Stanford Law Review Online

Volume 74 April 2022

SYMPOSIUM ESSAY

The Right to Vote: Baselines and Defaults

Yasmin Dawood*

Abstract. It is axiomatic in democratic theory that all citizens should have the right to vote. Voting should be easy and accessible, the theory goes. But easy compared to what? In practice, the right to vote is subject to an array of rules controlling the eligibility and opportunity to vote. An election undoubtedly requires some rules to ensure that it is 'free and fair,' but at what point do these rules diminish the equal opportunity of minority voters to cast a ballot?

This Essay addresses these questions by examining the baselines that undergird the right to vote. I identify three kinds of baselines—legal, contextual, and normative—and explore the implications of each for voting rights protection. Part I focuses on the legal baselines and defaults at play in the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*. It finds that Justice Alito's five "guideposts," while seriously undercutting the reach and scope of Section 2 of the Voting Rights Act (VRA) in vote-denial claims, do not provide a unified approach to the baseline question. This suggests that, in practice, *Brnovich* could be interpreted relatively broadly or narrowly, within its admittedly limited compass, in future vote-denial cases.

Part II focuses on a number of contextual baselines, including the *Brnovich* majority's treatment of the history of the Fifteenth Amendment and the VRA, the relevance of socioeconomic circumstances for the right to vote, and the interaction of race and partisanship in vote-denial cases. Finally, Part III identifies two kinds of normative baselines—first, racial-equality and universalist principles of voting; and second, institutional best practices—and underscores their relevance for assessing electoral laws, voting processes, and court decisions. The conclusion highlights the importance of legal, contextual, and normative baselines for safeguarding the fundamental right to vote.

* Canada Research Chair in Democracy, Constitutionalism, and Electoral Law and Associate Professor, Faculty of Law and Department of Political Science, University of Toronto. I would like to thank Jessie Amunson, Michael Carvin, Guy Charles, Michael Kang, Allison Riggs, Nick Stephanopoulos, anonymous reviewers, and the participants at the *Stanford Law Review* Symposium on Safeguarding the Fundamental Right to Vote for very helpful comments and conversations. Special thanks to Azeezat Adeleke for superb editorial work on this Essay, and to Donovan Hicks, Schuyler Atkins, and the staff of the *Stanford Law Review* for their excellent editorial assistance and for organizing a truly exceptional symposium.

Table of Contents

Introduction

It is axiomatic in democratic theory that all citizens should have the right to vote.[1] Voting should be easy and accessible, the theory goes. But easy compared to what? In practice, the right to vote is subject to an array of rules controlling the eligibility and opportunity to cast a ballot. An election undoubtedly requires *some* rules to ensure that it is 'free and fair,' but at what point do the rules governing the eligibility and opportunity to cast a ballot diminish the equal opportunity to vote?

This Essay addresses these questions by examining the baselines that undergird the right to vote. I identify three kinds of baselines—legal, contextual, and normative—and explore the implications of each for voting rights protection. Part I focuses on the legal baselines and defaults at play in the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*.[2] Legal baselines can be thought of as reference points, often explicitly articulated as an element of a legal test, which are indispensable to the analogic reasoning that undergirds legal interpretation. Defaults are best understood as "legal settings," which are evident in such things as the burden of proof, evidentiary thresholds, or in the likelihood that a particular legal test will be successfully met.

Part I argues that there are multiple baselines and defaults at play in the majority opinion in *Brnovich*. I suggest that Justice Alito's five "guideposts," while seriously undercutting the reach and scope of Section 2 of the *Voting Rights Act* (VRA) in vote-denial claims, do not provide a unified approach to the baseline question. This suggests that, in practice, *Brnovich* could be interpreted relatively broadly or narrowly, within its admittedly limited compass in future vote-denial cases. Part I contrasts the *Brnovich* best-case scenario with the *Brnovich* worst-case scenario to illustrate the possibilities and limits of this interpretive flexibility.

Part II focuses on the contextual baselines at work in the majority opinion. Contextual baselines consist of an assessment of background circumstances such as political, historical, or socioeconomic conditions. While often drawn obliquely, contextual baselines provide important points of reference for how a legal test is interpreted and applied. In Part II, I consider a number of contextual baselines, including the majority's treatment of the history of the Fifteenth Amendment and the VRA, the relevance of socioeconomic circumstances for the right to vote, and the interaction of partisanship and race

1. *See* Dennis F. Thompson, Just Elections: Creating a Fair Electoral Process in the United States 4 (2002).

