

[00:00:00] **Jeffrey Rosen:** I'm Jeffrey Rosen, President and CEO of the National Constitution Center and welcome to We The People, a weekly show constitutional debate. The National Constitution Center is a non-partisan, non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. Last week, the Supreme Court decided *Brnovich v. Democratic National Committee* upholding two Arizona voting requirements in a major voting rights ruling. Joining us to discuss that decision and its ramifications for the meaning of Section 2 of the Voting Rights Act are two of America's leading experts on voting rights and the constitution who will cast much light on this important question. Ilya Shapiro is a vice president of the Cato Institute, director of the Robert A. Levy Center for Constitutional Studies and publisher of the *Cato Supreme Court Review*. He's the author of *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court*. Ilya, it is wonderful to have you back on the show.

[00:01:05] **Ilya Shapiro:** Great to be back with you, Jeff.

[00:01:07] **Jeffrey Rosen:** And Rick Hasen is Chancellor's Professor of Law and Political Science at the University of California, Irvine. In 2020, he served as a CNN election law analyst. He's the author of *Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy* and the author of the leading Election Blog. Rick, it is wonderful to have you back on the show.

[00:01:29] **Richard Hasen:** It's always good to be with you.

[00:01:31] **Jeffrey Rosen:** Friends, we're here to discuss the meaning of Section 2 of the Voting Rights Act. It's one of the most complicated sections to teach and the Supreme Court has just disagreed vigorously about its meaning. Before we jump into the technicalities of the text, let's step back and begin with the question we usually end with Rick, why is this case important and why should we, the people, listeners care about it?

[00:01:54] **Richard Hasen:** So, this is an important case because this was the first time that the Supreme Court interpreted, but Section 2 of the Voting Rights Act means outside the context of, of redistricting. In the redistricting context, when every 10 years states draw new district lines to comply with a various constitutional principles, one of the things they have to do is also make sure that minority voters are given certain opportunities to elect candidates of their choice in districts. And the Supreme court since the 1986 case of *Thornburg v. Gingles* has set forth kind of a multi-part test to know when Section 2 is violated. But until the *Brnovich* decision which we got at the end of the Supreme Court's term, we never heard from the Supreme Court as to how Section 2 applies to protect minority voters outside the context of redistricting.

As you said, the majority in descent have strong disagreements about the meaning of Section 2, and this is going to have very large ramifications for challenges to laws that some minority plaintiffs argue, make it harder for them to register and to vote. And so now, one of the major tools that plaintiffs have hoped they would be able to use to attack laws that they claim make it hard to register and vote is, I would say, essentially gone.

[00:03:12] **Jeffrey Rosen:** So, Ilya, Rick just said that the court had previously interpreted Section 2 two to apply to so-called vote dilution claims that arose out of redistricting cases, but this was the first time it applied Section 2 to voting restriction claims that could affect voting requirements in the future. Why do you think that the case is important, then why should our listeners care about it?

[00:03:35] **Ilya Shapiro:** Well, it's important for the reason that Cato and I filed a brief in this case and we actually filed in support of neither side. We simply urge the court to give much needed clarity in this area, because what we've seen lately with polarization politically and within each party, and also a decline in, in trust in our institutions is that there's an increase in election litigation, including Section 2 vote denial claims. And the Supreme Court really needed to set out a basic framework, otherwise there's... there'd be a, a continuation or a growth in the lawyer, Full Employment Act with any change in voting rules, drawing a legal challenge and perhaps upheld one year only to be struck down the next, depending on lots of potentially different things.

And so to me, this case, I, and I think Rick agrees with this, was about much more than the two particular Arizona provisions at issue, which after all are commonplace around the country, requiring you to vote in your own precinct and preventing a ballot harvesting or collecting of earlier mail ballots by those other than family members, caregivers postmen and election officials. But much more important than those two provisions, whether in Arizona or elsewhere is the framework for the Supreme Court to set out.

And I had urged the court to set a bright line rule. It didn't quite do that. Although a few of the factors that Justice Alito said in his mentioned in his majority opinion does tend to I think we-we'll get into this set a pretty high bar and effectively work as a bright line for Section 2 claims.

[00:05:10] **Jeffrey Rosen:** Thank you very much for that and we'll look forward to discussing your proposed bright line and the court's ruling in a moment. But let's begin as they say with a text, and it's so important to begin with the text because the text is hotly contested and the majority and dissent disagree strongly about what it means. So I'm going to read the text and We The People listeners, this is a good time for you to just get out the opinion and read the text yourself so that you can decide what it means. So Section 2 has two interlocking parts, a subsection A says, no voting qualification or prerequisite to voting or standard practice or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.

And then section B tells the court how to apply that bar, but those are Justice Kagan's words. A violation of Section A is established if based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a given race in that those members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice. Rick, those words came against a very specific backdrop. They were designed to overturn the Supreme court's 1980

decision in the Mobile case, which said that you had to prove discriminatory intent in order to establish the Section 2 violation.

Instead, Congress wanted to say that laws that had a discriminatory impact could violate Section 2. They borrowed that language from a case called *White v. Regester*, that language about not being equally open to other members of the electorate to participate, but it's hotly contested about what the words mean and whether they suggest that any practices that have discriminatory impact can be challenged or something short of that. So I've read the language and I've given a bit of the background, please tell us, Rick Hasen, what was the background and what was Congress trying to achieve when it passed those words?

[00:07:31] **Richard Hasen:** Right, so I think we want to start with 1965 Voting Rights Act. That's when the act first passed. And one of the major provisions of the act was what's come to be known as pre-clearance or Section 5 of the act. And I think it's important to understand this backdrop before we go forward to talking about where we are today. So among the most important provisions was this idea that if a jurisdiction had a history of racial discrimination in voting, it couldn't make a change to its voting rules without getting federal approval from either a three judge court in Washington, D.C. or the Department of Justice. In order to get approval, the jurisdiction would have to show that the, the change in law that they wanted to make wouldn't make protected minority voters worse off. This is sometimes referred to as the retrogression principle.

