Supreme Court Elections Case

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Overview of Presentation

- Two big cases
- *Brnovich v. DNC*—Voting Rights Act
- *Americans for Prosperity v. Bonta*—nonprofit "big donor" disclosure case with possible/probable implications for campaign finance disclosure laws

Brnovich v. DNC—How Did we Get Here?

- *Shelby County v. Holder* (2013) as a practical matter eliminated the requirement from the Voting Rights Act that "covered" jurisdictions must have changes to elections laws "precleared" to make sure the changes weren't discriminatory
- Section 2 prohibits intentional discrimination based on race or color in voting and election practices that ***results*** in the denial or abridgment of the right to vote based on race or color
- Following *Shelby County,* the **results** portion of Section 2 of the Voting Rights Act (added in 1982) became the focus of litigation
- SCOTUS had never heard a results-based **vote denial** claim under Section 2

Overview

- Arizona's requirement that ballots cast in the wrong precinct and ballots collected by anyone other than a limited group of people not be counted didn't violate §2 of the Voting Rights Act
- 6-3
- Dissenters: Kagan, Breyer, Sotomayor
- Big picture: Roberts still in charge
  - Not a fan of the VRA—worked against adding disparate impact to Section 2 in 1982 while at DOJ
  - Alito writes for the Court—gift from the Chief

Facts

- The Democratic National Committee (DNC) sued the Arizona Attorney General claiming that Arizona's refusal to count ballots cast in the wrong precinct and ballots collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver "adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens," in violation §2 of the VRA
- The DNC also alleged the ballot-collection restriction was enacted with discriminatory intent in violation of §2

Section 2 of the VRA

- Section 2(a) disallows voting practices that "results in a denial or abridgement of the right" to vote based on race or color
- Section 2(b) states a violation occurs only where "the political processes leading to nomination or election" are not "*equally open* to participation" by members of the relevant protected group "in that its members have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice"
- Court: "it appears that the core of §2(b) is the requirement that voting be '**equally open**'"

This Isn't a Test it is 5 Factors

- Size of the burden imposed by the rule
- Whether the rule departs from standard voting practice in 1982 when §2 was amended
- Disparity of impact on different racial or ethnic groups
- Openness of the state's entire voting system
- Strength of the state interests served by the rule

Applying the Test to Precinct Only Voting

- "Having to identify one's own polling place and then travel there to vote does not exceed the 'usual burdens of voting'" particularly when considering Arizona's "political processes" as a whole
- While in 2016 over 1% of voters of color versus .5% of white voters voted out of precinct, according to the Court, "[a] policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open"
- Not counting out-of-precinct votes "induces compliance" with the requirement that voters vote at their assigned polling place. Precinct-based voting furthers important state interests including distributing voters more evenly at polling places and reducing wait times

Applying the Test to No Ballot Collection

- Arizonans who receive early ballots have numerous options to cast their ballots, can rely on multiple proxies, and have 27 days to vote
- The DNC was unable to provide statistical evidence that limits on ballot collection have had a disparate impact on minority voters
- "[T]hird-party ballot collection can lead to pressure and intimidation"

Intentional Discrimination Claim Fails

- The Supreme Court agreed the federal district court's finding of a lack of discriminatory intent in enacting the ballot-collection restriction "had ample support in the record"
- What happened after the airing of a former Arizona State Senator's "unfounded and often far-fetched allegations of ballot collection fraud" and a "racially-tinged" video created by a private party "was a serious legislative debate on the wisdom of early mail-in voting"

Dissent Word Collage

- “Unusual free-form exercise” resulting in a “non-test test”
- “Delusions of modesty”
- “A list of mostly made-up factors, at odds with Section 2 itself”
- “Stacks the deck against minority citizens’ voting
- “Tragic”
- “(Yet again) rewritten -- in order to weaken -- a statute that stands as a monument to America's greatness, and protects against its basest impulses”

Liberal Commentary—Very Upset

- Impossible to overstate how upset liberals are
  - It's been almost a week since the Supreme Court issued its most significant ruling on voting rights in nearly a decade, and each time I read Justice Samuel Alito's majority opinion in *Brnovich v. Democratic National Committee*, the **angrier I become**.
    - Rick Hasen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems*, Slate
  - The Roberts court continues to issue rulings that harm our democracy. On Thursday, it once again struck a **savage blow** to our nation's best frontline defense against racial voter suppression
    - David Hans, ***Selective originalism and selective textualism****: How the Roberts court* ***decimated*** *the Voting Rights Act*, SCOTUSblog

