524512/trump-dissolves-controversial-election-commission> [<https://perma.cc/8FV6-VHQT>].

93. Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, ASSOCIATED PRESS (Aug. 3, 2018), <https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-elections-f5f6a73b2af546ee97816bb35e82c18d> [<https://perma.cc/8CV7-U23E>].

94. Vann R. Newkirk II, *Inside Trump’s Voter-Fraud Crusade*, ATLANTIC (Aug. 8, 2018), <https://www.theatlantic.com/politics/archive/2018/08/inside-trumps-voter-fraud-inquisition/567074> [<https://perma.cc/US3N-NKFP>].

95. Taylor, *supra* note 92.

you!”⁹⁶ It was reported that “[v]oting rights advocates denounced Trump’s remarks as a blatant attempt to intimidate voters on the eve of Election Day—and part of a pattern among Republicans, they said, to curtail voting access with strict rules that disproportionately affect voters of color who tend to vote Democratic.”⁹⁷

In Georgia, Brian Kemp had baselessly asserted that Stacey Abrams was encouraging undocumented immigrants to vote for her, and “tweeted an article . . . from Breitbart, a conservative news outlet that regularly publishes right-wing conspiracy theories, claiming that ‘armed Black Panthers’ support Abrams. The racially charged article featured photographs of [B]lack men carrying guns and holding Abrams signs.”⁹⁸

Trump was even more unrestrained as the 2020 election approached, attacking mail-in ballots even as he voted by one and had it returned by someone else—a practice Republicans attack as “ballot harvesting.”⁹⁹ At one point the *Washington Post* identified sixteen Trump officials who had voted by mail even as Trump asserted voting by that means was rife with fraud, tweeting: “MILLIONS OF MAIL-IN BALLOTS WILL BE PRINTED BY FOREIGN COUNTRIES, AND OTHERS. IT WILL BE THE SCANDAL OF OUR TIMES!”¹⁰⁰ Mail-in voting was popular in 2020 as voters sought to avoid the risks of COVID-19 exposure from voting in person.¹⁰¹

Trump, in his last 2016 presidential debate with Democratic nominee Hillary Clinton, asserted the election was rigged against him and refused to say he would accept her victory.¹⁰² In 2020, it was

96. Maegan Vazquez, *Trump Keeps Warning of Voter Fraud Despite Lack of Evidence*, CNN (Nov. 5, 2018, 2:30 PM), <https://www.cnn.com/2018/11/05/politics/donald-trump-il-legal-voting-midterms/index.html> [<https://perma.cc/28TK-GX6U>].

97. Amy Gardner, *Without Evidence, Trump And Sessions Warn of Voter Fraud in Tuesday’s Elections*, WASH. POST (Nov. 5, 2018), https://www.washingtonpost.com/politics/without-evidence-trump-and-sessions-warn-of-voter-fraud-in-tuesdays-elections/2018/11/05/e9564788-e115-11e8-8f5f-a55347f48762_story.html [<https://perma.cc/SMD3-8PLH>].

98. *Id.*

99. Miles Parks, *Trump, While Attacking Mail Voting, Casts Mail Ballot Again*, NPR (Aug. 19, 2020, 4:11 PM), <https://www.npr.org/2020/08/19/903886567/trump-while-attack-mail-voting-casts-mail-ballot-again> [<https://perma.cc/7TBG-GRAS>].

100. Aaron Blake, *16 Trump Officials Who Have Voted By Mail Recently, Despite Trump’s Warnings About It*, WASH. POST (June 23, 2020), <https://www.washingtonpost.com/politics/2020/06/22/trump-officials-vote-by-mail> [<https://perma.cc/59ZC-SYNG>].

101. See Meredith Deliso, *Election 2020: Why Voting in the Coronavirus Pandemic Will be Unlike Any Other Year*, ABC NEWS (Oct. 19, 2020, 6:02 AM), <https://abcnews.go.com/Politics/election-2020-voting-coronavirus-pandemic-unlike-year/story?id=73592283> [<https://perma.cc/NCE4-Z5SX>] (noting that “mail-in voting has taken on new significance in the pandemic, with more than 80 million requested so far in this general election cycle, double the previous presidential election and more than half the total vote cast in 2016.”).

102. See Patrick Healy & Jonathan Martin, *Donald Trump Won’t Say if He’ll Accept Result of Election*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/us/politics/presidential-debate.html> [<https://perma.cc/4DW8-ESDX>].

clear that Trump would not accept being defeated by Democratic nominee Joe Biden.¹⁰³ And, indeed, upon Biden being declared the victor, Trump declared himself the actual winner.¹⁰⁴

Attorneys acting on Trump's behalf filed baseless lawsuits in state and federal courts seeking to overturn the election.¹⁰⁵ One "cannot fully cover all the aberrant ways in which Trump and his supporters attempted to overturn the 2020 election, which will, no doubt, be the subject of books and cinema to come."¹⁰⁶

Trump's election lies were at the center of a Washington, D.C. rally that he staged on the day the Congress was to accept the 2020 Electoral College results, with many rally-goers then going on to participate in an insurrection at the U.S. Capitol in which approximately 140 police officers were assaulted while trying to protect members of Congress and Vice President Pence.¹⁰⁷ Trump referred to the insurrectionists with "love" when saying they were "peaceful" and "great" people.¹⁰⁸

The single article of impeachment that resulted in Trump's second impeachment by the U.S. House alleged that Trump incited the insurrection, in part due to the fact that in the months prior to it he "repeatedly issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people or certified by State or Federal officials."¹⁰⁹ The article of impeachment noted that Trump's

103. See Sahil Kapur, *Trump Has Signaled He Won't Accept an Election Loss. Many of His Voters Agree.*, NBC NEWS (Oct. 30, 2020, 11:11 AM), <https://www.nbcnews.com/politics/2020-election/trump-has-signaled-he-won-t-accept-election-loss-many-n1245304> [<https://perma.cc/439W-GZYX>].

104. See Libby Cathey, *Joe Biden Defeats Donald Trump for President in Bitter and Historic Election*, ABC NEWS (Nov. 7, 2020, 2:36 PM), <https://abcnews.go.com/Politics/joe-biden-apparent-winner-presidency/story?id=73981165> [<https://perma.cc/T2H5-D35G>].