And the reason that Co... That Congress had put that in the 1965 Voting Rights Act is that the Department of Justice would go down and they'd sue Southern states for engaging in racially discriminatory voting practices, like the poll taxes, like literacy tests or, or whatever. They'd win their case and then the you get the jurisdiction just enacting a new restriction after DOJ left. And so this idea was we could prevent backsliding by putting the onus on these jurisdictions to make their get approval before they make any of their changes.

And so that helped. It was prevented backsliding, but it didn't help enough. And so for example, if a jurisdiction had a rule that was discriminatory and it's been on the books for a long time, it wouldn't be making a change and so it wouldn't be subject to pre-clearance. And so let's talk about *City of Mobile v. Bolden*. In New Orleans Louisiana they were electing representatives for the city and the representatives, some of them were elected at large. So everyone in the city got to vote. And imagine a city that is 60% white and 40% African-American and all the whites were for one set of candidates and all the African-Americans prefer another set of candidates. In that kind of system, if there's racially polarized voting where whites prefer one set of candidates, African-American prefer others and you vote at large, everyone gets to vote, then whites control the entire city council.

And so does it violate Section 2 of the Voting Rights Act, a different part of the Voting Rights Act to not require the creation of districts so minority voters can have a chance to elect representatives of their choice? And some Supreme Court decisions before the 1980 *City of Mobile v. Bolden* case, including *White v. Regester*, which you mentioned said, yeah, it could be a violation. If you look at a bunch of different factors, some of those called the totality of the circumstances, it could be discriminatory, but in *City of Mobile v. Bolden*, the court said,

we read Section 2, the Voting Rights Act is not reaching this question, that it only would make at large voting illegal, if a jurisdiction adopted it with the intent of discriminating against minority voters. And in 1982, in response to *City of Mobile v. Bolden* Congress in dialogue with the Supreme Court said, no, you've got Section 2 wrong.

It's enough to prove a discriminatory effect, not just to discriminatory intent, right? And so with *Thornburg v. Gingles* and interpreting the revised Section 2 of the Voting Rights Act said in 1986 was if you could meet certain requirements, which we don't have to get into here, then you could force a jurisdiction to draw districts in which minority voters would have a chance to elect representatives of their choice. And this was a... caused a dramatic change in representation. We res... W-we now have many more African-American preferred candidates for state and local and federal office. And so it was remarkably successful in achieving that.

And so Section 2 said in its revised form in 1982, it's enough to prove results or discriminatory effect. And so what was the issue in *Brnovich* as we get up to there is what does it mean to have a discriminatory effect in the context of not, a, a, not a vote dilution case or [inaudible 00:12:07] we just in case, but a vote denial case. And so the question, for example, suppose that African-American voters use a particular method of voting more commonly than another method.

So let's talk about the, in some places African-American voters do Sunday drives to get people to vote right after church, souls to the polls. And let's say that a jurisdiction, knowing that African-American voters voted high numbers on, on Sundays, and they tend to vote for Democrats, let's say that a Republican legislature passes a law that says no more Sunday voting. The question would be, is that a violation of Section 2? And my answer before *Brnovich* was surely yes and my answer after *Brnovich* is almost certainly no.

[00:12:18] **Jeffrey Rosen:** Ilya, you know, Rick just went through a lot of helpful history. I'd like you to review the same history. And we heard Rick tell us that in the *White v. Regester* case, which was 1973, the court said that vote dilution plaintiffs had to show that the political processes leading to nomination and election were not equally open to participation by the group in question- that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice. We heard Rick say that in the *Mobile* case, the court said you had to prove discriminatory intent. And we heard him say that Congress wanted to reverse that requirement in Section 2 of the amended Voting Rights Act and resurrect the *White v. Regester* test. Does that mean that all practices that had discriminatory effects could be challenged or did Congress in the 82 amendments intend to allow something less than that?

[00:13:19] **Ilya Shapiro:** The short answer is no and that's why I'll just take up the part where I want to clarify or correct depending how you see it, something that Rick said. And that's that the the eventual legislation that Congress passed, the, the Section 2 amendment did not simply say discriminatory effect, or as now we might say more often disparate impact. That's not what it said. Well, that, that, that kind of understanding met with stiff resistance in the Senate and there was compromised language to require a consideration of the totality

of the circumstances and that you know, the, the, the equally open language that, that you just read in which Justice Alito started his majority opinion in the Brnovich case with.

And, and that requires a consideration, as, as I said, of the totality of the circumstances. It's not you know, I, I don't know whether an anti-souls to the polls, you know, Sunday voting, that's thinly veiled to, to stop African-American post church vote goers. I don't know whether that would survive or not. But the, the idea is you look at whether, you know, the factors, I don't know whether you want to, Jeff, get into a Alito's actual majority opinion here, but the, the point is that minute or not statistically significant disparities don't, you know, don't make a particular rule suspect. You have to look at how the state let... sets out its rules altogether. You know, there's not a clear time, place or manner you know, guideline here.

But it's not merely importing the Section 5 anti-retro aggression test or the, the re-districting vote dilution tests under Section 2. Here, it's much more of a, you know, you don't have to prove intent but you do have to have something more than some, you know, mere you know, minor disparate impact altogether. And that's, that's, you know, goes to the difference between the analysis of the majority and the and the dissent in Brnovich.

[00:15:10] **Jeffrey Rosen:** Thank you for that. Rick, let's just stay with what Congress intended and debated in, in 1982. There is language for swearing any desire to require a proportional representation and Justice Alito, and Justice Kagan disagree about whether that exception limits the discriminatory effects testing in what ways? So d-do you believe that Congress was attempting in 1982 to forbid as Justice Kagan said all voting practices that make it harder for minorities to vote or does the text and the legislative history suggest a more limited principle as Justice Alito suggests?

