



SYMPOSIUM ESSAY

The Post-Trump Rightward Lurch in Election Law

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Abstract. The United States Supreme Court's decisions last Term, *Brnovich v. Democratic National Committee* and *Americans for Prosperity v. Bonta*, mark only the beginning of a conservative transformation of election law under the Court's post-Trump personnel. This Essay argues that although neither decision itself is immediately transformative, both decisions boldly discard ideological compromises not long ago held as obviously sensible by the right and instead point toward a conservative deregulation of minority voting rights and campaign finance disclosure in the near future.

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Introduction

Two Supreme Court decisions last Term, *Brnovich v. Democratic National Committee*¹ and *Americans for Prosperity Foundation v. Bonta*,² are signal cases that demonstrate the dramatic rightward lurch of this Court and the pending deregulation of election law under its new post-Trump personnel. Not long ago, there was conservative comfort with two basic compromises on voting rights and campaign finance disclosure. On voting rights, the conservative position was that Section 5 of the Voting Rights Act should be thrown out, because Section 2 responsibly protected the voting rights of racial minorities.³ On disclosure, the conservative position could be described as “deregulate and disclose”—that direct restrictions, such as a prohibition on corporate electioneering communications,⁴ were unnecessary because mandatory disclosure adequately exposed and deterred campaign finance corruption.

Today, with the Court shifted dramatically to the right with three new Trump appointees, conservatives have shifted rightward well beyond these positions, as *Brnovich* and *Bonta* now manifest, in favor of absolutist postures on both fronts that discard past ideological positions for the virtually complete deregulation of minority voting rights and campaign finance. Their earlier positions were political compromises necessitated by the Court’s more ideologically moderate composition at the time and are therefore no longer necessary now that the Court’s personnel have changed so dramatically. *Brnovich* and *Bonta* are early markers that reveal how far the Court has shifted rightward on election law, in a very short time, as a result.

Brnovich v. Democratic National Committee

Brnovich v. Democratic National Committee itself follows the Supreme Court’s 2013 decision, *Shelby County v. Holder*, effectively invalidating Section 5 of the Voting Rights Act.⁵ Section 5 was the core provision of the Voting Rights Act of 1965, historic legislation often characterized as the most successful

1. 141 S. Ct. 2321 (2021).

2. 141 S. Ct. 2373 (2021).

3. 52 U.S.C. § 10301 (prohibiting voting practices that “result[] in a denial or abridgement of the right any citizen of the United States to vote on account of race or color”).

4. *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”).

5. 570 U.S. 529 (2013); 52 U.S.C. § 10304 (requiring that certain “states or political subdivisions[s]” attain preclearance from the Attorney General regarding new voting restrictions and prohibiting voting laws that have “the purpose of or . . . the effect of diminishing the ability of any citizens . . . to elect their preferred candidates of choice”).

congressional enactment of the twentieth century. Section 5 transformed the Jim Crow South, where African Americans had been systematically disenfranchised for a century, by requiring covered jurisdictions, primarily in the South, to establish a nondiscriminatory purpose and effect before new election laws could go into effect. The process of preclearance imposed necessary federal oversight on these jurisdictions and began the incorporation of disenfranchised racial minorities into American democracy.

By 2013, however, a conservative majority on the Court ruled that Section 5 had outlived its original purposes. As Chief Justice Roberts wrote, in striking down preclearance in *Shelby County*, the majority felt “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”⁶ Section 5 put the onus on the state governments to seek out and win preclearance before implementation and thus served to screen out discriminatory restrictions on voting, such as reductions in polling places or elimination of certain elective offices, where the government could not show nondiscriminatory intent and effect.