2. 141 S. Ct. 2321 (2021).

in vote-denial cases. Although contextual baselines are more abstract than legal baselines, they play a role in protecting or undermining the right to vote.

Part III considers normative baselines, which provide an external vantage point from which to assess cases, statutes, and policies. I first consider universalist and racial-equality normative principles, which I apply to the Supreme Court's approach in *Brnovich* to demonstrate the majority's departure from democratic principles. I then turn to another kind of normative baseline—institutional best practices—which are helpful for both the protection and the provision of the right to vote. The conclusion highlights the importance of legal, contextual, and normative baselines for safeguarding the fundamental right to vote.

I. Legal Baselines and Defaults

After the Supreme Court's decision in *Shelby County v. Holder*,[3] which dismantled the preclearance process under Section 5 of the VRA, states enacted a wave of regulations restricting the opportunity and eligibility to vote.[4] These restrictions have amounted to a new form of vote denial.[5] To the extent that these voting restrictions have a disproportionate impact on minority voters, they can still be challenged under Section 2 of the VRA.[6]

A. Vote-Denial Claims and the *Brnovich* Factors

The Court's ruling in *Brnovich* was the first time it had addressed a Section 2 vote-denial claim.[7] At issue in the case were two Arizona voting rules: The first rule disenfranchised voters for casting a ballot in the wrong precinct, while the second rule prevented most third parties from delivering a voter's ballot.[8] In *Brnovich*, a 6-3 majority of the Supreme Court, in an opinion

3. 570 U.S. 529 (2013).

4. *See The Effects of* Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://perma.cc/R7JP-3HXE.

5. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691-92 (2006).

6. For a discussion of vote denial claims under Section 2, as distinguished from vote dilution claims under Section 2, see Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 442 (2015); and Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2175-85 (2015).

7. *Brnovich*, 141 S. Ct. at 2330.

8. *Id.* at 2334.

by Justice Alito, held that neither voting rule ran afoul of Section 2 of the VRA.[9]

More consequentially, the Court announced a new approach to vote-denial claims under Section 2. Relying on the "totality of the circumstances" language in Section 2, the Court identified five factors—or "guideposts"—that could be used to determine whether a Section 2 violation has been established; that is, whether the electoral process was not "equally open" to minority voters in that it did not provide an "equal opportunity" to participate in the political process.[10] According to the majority, this list of five factors does not amount to a formal "test," nor is the list exhaustive.[11] The majority declined to follow its approach to Section 2 vote-dilution claims[12] on the grounds that *Brnovich* concerned an issue of first impression—the time, place or manner for casting ballots.[13]

The first guidepost is the "size of the burden imposed by a challenged voting rule."[14] Because every voting regulation imposes a burden, whether it be travelling to a polling station or following directions to complete a ballot, the Court explained that Section 2 must allow for the "usual burdens of voting."[15] A "[m]ere inconvenience" would not pass muster.[16] The usual-burdens baseline establishes an additional threshold, not evident in the language of Section 2, that must be satisfied to demonstrate a violation.

The second factor is the "degree to which a voting rule departs from what was standard practice when Section 2 was amended in 1982."[17] The rationale for this baseline, according to the Court, is that the existing practice at the time—namely, voting in-person on election day with limited exceptions for absentee ballots—was presumptively supported by Congress. This baseline is puzzling given that Congress explicitly revised Section 2 to provide enhanced protection to minority voters.

9. *Id.* at 2343-44, 2350. The Court also rejected the claim that the ballot-delivery restriction was enacted with discriminatory intent in contravention of both Section 2 of the VRA and the Fifteenth Amendment. *Id.* at 2350.

10. *Id.* at 2338-40.

11. *Id.* at 2338.

12. For the majority's approach to Section 2 vote-dilution claims, see *Thornburg v. Gingles*, 478 U.S. 30 (1986), and its progeny.

13. *Brnovich*, 141 S. Ct. at 2337.

14. *Id.* at 2338.

15. *Id.*

16. *Id.* at 2338.

17. *Id.* at 2338.

The third factor is the "size of any disparities in a rule's impact on members of different racial or ethnic groups."[18] As the Court explained, race-based differences in "employment, wealth, and education," mean that even neutral regulations may result in disparities.[19] Hence, the majority established a baseline that small disparities are less likely to show that a voting system is not equally open.[20] This factor also establishes a default that voters must provide statistical evidence demonstrating a sufficiently large disparity.[21]

The fourth factor is the set of "opportunities provided by a State's entire system of voting."[22] This entire-system baseline means that burdens imposed on voters by any one method of voting must be evaluated in light of all the avenues to vote in the state. This factor also establishes a default by which states are inoculated against the discriminatory impact of any one voting method as long as they can demonstrate that other methods exist. It also seems to establish a default that voters have to select an option that does not disenfranchise them.