[00:15:51] **Richard Hasen:** Jeff, let me say that I can't remember being as angry in reading an opinion and thinking it is disingenuous since the Shelby County case, which is the case in 2013, where the Supreme Court effectively killed off Section 5 of the Voting Rights Act. This is a, an embarrassingly terrible opinion. And, and this is not... If you've listened to me on this program before, I don't use that language lightly. I don't think I've described any other cases in this way.

You said at the opening of today's program that it's important to start with the text and the history and this opinion by Justice Alito mangles both. Not only does the text talk about equality, it talks about minority voters having less opportunity, that's right there in the text, then others to participate in the political process and to elect representatives of their choice. Congress this law, trying to shake things up. It wanted, for example, the creation of these majority minority districts in places like new Orleans with their racially polarized voting, and essentially no representation for African-American voters. Justice Alito views this as radical, but it was radical. That was Congress's intent. Congress intended to break things up. And there was no evidence in Justice Kagan ha-having studied the the history of, of the, of Section 2's passage in, in some depth.

Justice Kagan has much better for the argument that Congress was not debating how radical to make this law. In fact, there was an age to Ronald Reagan who was working very hard to

water down what Section 2 was going to do, because he saw how radical Section 2 was meant to be by Congress. And he failed in getting Congress to water it down. That person's name, the point person on this was John Roberts. John Roberts, now the chief justice, United States Supreme court achieved in Brnovich what he couldn't achieve in 1982, politically, which is to water this law down and make it into nothing. Let me say one more thing about what the court did in Brnovich. Ordinarily, you start with the text, you look at the history and you put forward a test as to how to implement that history.

That's exactly how to implement that text as reflected in the history of its drafting. That's exactly what the Supreme Court did in Thornburg v. Gingles, by coming up with a three-part test for figuring out when there is vote dilution followed by a totality of the circumstances test, which was drawn from a Senate report on section 2's amendment in 1982, which itself was drawn from White v. Regester, from the Supreme court itself in setting forth the standards. Justice Alito doesn't do that in the Brnovich case.

Instead, he can't even name a test. He instead says, well, we've never looked at Section 2 before in this context, let me give you some guideposts. And I'm going to mention the five factors because we're going to have to get into this. The... this is what he said were the five factors that you should maybe look at in particular cases. The magnitude of the voting burden imposed by the practice, the degree to which the practice was widespread in 1982, the size of the racial disparity caused by the practice, the ease of voting under the state's whole electoral system and the strength of the state's interests underlying the practice. As Justice Kagan says in the dissent, this is just... this is made up law. This is made up out of whole cloth. The idea that we're now going to use 1982 as our baseline, and the idea that we're not going to look at a practice like banning souls to the polls and ask whether that means minority voters have less opportunity than others to participate in the political process, so long as a, there are other electoral opportunities for minority voters.

And this is mangling Section 2 beyond recognition. This is the worst form of statutory interpretation. And if I were a justice like Justice Gorsuch who professes allegiance to textual interpretation, this is not supported by the text. This is just wholly made up law that is intended to put roadblock after roadblock for plaintiffs who wish to use Section 2 to bring a vote denial claim.

[00:20:04] **Jeffrey Rosen:** Ilya, you just heard Rick's strong words and you read Justice Kagan's strong words. Both of them claim that the majority was making up law and posing extra-textual requirements in order to narrow Congress's intent. Do you agree or disagree?

[00:20:18] **Ilya Shapiro:** Yeah, I think Rick and I are on opposite sides of the looking glass, because I think justice Kagan's opinion was disingenuous. I mean, I generally respect Justice Kagan a whole lot. I think her opinions are clear, the questions she asks on oral argument go precisely to the issue that any given case turns on. But here, she essentially tries to make this Shelby County redux. She essentially tries to import disparate impact from other statutes, other, other understandings, and she reads the 1982 Section 2 amendment to say things that that it doesn't. And indeed, it's not surprising. If I were Justice Gorsuch to read the text of 19, of, of Section 2 based on what the words in it say and to accept the practices

that were in place in 1982, I don't think there's a constitutional or a Voting Rights Act, right to any early voting, for example, or to no excuse absentee voting.

And I don't think that if you take those away that that would be some sort of racial disenfranchisement, let alone a violation of Section 2, however, construed. I mean, we've expanded our states. Have different states in different ways have expanded their, their voting rules and, and have the ability to vote, the opportunities to vote for everyone by leaps and bounds. About in the last 20 years, Bush v. Gore was the real catalyst for this but you know, that may or may not be a good thing. We can debate that as a matter of policy or technical administration of election law, but, you know, I don't blame New York or Delaware for having many, many fewer opportunities to vote than Georgia or Iowa, Texas. I don't think that means they necessarily violate Section 2 because of that or that they are bad to voters because of that.

I mean, the competent handling of elections in New York City that we recently saw were probably bad for voting. But anyway, getting back to the, the actual debate between the majority and dissent this is not about letting in racial discrimination through the back door. This is not about eviscerating Section 2. You know, Shelby County, we can debate that separately. I think it was correct simply because the, the extraordinary conditions on the ground in the Jim Crow south were gone, or at least were applied in, in different ways. And the the, the coverage formula did not match the realities in 2006 that it had in 1972, et cetera.

But that's not this case. This case is about the equal opportunity to vote. And there simply to do that, to, to make out and, and acclaim for race-based vote denial, the court is saying here, you have to show race-based vote denial. It's as simple as that.

[00:22:45] **Jeffrey Rosen:** Rick, you mentioned the Gingles case, and I find it a complicated case to teach, because I would have to go back and look at the factors, but I'm I'm not going to read them to, to remind myself. And under Gingles plaintiffs have to show three preconditions before they can raise a vote dilution claim under Section 2. First, the racial language minority group is sufficiently large and geographically compact to constitute a majority in a single member district. Second, the group is politically cohesive, meaning its members tend to vote similarly. And third, the majority votes sufficiently as a block to enable it usually to defeat the minority's preferred candidates. If those three preconditions are met, then the plaintiffs have to show using factors that the Senate noted in passing the 1982 amendments that under the totality of the circumstances that a redistricting plan diminishes the ability of the minority group to elect representatives of their choice.

