The Quintessential Political Problem: Current Conditions
Justifying Current Burdens and the Modern Shift in Election Law Scrutiny

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“For the cries of pain and the hymns and protests of
oppressed people have summoned into convocation all the
majesty of this great Government—the Government of the
greatest Nation on earth. Our mission is at once the oldest
and the most basic of this country: to right wrong, to do
justice, to serve man.”

I. INTRODUCTION

In 1886, the Supreme Court of the United States, presiding in an
America that had not yet adopted the responsibility and inherent truth of
the Fifteenth Amendment, recognized that voting should be “regarded as a
fundamental political right, because [it is] preservative of all rights.”2
Nearly a century later, Congress passed one of the signature achievements
of the Civil Rights movement: the Voting Rights Act (VRA) in 1965.3 The
VRA has had a transformative impact on the way Americans participate in
our constitutional system, and is arguably the most significant and

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1 President Lyndon B. Johnson, Address to Congress on Voting Rights (Mar. 15, 1965).
2 See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (recognizing voting as fundamental
right). The Yick Wo Court quoted a decision by Lemuel Shaw, the Chief Justice of the Supreme
Judicial Court of Massachusetts, using language that would be reinvigorated by the Supreme
Court in the lead up to the Shelby County decision.

[T]hat in all cases where the constitution has conferred a political right or privilege,
and where the constitution has not particularly designated the manner in which that
right is to be exercised, it is clearly within the just and constitutional limits of the
legislative power to adopt any reasonable and uniform regulations, in regard to the time
and mode of exercising that right, which are designed to secure and facilitate the
exercise of such right, in a prompt, orderly, and convenient manner ….

See id. at 370-71 (quoting Capen v. Foster, 29 Mass. (12 Pick.) 485, 489 (1832)); see also U.S.
Const. amend. XV (stating right to vote shall not be denied).
(2013) (arguing against Chief Justice Roberts and Justice Thomas arguments repudiating present-
day voter suppression).
successful pieces of legislation in the last century. The VRA prohibits any and all race based “voting qualification[s] or prerequisite[s].” The enforcement provision of the VRA was written into Section 4, and it subjected jurisdictions with notorious and documented reputations of voter suppression to a preclearance requirement. Since its inception, the VRA has been challenged in court due to its unprecedented federalism construction. Rarely, if ever, had Congress stepped onto the state’s regulatory turf than with the VRA’s preclearance requirement. In the last ten years, the Tenth Amendment has regained primacy in Chief Justice John Roberts’s Supreme Court, which has shown a willingness to return considerable latitude to the states in regulating and administering elections. The Court’s decision in *Shelby County v. Holder* affirmed a

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6 See U.S. CONST. amend. XV (describing no voter shall be denied right to vote based on race); § 10301(a)-(b) (naming states using tests or devices, registration, and turnout below 50% subject to preclearance); see also Ellen Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615, 1634 (2009) (describing preclearance as most consistently controversial VRA provision).


new standard of review—originally unveiled in *Northwest Austin Municipal Utility District No. 1 v. Holder*—which began in the second term of the Roberts Court: “current burdens... justified by current needs.”

This Note analyzes the impact of the *Shelby County* decision on how litigators will need to prove facially neutral challenges to election law changes in jurisdictions that no longer have a preclearance requirement.

We will focus on Texas, and how the Lone Star State used a federal court decision in Indiana on voter identification statutes to craft legislation that has wrought considerable controversy. *Crawford v. Marion County* inexplicable for reasons other than race and therefore required strict scrutiny. See id. at 644 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).


*See South Carolina v. Katzenbach, 383 U.S. 301, 327-28 (1966), abrogated by *Shelby Cnty. Ala. v. Holder, 133 S. Ct. 2612* (2013)* (noting difficulty of singular lawsuits in combating voter suppression). Chief Justice Earl Warren wrote that “Congress had found that case-by-case litigation was inadequate to combat wide-spread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.” See id. at 328, Kata, supra note 6, at 1623 (noting difficulties in challenging state statutes without preclearance); *Hearing, infra note 27* (statement of Prof. Spencer Overton) (arguing Shelby County will delay remedies that preclearance allowed expeditiously); *see also Doug Chapin, Voting Rights After Shelby County: Bring on the Election Geeks, 12 Election L.J. 327* (2013) (arguing winners in post-Shelby jurisprudence are data-oriented researchers). Chapin argues:

Notwithstanding considerable pessimism, Congress (or at least some members) are taking up the Court’s call to update the coverage formula of the Act and will need data for that effort; [w]ithout Section 5, plaintiffs in cases of all kinds are going to need data to make the case that certain election procedures violate Section 2 of the Act; [b]y the same token, defendants are going to need data to demonstrate that their laws or practices do not violate the Act—or make the case in advance of a lawsuit that litigation is unnecessary; [e]veryone concerned is going to have to use data to evaluate whether litigation is even advisable given the higher costs associated with the need to actually go to court; and [a]dvocates and election officials are going to need data to reach out to legislators to identify opportunities to amend or repeal laws that might violate the Act—thus avoiding litigation.

Id.; see About Section 5 of the Voting Rights Act, *Administrative Review of Voting Changes, U.S. Department of Justice*, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Jan. 15, 2014) (noting on average DOJ reviews 5,000 §5 claims and up to 20,000 voting changes annually).