105. See Brendan Williams, *Did President Trump's 2020 Election Litigation Kill Rule 11?*, 30 B.U. PUB. INT. L. J. 181, 187 (2021).

106. *Id.*

107. Ashley Parker, Josh Dawsey & Philip Rucker, *Six Hours of Paralysis: Inside Trump's Failure to Act After A Mob Stormed The Capitol*, WASH. POST (Jan. 11, 2021, 11:21 PM), https://www.washingtonpost.com/politics/trump-mob-failure/2021/01/11/36a46e2e-542e-11eb-a817-e5e7f8a406d6_story.html [<https://perma.cc/Q2D3-ZCGR>] (watching the insurrection on TV, "the president himself was busy enjoying the spectacle. Trump watched with interest, buoyed to see that his supporters were fighting so hard on his behalf, one close adviser said."); Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html> [<https://perma.cc/842Y-RDCC>] (of the police officers involved, one was killed, two committed suicide, and others were left with physical and psychological injuries).

108. David Cohen, *Trump on Jan. 6 Insurrection: 'These Were Great People'*, POLITICO (July 11, 2021, 1:05 PM), <https://www.politico.com/news/2021/07/11/trump-jan-6-insurrection-these-were-great-people-499165> [<https://perma.cc/42RS-XCSG>].

109. Brian Naylor, *Article of Impeachment Cites Trump's 'Incitement' of Capitol Insurrection*, NPR (Feb. 9, 2021, 12:30 PM), <https://www.npr.org/sections/trump-impeachment>

conduct at the rally that preceded the Capitol insurrection—in which he asserted he won by a “landslide” and encouraged supporters to “fight like hell”—had

followed his prior efforts to subvert and obstruct the certification of the results of the 2020 Presidential election. Those prior efforts included a phone call on January 2, 2021, during which President Trump urged the secretary of state of Georgia, Brad Raffensperger, to “find” enough votes to overturn the Georgia Presidential election results and threatened Secretary Raffensperger if he failed to do so.¹¹⁰

The falsehood that Trump won the election became known as the “Big Lie,” and allegiance to it became required of Republicans.¹¹¹ Those publicly promoting this lie included the wife of a U.S. Supreme Court justice.¹¹² The lie fueled subsequent state efforts to combat mythical election fraud, what *Washington Post* contributor David von Drehle satirically called “a monster under the bed”—writing that “[t]he floorboards of America’s polling places are worn with the knee marks of monster hunters searching for that which is not actually there.”¹¹³ As late as June 2021, a poll found that one-third of Americans were convinced Biden only assumed the presidency because of voter fraud—that number grew to 63% for those who were Republican or leaned Republican.¹¹⁴

-effort-live-updates/2021/01/11/955631105/impeachment-resolution-cites-trumps-incite
ment-of-capitol-insurrection [https://perma.cc/S773-8GT8].

110. *Id.*

111. See Calvin Woodward, *Trump’s ‘Big Lie’ Imperils Republicans Who Don’t Embrace It*, ASSOCIATED PRESS (May 9, 2021), <https://apnews.com/article/michael-pence-donald-trump-election-2020-government-and-politics-0c07947f9fd2b9911b3006f0fc128ffd> [https://perma.cc/7MKB-XWNZ]; Alan Fram & Kevin Freking, *GOP Dumps Defiant Trump Critic Cheney From Top House Post*, ASSOCIATED PRESS (May 12, 2021), <https://apnews.com/article/donald-trump-liz-cheney-house-elections-election-2020-government-and-politics-db885d0a6b28f12d733da54dbae617fa> [https://perma.cc/EE9J-Q6YF] (“Republicans dumped GOP Rep. Liz Cheney from her House leadership post Wednesday for her persistent repudiation of Donald Trump’s election falsehoods”).

112. See Robert Barnes, *Ginni Thomas Apologizes to Husband’s Supreme Court Clerks After Capitol Riot Fallout*, WASH. POST (Feb. 2, 2021, 11:22 AM), https://www.washingtonpost.com/politics/courts_law/ginni-thomas-apology-clarence-thomas-clerks-trump-rally/2021/02/02/a9818cce-6496-11eb-8c64-9595888caa15_story.html [https://perma.cc/4Y28-D8GG] (“Conservative political activist Virginia Thomas told her husband Justice Clarence Thomas’s former law clerks that she was sorry for a rift that developed among them after her election advocacy of President Donald Trump and endorsement of the Jan. 6 rally in D.C. that resulted in violence and death at the Capitol.”).

113. David von Drehle, *Opinion, Voter Fraud Is Becoming Republicans’ Monster Under the Bed*, WASH. POST (July 16, 2021, 3:30 PM), <https://www.washingtonpost.com/opinions/2021/07/16/is-that-election-fraud-lurking-under-bed> [https://perma.cc/3SKK-28MP].

114. See Press Release, *Public Supports Both Early Voting and Requiring Photo ID to Vote*, MONMOUTH U. (June 21, 2021), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_062121 [https://perma.cc/54X9-WMA4].

IV. LIVING THE LIE: 2021 STATE EFFORTS TO SUPPRESS VOTING

In Arizona, Republicans tasked a company whose CEO was an election fraud conspirator to review the ballots cast in Maricopa County in the 2020 presidential election.¹¹⁵ As the *Arizona Republic* reported: “The CEO of the company leading Arizona’s audit of the 2020 Maricopa County general election appears in a new movie called ‘The Deep Rig’ that asserts the U.S. election was stolen from former President Donald Trump.”¹¹⁶ The methods of the company were deemed to be so sloppy—as it had no experience in reviewing election results—that the county declared the vote-counting machines in the company’s possession compromised and unusable in future elections, spending \$3 million for new machines.¹¹⁷ And the reality is that Arizona elections officials found “fewer than 200 cases of potential voter fraud out of over 3 million ballots cast” in 2020.¹¹⁸

Separately, Arizona’s legislative Republicans also voted to strip the secretary of state, a Democrat, of her power to oversee elections, placing that power with the attorney general, a Republican.¹¹⁹ It was reported that

[t]he measure was part of a grab bag of proposals inserted into major budget legislation, including several actions that appeared to address conspiracy theories alleging manipulated elections that some Republican lawmakers have promoted. One of the items allotted \$500,000 for a study of whether social media sites tried to interfere in state elections by promoting Democrats or censoring Republicans.¹²⁰

115. See Ryan Randazzo, *CEO Of Arizona Audit Contractor Cyber Ninjas Appears in Movie About U.S. Election Fraud*, AZCENT. (June 27, 2021, 2:42 PM), <https://www.azcentral.com/story/news/politics/elections/2021/06/27/cyber-ninjas-doug-logan-arizona-election-audit-overseer-appears-the-deep-rig-film-rigged-election/5350003001> [https://perma.cc/X6PS-YRGM].