Liberal Commentary—Beyond Emotion

- It will be difficult to bring successful cases under Section 2 of the VRA
  - The Supreme Court's ruling in a Voting Rights Act case Thursday may appear modest in scope and subdued in rhetoric, but it will have a sweeping impact — undercutting efforts to challenge a slew of new laws Republican-led states have passed imposing new restrictions on the ballot, lawyers and civil rights activists said
  - *Josh Gerstein & Zach Montellaro, Advocates Decry Supreme Court's Surprisingly Sweeping Voting Rights Decision*, Politico
- Court lost sight of the big picture
  - Importantly, whatever rule the Court decides will govern in Section 2 cases, it will be zero-sum: It will unavoidably privilege the claims of voters of color against the interests of states, or the interests of states over the claims of voters of color. Thus, the fundamental question in the case is whether the states or voters of color ought to have the benefit of the doubt.
  - Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, The Atlantic

Conservatives Commentary—Muted

- Federalism, keeping the courts out of elections
  - It marks a major victory for states that seek to innovate or tinker with their election laws — to expand them or to contract them. And it is the latest in a string of cases pushing the federal courts out of second-guessing state election laws.
  - Derek Muller, Brnovich, election-law tradeoffs, and the limited role of the courts – SCOTUSblog
- Section 2 was never supposed to reach "traditional state voting rules"
  - Hans von Spakovsky, The Supreme Court gets it right on Section 2 - SCOTUSblog
- Election security
  - "Today is a win for election integrity safeguards in Arizona and across the country," said Attorney General Mark Brnovich. "Fair elections are the cornerstone of our republic, and they start with rational laws that protect both the right to vote and the accuracy of the results."

Some Liberals: Could Have Been Worse?

- *Brnovich* does not apply to all Voting Rights Act cases, or even to all cases involving the law's "results test" — the specific provision of the Voting Rights Act at issue in the case. Rather, the opinion limits its analysis to "cases involving neutral time, place, and manner rules" governing elections.
- While Republican litigants proposed various interpretations of the Act that would have read a key prong of the Voting Rights Act **so narrowly as to render it meaningless**, Alito's opinion explicitly refuses to embrace those interpretations. "We decline in these cases to announce a test to govern all VRA §2 claims involving rules, like those at issue here, that specify the time, place, or manner for casting ballots," Alito writes.
- Ian Millhiser, *The Supreme Court leaves the Voting Rights Act alive — but only barely*, Vox

Legal Nerd Tidbits from Politico

- Democrats are mad at themselves from bringing a case that didn't have stronger facts
  - Biden DOJ said these laws didn't violate the VRA
- The mushiness is not typical of an Alito opinion," said University of California-Irvine Professor Rick Hasen. "I think this was necessary to get the other justices on board — probably [Amy Coney] Barrett and [Brett] Kavanaugh —with a test that would be sufficiently mushy that it could be defended as potentially allowing some Section 2 cases to go forward."

How Might a Court Apply these Guideposts?

- Nate Cohn, *How Convenient Should Voting Be? Court Ruling Leaves No Clear Answer*, NYT
- Restrictions on the convenience of voting methods may be relatively permissible
  - No early or mail absentee voting in 1982
  - But states have scaled back election day voting options so eliminating all "convenience" voting would leave all voters with fewer options than 1982
- New burdens on in-person voting, whether a reduction in precincts or new voter identification requirements, might be more vulnerable
  - No voter ID in 1982
  - Justice Kagan—country club polling place?

How Might a Court Apply these Guideposts?

- States with relatively lenient voting laws might have more leeway to impose new restrictions
  - Georgia has no-excuse absentee, early, and Election Day voting
- And no matter what, a fairly large racial disparity — backed by strong statistical evidence — may be crucial
  - If there's any consolation for voting rights activists, it's that many of the most prominent "voter suppression" laws usually feature clear statistical evidence showing that it imposes a burden on a larger share of eligible voters than Arizona's requirement that voters cast ballots in their own precinct
  - But what the statistical threshold is for striking down a restrictive law based on racial disparity — 2 points, 5 points, 10 points? — remains to be seen
- Fraud is a legitimate state interest
  - Not everything reduces fraud—eliminating automatic voter registration or Sunday early voting

What's Next for the VRA?