And then there are these nine Senate factors, some of which, as the Justice Alito noted are, are relevant to voting claims that don't involve vote dilution and others aren't, but they include the history of official discrimination in the jurisdiction that affects the right to vote, the degree to which voting is racially polarized and the extent to which minorities are discriminated against in socioeconomic areas, such as education, employment, and health. Rick, to what degree are these Senate factors, which was obviously part of the debate over the 1982 amendments relevant to deciding cases that don't involve votes dilution, which

was the sentence focus, but instead other fine kinds of restriction on the right to vote. And to what degree does, does this legislative history impact your view that Justice Kagan rather than the majority had a right?

[00:24:28] **Richard Hasen:** So one thing I think to start is that the threshold factors in Gingles, the ones you mentioned about racially polarized voting and the minority... the majority usually being able to feed the minorities preferred candidates, those, I think everyone agrees, don't have direct application to vote denial cases, you know, where you make it harder to register or to vote, but the totality of the circumstances do seem to be relevant. And in fact, if you look at every court decision since that before Brnovich that had tried to figure out what Section 2 means in the vote denial case, they did look at those totality of the circumstances factor. As in they had... the lower courts had developed a number of tests all of which were rejected by the majority in favor of these ad hoc standards that the court came up with. So just to give you an example of how ad hoc this is Justice Alito talks about the practice in 1982 as the standard. It has to be more than the usual burdens of voting as understood in 1982.

Why does that become the standard? Did Congress think that the law was going to just stop evolving and that voting practices weren't going to change after 1982? There's nothing to suggest that. Or to take another factor, the strength of the state's interests underlying the practice. Justice Alito in multiple points in the opinion, talks about the specter of voter fraud as though it is a major problem in the United States. And we know that it is a minor problem in the United States. Arizona had no instances of fraud connected to these practices. And so the upshot is under Justice Alito's test. Plaintiffs have a very high burden. They have to show that something is more than the usual burdens of voting, more than the usual burdens of voting as compared to what the law was in 1982 when early voting and absentee voting and was rare and voter registration was onerous.

And they have to show as a whole that there is not equal opportunity to vote. And the state doesn't have to come forward with any evidence that its laws actually necessary to support its interests. It can just assert an interest in voter fraud. On the very same day that the Supreme Court decided the Brnovich case, it decided a case called Americans for Prosperity Foundation v. Bonta. And in that case, it was totally flipped. The state has to come forward with lots and lots of evidence that its disclosure law is required to enforce its important law, law enforcement interests, but plaintiffs don't have to come forward with any evidence of a chill to support their claim that the, that the law is violating their first Amendment Rights. And what explains the difference in these two cases? Why does the state get a pass in one case and not the other, it's the conservative ideology of the justices on the Supreme Court.

There's no way to understand this but as a naked power grab by the Supreme Court. As I said, I-I'm still angry a week after the decision as we're recording this. I just find these opinions to not reflect anything like the totality of the circumstances test, not to reflect anything like either what the text of Section 2 says or what the legislative history requires, or how lower courts have construed the law. And let me... I'll give one final example. United States Court of Appeals for the Fifth Circuit, which I consider to be one of the most conservative courts in the country heard a challenge to Texas' very strict voter ID law on

bunk. That is the entire Fifth Circuit heard it. And the Fifth Circuit found that this very strict voter ID law violated Section 2.

Then Texas amended its law in response to the lawsuit, eased up the burdens, provided ways that voters who have difficulty getting voter ID could still vote. And the Fifth Circuit upheld the law. That's what Section 2 was meant to do. It was meant to say that in egregious cases, there should be found to be a violation of Section 2 for vote denial claims. But now after this opinion, I think that that Texas voter ID decision would have come out the other way and it's hard for me to imagine any current voting restriction violating Section 2. Congress didn't intend to pass a law that would have no effect in the vote denial content.

[00:28:57] **Jeffrey Rosen:** Thank you so much for that. Ilya, your response of course, and, and, and more, more broadly, I, I understand that you and Rick and others may disagree about the precise factors to be applied, but when I used to teach Section 2, the, the common wisdom was that Congress was trying to create a results test, which prohibits any voting law that has a discriminatory effect, regardless of whether it was motivated by discriminatory intent. I-i-is that wrong that Congress was trying to create a results test and, and are we just disagreeing about exactly how to prove discriminatory results? Or is there something else in the text or legislative history that, that suggests exactly what kind of discriminatory results Congress was trying to prohibit?

[00:29:45] **Ilya Shapiro:** Well, there has to be a diminimous or common sense filter on what a an effects test is and I don't... I'm not, you know, the, I don't think it's the same as disparate impact and other statutes, but r-regardless, in voting, there are kind of what Justice Stevens in the Crawford case involving voter ID called the usual burdens of voting. So you have to go somewhere or you have to register. Now, we've made it a lot easier with more widespread, no excuse absentee or mailed ballots, but there are certain burdens. You don't have a, a constitutional right to a... for the government to infer how you want to vote by your brainwaves or to to text your vote in, or, or, or click on a website or, or whatever the easiest technological way conceivable could be at any given time. And so things like you have to vote during certain hours or, you know, if you want to consolidate early voting days or whatever, those kinds of time, place, manner rules are fine. Souls to the polls would be problematic, probably because it's, it's widespread seen that you know, that's i-it, it looks facially neutral, but there'll be a pretext of trying to reduce racial minority voting or, or something like that.