*See Texas v. Holder, 888 F. Supp. 2d 113, 127 (2012)* (ruminating Indiana statute as source of guidance for Texas’s argument before preclearance court), *vacated*, 133 S. Ct. 2886 (2013); *see also Samuel P. Langholz, Fashioning a Constitutional Voter-Identification Requirement*, 93 Iowa L. Rev. 731, 788 (February 2008) (examining parameters within which voter identification
fundamental right that is "preservative of all rights."^{18}

II. THE HISTORY OF THE PRESERVATIVE RIGHT

A. The State of Affairs Leading to the Act’s Passage

Before the Voting Rights Act passed, the Tenth Amendment empowered individual sovereign states to administer and regulate all matter pertaining to elections, voter access, and ballot access.^{19} The Fifteenth Amendment would have to wait eighty-five years for its crucial phrase to gain any practical muscle.^{20} While that Amendment barred states from preventing individuals from casting their ballots on account of race, the seminal provision of the Amendment authorized Congress to take legislative action to enforce Section 1.^{21} Prior to the 1965 Voting Rights Act, states flagrantly ignored the clarion call to equality contained in the Fifteenth Amendment because the federal government refused to take any decisive action in enforcing its provision.^{22} In the cradle of the Confederacy, poll taxes and literacy tests were nurtured as the federal government stood idly by and the nation’s sacrifice during the Civil War was mocked.^{23} The federal government’s appetite for spending political capital on voting rights equality was minimal, with sparse attention paid and apathy reigning supreme.^{24} Whatever legitimate, albeit vastly limited, success the lawmakers in the early twentieth century had in securing a

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^{19} See U.S. CONST. amend. X (reserving enumerated powers not delegated to federal government to states); see also Yick Wo, 118 U.S. at 370.
^{20} See Ellement, supra note 3, at 265 (detailing Fifteenth Amendment’s slow start in enabling blacks right to vote).
^{21} See U.S. CONST. amend. XV.
^{23} See Ellement, supra note 3, at 265-66 (tracing history of voter suppression and dilution leading to Civil Rights Era legislation); see also Holder, 888 F. Supp. 2d at 121 (discussing historical background leading to development of strong federal role in election regulation).
more fair electoral system was rejected by the Supreme Court as overstepping the limited powers of the Congress in the face of the plenary powers of the state.\footnote{See Ellement, supra note 3, at 265-66 (outlining Jim Crow laws suppressing vote); see also Holder, 888 F. Supp. 2d at 121 (showing why VRA was needed to deal with Jim Crow laws). But see James v. Bowman, 190 U.S. 127, 139 (1903) (holding Congress did not have Fifteenth Amendment authority to provide remedy in Kentucky). Bowman is interesting in that it uses similar Catch-22 reasoning that Justice Ginsburg described in Chief Justice Roberts' Shelby opinion. See Bowman, 190 U.S. at 139-40; see also Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2649-50 (2013) (Ginsburg, J., dissenting). In Bowman, the defendant was charged with bribing African Americans so that they might not cast their ballot in a Congressional election. See Bowman, 190 U.S. at 139. According to the Supreme Court, the individual in Kentucky was acting as just that, an individual. See id. He was not representing the state of Kentucky, and was not acting under the color of state law or action. See id. (requiring satisfactory nexus between state preventing fundamental political right to blacks and individual briber).
\footnote{See Ellement, supra note 3, at 265-66 (detailing Civil Rights Acts passed in 1957 and 1960 with minimal effect).}

In the middle of the 20th century, Civil Rights activists would begin to move the needle and achieve concrete results pushing the Congress to assert its Constitutional authority to enact laws that would end black disenfranchisement.\footnote{See 52 U.S.C. § 10301 (2012); see also Ellement, supra note 3, at 267. The Civil Rights Act of 1957 placed the Justice Department in a position similar to private and public litigators after the Shelby County decision. Ellement, supra note 3, at 267. Individual lawsuits require high costs associated with labor, and trying to defend the VRA in multiple jurisdictions within just one state, never mind multiple states, could prove too large a task. See id.; see also Beer v. United States, 425 U.S. 130, 140 (1976) (“Section 5...a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.”); Voting Rights Act After the Supreme Court’s Decision in Shelby County: Hearing Before the Subcommittee on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. (2013) [hereinafter Hearing] (statement of Prof. Spencer Overton) (articulating impact on political operatives and litigators after Shelby County decision); Ellement, supra note 3, at 268 (noting states can pass and implement statutes quicker than federal enforcement procedures); infra note 33 and accompanying text; cf. Tomas Lopez, ‘Shelby County:’ One Year Later, BRENNAN CENTER FOR JUSTICE (June 24, 2014), http://www.brennancenter.org/analysis/shelby-county-one-year-later (assessing Shelby County impact in Texas and other preclearance states one year after decision).}

Two other Civil Rights Acts were passed in the early 1960s, but none related directly to the rights of blacks and minorities to equal and unfettered access to the ballot box.\footnote{See Ellement, supra note 3, at 267 (describing legislation passed during Civil Rights Era from 1950s to mid-1960s).} A new piece of legislation aimed directly at “banish[ing] the blight of
racial discrimination in voting, which had infected the electoral process in parts of [the] country for nearly a century. After considerable opposition from Southern States and Democratic Boll weevils, the Act passed "the House of Representatives by a vote of 328-74, and the Senate by a vote of 79-18." The Act was wide in its scope, nullifying poll taxes and literacy tests, permitting federal officers to oversee state elections and ensure that all individuals were properly registered and allowed to vote. The VRA barred any state from developing regulations that would create "qualification[s] or prerequisites" to voting.

Whereas the Civil Rights Act of 1957 authorized the Attorney General to bring individual suits for individual offenses, the VRA empowered the Justice Department and the federal government to nip voter suppression in the bud. The preclearance requirement has always

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[It was last week in Selma, Alabama. There, long-suffering men and women peacefully protested the denial of their rights as Americans. Many were brutally assaulted. One good man, a man of God, was killed. There is no cause for pride in what has happened in Selma. There is no cause for self-satisfaction in the long denial of equal rights of millions of Americans. But there is cause for hope and for faith in our democracy in what is happening here tonight. For the cries of pain and the hymns and protests of oppressed people have summoned into convocation all the majesty of this great Government—the Government of the greatest Nation on earth. Our mission is at once the oldest and the most basic of this country: to right wrong, to do justice, to serve man... The issue of equal rights for American Negroes is such an issue. And should we defeat every enemy, should we double our wealth and conquer the stars, and still be unequal to this issue, then we will have failed as a people and as a nation.]