With the removal of Section 5 preclearance after *Shelby County*, state governments were free to enact voting restrictions without needing to prove nondiscrimination up front. As a consequence, southern jurisdictions suddenly were free to implement a slew of election-law restrictions and changes and did so with gusto. For instance, North Carolina and Texas announced within hours of the *Shelby County* decision their legislative intention to enact new voter identification requirements, and by 2018, previously covered jurisdictions had closed 1,688 polling places, despite increases in voter turnout and population.⁷

In *Shelby County*, notable conservative lawyers, like Bert Rein, argued that Section 5 was unnecessary because a separate provision of the Voting Rights Act would pick up the slack in Section 5’s absence.⁸ The petitioner’s brief in *Shelby County* argued that “preclearance is not an appropriate remedy for practices that affect the weight of votes cast and can be effectively addressed via Section 2 [of the Voting Rights Act].”⁹ In arguing against Section 5’s

6. *Shelby Cnty.*, 570 U.S. at 535.

7. See, e.g., WENDY WEISER & MAX FELDMAN, BRENNAN CTR. FOR JUST., *THE STATE OF VOTING 7* (2018); LEADERSHIP CONF. EDUC. FUND, *DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 10* (2019) (reporting a “surge in voting changes” after *Shelby County* in 757 of roughly 860 counties previously covered by Section 5).

8. See, e.g., Brief for Petitioner at 15, *Shelby Cnty.*, 570 U.S. 529 (No. 12-96), 2012 WL 6755130; *From Selma To Shelby County: Working Together To Restore The Protections Of The Voting Rights Act: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 13 (2013) [hereinafter *Voting Rights Act Hearing*] (statement of Michael Carvin, Partner, Jones Day).

9. Brief for Petitioner, *supra* note 8, at 20.

constitutionality, petitioner argued that “Section 2 is now the ‘appropriate’ prophylactic remedy for any pattern of discrimination documented by Congress in 2006.”¹⁰ Justice Kennedy took the cue during oral argument and opined that “it’s not clear to me that there’s much difference in a Section 2 suit now and preclearance.”¹¹ Justices Kennedy and Scalia were curious during oral argument about the possibility, as the solicitor general put it, that dozens of Department of Justice staff simply might be reallocated from the Section 5 preclearance process and instead “could be used to bring Section 2 litigation.”¹² All of this underscored the conservative position that Section 5 preclearance was unconstitutional, as Republican election lawyer Michael Carvin later summarized, because “Section 2 is a very muscular provision [that already] prophylactically eliminate[s] anything that could be characterized as purposeful discrimination.”¹³ Section 5 was, in his words, “a temporary supplement to Section 2.”¹⁴

After *Shelby County*, voting rights litigation regarding the new generation of voting restrictions was brought under Section 2, just as expected. And lower courts quickly developed new Section 2 methodology for addressing so-called vote-denial measures that had previously been addressed under Section 5 before *Shelby County*. In such cases involving restrictions on voting, for instance, the Ninth Circuit considered a two-step test that asks first whether the challenged voting standard, practice, or procedure results in a disparate burden on members of a racial minority such that they do not have equal opportunity to participate politically and elect candidates of their choice.¹⁵ If there is a disparate burden under the first step, then the question is whether, under the totality of circumstances, there is a relationship between the challenged standard, practice, or procedure on the one hand, and “social and historical conditions” on the other hand that suggest a discriminatory effect.¹⁶

Now with vote-denial cases actually being litigated under Section 2 instead of Section 5 as they contemplated, however, conservatives pressed for a reconsideration of Section 2’s application to such claims. *Brnovich* represented the first Section 2 case dealing with vote denial decided by the Supreme Court.¹⁷ But conservatives argued that the Court should limit Section 2’s

10. *Id.* at 29.

11. Transcript of Oral Argument at 37, *Shelby Cnty.*, 570 U.S. 529 (No. 12-96).

12. *Id.* at 39.

13. *Voting Rights Act Hearing*, *supra* note 8, at 13 (statement of Michael Carvin, Partner, Jones Day).