But in the general circumstance, I think it's patronizing to say that you know whites are better than racial minorities that figuring out where to vote or how to get a voter ID. And so the rules, and we've seen this litigation again and again, is, you know, for voter ID, you, you can require it. Most people support it overwhelmingly including Democrats, including members of racial minorities. You know, progressive elites don't, but they're the only ones. And as long as states don't make it overly hard to get the actual ID, that will survive. And similarly with, you know, other sorts of commonplace rules that states have great leeway to put in so long as, again, it's not just, you know, it doesn't fail the constitutional smell test, come on, this is a, a, a pretext for going after you know, some disfavored group.

[00:31:37] **Jeffrey Rosen:** Rick, Justice Kagan says I-I'm not talking about small impacts, the minimus requirements. And she also says Section 2 doesn't demand equal outcomes if members of different races have the same opportunity to vote, but go to the ballot at different rates, that's their preference. But, she says, if a law produces different voting opportunities across races, if it establishes rules and conditions of political participation that are less favorable or advantageous for one racial group than for others, then Section 2 kicks in, it applies in short, whenever the law makes it harder for citizens of one race than of others to cast a vote. I, I think you believe that that's supported by the text in history of Section 2. Tell us why?

[00:32:20] **Richard Hasen:** Well I'm looking at the opinion and there's a part in the dissent from Justice Kagan, where she talks about Justice Scalia, who was you know, not always a friend to the Voting Rights Act, where he said that he wrote in a case called *Chisom v. Roemer* suppose that a county passed a law limiting voter registration to only three hours one day a week, and suppose the policy makes it more difficult for blacks to register than for whites, say, because the jobs African-Americans disproportionately hold make it harder for them to take time off in that window, though, right? Those are the sociological factors that and education factors that you mentioned, the totality of the circumstances test. Justice Scalia had concluded that if that were the case, then those voters would have less opportunity to participate in the political process than whites and Section 2 would therefore be violated.

Common sense, textual interpretation of the law. And yet the majority seems to say, no Justice Scalia was wrong there, that's not what Section 2 requires. You've got to look at the entire system as a whole. You've had to compare what the registration rules were in the 1980s. The state can come forward with interests and not support them like efficiency. So I think that, you know, what you have in Justice Alito's opinion is just a roadmap for lower courts to find no Section 2 violation and for appellate courts, if more liberal district court judges find some kind of violation to overturn that. The touchstone of this law should be less opportunity than others. You read the part from Justice Kagan's dissent

That less opportunity than others, that disparate impact is what the majority rejects, but that should be the touchstone for any textual analysis as Justice Scalia's opinion, I Justice Scalia's earlier opinion in *Chisom v. Roemer*. I think so nicely illustrated.

[00:34:13] **Jeffrey Rosen:** Ilya, why, why shouldn't that language, having less opportunity down their groups to participate, that is, disparate impact be the touchstone? And then since Congress, obviously didn't think clearly about the vote denial as opposed to vote dilution claims why not come up with a simple, clear test. You recommended a test share with our listeners, what a test you recommended and why you believe that Justice Alito's factors broadly satisfy that need for a clear test and, and are consistent with the text of the statute?

[00:34:44] **Ilya Shapiro:** I actually didn't recommend a test. I just said there should be a test so that there's clarity going forward and states aren't constantly in flux with, with their election rules. But I think for, for Rick's hypothetical, the, the only three hours of, of

registration when overwhelmingly that that's racial minorities that are, that are working then, or make it harder to register. And registration, of course, is a bottleneck. Is it's you know, even if you look at totality of circumstances of when and how you can vote, if you're not registered, you can't vote. Well, that seems like failing Justice Scalia's factors.

So I don't think this precludes, you know, egregious situations where, as I said, there can be no possible explanation for a given rule other than that it's, it's targeted at disfavored groups based on, on race. And so I think that this you know, this, this multi-factor test, this kind of totality of the circumstances, even though I don't like them, I wish it were a little bit sharper, but it certainly allows for, you know, egregious rules that failed the smell test as I said. But you know, most rules in most states don't do things like that. And maybe the Texas voter ID was, maybe it wasn't.

You know, judges can debate, there are going to be gray areas, certainly. But you know, the, the, the vote, I don't think equal opportunity is synonymous with, with disparate impact. I don't think it was the way that the laws enacted and I don't think, you know, to the extent legislative history even matters. I don't think it supports it.

[00:36:06] **Jeffrey Rosen:** Thanks for that. Rick, how significant does the disparity need to be for it to violate Section 2? And is it fair to say that Congress didn't think squarely about how Section 2 might apply to vote denial cases and therefore some kind of test is necessary for the court to construe or, or, or not?

[00:36:27] **Richard Hasen:** Well, I think it goes without saying that there needs to be a judicial gloss on this language because the... you read the statute at the beginning, you know. I was very proud of you for getting all the way to the end of it without falling asleep, because it's hard to hear statutory language. But it's, it's opaque. And so it requires interpretation. Congress, one thing we know is that Congress when it passes laws, doesn't think about every possible permutation. And of course it can't foresee everything that's going to happen in the future. I mean, you could talk about the Communications Decency Act of 1996 you know, that regulates the internet and no one could foresee where social media was going to go in 2021. And so of course we have to take statutory language and apply to new circumstances, and there are different thoughts of interpretation as to how that should be done.

But I think the core which Justice Kagan says in her dissent, the core is can you show a, as a threshold, not as the, not as a total test, can you show a statistically significant disparate impact. That is and she dropped a footnote talking about the other instances in which the Supreme Court has relied on statistical disparities as a, as kind of a first cut. Can you show that this law is having a disparate effect, a statistically significant disparate effect? I tend to think that generally speaking, third-party ballot collection laws probably don't have that effect and they could be justified by an interest in preventing voter fraud since we actually have had cases of third-party ballot collections leading to fraud. But yet Justice Kagan makes a really compelling case that in the particular context of Arizona, where only 17% of Native American voters many of whom are on reservations, have the opportunity to, to, to have

easy access to a mailbox. Because they're living in these remote areas, that there, it could be a big burden and you could statistically show that kind of burden.