116. *Id.*

117. See Jonathan J. Cooper, *Arizona County to Spend \$3M on Voting Machines After Audit*, ASSOCIATED PRESS (July 14, 2021), <https://apnews.com/article/joe-biden-government-and-politics-arizona-voting-election-2020-58e027040fbca3b72cfabf453c3b9f16> [https://perma.cc/QTD3-2KH4].

118. See Bob Christie & Christina A. Cassidy, *Few AZ Voter Fraud Cases, Discrediting Trump’s Claims*, ASSOCIATED PRESS (July 17, 2020), <https://apnews.com/article/business-government-and-politics-only-on-ap-election-2020-8260008a320b6c96a15e6884af3fa474> [https://perma.cc/7R8J-RLQS] (“Arizona’s potential cases also illustrate another reality: Voter fraud is often bipartisan. Of the four Arizona cases that have resulted in criminal charges, two involved Democratic voters and two involved Republicans.”).

119. See Michael Wines, *In Arizona, G.O.P. Lawmakers Strip Power from a Democrat*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/Arizona-Republicans-voting.html> [https://perma.cc/N22H-LSAD].

120. *Id.*

In Florida, legislation passed to

limit the use of drop boxes; add more identification requirements for those requesting absentee ballots; require voters to request an absentee ballot for each election, rather than receive them automatically through an absentee voting list; limit who could collect and drop off ballots; and further empower partisan observers during the ballot-counting process.¹²¹

No Democrats voted for it, and just one Republican, a state senator, opposed it.¹²² One state representative asserted that the apparent motivation was that Democrats cast 600,000 more vote-by-mail ballots than did Republicans.¹²³ Another Democratic representative, in deriding Republican claims of election fraud, “framed the debate as similar to the hunt for the chupacabra, the mythical, nightmarish mammal-gobbling and goat-blood-sucking beast.”¹²⁴

In fact, it was Florida Republicans who engaged in conduct in 2020 legislative races that led to at least one felony charge, as they spent \$550,000 in “untraceable contributions” to send out mailers in three competitive state Senate races that “talked up no-party candidates, who did no campaigning of their own, as champions for progressive causes in an apparent attempt to drive Democratic voters away from the Democratic candidates in those races.”¹²⁵

Governor Ron DeSantis signed the bill live on Fox News, “at a private event with a fan club for former President Donald Trump.”¹²⁶ As Fabiola Santiago wrote in the *Miami Herald*, “DeSantis barred all other news media from the West Palm Beach event, held behind closed doors, violating the spirit of the state’s Sunshine laws.”¹²⁷

121. Patricia Mazzei & Nick Corasaniti, *Florida Republicans Pass Voting Limits in Broad Elections Bill*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/2021/04/29/us/politics/florida-voting-rights-bill.html> [https://perma.cc/RA5X-RRY7].

122. *See id.*

123. *Id.*

124. *Id.*

125. Alex Daugherty & Samantha J. Gross, ‘A Cloud of Corruption’: Democrats Want DOJ Probe of Florida State Senate Races, TAMPA BAY TIMES (Mar. 25, 2021), <https://www.tampabay.com/news/florida-politics/2021/03/25/a-cloud-of-corruption-democrats-want-doj-probe-of-florida-state-senate-races> [https://perma.cc/VVS5-KYFK].

126. Jaclyn Diaz, *Florida Governor Signs Law That Limits Voting by Mail and Ballot Drop Boxes*, NPR (May 6, 2021, 2:31 PM), <https://www.npr.org/2021/04/30/992277557/florida-legislature-approves-election-reform-bill-that-includes-restrictions> [https://perma.cc/53EV-67YH].

127. Fabiola Santiago, *Republicans Get Away With Cheating in Voting Bill DeSantis Signs on Fox News*, MIAMI HERALD (May 7, 2021, 9:05 AM), https://account.miamiherald.com/paywall/subscriber-only?resume=251209599&intcid=ab_archive [https://perma.cc/R9YJ-QY4J].

Reportedly,

[e]ven Fox News appeared taken aback by the stunt. It later issued a statement saying it had booked DeSantis' appearance on its program "as an interview and not as a live bill signing. Neither the network, nor the show, requested or mandated the event be exclusive to Fox News Media entities."¹²⁸

In Georgia, while signing the so-called "Election Integrity Act of 2021" into law, Governor Kemp stated: "Significant reforms to our state elections were needed. There's no doubt there were many alarming issues with how the election was handled, and those problems, understandably, led to a crisis of confidence in the ballot box here in Georgia[.]"¹²⁹

Among other changes, the new law made Georgia "one of just four states that require absentee voters to submit a driver's license number or other ID number"—something that about 3% of Georgia voters lack—and went so far as to "prohibit distributing food and water to voters in line" waiting to vote in person.¹³⁰ Any voter would have the right to challenge the eligibility of as many other voters in their county or city as they choose: "That means a voter in Fulton County would be empowered to challenge all the county's 860,000 voters if he or she chooses to do so."¹³¹

President Biden declared the new law "Jim Crow in the 21st Century."¹³² And the U.S. Justice Department filed suit in June to overturn the law, with Attorney General Merrick Garland arguing the law was aimed at suppressing Black voter participation.¹³³ In

128. Bobby Caina Calvan & David Bauder, *Florida Gov Signs GOP Voting Law Critics Call 'Un-American'*, ASSOCIATED PRESS (May 6, 2021), <https://apnews.com/article/race-and-ethnicity-voting-rights-voting-government-and-politics-2d3177bdf6c823d54fc6cbf049ba7da9> [https://perma.cc/5FA2-A7ZP].