Special Message to the Congress, supra; see Katzenbach, 383 U.S. at 308 (discussing purpose for Voting Rights Act to combat "blight of racial discrimination"); see also Ellement, supra note 3, at 267 (discussing federal regulations to encourage and enforce nondiscriminatory voting practices in states).


32 52 U.S.C. § 10302(c) (2012); Ellement, supra note 3, at 267 (outlining framework of VRA).

33 See Beer v. United States, 425 U.S. 130, 140 (1976) (writing on Congress taking notice of
generated the most consternation because it shifted the balance in power towards the federal government in overseeing a traditionally and exclusively state prerogative.\textsuperscript{34} The Supreme Court, under the Fifteenth Amendment enforcement clause in \textit{Katzenbach}, ratified this unprecedented exercise of congressional authority.\textsuperscript{35} Unlike previous legislation aimed at bad actors tactics in drafting VRA). The Court noted:

Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory.... Congress therefore decided, as the Supreme Court held it could, to shift the advantage of time and inertia from the perpetrators of the evil to its victim, by freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.

\textit{Id.} (internal quotation marks omitted) (quoting H.R. REP. NO. 94-196, at 57-58); see S. REP. NO. 94-295 (1975), reprinted in 1975 U.S.C.C.A.N. 774 (outlining intent of Congress to get ahead of ever-changing state regulations); H.R. REP. NO. 91-397 (1969), reprinted in 1970 U.S.C.C.A.N. 3277 (same); S. REP. NO. 89-162 (1965), reprinted in 1965 U.S.C.C.A.N. 2508 (same); H.R. REP. NO. 89-439 (1965), reprinted in 1965 U.S.C.C.A.N. 2437 (same); H.R. REP. NO. 94-196 (1965), reprinted in 1965 U.S.C.C.A.N. 3277 (same); see also \textit{Hearing}, supra note 27, (statement of Spencer Overton) (commenting on increased cost to litigate Section 5 cases after \textit{Shelby County}). Prof. Overton stated that “[a]nother problem is that lawsuits can take years. Too often, lawsuits don’t stop unfair voting rules before they are used in elections and harm voters. In contrast, preclearance was relatively quick, efficient, inexpensive. Preclearance also generally prevented discriminatory practices before they became effective.” See \textit{Hearing}, supra note 27, (statement of Spencer Overton). Prof. Overton also noted that in poorer counties like Nueces County, Texas, the Latino population has exploded, growing to 56\% of the population. See \textit{id.}. The costs of litigation for the Department of Justice were sometimes in the millions, fees that are entirely unavailable to an impoverished population. See \textit{id.} See generally \textit{Emery G. Lee III & Thomas E. Willging, Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules} (Federal Judicial Center 2010), available at \textit{http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf} (studying increase in costs to litigate generally).

\textsuperscript{34} U.S. CONST. amend. X (establishing federal government only has those powers delegated by Constitution); § 10304(a) (requiring states to prove to purpose and effect). Section 10304(a) requires each sovereign state to report and justify their actions to the federal Executive or Judicial branch that “such qualification, perquisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color...” § 10304(a); see South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966) (“[Congress] shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim...”), abrogated by \textit{Shelby Cnty. v. Holder}, 133 S. Ct. 2612 (2013); see also H.R. REP. NO. 89-439, at 23-34 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2470-71 (arguing VRA impedes state sovereignty and upsets federalism construction). Critics claimed that the VRA “attempt[ed] to remedy discrimination by discriminatory means.” See H.R. REP. NO. 89-439, at 23-34 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2470-71.

\textsuperscript{35} \textit{Katzenbach}, 383 U.S. at 337 (upholding VRA as means of enforcing Fifteenth Amendment); see H.R. REP. NO. 109-478, 2 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 623 (citing \textit{Katzenbach} as dicta for Congressional oversight of state elections administration and
leveling the playing field and ensuring a purer democratic process, the VRA did not require litigation after the exploitive measure had been enacted, rather it forced the jurisdictions covered under the Section 4 formula to prove their changes were not based on race to comply with Section 5 preclearance. Furthermore, preclearance applied only to certain jurisdictions with a pernicious prior record of voter suppression.

B. Preclearance and Options Affording to the States

For any jurisdiction covered by the Section 4 formula to implement a change to its election procedures, the jurisdiction would have to either seek a declaratory judgment from a three-judge panel of the U.S. District Court for the District of Columbia or submit the change to the Department of Justice—specifically the Attorney General—for authorization. If a jurisdiction had implemented a poll tax, literacy test, or had fewer than fifty

regulation).


37 See 52 U.S.C. § 10303(b) (2012) (reserving preclearance to certain jurisdictions); Ellement, supra note 3, at 268-69 ("[T]he coverage formula is meant to subject those jurisdictions with a history of racial discrimination to the strictures of the preclearance requirement."). Preclearance was restricted to jurisdictions with prerequisite tests or devices—such as poll taxes or literacy tests—and less than 50% of eligible voters either registered or participating in the most recent presidential election. See § 10303(b) (providing criteria for application of preclearance); cf Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (holding poll taxes in Virginia and United States unconstitutional). The VRA itself did not explicitly outlaw poll taxes, but it did instruct the Attorney General to test the constitutionality of such actions before the Court. See § 10306 (giving Attorney General authority to institute safeguards preventing use of poll taxes impairing voting rights). Justice Earl Warren in Katzenbach described the impact of the tests and devices on African Americans: "more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write." Katzenbach, 383 U.S. at 311. The Katzenbach Court quoted South Carolina Senator Ben Tillman as stating, "[t]he only thing we can do as patriots and as statesmen is to take from the ignorant blacks every ballot that we can under the laws of our national government." Id at 310 n.9; see Texas v. Holder, 888 F. Supp. 2d 113, 122 (D.D.C. 2012) (writing about historical viciousness with which white supremacists abridged minority voting rights), vacated, 133 S. Ct. 2886 (2013); History of Federal Voting Rights Laws, supra note 15 (reviewing history of racial discrimination in voting and disparities in minority participation); see also Jurisdictions Previously Covered By Section 5, supra note 15 (listing every jurisdiction covered and bailed out since 1965).