14. *Id.*

15. *Feldman v. Ariz. Sec’y of State’s Off.*, 840 F.3d 1057, 1070 (9th Cir. 2016).

16. *Id.*

17. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2330 (2021).

application to such cases so narrowly that it might not even apply to restrictions like those challenged in *Brnovich*.¹⁸ The Arizona Republican Party, represented by Michael Carvin, argued in *Brnovich* that voting restrictions do not discriminate on the basis of race under Section 2 if they are facially neutral, even if they impose differential burdens on racial minorities.¹⁹ Such an interpretation therefore would have reduced Section 2's application, perhaps only to voting restrictions that were racially discriminatory on their face.²⁰ If Section 2 was so applied, it would be hard to imagine how Section 2 could replace Section 5's prophylactic protections against race discrimination in voting as Carvin and other conservatives previously argued around *Shelby County*.²¹ Now that Section 2 was pressed into action to replace Section 5, conservatives were poised to argue Section 2 out of existence as well.

Brnovich was a voter-access case, or alternately a “vote-denial” case, because the Arizona election laws struck down by the Ninth Circuit posed legal restrictions to Arizona voters casting a legally valid ballot. The first Arizona law invalidated ballots cast in-person by Arizona voters in the wrong precinct. When a voter votes in the wrong precinct, *some* of her votes on that precinct's ballot rightfully should not count because the voter may be voting in the incorrect city ward or state legislative district with an incorrect set of candidates for that voter. That said, at least *some* of her votes would nonetheless be unaffected by voting on the wrong ballot—her choices for president or governor, for instance, are identical regardless of the precinct ballot. Arizona law, though, invalidated *all* the voter's votes if cast in the wrong precinct, and Arizona happened to account for roughly one-third of the national total of the ballots thrown out for this reason. The second Arizona law in *Brnovich* prohibited submission of mail-in ballots by anyone other than an election official, mail carrier, or family member, household member, or

18. Brief for State Petitioners at 15-16, *Brnovich*, 141 S. Ct. 2321 (Nos. 19-1257 & 19-1258), 2020 WL 7121776 (arguing for a narrow reading of Section 2 because invalidating state voting laws with any disparate racial impact would “violate the Fourteenth Amendment's central mandate of racial neutrality in governmental decisionmaking” and frustrate “[s]tates' laws that merely regulate elections and result in no more than the usual burdens of voting”).

19. Brief for Private Petitioners at 26, *Brnovich*, 141 S. Ct. 2321 (Nos. 19-1257 & 19-1258), 2020 WL 7121775 (“[A] race-neutral time, place, or manner rule that imposes only the ordinary burdens of voting neither denies nor abridges the right to vote under § 2, regardless of the rates at which different racial groups happen to participate under that system.”).

20. Arguably, the Arizona Republican Party's position resurrects pre-VRA arguments about a law's facial neutrality. See, e.g., *Lassiter v. Northampton Cnty. Bd. Of Elections*, 360 U.S. 45, 53-54 (1959) (finding a North Carolina literacy test constitutional because it was “applicable to members of all races” and was thus not “merely a device to make racial discrimination easy”).

21. See *supra* notes 8-11 and accompanying text.

caregiver. Many Arizona voters living in remote areas without regular mail service, particularly Native Americans, relied on third parties to collect and deliver their completed ballots for them. The Ninth Circuit ruled that each law had a discriminatory effect on racial minority voters who tended disproportionately to cast out-of-precinct ballots and to rely on mail-in ballot collection by third parties,²² as well as finding discriminatory purpose by the Arizona legislature in adopting the restriction on mail ballot submission.²³