The fifth factor is the "strength of the state interests served by a challenged voting rule."[23] According to the majority, the prevention of fraud and the prevention of undue influence in voting are strong state interests.[24] This factor establishes two defaults which are beneficial for the states. First, the states do not have to show evidence of electoral fraud; that is, they may take steps to prevent fraud without having to first detect it.[25] Second, the majority held that the state does not have to provide evidence that a less-restrictive alternative was not available or that the regulation was necessary to meet the state's objectives.[26]

In addition, the *Brnovich* majority cautioned that the *Gingles* or Senate factors were designed for vote dilution cases; indeed, some of the Senate factors were clearly inapplicable to vote-denial claims.[27] The Court appeared to say, however, in a rather ambiguous passage, that a consideration of some of the other Senate factors, such as historical and ongoing discrimination, was not

18. *Id.* at 2339.
19. *See id.*
20. *Id.*
21. *See id.* at 2346-47.
22. *Id.* at 2339.
23. *Id.*
24. *Id.* at 2340.
25. *Id.* at 2348.
26. *Id.* at 2345-46.
27. *Id.* at 2340 (citing Thornburg v. Gingles, 478 U.S. 30, 37 (1986)).

impermissible.[28] While these Senate factors should not be disregarded given Section 2(b)'s totality-of-the-circumstances test, their "relevance is much less direct."[29] The Court also stated that the disparate-impact model used in employment and housing cases was not useful in the voting context. In particular, the majority declined to read into Section 2 a strict necessity test whereby the states would have to show that the regulation in question provided the only means to achieve their interests.[30]

In a notable dissent, Justice Kagan argued that the Court had "undermine[d] Section 2 and the right it provides."[31] Instead of reading Section 2 as Congress intended, the majority gave "a cramped reading to broad language" and then used that "reading to uphold two election laws from Arizona that discriminate against minority voters."[32] Furthermore, the guideposts announced by the Court serve as "extra-textual restrictions" on Section 2 that "all cut in one direction—toward limiting liability for race-based voting inequalities."[33]

B. The Best-Case Scenario and the Worst Case Scenario After *Brnovich*

Predictions about the likely impact of *Brnovich* will be inevitably influenced by the pre-existing treatment of vote-denial claims by lower courts prior to the Court's decision. While a detailed appraisal of these cases is beyond the scope of this Essay, it is worth noting that, prior to *Brnovich*, several appellate courts had coalesced around a two-part inquiry for vote-denial claims.[34] It asks, first, whether the challenged rule imposes a disparate burden on minority voters; and second, whether that burden is caused by or linked to

28. The majority stated that "the only relevance of . . . [Senate factors two, six and seven] and the remaining factors is to show that minority group members suffered discrimination in the past (factor one) and that effects of that discrimination persist (factor five)." *Id.* at 2340.

29. *Id.*

30. *Id.* at 2340-41. Nicholas Stephanopoulos proposes that Section 2 be treated as a standard disparate impact claim (similar to disparate impact claims in housing and employment), which would require a two-part test that asks, first, if a particular practice causes a significant racial disparity, and second, if the practice is necessary to achieve a substantial state interest. *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1595 (2019).

31. *Brnovich*, 141 S. Ct. at 2351 (Kagan, J., dissenting).

32. *Id.*

33. *Id.* at 2362.

34. *See* Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J.F. 799, 806-08 (2018); *see also* Stephanopoulos, *supra* note 30, at 1578-80 (analyzing the "emerging judicial consensus" for adjudicating vote-denial claims).

the social and historical conditions of past and ongoing discrimination.[35] But despite this apparent consensus, there were, as Nicholas Stephanopoulos argues, several unresolved issues with respect to the application of this two-part test in vote-denial cases pre-*Brnovich*.[36] Case outcomes had also been mixed, with some voting restrictions upheld and others struck down.[37] While the impact of *Brnovich* will become clearer as lower courts apply the guideposts to actual cases, the decision may be less consequential than one might expect, in part because lower courts have always been more or less receptive to Section 2 vote-denial claims.[38]

With this in mind, it is helpful to contrast the best-case scenario and the worst-case scenario post-*Brnovich*. While *Brnovich* erects significant barriers to a successful Section 2 vote-denial claim, it is worth observing that the Court has not established a unified approach to the baseline question.