38 See § 10304(a) (describing procedure for alteration of voting qualifications); 28 C.F.R. § 51.11 (2012) (codifying that jurisdictions can seek declaratory judgment after submission to Justice Department); Ellement, supra note 3, at 268-69 (revealing preclearance procedure for covered jurisdictions); see also Shelby Cnty., 811 F. Supp. 2d at 431 (allowing jurisdictions to appeal Attorney General objection to District Court); Jocelyn F. Benson, A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act, 88 Neb. L. Rev. 124, 129 (2009) (studying most efficient means for covered jurisdiction to implement changes).
percent of its eligible voting citizens registered and participating in the most recent presidential election, the jurisdiction (state, county, municipality, voting subdivision) would be a covered preclearance jurisdiction.  

In lieu of the heated political and ideological debate surrounding the Section 4 formula and Section 5 preclearance, the drafters of the VRA originally imposed a five-year time limit on the sections and inserted a bailout provision for covered jurisdiction. A successful bailout occurs after a covered jurisdiction proves before the District Court or Attorney General that they have not engaged in practices enumerated under the Section 4 formula. The covered jurisdictions "must have eliminated those

39 See supra note 38 and accompanying text (citing policies for DOJ to enforce VRA); see also Katzenbach, 383 U.S. at 309 (recognizing speed at which legislatures subverted minority voting before federal response could be developed). Crafty legislatures suppressed African American voters through "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution..." Katzenbach, 383 U.S. at 309; see Persily, supra note 4, at 177 (noting unique role federal government played in preclearance states' election administration).

No other statute applies only to a subset of the country and requires covered states and localities to get permission from the federal government before implementing a certain type of law. Such a remedy was necessary because case-by-case adjudication of voting rights lawsuits proved incapable of reining in craft Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order.

Persily, supra note 4, at 177.


41 See Section 4 of the Voting Rights Act, supra note 40 (listing criteria set forth to bailout of preclearance). A jurisdiction seeking to bailout must establish that in the last ten years,

No test or device has been used within the jurisdiction for the purpose or with the effect of voting discrimination. All changes affecting voting have been reviewed under Section 5 prior to their implementation. No change affecting voting has been the subject of an objection by the Attorney General or the denial of a Section 5 declaratory
voting procedures and methods of elections that inhibit or dilute equal access to the electoral process. Many jurisdictions have successfully bailed out using the criteria issued by the Supreme Court in *Northwest Austin*.

C. The Lone Star State’s Voter Identification Statute

In January 2011, the Texas legislature enacted, and the following May Governor Rick Perry signed Senate Bill 14 (“SB 14”), an act “relating to requirement to vote, including presenting proof of identification . . . [and] providing criminal penalties.” SB 14 established a more “stringent” regulatory scheme for elections in Texas. Whereas under previous Texas judgment from the District of Columbia district court; There have been no adverse judgments in lawsuits alleging voting discrimination; There have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice; There are no pending lawsuits that allege voting discrimination; and Federal examiners have not been assigned; There have been no violations of the Constitution or federal, state or local laws with respect to voting discrimination unless the jurisdiction establishes that any such violations were trivial, were promptly corrected, and were not repeated.

Id. (listing statutory criteria for bailout).


43 See *Jurisdictions Previously Covered By Section 5*, supra note 15 (listing every jurisdiction covered and bailed out since 1965); see also *Section 4 of the Voting Rights Act*, supra note 40 (providing for termination of coverage for “good behavior”).

44 See *Texas v. Holder*, 888 F. Supp. 2d 113, 115-17 (2012) (reviewing history of Texas’s Voter ID Law), vacated, 133 S. Ct. 2886 (2013). Prior to SB 14, Texas did have a form of voter identification. *See id.* at 115. Texas voters had to file a registration application with the board of elections registrars in their county. *See id.* The application required a name, birthday, and a sworn affidavit that the individual was a U.S. citizen. *See id.*; see also *Tex. Elec. Code* § 13.002 (2012). If their application were approved, the voter would receive a certificate—without a photograph identifying the individual voter—from the registrar that had to be presented at the ballot box. *See Elec.* §§ 13.142, 13.144. Voters would not be turned away at the polling location if they brought an affidavit swearing that they did not have their registrar certificate, or if they presented some other form of accepted identification. *See Elec.* § 63.008. Other forms of identification accepted by Texas were “birth certificates, expired and non-expired driver’s licenses, U.S. passports, U.S. citizenship papers, utility bills, ‘official mail addressed to the person . . . from a governmental entity,’ any ‘form of identification containing the person’s photograph that establishes the person’s identity,’ and ‘any other form of identification prescribed by the secretary of state.’” See *Elec.* § 63.0101; see also *Holder*, 888 F. Supp. 2d at 115 (describing Texas policy under SB 14).