In the end, the Court significantly narrowed the application of Section 2 in *Brnovich* while stopping short of absolutely gutting Section 2 in the vote-denial context. Justice Alito's opinion for the conservative majority affirmed Section 2's applicability to discriminatory vote denial but insisted that there be both significant racial impact in both absolute terms and relative to white participation. *Brnovich* reversed the Ninth Circuit, finding that both Arizona laws imposed racial disparities that were small in absolute terms and did not affect sufficient numbers of voters to violate Section 2, at least in light of what the Court considered the state's weighty interests in the prevention of voter fraud, to which it gave far greater credence than the Ninth Circuit had below. The result was short of the maximal limitation of Section 2 urged by the Arizona Republican Party, but a significant narrowing of Section 2's effective application to vote-denial claims nonetheless. *Brnovich* therefore dampens what had been robust extension of Section 2 to vote denial by lower federal courts following *Shelby County*.

What stands out, though, is the predictable but sudden retrenchment of conservatives on Section 2's usefulness regarding vote-denial claims. Before *Shelby County*, conservatives argued Section 5 was unnecessary precisely because Section 2 was poised to handle vote-denial claims and indeed would be more effective than Section 5 in doing so. But when voting rights litigation naturally shifted to Section 2 after *Shelby County* eliminated Section 5 preclearance, conservatives no longer felt so sanguine about Section 2. Indeed, as Rick Hasen pointed out on his blog after *Shelby County*, conservative legal advocates Roger Clegg and Hans von Spakvosky already were advancing

22. For instance, the Ninth Circuit noted that "in the 2016 general election, as in the two previous elections, American Indians, Hispanics, and African Americans voted [out-of-precinct] at twice the rate of whites," crediting the district court's finding that 1 in 100 Hispanic, African American, and Native American cast out-of-precinct ballots, as compared to 1 in 200 white voters. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1004-05 (2020), *rev'd*, 141 S. Ct. 2321 (2021). As to third-party mail-in ballot collection, the Ninth Circuit cited unequal access to reliable transportation and outgoing mail services as examples of discriminatory effect. *Id.* at 1006.

23. *Id.* at 1039-40 (citing "false and race-based allegations of fraud by [a major proponent of restricting third-party ballot collection]" and a "racially-tinged" video created by the Maricopa County Republican Chair).

arguments for narrowing and ultimately finding unconstitutional Section 2.²⁴ A constitutional challenge against Section 2 is now inevitable, and Justice Gorsuch already was arguing in his *Brnovich* concurrence against the long recognized private right of action under Section 2,²⁵ a position no one would have taken seriously before the Trump appointees joined the Court.

Americans for Prosperity v. Bonta

A parallel reversal of conservative thought is occurring on mandatory campaign finance disclosure, as the Court's recent decision in *Americans for Prosperity v. Bonta* seems to signal. The *Bonta* decision marks a decided shift in the Court's approach to mandatory disclosure away from the traditional deference to the government's interest in preventing corruption and voter education it has applied at least since *Buckley v. Valeo*.²⁶ Indeed, even the Roberts Court had resisted a rightward shift on disclosure while it tacked sharply rightward on other aspects of campaign finance law.

The Supreme Court had long applied deference to mandatory campaign finance disclosure. This deference followed from the fact that disclosure, in contrast to other forms of campaign finance regulation such as contribution and expenditures limits, imposed no direct restrictions on the First Amendment activity of spending money on electioneering. As the Court explained in *Buckley*, the seminal decision from which modern campaign finance law flowed, "in most applications," "disclosure requirements . . . appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption."²⁷ As the result, courts apply only exacting scrutiny, not strict scrutiny, to mandatory disclosure of contributors, contributions, and expenditures above certain thresholds under federal campaign finance law.

Even as recently as *Citizens United v. Federal Election Commission* in 2010, when the Roberts Court upended modern campaign finance law by deregulating independent expenditures and effectively ushering in the super political action committee era, eight of nine justices voted to uphold new mandatory disclosure provisions under the McCain-Feingold Act almost

24. Rick Hasen, *On the Road to Arguing for the Unconstitutionality of Section 2 of the Voting Rights Act*, ELECTION L. BLOG, (Mar. 17, 2014, 9:20 PM), <https://perma.cc/Z23W-9RDG> ("Now that Section 5 is essentially gone, it is time for the attack on Section 2.").

25. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring).

26. 424 U.S. 1, 80-82 (1976) (per curiam), *superseded in other part by statute*, Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

27. *Id.* at 68.

without comment or controversy.²⁸ The Court itself, in upholding disclosure in *Citizens United*, suggested sunnily that internet disclosure in the present day allows “transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages.”²⁹ In the words of the former Federal Election Commission chair Bradley Smith, a Republican and campaign finance conservative, “disclosure of contributions and expenditures is one part of the law on which virtually all observers agree.”³⁰ Such was the consensus in favor of campaign finance disclosure.

Indeed, conservatives of this earlier time sometimes advanced an approach to campaign finance law that Richard Briffault termed “deregulate and disclose.”³¹ Under this aggressively conservative view for the time, mandatory disclosure was not only acceptable, perhaps necessary, but also a fully *sufficient* form of campaign finance regulation.³² The government should, under this view, require disclosure, but otherwise refrain from direct restriction or limitation on campaign finance activity as unnecessary. Public exposure from disclosure would provide sufficient deterrent for quid pro quo exchanges in campaign finance. As then-House Minority Leader John Boehner explained in 2007, “we ought to have full disclosure, full disclosure of all of the money we raise and how it is spent. And I think that sunlight is the best disinfectant.”³³ Even Mitch McConnell, archenemy of campaign finance reform, declared at the time that “Republicans are in favor of disclosure Why would a little disclosure be better than a lot of disclosure?”³⁴

28. 558 U.S. 310, 371 (2010) (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages. For the same reasons . . . [w]e find no constitutional impediment to the application of . . . disclosure requirements [here].”).

29. *Id.*

30. Bradley A. Smith, *A Moderate, Modern Campaign Finance Reform Agenda*, 12 NEXUS, 2007, at 3, 15; see also Fred Hiatt, Opinion, *A GOP Bait-and-Switch on Disclosure*, WASH. POST (June 17, 2012), <https://perma.cc/NE32-BJ75> (quoting Senator Mitch McConnell as agreeing that “Republicans are in favor of disclosure,” including disclosure of issue advocacy).

31. Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 286-90 (2010); see also Thomas E. Mann, Commentary, *Campaign Finance in the Wake of Citizens United*, 44 J. MARSHALL L. REV. 583, 590 (2011) (describing “deregulate and disclose”).

32. See generally Michael S. Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1704 (2013) (emphasis added) (explaining that “many opponents of campaign finance reform advocated for disclosure as a substitute for other forms of campaign finance regulation”).

33. See Hiatt, *supra* note 30 (quoting Representative John Boehner).

34. *Id.* (quoting Senator Mitch McConnell).

But *Citizens United* transformed campaign finance law by largely realizing the “deregulate” half of “deregulate and disclose.” Once conservatives had achieved deregulation of campaign finance following *Citizens United*, the continued maintenance of mandatory campaign finance disclosure no longer seemed quite so appealing.³⁵ Conservatives no longer felt any pressure to support disclosure as part of a compromise position that offered reformers disclosure in exchange for regulatory relaxation that had already been achieved in spades.

As a result, conservatives reversed course on disclosure and targeted it in earnest in cases like *Americans for Prosperity v. Bonta*. The Court in *Bonta* held unconstitutional California’s requirement that charitable organizations disclose names and addresses of donors who gave them more than \$5,000 in a particular tax year.³⁶ Until *Bonta*, courts typically upheld such general disclosure requirements under the First Amendment but entertained as-applied challenges in individual cases where donors would face a “reasonable probability . . . of threats, harassment, or reprisals” as a result of disclosure.³⁷ The government’s important interests in transparency, oversight, and prevention of fraud justified disclosure requirements, under exacting scrutiny, against generalized worries about chilling donor activity, in the absence of a particularized as-applied concern.