Because these guideposts are neither a test nor an exhaustive list, courts would have some, albeit limited, discretion about which factors are most relevant. The ultimate stringency of the analysis will turn, to some degree, on the particular combination of baselines and defaults that a court selects. The non-exhaustive nature of the guideposts means not only that a court could select among the five *Brnovich* factors, but also that it could presumably consider other factors, including some of the Senate factors as indicated by the Court, under a totality of the circumstances analysis. Not only do courts have some (limited) flexibility in selecting a combination of baselines and defaults, they also have some discretion about how stringently these baselines and defaults are interpreted. The best-case scenario is that *Brnovich* could be

35. *See* Ho, *supra* note 34, at 806. In a 2014 article, Daniel Tokaji proposed a three-part test for vote-denial claims (which was based in part on his earlier 2006 proposal). The first two steps are similar to the approach adopted by the lower courts, while the third step requires that the state "show by clear and convincing evidence that the burden on voting is outweighed by the state interests in the challenged standard." Tokaji, *supra* note 6, at 473-74; *see also* Tokaji, *supra* note 5, at 724 (proposing his earlier 2006 version of the test).

36. *See* Stephanopoulos, *supra* note 30, at 1582-89; *see also* Ho, *supra* note 34, at 809 (discussing differences among the circuit courts as to the evidentiary showing required to satisfy the two-part test); Dale E. Ho, *Voting Rights Litigation After* Shelby County: *Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 680, 689-90 (2014) (describing various factors used by courts to decide claims under Section 2).

37. *See* Ho, *supra* note 34, at 808.

38. *See generally* Michael S. Kang, *Election Law Under the Post-Trump Supreme Court*, STAN. L. REV. ONLINE (forthcoming 2022) (analyzing the impact of hyperpartisanship on election law). Another factor that may affect the overall impact of *Brnovich* is the decline in Section 2 claims. *See* Richard Hasen, *Updated Katz Study: Substantial Decline in the Number of Cases Brought Under Section 2 of The Voting Rights Act and Plaintiffs' Success in Winning Them*, ELECTION L. BLOG (Mar. 1, 2022, 7:02 AM), https://perma.cc/KR2V-Q2GT.

interpreted relatively broadly or narrowly by courts, within this admittedly constrained compass.

That being said, *Brnovich* has added new considerations to the mix, which may, even under a best-case scenario, exert a chilling effect on the likelihood of success. The 1982 baseline, for example, has significant implications for future cases: Challenges to post-1982 developments like early voting, voting by mail, and automatic registration are unlikely to succeed.[39] In addition, this baseline sends a signal to the states that "they can roll back voting restrictions to a time when registration was onerous, and early and absentee voting rare."[40] The two-part test used by most lower courts in vote-denial cases did not employ this 1982 baseline, nor did it rely on some of the other *Brnovich* factors, such as the usual-burdens baseline and the entire-system baseline.[41] The *Brnovich* guideposts also establish defaults that benefit the states: The third factor, for instance, requires plaintiff voters to provide statistical evidence of a sufficiently large racial disparity, while the fifth factor makes it easier for states to demonstrate the strength of the state interests behind the challenged rule.[42] Taken together, these additional considerations will make it more difficult for plaintiff voters to demonstrate a violation of Section 2 as compared to the requirements of the lower courts' two-part test.

While there remains some possibility of redressing vote denial under the best-case scenario, the worst-case scenario post-*Brnovich* would be very bad indeed. To be sure, given the partisan pattern of voting restrictions (and for that matter, courts), much turned, even prior to *Brnovich*, on whether or not the court in question was hostile to the VRA. What *Brnovich* has done, however, is to furnish lower courts not only with a green light to reject challenges to voting rules but also with enhanced jurisprudential tools to do so.

Under the worst case scenario, a court could select the most stringent combination and interpretation of the baselines and defaults from the five *Brnovich* factors. Under such an approach, plaintiff voters would be required to provide the following: a statistical demonstration of a sufficiently large racial disparity resulting from an unusual burden placed on minority voters by a voting rule which was not a standard practice in 1982 and which provides the only avenue to cast a ballot. Meanwhile, a state would be inoculated from Section 2 liability if it provided multiple avenues for voting and had a sufficiently strong state interest. This is a low bar to meet because, first, almost

39. *See* Nicholas Stephanopoulos, *Strong and Weak Claims After Brnovich*, ELECTION L. BLOG (July 1, 2021, 6:58 PM), https://perma.cc/XS3E-DR6A.

40. Richard L. Hasen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems*, SLATE (July 8, 2021, 10:16 AM), https://perma.cc/2WQE-LDMJ.