45 See *Holder*, 888 F. Supp. 2d at 115 (describing SB 14 as more strict than preexisting statute); see also *All Things Considered: Texas’ Voter ID Law Creates A Problem for Some Women* (NPR radio broadcast Oct. 30, 2013) (inferring that Voter ID in Texas is over inclusive to minorities and women). Judge Sandra Watts was forced to cast a provisional ballot because the voting registration lists had her middle name listed, but she took her maiden name as her middle name upon marrying her husband. *See All Things Considered*, supra (demonstrating restrictive
law voters could produce any form of identification, now their accepted identification had to include a photograph. \footnote{66} This included the certificate from the county elections registrar. \footnote{46} The IDs had to be current, and the polling location would not accept any form of identification that had expired more than sixty days before the election. \footnote{48} Texas’s Voter ID statute increased the number of acceptable identification forms for presentation at the ballot, and charged the Texas Department of Public Safety (DPS) with responding to voter’s requests for identification. \footnote{49} If someone lacks one of these forms of identification, they must report in person to a regional DPS office to obtain an electronic identification certificate in order to vote. \footnote{50} While the statute does not permit the DPS to collect fees for these forms of identification, the material required to verify identity does involve fees. \footnote{51}


\footnote{46} See \textit{Holder}, 888 F. Supp. 2d at 115 (noting changes included requiring photo ID); see also \textit{ELEC.} § 63.0101 (discussing what documentation is acceptable for proof of identification).

\footnote{47} See \textit{Holder}, 888 F. Supp. 2d at 115; see also \textit{ELEC.} § 63.0101.

\footnote{48} See \textit{Holder}, 888 F. Supp. 2d at 115; see also \textit{ELEC.} § 63.0101.

\footnote{49} See \textit{Holder}, 888 F. Supp. 2d at 115 (laying out proper identification forms and DPS as agency in charge of providing IDs). Now Texas polling places will accept a license to carry a concealed handgun, a U.S. Military ID card, a U.S. citizenship certificate containing a photograph, and a U.S. passport in addition to a Texas driver’s license of personal ID card issued by DPS. \textit{See id.; see also ELEC.} § 63.0101.

\footnote{50} See \textit{Holder}, 888 F. Supp. 2d at 115 (blending Voter ID regulations with Texas Transportation Department and Administrative Code); \textit{TEX. TRANSP. CODE} § 521A.001(e) (2012); \textit{37 TEx. ADMIN. CODE} § 15.182 (2012) (stating applications must provide necessary documents for election identification certificate).

\footnote{51} See \textit{TRANSP.} § 521A.001(e). Once at the regional DPS office, the voter will have to present a valid birth certificate, a court document showing an official name or gender change, U.S. citizenship or naturalization papers without a photo identification, school records, Social Security cards, pilot’s licenses, or an out-of-state driver’s license. \textit{See 37 TEx. ADMIN. CODE} § 15.182(3)-(4). Judge Tatel in \textit{Texas v. Holder} expounded on the implications of the primary and secondary identification form requirements:

\textbf{EIC applicants}—i.e., would-be voters—who possess none of these underlying forms of identification will have to bear out-of-pocket costs. For Texas-born voters who have changed neither their name nor gender, the cheapest way to obtain the required documentation will be to order a certified copy of their birth certificate from the Texas Bureau of Vital Statistics at a cost of $22 . . . . Actually obtaining [emphasis omitted] a legal change of name and/or gender costs far more—at least $152 . . . . More expensive options exist as well, ranging from $30 for an “expedited” birth certificate order all the way up to $354 for a copy of U.S. citizenship or naturalization papers.

Two months after Governor Perry signed the new regulatory scheme into law, Texas filed for preclearance with the Attorney General. The Justice Department requested that Texas show how many voters lacked a driver’s license or personal ID card, and how many of those individuals were minorities. In March 2012, Attorney General Holder rejected Texas’s application for preclearance after the state submitted incomplete and unreliable estimates of Hispanic voters who may have been impacted by SB 14. The Justice Department determined that “Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack” the required documentation to obtain an electronic identification card and that Texas “failed to show that the availability of purportedly ‘free’ EIC would mitigate the impact on minority voters.” Under preclearance, the Attorney General was only required to show a discriminatory effect on minority voters, so Attorney General Holder declined to determine whether or not Texas enacted SB 14 with a discriminatory purpose.

After the denial by the Attorney General, Texas filed suit for a declaratory judgment in the United States District Court for the District of Columbia with hopes of implementing SB 14 before the November 2012 elections. Texas argued that there was a compelling state interest in

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52 See Holder, 888 F. Supp. 2d at 117 (outlining process Texas as preclearance jurisdiction went through for federal authorization).

53 See id. (requiring Texas show SB 14 justification for restricting voter access). For preclearance, Texas must show that its voter ID law “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race...” Id. (allowing for extension to 60-day requirement when requests for supplemental information are made).

54 See Holder, 888 F. Supp. 2d at 117. Texas gave the Justice Department a list of 795,955 registered voters who could not be corroborated on the DPS’s databases for driver’s licenses and personal ID cards. See id. (detailing nearly 40%, or 304,389 voters were Hispanic).

55 See id. Attorney General Holder identified the birth certificate as the least expensive option for a prospective voter to obtain an Election Identification Certificate, and that would run the voter twenty-two dollars. See id. at 117. The prospective voter would also have to drive to a regional DPS office. See id. The trouble with the in-person requirement in § 63.0101 is that there are no offices equipped to process a driver’s license application in 81 of Texas’s 254 counties. See id. at 118. These offices typically have shorter operational hours, meaning that if a prospective voter could take time off of work and use a vehicle to drive, that voter still may not be able to receive the necessary identification forms needed to cast a ballot. See id. at 117-18.