And so, the majority doesn't seem to see that as the touchstone and in fact, rejects that as a touchstone, instead coming up with this amorphous test. I really think that if Justice Kagan's test were adopted, a majority of Section 2 cases would still fail. It's a high burden and she says it's a high burden. It's not meant to get to minor disparities or mere inconveniences. But for egregious laws that are passed without the state having a real interest, those laws should not pass. And that reminds me of, o-of, of a really important point back about the totality of the circumstances. One of the totality of circumstances recognized in the Senate report coming out of the Supreme court's decision and *White v. Regester* and other cases is the tenuousness of the state's justification. That is as Justice Kagan explains in her dissent. There are instances throughout history of laws that look like they're neutral on their face, but are really intended to make it harder to register and vote.

But proving intentional discrimination is really hard. And so, one way to get at that through the backdoor is to ask, is the state passing a law and asserting its interest in passing law? Doing it with actual evidence that the laws necessary to, to reach its goals or is it tenuous? Is it just an excuse to discriminate. If that's what's going on, if it's tenuous, that should be a big thumb on the scale against the law. And in fact, Justice Alito reverses that and puts the thumb on the scale, favoring the state, as it comes up with his tenuous excuses for passing laws that suppress the vote.

[00:40:13] **Jeffrey Rosen:** Ilya, Rick just stated a really simple test, can you show this law as having a statistically significant disparate impact and Justice Kagan offered a similar test, and both of them are saying, this is broadly what Congress was trying to do in 1982, it was rejecting an intent requirement and trying to prohibit a disparate impact. And the test should be, is the, is the impact statistically significant? Do you believe that's a plausible reading of the text and purpose or not?

[00:40:43] **Ilya Shapiro:** I think a statistically significant impact would be one of Alito's factors as well. I think he, he mentioned that the size of the disparities in the rules effect on members of different racial or ethnic groups. And so there could be sort of a, a burden shifting at a certain point if if a plaintiff shows that there's such a big effect like with Rick's hypothetical of the three hour rule or an anti-souls to the polls type of rule neutral, just cutting back on Sunday voting, what have you. I think in effect, in practice, how courts would look at that is to shift the burden and look at what the state's justification is.

Because the state's justification, isn't always simply anti-fraud. And I agree with Rick that there's not that much fraud, but it exists in certain context, more, much more through mail than through in-person voting. But the greater state interest is to maintain or increase the confidence of the electorate in the legitimacy of the government that the election producers or the integrity of the, of the balloting. I think we can we can all agree on that. And so, you know, I, I don't think there should be a Section 5 style test where every state changed to an electoral law has to be run by a court or, or the Justice Department or anyone else. But I think in effect even under J-Justice Alito's multifactor totality of the circumstances test, if

you show us you know, a significant disparate impact, and that's gonna raise some questions. What really is going on here? And, and, and courts will delve into that.

But, but again there's a big difference between, you know, you can only register for three hours on a given workday or whatever, or, or no Sunday voting versus we're cutting back early voting from 25 days to 13, or we're making it nine to seven instead of eight to six or, or whatever, the changes that tend to be debated with such a acrimony of late.

[00:42:29] **Jeffrey Rosen:** Many, thanks for that. Rick, could Congress overturn this Brnovich decision through a new statute if the votes were there, which we know from a current reality is not the case or is there language in the opinion suggesting that a race-conscious Voting Rights Act might itself be unconstitutional?

[00:42:49] **Richard Hasen:** That's a great question. Let me just first start by saying that I was heartened to hear some of what Ilya said about how he reads the Supreme Court's opinion, but I'm much more, in terms of what would violate Section 2, but I'm much I'm much more pessimistic that this is what the court actually meant. You know, so now we're not debating what Section 2 means, we're debating what the court meant in Brnovich. And I sure hope that Ilya's right and I'm wrong on this point, but I-I'm not confident of that. Could Congress revise the Voting Rights Act to adopt Justice Kagan's descent? And I think the answer to that question is first politically it'd be very difficult, even though in 2006, Congress passed a renewal and strengthened Voting Rights Act by a vote of 98 to zero in the United States Senate. Times have changed and this has now become a much more politically polarized issue where very few Republican members of Congress are supporting a a revised Voting Rights Act at all much less one that would change the Brnovich decision. So I think politically, there's a huge question about whether something could pass, but let's suppose that it could pass, would the Supreme court finds it to be unconstitutional?

There is language in the opinion. It's on page 25 of the slip opinion, which you can find on the Supreme Court's website where... In the, the 20 page, 25 in the majority opinion where Justice Alito is talking about the standard that Justice Kagan has adopted this disparate impact standard. And he suggests that such a standard would be a he calls it a, a, a radical test and he says I want to get the exact language for you here in the opinion.

He says that that it would... that, that, that Justice Kagan's alternative would quote, "Deprive the states of their authority to establish non-discriminatory voting rules." And so I think if Congress adopted a disparate impact test, like Justice Kagan suggests, that a court could do a kind of Shelby County, too. You're depriving states of their sovereignty, here not equal sovereignty, because it's not singling out states with the coverage formula. But you're depriving states of their sovereignty, you're upsetting the federal balance. Which makes me think that one way to try to insulate revised Section 2 from a constitutional challenge might be for the court to apply this new Section 2 only to federal elections, because Congress has broader powers under federal elections. In Article I Section 4 of the constitution, Congress has the power to make or alter the laws for a federal election set by the states.

Whereas the power to regulate elections generally to prevent race discrimination comes from enforcement of the 14th and 15th Amendments, 14th Amendments, equal protection

clause, 15th Amendments prohibition on discrimination on the basis of race. So I think you know, it's not clear if Congress could enact Justice Kagan's dissent as Section 2. It would be a better chance if we applied only to federal elections.

[00:45:58] **Jeffrey Rosen:** Ilya, do you believe that Congress could enact Justice Kagan's dissent, or do you think that that would violate the constitution?