41. *See supra* text accompanying notes 14-17, 22.

42. *See supra* text accompanying notes 18-21, 23-26.

any state interest (fraud prevention; electoral integrity; orderly administration) is acceptable and second, the state is not required to provide evidence justifying this state interest. Nor, for that matter, is the state required to show that there are any less-restrictive alternatives to the measure.

Indeed, as demonstrated by the Court majority's analysis of the Arizona voting rules, the *Brnovich* factors can be easily used to find no violation of Section 2.[43] For the first factor, the majority found that voting in the correct polling place was a "quintessential" example of a usual burden, as was the requirement to submit early ballots by mail.[44] With respect to the third factor, the 0.5% difference in out-of-precinct ballots as between minority voters and non-minority voters was, according to the majority, too small a disparity, particularly in view of the overall rates of voting.[45] As for the ballot-delivery restriction, the majority first noted the lack of statistical evidence, and then proceeded to reject the witness testimony regarding the disadvantages faced by Native American voters on the grounds that this testimony was insufficient to establish that the restriction resulted in less opportunity to participate in the political process.[46] For the fourth factor, the Court found that even if Arizona had the highest rate of discarded out-of-precinct votes in the country, the state offered several ways to vote, including early voting.[47] With respect to the fifth factor, the Court found that the state interests behind the two rules—orderly administration and electoral integrity, respectively—were sufficiently weighty to satisfy Section 2.

In sum, while it is certainly the case that lower courts prior to *Brnovich* were able to reject vote-denial challenges, the *Brnovich* decision has given a stamp of approval—and greater jurisprudential means—to lower courts that are determined to make Section 2 a dead letter. If a court is open to Section 2 claims, there is some, albeit limited, scope to find that a voting restriction has run afoul of Section 2. In this sense, the *Brnovich* decision has shifted the goalposts—making it even easier for courts to reject challenges to vote-denial practices and even harder for voters to prevail.

II. Contextual Baselines

In addition to the explicit baselines and defaults which form the "legal machinery" of tests, judicial decisions also deploy contextual baselines which

43. To be sure, it would have been far more instructive if the Court had applied the factors to a strict photo-identification requirement than the two Arizona voting rules.

44. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2344-46 (2021).

45. *Id.* at 2344-45.

46. *See id.* at 2346-47, 2347 n.19.

47. *See id.* at 2344.

provide background reference points for how a legal test is constructed, interpreted, and applied. These baselines are rooted in an assessment of political, historical, or socioeconomic conditions, and may augment or diminish the relevance of these background conditions. Although contextual baselines are often expressed obliquely (if at all), they can have a significant impact on the ultimate decision.

A. The Historical Context of the Fifteenth Amendment and the Voting Rights Act

In *Brnovich*, the most notable example of a contextual baseline is the Court majority's treatment of the history of the Fifteenth Amendment and the VRA. Justice Alito painted an appropriately bleak picture of this historical context, observing that the right to vote for African Americans was "heavily suppressed" by frequently "blatant efforts" of disenfranchisement—in particular the use of "notorious methods," such as literacy tests and 'white primaries,' which led to "appallingly low" rates of voting in some states.[48]

The point of this contextual baseline, however, is not to indicate a protective stance toward the right to vote but rather the opposite: to imply, first, that the two Arizona laws are trivial in comparison, and second, that the kind of race-based voter discrimination that requires a legal response is an artifact of the past and/or that current vote denial must rise to the same level of past egregiousness to warrant a response. Reminiscent of *Shelby County v. Holder*,[49] Justice Alito under-emphasized the crucial role played by the VRA in protecting minority voting rights. Despite his reassurance that "no one [is] suggest[ing] that discrimination in voting has been extirpated,"[50] he failed to mention the political reality that numerous states passed voter suppression laws after the Court dismantled the preclearance process in *Shelby County*.[51]

B. Social and Economic Circumstances

The *Brnovich* majority displayed considerable ambiguity about the legal relevance of background socioeconomic conditions, making it difficult to discern a clear baseline. The Court did acknowledge that race-based "differences in employment, wealth, and education may make it virtually

48. *See id.* at 2330-31.

49. 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) (arguing that "[t]hrowing 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. *Brnovich*, 141 S. Ct. at 2343.

51. *See The Effects of* Shelby County v. Holder, *supra* note 4 ("The decision in Shelby County opened the floodgates to laws restricting voting throughout the United States.").

impossible for a State to devise rules that do not have some disparate impact."[52] Hence, guidepost three requires a showing of a *large* racial disparity.[53] While there are good reasons for this requirement, in particular the concern that it would be unmanageable if every minor disparate impact could trigger a Section 2 claim,[54] the addition of this requirement does not resolve the underlying ambiguity.