56 See id. at 118 (declining Texas’s request for preclearance on SB 14).

57 See id. at 118-19 (noting Texas’s urgency seeking relief in order to impose voter ID prior to presidential election). Texas filed a request for an “expedited litigation schedule” and the district court granted it before the United State answered Texas’s amended complaint. See id. at 119 (citing Shelby County and Northwest Austin as support for allowing expedited schedule); see also Shelby County v. Holder, 679 F.3d 848 (D.C. Cir. 2012) (upholding facial constitutionality of Section 5); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009) (granting preclearance structure critical attention). Given Section 5’s “substantial federalism costs” as described in Northwest Austin, and the doctrine of equal sovereignty, the district court believed that because Section 5 covered only certain jurisdictions, it violated Texas’s equal sovereignty
combatting voter fraud, and that SB 14 was directly and narrowly tailored to serving that legitimate state interest. More specifically, Texas argued that Voter ID laws could not “abridge the right to vote,” or change the position of minorities in voting, because the laws represent a “minor inconvenience,” resting entirely on whether an individual chooses to participate. Moreover, Texas contended that a recent voter ID decision by the Supreme Court controlled the case, and since that statute was upheld Texas should be allowed preclearance to implement SB 14. The United States—citing the dearth of voter fraud examples contained in evidence introduced by Texas—argued that SB 14 was a vehicle for suppressing minority vote and contained no compelling state interest. Furthermore, the United States countered that *Crawford v. Marion County Election Board* was distinguishable because it was a “facial challenge to a voter ID law enacted by a state not covered by section 5.” This impacts which party carries the burden of proving that the statute carries or does not carry a discriminatory purpose or intent.

The district court rejected Texas’s assertion regarding the

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rights. *See Holder*, 888 F. Supp. 2d at 119 (emphasizing other non-covered jurisdictions and states permitted to implement voter identification laws without federal scrutiny); *see also Coyle v. Smith*, 221 U.S. 559, 576-77 (1911) (noting doctrine of equal sovereignty when states are admitted to Union). Equal sovereignty was not incorporated into Article IV of the Constitution, which merely read, “new states may be admitted by the Congress into this Union.” *See Coyle*, 221 U.S. at 566; *see also U.S. CONST. art. IV, § 3, cl. 1.

58 *See Holder*, 888 F. Supp. 2d at 121 (“Texas also argues that record evidence affirmatively proves that SB 14 will have no discriminatory effect.”).

59 *See id.* at 127 (reviewing Texas’s argument in Findings of Fact presented to court); *see also 52 U.S.C. § 10304(a) (2012). Texas argued that voter ID laws have no bearing on turnout, be it to increase or decrease participation. *See id.* at 123. So, if the laws do not have any bearing on turnout, correspondingly, the laws will not impact minorities. *See id.* at 127.

60 *See id.* at 128. Judge Tatel summarized Texas’s argument:

From this, Texas urges us to draw three conclusions: (1) photo ID laws ultimately prevent very few people from voting; (2) photo ID laws have no disproportionate effect on racial minorities; and (3) disparate ID possession rates have little effect on turnout. We reject these proposed findings because the circumstances in Georgia and Indiana are significantly different from those in Texas.

61 *See id.* at 128; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202-03 (2009) (holding voter ID laws impose minimal First and Fourteenth Amendment burdens on voters).

62 *See Holder*, 888 F. Supp. 2d at 121 (outlining parties’ arguments).

63 *See supra* note 59 and accompanying text.
theoretically minimal impact voter ID laws has on turnout because the study produced by Texas was not dispositive.64 The panel found that Texas misread Section 5 of the VRA in their argument, and that if the minimalism argument held it would exempt voter ID laws from Section 5 scrutiny.65 Interestingly, the district court rejected the arguments regarding Crawford by both parties.66 The government’s argument against using Crawford was inaccurate because the decision allowed Indiana to combat voter fraud without evidence of the fraud existing and in determining that minimal inconveniences to participation are permissible.67 The court did accept the government’s burden of proof argument, and rejected Texas’s position that Crawford completely governed this case because of Texas’s status as a preclearance jurisdiction under Section 5 of the VRA.68

Ultimately, the court rejected all of the evidence provided by the parties, and denied preclearance to Texas because it failed to show that SB 14 would not have a retrogressive effect on racial minorities.69 The court

64 See Holder, 888 F. Supp. 2d at 127 (noting lack of consensus on voter ID impact on turnout). “We are unable to credit this line of argument because the effect of voter ID laws on turnout remains a matter of dispute among social scientists.” See id. Essentially, Texas and the United States introduced competing political and social science theories, and the court held that they canceled each other out. See id.

65 See id. at 142-43 (finding Texas’s argument “entirely unpersuasive.”). The court noted that the pernicious prerequisite devices that gave rise to the VRA in the 1960s were written racially neutral to provide a loophole to previous Civil Rights Acts. See id. at 142 (noting “notorious devices” such as literacy tests, poll taxes, and grandfather clauses). As such, the court rejected Texas’s argument that Section 5 applied only to voting changes that directly violated the Fifteenth Amendment. See id. at 143 (reasoning Texas’s interpretation of Section 5 goes against its very purpose).

66 See id. at 125 (stating “the correct answer lies somewhere between these two positions”).

67 See id. at 125-26 (allowing legitimate state interest “without any concrete evidence of a problem” in Indiana and Texas); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009). The court noted that preserving the integrity of the voting process was a legitimate state concern, and denying that interest to Texas because of preclearance was violative of the equal sovereignty rights. See Nw. Austin, 557 U.S. at 203; see also Holder, 888 F. Supp. 2d at 125. Furthermore, “according to Crawford, there are certain responsibilities and inconveniences that citizens must bear in order to exercise their right to vote, and a one-time trip to the driver’s license office is, in most situations, simply one of those responsibilities.” See Holder, 888 F. Supp. at 126; see also Crawford, 553 U.S. at 203; E. Earl Parson, The Persistence of Racial Bias In Voting: Voter ID, The New Battleground for Pretextual Race Neutrality, 81 J. L. SOCIETY 75, 95 (Summer 2007) (discussing opposition to new measures citing lack of evidence justifying restrictions).