- Federal lawsuits against the states
  - DOJ lawsuit against Georgia alleges **intentional** discrimination
- Congressional action/inaction
  - Bills on the table
  - Efforts to eliminate the filibuster
- State laws making voting more difficult/easier
- Biden and the bully pulpit
- Domenico Montanaro, *What's Next For Voting Rights After Supreme Court Decision*, NPR

Americans for Prosperity v. Bonta

- Isn't an "obvious" elections case
- California violated the First Amendment by requiring charitable organizations to disclose their major donors to the state attorney general
- 6-3 decision written by Chief Justice Roberts
- Same dissenters as *Brnovich*

Facts

- To operate and raise funds in California, charities must register annually with the Attorney General
- Regulations require them to submit a copy of their Internal Revenue Service Form 990, including Schedule B, which lists the names of donors who have contributed more than $5,000 or, in some cases, more than 2 percent of an organization's total contributions
- A number of charities sued California's Attorney General claiming requiring them to turn over this information violated the First Amendment
- The AG wasn't supposed to disclose donor list to the public but…

Exactly Scrutiny

- Applies to all compelled disclosures (says Roberts, Kavanaugh, and Barrett)
- The version of exacting scrutiny described below applies in this case (says Roberts, Kavanaugh, Barrett, Alito, Gorsuch, and Thomas)
- Higher the scrutiny the more likely a law is going to be unconstitutional
- Exacting scrutiny is pretty high
  - "The strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights"
  - Disclosure requirements must be "**narrowly tailored to the government's asserted interest**"

California Loses

- Facially invalid: California's interest is less in investigating fraud and more in **ease of administration**
- Overbroad: disclosure requirements can chill association "[e]ven if there [is] no disclosure to the general public"

Dissent—Sotomayor

- No First Amendment right burdened here
  - What harm would a donor realize if only the CA AG knows a donor's identity
- New test for exacting scrutiny
  - Where did "narrow tailoring" come from?
- Under a First Amendment analysis that is faithful to this Court's precedents, California's Schedule B requirement is constitutional

What Does this Case Have to Do with Elections?

- It all goes back to *Citizens United*
  - SCOTUS held limiting "independent political spending" from corporations and non-profits violates the First Amendment
  - SCOTUS upheld donor disclosure requirement 8-1 applying exacting scrutiny **without the narrow tailoring requirement**
- First holding—"dark money"
  - Easier for the wealthy to "hide" political spending in non-profits and **not get noticed**

Second Holding—Campaign Finance Disclosure

- Justice Sotomayor: "Today's analysis marks **reporting and disclosure requirements** with a bull's-eye"

Why Did Justice Sotomayor Say that When…

- This isn't a campaign finance case
  - Thomas More Law Center stated it wasn't challenging campaign finance
  - Exacting scrutiny comes from campaign finance cases
- And Alito and Gorsuch are "not prepared at this time to hold that a single standard applies to all disclosure requirements"
  - I think they are saying they not sure if they want this version of exacting scrutiny (with narrow tailoring) to apply in the campaign finance disclosure context

What if She is Right?

- How big of a deal is it to apply a stricter standard to campaign disclosure laws?
  - Tara Malloy, attorney at the Campaign Legal Center, "Even if the standard of review is slightly heightened, there's no reason to think that election transparency laws can't clear it"
  - David Keating, president of the Institute for Free Speech, which filed its own lawsuit against California's disclosure law, said the ruling could increase his organization's challenges to "unreasonable" campaign finance rules
- Might this ruling threaten **campaign contribution laws** which also apply exacting scrutiny
  - Rick Hasen, UCI Law: "Lower courts can now find that such laws are not narrowly tailored to prevent corruption or its appearance or do not provide voters with valuable information — two interests the court recognized in the past to justify campaign laws"
- Karl Evers-Hillstrom, *Supreme Court ruling opens door to more campaign finance challenges,* The Hill

Or Maybe this Case is Just about Cancel Culture?

- Much of the Court's right flank spent the oral argument in *Americans for Prosperity* rejecting Scalia's "civic courage" in favor of a kind of **paranoia over cancel culture**. Justice Neil Gorsuch warned that the government could demand to see your "Christmas card lists" or to disclose your "dating history" to state regulators. Justice Samuel Alito spoke of "vandalism, death threats, physical violence, economic reprisals, [and] harassment in the workplace" directed against donors to an anti-LGBTQ campaign.
- Ian Millhiser, *The Supreme Court just made Citizens United even worse*, Vox
- With racial issues at the forefront of the cancel culture debate, it was fitting that the Supreme Court largely based this decision on its 1958 precedent in *NAACP v. Alabama*. There, the Court unanimously ruled that given the "the vital relationship between freedom to associate and privacy in one's associations," the First Amendment protected the NAACP from having to disclose its membership list to the state of Alabama at the risk of reprisals to its members.
- Curt Levey, *Justices Strike a Blow Against Cancel Culture,* Federalist Society

The Truth is…Boring…

- Only time will tell what this decision makes for campaign finance disclosure laws