For instance, none of the guideposts explicitly invite plaintiffs to demonstrate the impact of these background conditions on voting.[55] That being said, the *Brnovich* majority did allude to some of the Senate factors, including historic and ongoing discrimination, but here too there is a certain amount of hedging, with the Court stating that while these Senate factors should not be ignored, they are also not directly relevant.[56] The *Brnovich* majority's ambiguous stance on the legal relevance of background socioeconomic conditions is particularly evident when contrasted with Justice Kagan's straightforward assertion that Section 2's totality-of-the-circumstances inquiry requires the consideration of contextual circumstances: Equal voting opportunity is a function of both the voting rule and how it operates "against the backdrop of historical, social, and economic conditions."[57]

C. The Meaning of "Equally Open" and "Equal Opportunity"

The Court's ambiguous stance is also evident its interpretation of the statutory language of Section 2. While, according to the majority, the term "equal opportunity" helps to explain the meaning of "equally open," the "touchstone" of Section 2 is that the voting process must be "equally open" for minority voters.[58] But the wording of Section 2 does not even mention "*equal* opportunity;" instead, Section 2 refers to minority voters having "*less*

52. *Brnovich*, 141 S. Ct. at 2343.

53. *See id.* at 2339.

54. *See, e.g.*, Stephanopoulos, *supra* note 30, at 1612 (arguing that "[d]isparate impacts are ubiquitous, alas, so if they were all actionable, many institutions might be paralyzed by litigation and more severe discrepancies could be overshadowed by relatively trivial ones").

55. For a contrasting approach, see Ho, *supra* note 34, at 821 (describing how racial disparities in factors such as the possession of photo identification or a reliance on early voting are caused by socioeconomic factors linked to historic racism).

56. *See supra* text accompanying notes 27-29.

57. *Brnovich*, 141 S. Ct. at 2359-60 (Kagan, J. dissenting); *see also* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 586 (2013) (arguing that the VRA is a disparate impact statute and that vote-denial claims under § 2 should focus on the racial context as a cause of disparate vote denial).

58. *Brnovich*, 141 S. Ct. at 2337-38.

opportunity" than other voters.[59] The purpose of the majority's analysis, it seems, is to focus attention on the equal openness of the *voting rule* (which requires a formalist assessment of the means) rather than on the diminished opportunity experienced by the *minority voter* (which requires a contextual assessment of the voter's ability to use the means).

Furthermore, given that "opportunity" means, according to the majority's own definition, a "combination of circumstances, time, and place" favorable for a particular outcome,[60] it seems logical that such background circumstances would be relevant to assessing whether or not a minority voter had "less opportunity" to participate.[61] The Court's ambiguous stance is amplified by its fleeting concession at the conclusion of its textual analysis that Section 2's reference to equal "opportunity" may "stretch" the concept of equal openness "to some degree to include consideration of a person's ability to *use* the means that are equally open."[62] The Court appears to acknowledge that the background circumstances affecting a voter's ability to vote may be relevant but, at the same time, the majority does not explicitly embrace a consideration of these background conditions.

D. Race, Partisanship, and Voting Restrictions

Justice Kagan stated that there is "a Section 2 problem when an election rule, operating against the backdrop of historical, social, and economic conditions, makes it harder for minority citizens than for others to cast ballots."[63] Why does this not seem to be a Section 2 problem for the *Brnovich* majority? One possible reason is that these voting restrictions are viewed as partisan barriers rather than as racial ones—that is, states are passing these restrictions to suppress the vote of their political opponents (Democrats) rather than to suppress the votes of minority voters per se.

On this account, the wave of voting restrictions passed in the wake of *Shelby County* is just another example of partisan politics.[64] For instance, the *Brnovich* majority stated that "partisan motives are not the same as racial motives" when it discussed the intentional discrimination claim with respect

59. 52 U.S.C. § 10301.

60. *Brnovich*, 141 S. Ct at 2338.

61. *Id.* at 2337.

62. *Id.* at 2338.

63. *Id.* at 2360 (Kagan, J., dissenting).

64. For an analysis of the race/party divide, see generally Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014) (arguing that, given the overlap of considerations of race and considerations of party, a restriction on voting is often viewed as either a law about race or as a law about party politics).

to the ballot-delivery restriction (which it described as a reaction to a "Democratic get-out-the-vote strategy").[65] Since partisan competition is inevitable, the theory would go, the VRA should only kick in when a certain threshold of race-based vote denial has been reached. Even putting aside the problem that this approach wrongfully minimizes the harm of race-based voting restrictions, the fact that it is fair game for states to exploit these socioeconomic differences for partisan gain is itself deeply problematic.