68 See Holder, 888 F. Supp. 2d at 126 (positioning analysis between poles presented by parties). Crawford was analyzing the impact of voter ID on all voters in Indiana. See Crawford, 553 U.S at 203. Texas must prove “that SB 14 lacks retrogressive effect even if a disproportionate number of minority voters in the state currently lack photo ID. But to do so, Texas must prove that these would-be voters could easily obtain SB 14-qualifying ID without cost or major inconvenience.” See id.

69 See Holder, 888 F. Supp. 2d at 127 (finding Texas failed to meet its burden).
rejected further studies presented by both the federal government and the state of Texas.\textsuperscript{70} SB 14 presented a bifurcated cost to low-income minority voters who disproportionately lacked the materials required by the statute to obtain an electronic identification card.\textsuperscript{71} The court also noted that Texas could not rebut the lack of regional DPS offices, increasing the burden on minorities who may have to travel outside of their home county to obtain an electronic identification card.\textsuperscript{72} The district court described the entirety of Texas’s argument for implementing SB 14 prior to the November elections as “unpersuasive, invalid, or both.”\textsuperscript{73} As a covered jurisdiction seeking preclearance, the court found Texas’s argument unpersuasive, that SB 14 would disproportionately affect impoverished minorities, and denied SB 14 from going into effect.\textsuperscript{74}

### III. THE VOTING RIGHTS ACT IN PRACTICE AND THE STANDARDS OF REVIEW

#### A. The Path Leading to Shelby County

The crown jewel of the Civil Rights Era was the Voting Rights Act of 1965, but Congress imposed a five-year time limit on the efficacy of the preclearance requirement so that the body could review the progress of the legislation.\textsuperscript{75} For the first time, Congress passed a law in 1965 that applied

\textsuperscript{70} See id. at 130. Texas study of ID possession rates was comprised by a 2\% response rate to a phone survey and improperly weighted figures for African Americans. See id. at 131. Dr. Ansolabehere’s study for the U.S. was unreliable because it only studied the possession rate for two of the five permissible forms of ID, and included deceased voters. See id. at 133-35.

\textsuperscript{71} See id. at 128-29 (citing purchasing materials cost and traveling to DPS regional office to verify identity). The court compared the costs of obtaining the cheapest options for identity verification in Texas to Indiana. See id. In Texas it was twenty-two dollars, while in Indiana—depending on the county—the cost ranged from three dollars to twelve dollars. See id.; see also Crawford, 557 U.S. at 198.

\textsuperscript{72} See Holder, 888 F. Supp. 2d at 128-29. The federal government showed that “81 Texas counties have no [DPS] office, and 34 additional counties have [DPS] offices open two days per week or less.” Id. In Crawford, Indiana voters faced no such travel burden. See id.; Crawford, 557 U.S. at 198. There was an appropriate state office in every county, with a minimal fee. See supra, note 41 and accompanying text.

\textsuperscript{73} See Holder, 888 F. Supp. 2d at 144. Compare Holder, 888 F. Supp. 2d at 119-20, 143-45 (summarizing Texas’s “dilatory” approach to litigation), with Katz, supra note 6, at 1623 (noting difficulties in challenging state statutes without preclearance).

\textsuperscript{74} See Holder, 888 F. Supp. 2d at 144 (denying SB 14 authorization to proceed forward).

\textsuperscript{75} See Persily, supra note 4, at 177 (describing early years and necessities for passage
only to portions of the country so that true remedies could be sought to end the long-standing practice of denying racial minorities the right to vote on invidious and perniciously discriminatory grounds.  

In 1970, Congress modestly adjusted the preclearance formula and extended the VRA for five years. Congress again reauthorized the VRA in 1975 for seven years. Like the 1970 reauthorization, this Congress moved up the date for measuring covered jurisdictions to the 1972 election. The 1982 reauthorization did nothing to the coverage formula, imposed on VRA). Persily goes further, saying that “Congress intended the expiration of Section 5 to force the nation to take stock of its progress, or lack thereof, in achieving equal voting rights, as well as to adapt the law to new challenges and changing political realities.” Id.; see American Civil Liberties Union of Connecticut, Issues, The Voting Rights Act at Forty—A Shining Moment in the Conscience of Man, https://www.acluct.org/updates/the-voting-rights-act-at-forty-a-shining-moment-in-the-conscience-of-man/ (Jan. 1, 2006) (quoting President Reagan describing right to vote as “crown-jewel” of American liberties).

76 See Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2620 (stating that Congress’s intent was for limited applicability of Sections 4 and 5); see also Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 199 (2009) (“§§ 4 and 5 [of the VRA]...were temporary provisions...expected to be in effect for...five years.”); Persily, supra note 4, at 177 (noting VRA’s unique and unparalleled federal construction). Prior to the VRA, no statute passed by the Congress had ever precluded state and municipal governments from enacting bills to regulate activities within their time-honored plenary powers, of which voting was one. See Persily, supra note 4, at 177; see also 52 U.S.C. § 10304 (2012) (requiring qualifying § 4 jurisdictions receive authorization before implementing changes). “Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” that was implemented had to be cleared under the VRA. See Persily, supra note 4, at 177.

77 See id. at 2620 (stating that Congress’s intent was for limited applicability of Sections 4 and 5); see also Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 199 (2009) (“§§ 4 and 5 [of the VRA]...were temporary provisions...expected to be in effect for...five years.”); Persily, supra note 4, at 177 (noting VRA’s unique and unparalleled federal construction). Prior to the VRA, no statute passed by the Congress had ever precluded state and municipal governments from enacting bills to regulate activities within their time-honored plenary powers, of which voting was one. See Persily, supra note 4, at 177; see also 52 U.S.C. § 10304 (2012) (requiring qualifying § 4 jurisdictions receive authorization before implementing changes). “Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” that was implemented had to be cleared under the VRA. See Persily, supra note 4, at 177.