[00:46:06] **Ilya Shapiro:** Well, it could certainly change and amend Section 2 to have an explicit disparate impact standard of, of some kind. It could change it in other ways. It could enact a new for that matter coverage formula for to, to, to renew Section 5, that's being debated in the John Lewis Act. Now I'm, I with Justice Thomas think that there is no longer any constitutional justification for the extraordinary subversion of our federalist regime to have the federal government act as a trustee of state elections any further unlike for Section 2 or Section 3, which are fully justified, but that's getting into the weeds of some.

But I'd like to thank Rick for pointing us to page 25 of the slip opinion, because this goes to two earlier points that we've been discussing. One is Justice Kagan's accusation that Justice Alito considered Section 2 to be a radical piece of legislation. He doesn't say that. He says the dissent, Justice Kagan's dissent is, is, is radical, and that's partly why I think Kagan is being disingenuous. But also, he talks about this issue of statistical significance and disparate impact. Footnote 17 he says, we do not think Section 2 is so procrustean as to simply make any statistically significant disparity into a violation.

Instead whatever might be standard in other contexts, we have explained that Section 2 is focused on equal openness and equal opportunity does not impose a standard disparate impact regime, but it opens the conversation as I alluded. So, Rick, I don't think you need to be so pessimistic about Justice Alito. I think what I described as very much in line with what his opinion said, but of course that's what lower courts are going to have to be interpreted.

[00:47:39] **Jeffrey Rosen:** Rick, Justice Kagan says that the majority has eviscerated the power of Section 2 and that many discriminatory voter practices can no longer be challenged, even though she thinks they should be because they have discriminatory impact. Tell us what those practices are and what the practical effects of the Brnovich decision will be?

[00:47:59] **Richard Hasen:** So I think that we need to understand the context of this, this opinion coming at this time in American history. And I, I think the dissent acknowledges that, but the majority ignores it. We just went through a very difficult contested election where President Trump made wildly unsubstantiated claims of voter fraud, claimed the election was stolen, tried to interfere with the outcome of the election by calling election officials and asked them to change vote totals. I mean, i-it's mind boggling. We had a, a an insurrection in the United States Capitol where people stormed the Capitol and tried to stop the counting of the electoral college votes. Just astounding. And in response to this, rather than a bipartisan commission that comes together to try to figure out how do we stop this and how do we stop this scourge of lying about election integrity?

Instead, Republican legislatures are considering hundreds of bills to make it harder to register and to vote. We're seeing a new wave of voter suppression. And for many years, I resisted calling a voter suppression because I thought that the debate over voter fraud versus voter suppression was a good faith debate. I no longer think that is true. These laws are being put in place either to please the Trumpine base of the Republican party, or to make it harder for people who are likely to vote for Democrats to register and to vote. And in this context, with this new wave of suppressive voting laws, here comes the Supreme Court, giving the green light to states to pass restrictive voting laws and essentially giving a roadmap to states that want to do so as to what their arguments should be, so that they can overturn a overcome a challenge under Section 2. When you, when it comes right down to it, the Supreme Court with this decision has now taken away the three main tools that plaintiffs used to use to challenge restrictive voting laws.

Number one, Section 2, as we see in the Brnovich case. Number two, Section 5 of the Voting Rights Act, which the court essentially killed in Shelby County and number three constitutional litigation under the 14th Amendment, and in 2008 in the Crawford v. Marion County Election Board case, the court made it very difficult to bring those cases as well. And just to add to this, there's one other path that could remain open to challenging restrictive voting laws, which is going back to the pre-study of Mobile v. Bolden days and challenging under Section 2, a voting practice as illegal, because it, it is enacted with racially discriminatory intent.

This is the theory behind the Department of Justice's lawsuit against Georgia for passing its new voting law. And I think that the complaint was drafted to get around a likely adverse opinion in Brnovich on discriminatory effects, but in Brnovich, near the end of Justice Alito's opinion, Justice Alito says, following up on an earlier case, that he wrote an opinion in called Abbott v. Paris.

He says, look you gotta have, the whole legislature has got to have a racist intent and partisan intent is not racist intent. Even if 90% of African-American voters vote for Democrats and you discriminate against Democrats, that's not racist intent, he says. And so, the fourth possible path to going after suppressive voting laws, racial discriminatory intent has been made more difficult as well. And so read through Justice Kagan's dissent, you see all the kinds of laws that, that states can now pass, that will not be subject to a Voting Rights Act or other kind of federal lawsuit to try to stop them. It, it's a very depressing time and it says that the main way to fight suppressive voting laws has to be through political action in the states.

[00:51:52] **Jeffrey Rosen:** Ilya tell our listeners, what you think the effects of the decision will be in terms of challenging future voting laws in the states and do you agree or disagree with Rick that the court having narrowed Section 5 and Section 2 of the Voting Right and constitutional litigation under the 14th Amendment has now made it extraordinarily hard to prove discriminatory intent by requiring clear evidence of racial intent and saying that partisan intent doesn't count.

[00:52:25] **Ilya Shapiro:** Well, Jeff, I have good news for both your listeners and for Rick in that it's never been easier to vote in this country, for everyone, everywhere. That was certainly true before the pandemic, it certainly was even more true during the pandemic when we essentially had a free for all and, and, and many states changing rules on the fly, chaos that contributed to the decrease in trust in those results on both the left and the right. And it's certainly true now, as states go around trying to regularize and standardize post-pandemic procedures, tweaking here and there you know, making transparent on how things are gonna work trying to increase that kind of trust.

In a cover story in the Washington Examiner called The Voter Suppression Lie, I quote an esteemed election law scholar is talking about New York's abysmal election administration, and if that state were a Southern Republican state, there would be protests and calls for businesses to boycott because it's that terrible. But it's a blue state, so you don't see that. That scholar of course, is Rick Hasen. And that goes to how astroturf these debates about suppression and fraud really are.