III. Normative Baselines

Normative baselines provide an external vantage point by which current laws, policies, and judicial decisions can be judged. These baselines refer not only to the ideals, principles and values underlying the right to vote, but also to the institutional best practices that help to provide and protect voting rights.

A. The Principle of Racial Equality

An important normative baseline is the vision of racial equality that animates the VRA. The *Brnovich* decision departs in significant measure from this normative baseline. As Justice Kagan observed, 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."[66] Rather than ensuring the equal opportunity of minority voters to cast a ballot, the *Brnovich* approach "stacks the deck against minority citizens' voting rights."[67] There is no question that the *Brnovich* guideposts, which place the onus on minority voters, are in some considerable tension with a statute designed by Congress to place the onus on the states.[68]

65. *Brnovich*, 141 S. Ct at 2349 (citing Cooper v. Harris, 137 S. Ct. 1455, 1473-74 (2017)).

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

67. *Id.* at 2362.

68. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, ATLANTIC (July 8, 2021), https://perma.cc/SY3A-EHSS; Nicholas Stephanopoulos, Brnovich *and the Conflation of Disparities and Burdens*, ELECTION L. BLOG (July 6, 2021), https://perma.cc/RQA2-37RR (arguing that the *Bnrovich* decision is simply "inventing additional hoops" and "stacking the deck against plaintiffs so they'll lose more often," and that it therefore amounts to "ideological opposition to Section 2, not statutory interpretation").

B. Universalist Principles of Voting

Universalist principles of voting, which apply to all citizens irrespective of race, have attracted increasing attention,[69] perhaps in part due to the skepticism displayed in recent Supreme Court decisions about the need to protect minority voting rights.[70] These universalist principles can provide a useful vantage point from which to assess judicial decisions, such as *Brnovich*, even when these decisions are concerned with barriers faced by minority voters.

Although a full-blown analysis is not possible in this Essay, I provide a provisional account of two universalist normative principles.[71] The first is that voter-qualification and voting-access rules should be structured to optimize the ability of voters to cast a ballot. The underlying assumption is that greater participation is preferable to less participation in a democracy. This means that the opportunity to vote should be as expansive as possible while still ensuring a fair and efficacious electoral process. To put it another way, the baseline should be set to enable the greatest possible level of voting by all citizens, while nonetheless ensuring that the administration of the election abides by genuine (and not pretextual) requirements of accuracy, efficacy, transparency, and trustworthiness.

The second normative principle is that a voting law that creates barriers because of the anticipated choice of the voter violates the basic premise of free and fair elections, namely that all citizens are equal and should have the equal opportunity to participate freely in elections. In a democracy, individuals should not face barriers to voting because of how they are expected to vote.

69. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1433 (2015); Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299, 300-01 (2016).

70. *See, e.g.*, Charles & Fuentes-Rohwer, *supra* note 69, at 1439 (arguing that "the consensus about racial discrimination that supported the VRA has dissolved"); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation*, 62 HOWARD L.J. 809, 814-15 (2019) (arguing that barriers to voting, whether based on race or not, are increasingly viewed as unacceptable, and that this shift to universality is ironically due to the nation's experience with race and voting); Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 YALE L.J. 862, 864-66, 872-76 (2021) (describing the Supreme Court majority's skepticism of race-based electoral policies and exploring the implications of a race-blind baseline for vote dilution cases); Ekow N. Yankah, *Compulsory Voting and Black Citizenship*, 90 FORDHAM L. REV. 639, 652, 675 (2021) (arguing for the adoption of compulsory voting as a remedy for various democratic ills, including the fact that "universal access to voting has been insufficient to secure the Black vote").

71. For a discussion of these principles, see Yasmin Dawood, *Constructing the Demos: Voter Qualification Laws in Comparative Perspective*, *in* COMPARATIVE ELECTION LAW 270, 270-84 (James A. Gardner ed., forthcoming 2022).