129. Mark Niesse, *Sweeping Changes to Georgia Elections Signed Into Law*, ATLANTA J.-CONST. (Mar. 25, 2021), <https://www.ajc.com/politics/bill-changing-georgia-voting-rules-passes-state-house/EY2MATS6SRA77HTOBVEMTJLIT4> [https://perma.cc/4DB2-YW76].

130. David Wickert & Mark Niesse, *Voting Law A Rorschach Test for A Divided Georgia*, ATLANTA J.-CONST. (Apr. 3, 2021), <https://www.ajc.com/politics/georgia-state-legislature/voting-law-a-rorschach-test-for-a-divided-georgia/JA36OVZ5KJD2XLCTPIBRF5GG4A> [https://perma.cc/2M43-TAE5].

131. Mark Niesse, *How Georgia's Voting Law Works*, ATLANTA J.-CONST. (May 6, 2021), <https://www.ajc.com/politics/how-georgias-new-voting-law-works/GF6PLR44PNESPKR5FXCBE7VEOY> [https://perma.cc/THC4-PPYA].

132. Seung Min Kim, *Biden Attacks New Georgia Voting Law As 'Jim Crow'*, WASH. POST (Mar. 26, 2021, 6:15 PM), https://www.washingtonpost.com/politics/biden-georgia-law-jim-crow/2021/03/26/35383056-8e40-11eb-a730-1b4ed9656258_story.html [https://perma.cc/PB3P-XB92].

133. See Barbara Sprunt, *In Suing Georgia, Justice Department Says State's New*

July, a U.S. District Court judge appointed by President Trump declined to block the operation of the law in runoff elections scheduled that month.¹³⁴

Corporate America also expressed umbrage, with Major League Baseball moving the 2021 All Star Game from Atlanta.¹³⁵ Georgia-based Delta Air Lines was among companies that condemned the voting law, getting into a war of words with Governor Kemp after its CEO was quoted saying that

[t]he entire rationale for this bill was based on a lie: that there was widespread voter fraud in Georgia in the 2020 elections. This is simply not true. Unfortunately, that excuse is being used in states across the nation that are attempting to pass similar legislation to restrict voting rights.¹³⁶

When U.S. Senate Democrats held a “rare field hearing in Atlanta” in July 2021 to focus attention on the Georgia law and the need for federal legislation to counter voter suppression, “[n]o Republicans attended the hearing, and they did not provide witnesses.”¹³⁷ And yet, former President Trump was still not placated by the new Georgia law, calling it “far too weak and soft” and accusing Governor Kemp and the state’s Republican secretary of state of not being real Republicans.¹³⁸

Voting Law Targets Black Voters, NPR (June 25, 2021, 12:54 PM), <https://www.npr.org/2021/06/25/1010259443/in-suing-georgia-justice-department-says-states-new-voting-law-targets-black-vot> [https://perma.cc/6SPT-YAPT].

134. See Rebecca Beitsch, *Federal Judge Declines to Block Portions of Georgia Election Law*, THE HILL (July 7, 2021, 1:49 PM), <https://thehill.com/regulation/court-battles/561888-judge-declines-to-block-parts-of-georgia-election-law> [https://perma.cc/8D3N-WWSG].

135. Vanessa Romo, *MLB Moves All-Star Game from Atlanta Over Georgia’s New Voting Law*, NPR (Apr. 2, 2021, 7:26 PM), <https://www.npr.org/2021/04/02/983970361/mlb-moves-all-star-game-from-atlanta-over-georgias-new-voting-law> [https://perma.cc/SFJ5-H5NZ] (Governor Kemp asserted that “Major League Baseball caved to fear, political opportunism, and liberal lies.”).

136. Chris Isidore, *Delta CEO and Georgia Governor Get Heated in Voter Law Square-Off*, CNN (Apr. 1, 2021, 7:54 AM), <https://www.cnn.com/2021/03/31/business/brian-kemp-ed-bastian-delta-georgia-voter-law/index.html> [https://perma.cc/9AMB-HSLG]. However, the disapproval of other big businesses had its limits. See Isaac Stanley-Becker, *Businesses Condemned Georgia’s Voting Law, Then Gave Thousands to Its Backers*, WASH. POST (July 22, 2021, 6:00 AM), <https://www.washingtonpost.com/politics/2021/07/22/voting-georgia-donations> [https://perma.cc/8HE6-9PGV].

137. Christina A. Cassidy, *Senate Democrats Take Their Case For Voting Bill to Georgia*, ASSOCIATED PRESS (July 19, 2021), <https://apnews.com/article/government-and-politics-voting-georgia-bills-voting-rights-531fc6e0de9abff2b64d8faed0f6861e> [https://perma.cc/Y45B-DR75].

138. Phillip M. Bailey, *Trump Blasts Georgia Election Law As ‘Too Weak,’ Continuing Attacks on Kemp, Raffensperger As ‘RINOS’*, USA TODAY (Apr. 7, 2021, 1:43 PM), <https://>

In Iowa, the *Des Moines Register* reported, “Four months after Iowans voted in record numbers, Gov. Kim Reynolds has signed legislation cutting the state’s early voting period and closing the polls an hour earlier on Election Day.”¹³⁹ As the *Register* noted, “Every Republican present for debate in the House and Senate voted for the legislation. Every Democrat voted against it.”¹⁴⁰ The efforts of those Republicans and the Republican governor had moneyed support:

Heritage Action, a national conservative group, announced it would spend \$10 million across eight states, including Iowa, to run advertising, mobilize volunteers and work with state lawmakers to promote legislation limiting use of absentee ballots, requiring voter ID, verifying voter citizenship and requiring verification of the accuracy of voter registration lists.¹⁴¹

In the wake of the new law, it was reported that “Democrats said they’re examining their reliance on early voting. In the last election, more than 70% of Democrats voted early.”¹⁴² As Iowa City’s *Press-Citizen* editorialized, “members of the Iowa GOP perpetrate lies about mass voter fraud in the 2020 Election—essentially claiming the system run by the Republican Iowa Secretary of State, which put them in power, is broken and illegitimate.”¹⁴³ As the newspaper noted, nearly 60% of Iowans, of both parties, had voted by absentee in the 2020 election.¹⁴⁴

In Montana, Republican Governor Greg Gianforte had, as governor-elect and a U.S. House member, signed onto baseless litigation seeking to invalidate Biden’s victory in four battleground states.¹⁴⁵ As governor, he signed legislation ending the state’s practice

www.usatoday.com/story/news/2021/04/07/trump-georgia-election-law-too-weak-attacks-kemp-raffensperger/7123560002 [https://perma.cc/E76Y-L235].