We do not have a voting rights crisis in this country. We have a voter confidence, a citizen confidence in institutions, in integrity of elections, in our government, et cetera, et cetera. That's a big problem. But it has nothing to do with Brnovich Section 2, Section 5, voting rights, how states administer their elections. I mean, there's always going to be problems in election administration.

Too long lines, ballots not processed in time. You know, we need to change rules so that the absentee ballots, the mailed in ballots get processed as they come in rather than on election nights, so we we get them, you know, not the results, not two weeks later. Whole host of technocratic issues, but racial disenfranchisement, voter suppression. No, I have good news. That is a myth.

[00:54:16] **Jeffrey Rosen:** Well, it is time for closing arguments in this important vigorous and illuminating debate. Rick, the first closing thoughts are to you. Sum up for our listeners why you believe that the Brnovich decision is not a persuasive interpretation of the text of Section 2 of the Voting Rights Act and what its impact on American elections will be.

[00:54:41] **Richard Hasen:** Thanks Jeff for this opportunity and I appreciate the vigorous debate with Ilya. I have to say before I answer your question that I don't think I could disagree more with his last statement both him calling the 2020 election chaos, I think it was a remarkably smooth, clean, and well-run election under very difficult conditions of a pandemic, as well as his claim that voting is easier everywhere. This is not true. How easy it is to vote depends on where you live and often depends on your political party affiliation or the color of your skin. In many places, voting is getting easier, in other places, voting is getting harder and it's getting harder, not for a good reason, but because there is an attempt to deliberately suppress the vote.

Brnovich is I think very much in line with the comments of Ilya. It's a belief that racial discrimination in voting is a thing of the past and harking back to Justice Ginsburg's dissent in the 2013 case of Shelby County v. Holder. In that case Justice Ginsburg talked about how throwing out pre-clearance because you don't see lots of intentional discrimination is like

getting rid of your umbrella in a rainstorm because you're not getting wet. And Justice Ginsburg was right. As soon as the Supreme Court passed, as soon as the Supreme Court decided Shelby County Texas went to in within two hours to enforcing its, its voter ID law, the strictest in the nation. Within weeks North Carolina passed the most restrictive set of voting rules that the country has seen since the passage of the 1965 Voting Rights Act.

Which the Fourth Circuit called targeted at African-American voters with almost surgical precision. We were assured when the Supreme Court decided Shelby County, don't worry about the loss of Section 5 of pre-clearance, because there's always Section 2 to protect voting rights. What the Supreme Court has done in Brnovich is showing us that Section 2 is now a hollow protection for voting rights. Voting rights in this country is something that people died for throughout American history. And the Voting Rights Act took the struggle of African-American voters and their allies in the South, many dealing with violence and, and even death. And the thought that the Supreme Court has taken this crown jewel of the, o-of the civil rights movement and made it into an empty letter is both depressing and dangerous for American democracy. I can't think of a worst decision in voting that the Supreme Court has decided other than the Shelby County case, which essentially kills off the other major provision of the voting of the Voting Rights act.

[00:57:23] **Jeffrey Rosen:** Thank you very much for that. Ilya the last word is to you. Tell We The People listeners, why you think that the Brnovich decision is a convincing interpretation of Section 2 of the Voting Rights Act and what its implications will be for the future of American elections.

[00:57:40] **Ilya Shapiro:** Well, as I said, in my brief, I would have preferred a clearer rule. I, I always am wary of multi-factor balancing tests, whether they come off the pen of Justice Alito, Justice Breyer or anybody else. But I think this does clarify things and give states some assurance that something that's constitutional one day won't be unconstitutional the next day depend on, depending on the, the random panel assignment in your particular circuit. Justice Ginsburg used the wrong analogy. Ending Section 5 disabling it is not throwing out your umbrella when it's, because you're not getting wet. It's ending chemotherapy when the cancer is eradicated, and that cancer is systemic racial disenfranchisement. We have problems, we're not perfect, but Section 2 still exists to deal with actual vote denial based on race. And it's still there whether that's voter ID, whether that's taking away the, the equal opportunity to to vote, fundamentally, that's, that's the main point.

Our rate of voting has only increased as these so-called restrictions have gone in just like rates of voting in the, in the states, in the post-Shelby states with these so-called restrictions have increased with rates of racial minorities increasing by more than those, of, of whites. So again, this is all very unfortunate. The calls of systemic fraud on the right are unfortunate, the cause of systemic suppression on the left are unfortunate. All they do is decrease the level of institutional trust decrease the confidence in the integrity of elections and ultimately contribute to the increasing polarization, partisanship and division in this country. I really wish Rick and I weren't debating this because I don't think there's a debate here.



[00:59:16] **Jeffrey Rosen:** Thank you so much, Rick Hasen, and Ilya Shapiro for a vigorous a serious and civil debate about the meaning of Section 2, the Voting Rights Act and the future of American elections. Rick, Ilya, thank you so much for joining.

[00:59:34] **Ilya Shapiro:** Thanks, Jeff.

[00:59:35] **Richard Hasen:** Thank you so much.

[00:59:42] **Jeffrey Rosen:** Today's show was engineered and produced by Jackie McDermott with editing by the National Constitution Center's AV team. Research was provided by Mac Taylor, Olivia Gross, and Lana Ulrich. Homework of the week, We The People friends read the Brnovich decision, the majority opinion and the dissent and make up your own minds. Please rate, review and subscribe to We The People on Apple Podcasts and recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of vigorous constitutional debate. And always remember that the National Constitution Center is a private nonprofit. Thanks so much to those of you who've been joining at \$1, \$5. It's so meaningful to have your engagement and support. A donation of any amount is much appreciated. You can support the mission by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including this podcast and that's constitutioncenter.org/donate. Thank you, We The People friends, hope you all had a good 4th of July weekend and on behalf of the National Constitution Center, I'm Jeffrey Rosen.