This principle would bar partisan rules that are designed to create barriers to vote for supporters of an opposing political party.[72]

With respect to the first normative principle, the Supreme Court could have furnished a set of factors (and accompanying baselines and defaults) in *Brnovich* that optimized the equal ability of minority voters to cast a ballot by allowing for a (better) balance between protecting voting rights and protecting the state's interests in an orderly election. This would mean, for example, that the requirement that voters demonstrate a sufficiently large racial disparity be balanced by comparable burdens imposed on the states. That is, that states would be required to furnish evidence about the harms they were seeking to prevent. The second normative principle, whereby states would be required to ensure widespread voting irrespective of how particular voters are expected to vote, likewise highlights the deficiencies of the *Brnovich* decision. On this view, rules that make it harder for certain voters to vote—whether because of their racial identity or assumed partisan affiliation—would be impermissible.

C. Institutional Best Practices

Voting rights also benefit from attention to institutional best practices. The right to vote, as I suggest elsewhere, amounts to a "structural right" because its existence depends upon an entire array of institutions, such as political parties, electoral districts, and legislative bodies.[73] This means that the right to vote cannot be protected without attention to the institutional infrastructure that renders such a right intelligible and meaningful.[74] Indeed, I claim that the provision of the right to vote in free and fair elections is a basic requirement of effective democratic government.[75]

Thus, the development of best practices to support and strengthen this institutional infrastructure is crucial for voting rights protection. These institutional best practices may focus on innovations such as automatic voter registration and election day registration.[76] Alternatively, these baselines may concern best practices of electoral administration as developed during the

72. For an argument against partisanship, see generally Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017) (arguing that partisanship is not a constitutional government purpose).

73. *See* Yasmin Dawood, *Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review*, 62 U. TORONTO L.J. 499, 503 (2012).

74. *See* Yasmin Dawood, *Democracy and the Right to Vote: Rethinking Democratic Rights Under the Charter*, 51 OSGOODE HALL L.J. 251, 255 (2013).

75. *See* Yasmin Dawood, *Effective Government and the Two Faces of Constitutionalism*, *in* CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? 47, 48 (Vicki C. Jackson & Yasmin Dawood eds., forthcoming 2022).

76. *See* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 498-501 (2008).

pandemic.[77] Normative baselines with respect to electoral management bodies are likewise helpful.[78] Comparative examples and international standards of electoral integrity may also be a source of institutional best practices.[79]

D. The Democratic Value of Normative Baselines

What is the democratic value of these normative principles and institutional best practices? They may seem trivial or even irrelevant in the face of the multiple challenges facing democracy. Not only have the Supreme Court's decisions on preclearance, partisan gerrymandering, campaign finance, and now, vote denial, undermined the fairness of the electoral process, but certain states are actively engaged in restricting voting rights.[80] The post-election insurrection has revealed the fragility of democratic norms. The political blockades against the *For The People Act* and the *Freedom to Vote Act* (not to mention the anticipated judicial reaction to such statutes if enacted) raise serious doubts about the capacity of the political branches to protect voting rights.[81] These anxieties about the resilience of democracy are magnified given current events on the world stage.[82]

Despite these significant challenges, it is, in my view, more important than ever to develop and foster normative principles and institutional best practices to protect the right to vote. Normative principles provide us with the benchmarks by which we can assess and judge policies, laws, and judicial decisions. These principles matter not only for the protection of voting, but they also serve as a crucial foundation for citizens' continued commitment to the values and ideals of the right to vote. Institutional best practices are likewise indispensable for strengthening the right to vote and for establishing benchmarks for future reforms.

77. *See* Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 U.S. Election*, 32 J. DEMOCRACY 159, 160, 174-75 (2021).

78. *See* MARK TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY 123-57 (2021).

79. *See* PIPPA NORRIS, WHY ELECTIONS FAIL 4-11, 19-21, 170-78 (2015).

80. *See* Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 ST. LOUIS U. L.J. 609, 611-17 (2020); *The Effects of* Shelby County v. Holder, *supra* note 4.

81. *See* Andrew Prokop, *Democrats' Doomed Voting Bill Is Too Broad to Pass–and Not Broad Enough to Work*, VOX (June 8, 2021, 8:00 AM EDT), https://perma.cc/UR2G-KXKV.

82. *See generally, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015).

Conclusion

This Essay has highlighted the significance of three kinds of baselines—legal, contextual, and normative—for safeguarding the fundamental right to vote. I have suggested that the protection of the right to vote is, at least in part, a function of the legal baselines and defaults used to assess the rules that govern the eligibility and opportunity to vote. While contextual baselines are more abstract, often relating to understandings of background political, historical, and socioeconomic circumstances, they too are vital for defending voting rights. Finally, this Essay has considered normative baselines for the conceptual and institutional dimensions of voting. I have suggested that, notwithstanding the significant challenges facing the polity, an important way to bolster voting rights is to continue to shine a light on the normative principles, ideals, and institutional best practices of free and fair elections.