139. Stephen Gruber-Miller, *Gov. Kim Reynolds Signs Law Shortening Iowa’s Early And Election Day Voting*, DES MOINES REG. (Mar. 9, 2021, 10:44 AM), https://www.desmoinesregister.com [https://perma.cc/8TLA-V72B].

140. *Id.*

141. *Id.*

142. David Pitt, *Iowa Governor Signs GOP-Forced Voting Changes Bill Into Law*, ASSOCIATED PRESS (Mar. 8, 2021), https://apnews.com/article/legislature-voting-iowa-elections-campaigns-881cb8de23a9d9fd886c738a21aafa83 [https://perma.cc/JQ7J-Z4LU].

143. Editorial, *Iowa Legislature’s Latest Voter Suppression Efforts Authored by Same Party Spreading ‘Big Lie’*, PRESS-CITIZEN (Feb. 28, 2021, 5:04 PM), https://www.press-citizen.com/story/opinion/editorials/our-view/2021/02/28/gop-using-big-lie-push-voter-suppression-efforts-iowa/6832860002/?utm_campaign=snd-autopilot [https://perma.cc/9URA-PT3G].

144. *See id.*

145. *See* Holly Michels, *Gianforte Joins Brief Challenging Election Results in 4 States*, INDEP. RECORD (Dec. 10, 2020), https://helenair.com/news/state-and-regional/govt-and-politics/gianforte-joins-brief-challenging-election-results-in-4-states/article_56c4f721-6e

of Election Day voter registration, as well as a bill requiring that “any voter who does not have a government-issued photo ID or a state concealed carry permit must produce two forms of identification in order to cast a ballot at the polls.”¹⁴⁶ It was reported that the laws were likely to heavily impact Native Americans, who make up 7% of Montana’s population:

New restrictions—ballot collection bans, earlier registration deadlines, stricter voter ID laws and more—are likely to make it harder, and the starkest consequences may be seen in places like Montana: sprawling, sparsely populated Western and Great Plains states where Native Americans have a history of playing decisive roles in close elections.¹⁴⁷

For example, it was noted that “[i]n 2018, Senator Jon Tester, a Democrat, won seven of eight Montana counties containing the headquarters of a federally recognized tribe and received 50.3 percent of the vote statewide, a result without which his party would not currently control the Senate.”¹⁴⁸

Proving no jurisdiction was beyond Trump’s suspicion—despite the fact that Trump carried Montana in 2020 by almost a 17-point margin—he baselessly suggested that election fraud there, supposedly involving “missing” mail-in ballots, may have made his victory smaller.¹⁴⁹

A rare win for voting rights came in New Hampshire. In New Hampshire, Democrats sued to overturn a Republican-backed law passed in 2017 that aimed at making it more difficult for college students to vote, and a trial judge struck it down in 2020.¹⁵⁰ It was reported that “[t]he judge noted that there has been an average of one

da-5e47-80b7-2e7134e564fc.html [https://perma.cc/3QSR-YU6X]. The U.S. Supreme Court declined to hear the case. *See Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020).

146. Alex Sakariassen, *Gianforte Approves Changes to Montana Election Laws*, MONT. FREE PRESS (Apr. 19, 2021), <https://montanafreepress.org/2021/04/19/gianforte-approves-changes-to-montana-election-laws> [https://perma.cc/Y4W8-L6RS].

147. Maggie Astor, *How G.O.P.-Backed Laws in Montana Could Hurt Native American Voting*, N.Y. TIMES (July 6, 2021), <https://www.nytimes.com/2021/07/06/us/politics/montana-native-americans-voting-rights.html> [https://perma.cc/3YK5-FF7E].

148. *Id.*

149. Tom Porter, *Trump Stirred Conspiracy Theories About Election Fraud in Montana, A State He Won, At His Comeback Rally*, BUS. INSIDER (June 27, 2021, 5:37 AM), <https://www.businessinsider.com/ohio-trump-stirs-election-fraud-claims-montana-state-he-won-2021-6> [https://perma.cc/24JE-QXD6].

150. *See* Dareh Gregorian, *‘Unreasonable’ New Hampshire Voter Registration Law Struck Down*, NBC NEWS (Apr. 9, 2020, 5:28 PM), <https://www.nbcnews.com/politics/2020-election/unreasonable-new-hampshire-voter-registration-law-struck-down-n1180601> [https://perma.cc/V9CG-WHC2].

confirmed case of voter fraud a year in New Hampshire over the past 20 years, and he concluded that the requirements in the law did little to address fraud and only made registering more difficult.”¹⁵¹

The law was inspired by Trump’s recurring and false assertions that he lost New Hampshire in 2016 because out-of-state voters were bused into the state.¹⁵²

On appeal, the New Hampshire Supreme Court unanimously agreed the law was unconstitutional, declaring: “We conclude that SB 3 imposes unreasonable burdens on the right to vote. We also conclude that the State failed to carry its burden to demonstrate that SB 3 is substantially related to an important governmental objective.”¹⁵³ The court noted that “the trial court rejected the State’s voter-fraud justification, and, likewise, found that the State’s perceived need to protect the integrity of New Hampshire’s elections was ‘illusory.’”¹⁵⁴ There was an irony in the fact that, despite the ardent support of Republican Governor Chris Sununu for the law, the author of the opinion finding it invalid was a “Sununu-appointed judge to the high court who grew up in the governor’s hometown of Salem.”¹⁵⁵