Bonta flipped this constitutional framework on its head, holding that even under exacting scrutiny, such disclosure requirements must be narrowly tailored, as they would be under strict scrutiny, and plaintiffs challenging those requirements need not establish that disclosure would likely expose them to objective threats, harassment, or reprisals. As a result, despite minimal objective concerns about harms stemming from the required disclosures in *Bonta*, the Court held the requirements unconstitutional because they were not narrowly tailored to the government’s oversight interests. The State of California could obtain that information for enforcement purposes through other, perhaps more cumbersome and costly means. In other words, *Bonta* significantly increased the burden for the government in terms of the narrow tailoring of government means and ends.

Bonta, technically speaking, was not a campaign-finance case. The disclosure laws in *Bonta* regarded donations to charitable nonprofit organizations, not candidates, parties, or political committees. But the obvious

35. See Kang, *supra* note 32, at 1704 (2013); Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 664-65 (2012).

36. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2380-82 (2021).

37. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam), *superseded in other part by statute*, BCRA, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

relevance of *Bonta* for campaign-finance law was hard to miss. Campaign-finance disclosures were justified under the same constitutional framework, and Justice Breyer himself asked during the *Bonta* oral argument, “How is this different from campaign finance laws, where there is an even stronger interest in donating anonymously?” Transferred to campaign-finance law, *Bonta* will raise the burden for the government to defend disclosure requirements against First Amendment challenges, even if the government’s antifraud interests are arguably stronger in campaign finance. As Justice Breyer suggested, even if the government’s interests are stronger in campaign finance, it may also be true that the individual’s First Amendment interest in anonymous participation is stronger as well.

What *Bonta* shows, like *Brnovich* before it, is the marked shift in the conservative position from the pre-Trump to post-Trump Court. Kathleen Sullivan, who argued *Bonta*, had earlier endorsed “deregulate and disclose” in her scholarship,³⁸ but successfully undermined the constitutional support for mandatory disclosure in her case before the post-Trump Court.

Justice Thomas in concurrence signaled his continuing support for applying strict scrutiny to disclosure in a way that would likely doom campaign-finance disclosure if he were to win his way.³⁹ Once the lone dissenter in *Citizens United* on disclosure, he now had Justices Alito and Gorsuch signaling their sympathy in their own *Bonta* concurrence.⁴⁰ “Deregulate” has already happened, and “disclose” itself seems perhaps headed toward its own demise.

Conclusion

The post-Trump Republican majority on the Court reflects the modern, more conservative Republican Party such that familiar understandings of conservative positions, however recent, no longer hold across a spectrum of doctrinal and jurisprudential questions.⁴¹ In today’s hyperpolarized age, the Republican Party is markedly more conservative than it was a decade ago, and Trump’s appointments have abruptly realigned the Supreme Court closer to today’s Republican politics and therefore transformed the universe of

38. See, e.g., Kathleen M. Sullivan, Lecture, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688-89 (1997).

39. *Bonta*, 141 S. Ct. at 2390 (Thomas, J., concurring).

40. *Id.* at 2391-92 (Alito, J., concurring) (“[N]othing in [election law jurisprudence] can be understood as rejecting strict scrutiny . . . [However, b]ecause the choice between exacting and strict scrutiny has no effect on the decision in these cases, I see no need to decide which standard should be applied.”).

41. See, e.g., Ryan Doerfler, *Late Stage Textualism*, 2022 SUP. CT. REV. (forthcoming 2022) (manuscript at 2-4), <https://perma.cc/DXN8-AXR4>.

possibilities for legal change. The conservative reversals in *Brnovich* and *Bonta* represent the ascent of new conservative positions on election law that put on the table for the near Term a whole set of previously unimaginable outcomes. *Brnovich* and *Bonta*, in other words, are likely just the beginning.