Because of the understandable focus on minority voter suppression, widespread Republican efforts to make it more difficult for college students to vote have perhaps escaped attention, and one study found that “[w]hile learning about youth suppression generally did make people angry, it did not make people more likely to want to vote. . . . Most concerning, information about youth suppression did not even boost voting intentions for young adults themselves—the individuals who stood to lose the most.”¹⁵⁶

151. *Id.*

152. See Victoria McGrane, *Trump Is Still Blaming His 2016 New Hampshire Loss on Voter Fraud—With Zero Proof*, BOS. GLOBE (Aug. 17, 2019, 8:00 AM), <https://www.boston.com/metro/2019/08/17/trump-still-blaming-his-new-hampshire-loss-voter-fraud-with-zero-proof/xpIFyQLOP003RgVjLZprKL/story.html> [<https://perma.cc/K575-8YPT>]; Eli Stokols, *Trump Brings Up Vote Fraud Again, This Time in Meeting with Senators*, POLITICO (Feb. 10, 2017, 5:30 PM), <https://www.politico.com/story/2017/02/trump-voter-fraud-senators-meeting-234909> [<https://perma.cc/SPE5-L9SX>] (In a meeting with 10 senators, “‘an uncomfortable silence’ momentarily overtook the room” after Trump, apropos of nothing, railed about the “‘thousands’ of people who were ‘brought in on buses’ from neighboring Massachusetts to ‘illegally’ vote in New Hampshire.”).

153. *New Hampshire Democratic Party v. State*, No. 2020-0252, 2021 WL 2763651, *13, 18–19 (N.H. Jul. 2, 2021).

154. *Id.* at *16.

155. Kevin Landrigan, *High Court Strikes Down NH GOP-Led Voting Law*, YAHOO LIFE (July 2, 2021), <https://www.yahoo.com/lifestyle/high-court-strikes-down-nh-224800930.html> [<https://perma.cc/DG3F-49HV>]. Sununu had originally pledged to oppose the law. Casey McDermott, *Gov. Sununu: ‘I Will Never Support Anything That Suppresses The Student Vote’*, NHPR (Dec. 12, 2017, 4:23 PM), <https://www.nhpr.org/post/gov-sununu-i-will-never-support-anything-suppresses-student-vote#stream/0> [<https://perma.cc/8LRR-5J6N>].

156. Charlotte Hill, *Democrats Can’t Count on Voters Being Mad Enough About*

In Texas, legislation was pushed that placed

new restrictions on absentee voting; grants broad new autonomy and authority to partisan poll watchers; escalates punishments for mistakes or offenses by election officials; and bans both drive-through voting and 24-hour voting, which were used for the first time during the 2020 election in Harris County, home to Houston and a growing number of the state's Democratic voters.¹⁵⁷

Democrats succeeded in killing the bill in May 2021 by walking out of the House chamber and denying Republicans the quorum needed to conduct business,¹⁵⁸ and it was reported that “studies consistently put Texas near the top of the list of states that make it harder to register and vote, which explains, in part, why the stakes are viewed as so high.”¹⁵⁹ When Republican Governor Greg Abbott called a special session to resurrect the legislation, legislative Democrats fled the state, with Abbott and Republican legislators pledging to have them arrested upon their return.¹⁶⁰

The bitter irony is that Republican states like Texas have benefited by the growth of their Latinx population—this growth has conferred upon these states more U.S. House seats and congressional power—yet, as the *Washington Post* reported: “For decades, Lydia Camarillo has watched Texas expand its influence in Congress, acquiring more seats from population booms fueled largely by Latinos. And each time, Camarillo has battled a majority-White state legislature, which resisted drawing those new congressional districts to reflect the Latino community’s growth.”¹⁶¹ Thus, the *existence* of ethnic

Suppression to Overcome It, WASH. POST (July 29, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/07/29/youth-vote-backlash-effect> [<https://perma.cc/3LYZ-3EEE>].

157. Nick Corasaniti, *Texas G.O.P. Races to Pass Voting Bill as State Democrats Push Back*, N.Y. TIMES (June 8, 2021), <https://www.nytimes.com/2021/05/30/us/politics/texas-voting-bill.html> [<https://perma.cc/SGG3-VRBS>].

158. Paul J. Weber & Acacia Coronado, *Dems Walk, Stop Texas GOP's Sweeping Voting Restrictions*, ASSOCIATED PRESS (June 1, 2021), <https://apnews.com/article/tx-state-wire-texas-government-and-politics-92d26e25c9db88a32e0fda890773b908> [<https://perma.cc/BHF2-DVMM>] (“They gathered later outside a Black church, driving home their anger over a last-minute change to the Texas bill that would have prohibited Sunday voting before 1 p.m., when many Black worshippers go to the polls.”).

159. David Montgomery, *After Walkout, Texas Voting Showdown Part II Looms*, N.Y. TIMES (July 20, 2021), <https://www.nytimes.com/2021/07/10/us/TEXAS-VOTING-REPUBLICANS-LEGISLATURE.html> [<https://perma.cc/TH7F-QVCJ>].

160. See Edgar Sandoval, *Why Did Texas Democrats Flee the State? And What Does It Mean?*, N.Y. TIMES (July 13, 2021), <https://www.nytimes.com/2021/07/13/us/texas-democrats-flee.html?auth=login-email&login=email> [<https://perma.cc/Q8TN-KYMP>] (“Dade Phelan, the speaker of the Texas House, could have directed the sergeant-at-arms to guard entrances and exits to prevent the mass exodus of Democrats. But it was unlikely that he expected lawmakers from the opposing party to flee for the second time[.]”).

161. Colby Itkowitz & Harry Stevens, *Booming Latino Populations Are Helping GOP*

minorities is politically beneficial to the same Republicans who seek to suppress the *voices* of those minorities.¹⁶²

As Black columnist Charles M. Blow has written in the *New York Times*, in words that could now apply to *all* voter demographics that pose a threat to Republican control:

[T]he history of pursuing Black people for voter fraud is long. It is a form of terror as a deterrent. It is a scare tactic aimed at the Black people who intend to vote and for the benefit of the white electorate nervous that their electoral power and supremacy is in retreat. According to their logic, the determinative white vote and white voice is in danger not because of shifts in values and demographics, but because of deceit and chicanery. As such, they must pass laws to crack down and ensure the purity of the vote. They don't want to bolster the vote, but to bleach it.¹⁶³

CONCLUSION: WILL AN IMPOTENT CONGRESS ACT?

In *Shelby County*, the Court majority had, however disingenuously, invited Congress to fix the VRA: "Congress may draft another formula based on current conditions."¹⁶⁴ As E.J. Dionne, Jr., wrote in the *Washington Post*, "elections are often decided on the margins, so voter suppression can chip away at participation just enough to shift outcomes. And gerrymanders can put victory out of reach altogether."¹⁶⁵ Congressional Democrats proposed new laws to combat voter suppression, but those could only get through the U.S. House in 2021.¹⁶⁶ President Biden "decried a '21st century Jim Crow assault' on voting rights"—yet he and other Democrats were unwilling to get rid of the U.S. Senate filibuster rule that made passage of new voting rights laws impossible.¹⁶⁷

States Like Texas Gain New Seats in Congress, WASH. POST (Aug. 12, 2021, 5:50 PM), <https://www.washingtonpost.com/politics/2021/08/12/redistricting-latino-gop-states/> [<https://perma.cc/679L-6K2L>].

162. *Id.*

163. Charles M. Blow, *The Voter Fraud Fraud*, N.Y. TIMES (July 11, 2021), <https://www.nytimes.com/2021/07/11/opinion/texas-elections-black-people.html> [<https://perma.cc/M8AQ-5467>].

164. 570 U.S. at 557. Of course, the Court could then nullify that new formula.

165. E.J. Dionne, Jr., Opinion, *Biden Must Embrace His Own Logic on Voting Rights*, WASH. POST (July 14, 2021, 4:49 PM), <https://www.washingtonpost.com/opinions/2021/07/14/biden-must-embrace-his-own-logic-voting-rights/> [<https://perma.cc/4SNL-5EE3>].

166. See Nicholas Fandos, *Targeting State Restrictions, House Passes Landmark Voting Rights Expansion*, N.Y. TIMES (June 1, 2021), <https://www.nytimes.com/2021/03/03/us/politics/house-voting-rights-bill.html> [<https://perma.cc/FE4R-4VHE>] ("H.R. 1's voting provisions were originally drafted by Representative John Lewis, the Georgia Democrat and civil rights icon who died last year.").

167. Dionne, *supra* note 165. For example, in what was described as "the most passionate speech of his presidency" Biden denounced attacks on voting rights, with "quote

California Democratic Senator Diane Feinstein supported getting rid of the filibuster only “[i]f democracy were in jeopardy”—and opined it was not.¹⁶⁸ West Virginia’s Democratic Senator Joe Manchin penned an homage to the filibuster (and expressly opposed the House-passed voting rights bill),¹⁶⁹ and Arizona Democratic Senator Kyrsten Sinema similarly rhapsodized about the filibuster.¹⁷⁰

When a Senate vote on House-passed voting rights legislation occurred in June 2021, “[a]ll 50 Senate Democrats voted to advance the federal legislation and open debate on other competing voting bills. All 50 Republicans united to deny it the 60 votes needed to overcome the filibuster, deriding it as a bloated federal overreach.”¹⁷¹ The filibuster’s Democratic supporters were undaunted: “‘The filibuster is needed to protect democracy, I can tell you that,’ Mr. Manchin told reporters[.]”¹⁷² If so, giving a minority of senators the power to overcome a majority on a matter so existential as the everyday citizen’s right to vote is certainly a tortured definition of “democracy.”¹⁷³

after quote sounding the alarm. What was missing, as many in his party and leaders of civil rights and voting rights groups that have been pushing the administration and Democrats in Congress were quick to note, was any mention of the obstacle that prevents them from acting.” Dan Balz, *Democrats Are Making Headlines on Voting Rights, But Little More to Counter Restrictive Efforts by Republicans*, WASH. POST (Jan. 17, 2021, 3:42 PM), https://www.washingtonpost.com/politics/democrats-are-making-headlines-on-voting-rights-but-little-more-to-counter-restrictive-efforts-by-republicans/2021/07/17/323f7aa2-e701-11eb-8aa5-5662858b696e_story.html [https://perma.cc/4QTU-URSW].

168. Joan Walsh, *Dianne Feinstein Is an Embarrassment*, NATION (June 11, 2021), <https://www.thenation.com/article/politics/dianne-feinstein-filibuster> [https://perma.cc/2LJF-VJVB].

169. Joe Manchin, *Why I’m voting against the For the People Act*, CHARLESTON GAZETTE-MAIL (June 6, 2021), https://www.wvgazettemail.com/opinion/op_ed_commentaries/joe-manchin-why-im-voting-against-the-for-the-people-act/article_c7eb2551-a500-5f77-aa37-2e42d0af870f.html [https://perma.cc/7SGF-8CLR]. “The senator’s attempts at protecting the rights of the Senate’s legislative minority have not struck everyone as virtuous—especially when it comes to protecting the rights of vulnerable *demographic* minorities.” Clyde McGrady, *Black Voters in West Virginia Are Tired of Being Invisible*, WASH. POST (Aug. 12, 2021, 6:00 AM), https://www.washingtonpost.com/lifestyle/black-voters-west-virginia-manchin/2021/08/11/90ffef54-d955-11eb-ae62-2d07d7df83bd_story.html [https://perma.cc/VD3Q-UNPF].

170. See Kyrsten Sinema, *We Have More to Lose Than Gain by Ending the Filibuster*, WASH. POST (June 21, 2021, 8:31 PM), <https://www.washingtonpost.com/opinions/2021/06/21/kyrsten-sinema-filibuster-for-the-people-act> [https://perma.cc/7JG2-6VSA] (“The filibuster compels moderation and helps protect the country from wild swings between opposing policy poles.”).

171. Nicholas Fandos, *Republicans Block Voting Rights Bill, Dealing Blow to Biden and Democrats*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/06/22/us/politics/filibuster-voting-rights.html> [https://perma.cc/757U-UHTV] (Manchin voted for it in exchange for consideration of a narrower compromise he had devised, which also lacked Republican support.).

172. *Id.*

173. And voting rights’ politics had certainly changed since the Senate voted 98–0 to reauthorize the VRA in 2006:

As Alex Shephard wrote in the *New Republic*, “If this is as deep an existential crisis for American democracy as the Biden administration occasionally suggests, then they and their fellow Democrats in Congress should act like it. Instead, they’re fiddling while Republicans across the country make plans to bring the crisis to completion.”¹⁷⁴ Even after the Texas legislative Democrats who had fled Texas in order to block voter suppression there met with U.S. senators to plead with them to act on voting rights, “only a few” senators declared voting rights a “top priority,” with others focused on an economic agenda as “a more pressing matter than securing voting rights, and perhaps future majorities.”¹⁷⁵ That seemed a politically fatal,¹⁷⁶ let alone demoralizing and immoral, tradeoff.¹⁷⁷

Most Republicans joined united Democrats in pushing ahead, saying that while the Voting Rights Act had produced historic results, it was still warranted.

“South Carolinians, you have come a long way,” said Senator Lindsey Graham, a Republican from that state, which is among those covered by the law. “But we, just like every other part of this country, still have a long way to go.”

Carl Hulse, *By a Vote of 98–0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES (July 21, 2006), <https://www.nytimes.com/2006/07/21/washington/21vote.html> [<https://perma.cc/WQ7W-KPD3>].

174. Alex Shephard, *Maybe the Democrats Don’t Care That Much About Voting Rights, After All*, NEW REPUB. (June 22, 2021), <https://newrepublic.com/article/162820/democrats-voting-right-election-2020> [<https://perma.cc/FL2U-T6LB>]. Republicans have also been curtailing the right of voters themselves to legislate through progressive ballot measures: “So far, the efforts by Republicans to raise the bar for qualifying initiatives have been incredibly successful: Red states enacted 24 laws amending the ballot process in the most recent legislative sessions.” Liz Crampton & Mona Zhang, *The Next Republican Target: Ballot Campaigns*, POLITICO (July 21, 2021, 4:30 AM), <https://www.politico.com/news/2021/07/21/republicans-ballot-campaigns-voting-rights-500347> [<https://perma.cc/P6PU-3Z93>].

175. Mike DeBonis, *Texas Democrats Find Voting Rights Are a Tough Sell as Capitol Hill Turns Its Focus to Biden’s Economic Agenda*, WASH. POST (June 15, 2021, 6:50 PM), https://www.washingtonpost.com/politics/texas-democrats-find-voting-rights-are-a-tough-sell-as-capitol-hill-turns-its-focus-to-bidens-economic-agenda/2021/07/15/f881e386-e570-11eb-8aa5-5662858b696e_story.html [<https://perma.cc/XY9Q-BNV2>]. It did not help that the Texas lawmakers suffered an outbreak of COVID-19 while in the nation’s capital. See Reid J. Epstein & Nick Corasaniti, *Texas Democrats Face Covid Outbreak and a Stalled Voting Rights Push*, N.Y. TIMES (Aug. 11, 2021), <https://www.nytimes.com/2021/07/20/us/politics/texas-covid-voting-rights.html> [<https://perma.cc/7BZQ-E47M>].

176. See Maya King, David Siders & Daniel Lippman, *We’re F---Ed’: Dems Fear Turnout Catastrophe From GOP Voting Laws*, POLITICO (July 26, 2021, 4:30 AM), <https://www.politico.com/news/2021/07/26/democrats-gop-voting-laws-crisis-500726> [<https://perma.cc/KK4V-93QH>] (Under Georgia’s new law, for instance, “the implications became clear to party officials and voting rights activists. In a state that Joe Biden carried by fewer than 12,000 votes last year, the new law stood to wipe out many of the party’s hard-fought gains—and put them at a decisive disadvantage.”).

177. See John Blake, *Democrats Are on the Verge of Repeating a Voting Rights Blunder That Led to the Rise of Jim Crow*, CNN (Aug. 1, 2021, 11:08 AM), <https://www.cnn.com/2021/08/01/politics/voting-rights-blunder-democrats-blake/index.html> [<https://perma.cc/3JMZ-PGRV>] (“As I watch some Democrats handle the voting rights issue, I’m seeing

In his famous “I Have a Dream” speech in 1963, Dr. Martin Luther King, Jr. spoke of the “fierce urgency of now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to make real the promises of democracy.”¹⁷⁸

Yet the voting rights dreams of Dr. King, and the late John Lewis, who was “bloodied at Selma and across the Jim Crow South in the historic struggle for racial equality,”¹⁷⁹ ultimately had to be sacrificed, in 2021, on the altar of parliamentary procedure that trumped public policy.¹⁸⁰

a replay of a 19th-century political horror story. It ended with Black voters losing faith in the leaders who were supposed to protect them.”).

178. *Text of the Speech Dr. King Delivered 20 Years Ago Today*, N.Y. TIMES (Aug. 28, 1983), <https://www.nytimes.com/1983/08/28/us/text-of-the-speech-dr-king-delivered-20-years-ago-today.html> [https://perma.cc/36SW-XUHG].

179. Katharine Q. Seelye, *John Lewis, Towering Figure of Civil Rights Era, Dies at 80*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/07/17/us/john-lewis-dead.html> [https://perma.cc/F4K9-E8ZH].

180. Harvard Law School Professor Nikolas Bowie writes that [t]he United States calls itself the world’s oldest democracy, which would be true if the world began in 1965. That was the year John Lewis marched to the Edmund Pettus Bridge, the president said “We shall overcome” and Congress passed the Voting Rights Act, which allowed many citizens to exercise their right to vote for the first time.

Nikolas Bowie, *How The Supreme Court Dominates Our Democracy*, WASH. POST (July 16, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/07/16/supreme-court-anti-democracy> [https://perma.cc/76ZD-J4UM].