78 See id. at 2620 (stating that Congress’s intent was for limited applicability of Sections 4 and 5); see also Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 199 (2009) (“§§ 4 and 5 [of the VRA]...were temporary provisions...expected to be in effect for...five years.”); Persily, supra note 4, at 177 (noting VRA’s unique and unparalleled federal construction). Prior to the VRA, no statute passed by the Congress had ever precluded state and municipal governments from enacting bills to regulate activities within their time-honored plenary powers, of which voting was one. See Persily, supra note 4, at 177; see also 52 U.S.C. § 10304 (2012) (requiring qualifying § 4 jurisdictions receive authorization before implementing changes). “Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” that was implemented had to be cleared under the VRA. See Persily, supra note 4, at 177.

79 See id. at 2620 (stating that Congress’s intent was for limited applicability of Sections 4 and 5); see also Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 199 (2009) (“§§ 4 and 5 [of the VRA]...were temporary provisions...expected to be in effect for...five years.”); Persily, supra note 4, at 177 (noting VRA’s unique and unparalleled federal construction). Prior to the VRA, no statute passed by the Congress had ever precluded state and municipal governments from enacting bills to regulate activities within their time-honored plenary powers, of which voting was one. See Persily, supra note 4, at 177; see also 52 U.S.C. § 10304 (2012) (requiring qualifying § 4 jurisdictions receive authorization before implementing changes). “Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” that was implemented had to be cleared under the VRA. See Persily, supra note 4, at 177.
but it did allow political subdivisions to bailout of the Section 4, and—most significantly—amended Section 2 to not compel a plaintiff to prove discriminatory purpose. All of these reauthorizations were upheld by the Supreme Court, passed with a Democratic majority in at least one house of Congress, and signed into law by Republican Presidents.


See Shelby Cnty., 133 S. Ct. at 2620 (offering limited Roberts Court discussion of reauthorization in 1982); History of Federal Voting Rights Laws, supra note 15 (noting provisions of 1982 reauthorization). The political subdivision provision for bailout requires that the applicant “not have used a forbidden test or device, failed to receive preclearance, or lost § 2 suit, in the ten years prior to seeking bailout.” See History of Federal Voting Rights Laws, supra note 15; see also Beer v. United States, 425 U.S. 130, 140 (1976) (noting Congress accounted for state actors circumventing federal responses to voter suppression). Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. See Texas v. Holder, 888 F. Supp. 2d 113, 119 (D.D.C. 2011) (denying federal government demand for all ‘legislative acts’ or motivations with respect to SB 14), vacated, 133 S. Ct. 2886 (2013); see also Hearing, supra note 27 (statement of Prof. Spencer Overton) (commenting on increased cost to litigate § 5 cases after Shelby County). Prof. Overton stated that “[a]nother problem is that lawsuits can take years. Too often, lawsuits don’t stop unfair voting rules before they are used in elections and harm voters. In contrast, preclearance was relatively quick, efficient, inexpensive. Preclearance also generally prevented discriminatory practices before they became effective.” See Hearing, supra note 27 (statement of Prof. Spencer Overton); see also Order at 9, Perez v. Texas, No. 11-CA-360-OLG-JES-XR (W.D. Tex. Sept. 6, 2013) [hereinafter Order] (“[A]nother round of fact and expert discovery may be necessary to adequately prepare...for second trial...”). The case involved a lawsuit by Latino voting advocacy groups and members of Congress against a redistricting plan implemented by the Texas Legislature after the 2010 Census. See Order, supra, at 2-3. Judge Xavier Roderiguez advised “additional fact witnesses... will need to testify in person, if possible, or by video deposition if they are unable to testify in person. There will be additional documentary evidence, including approximately 400 exhibits that were previously used in the D.C. preclearance proceedings. Evidentiary challenges will need to be resolved.” See id. at 19.

See Shelby Cnty., 133 S. Ct. at 2620-21 (citing Supreme Court cases upholding reauthorization provisions); see also Lopez v. Monterey Cnty., 525 U.S. 266 (1999) (upholding reauthorization of VRA), abrogated on other grounds by Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013); City of Rome v. United States, 446 U.S. 156 (1980) (same), abrogated on other grounds by Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013); Georgia v. United States, 411 U.S. 526 (1973) (same), abrogated on other grounds by Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013); Timeline: A History of the Voting Rights Act, ACLU, https://www.aclu.org/timeline-history-voting-rights-act (last visited Nov. 8, 2013) (proving timeline for major events in history of VRA). In extending the VRA, President Nixon emphasized its significance, stating “the Voting Rights Act of 1965 has opened participation in the political process.” See Timeline: A History of the Voting Rights Act, supra (quoting President Nixon on signing amendments to VRA reauthorizing Act), see also Remarks Upon Signing a Bill Extending the Voting Rights Act of 1965, 2 PUB. PAPERS 477 (Aug. 6, 1975), available at http://www.presidency.ucsb.edu/ws/?pid=5157 (“The right to vote is at the very foundation of our American system, and nothing must interfere with this very precious right...” In the past decade, the voting rights of millions and millions of Americans have been protected and our system of government has been strengthened immeasurably. The bill that I will sign today extends the..., provisions to bar discrimination against Spanish-speaking Americans, American Indians, Alaskan natives, and Asian Americans. Further, this bill will permit private citizens, as well as the Attorney General, to initiate suits to protect the voting rights...
the 111th Congress reauthorized the Voting Rights Act of 1965 for twenty-five years. Shortly thereafter the Northwest Austin Utility District brought suit, and the Supreme Court would fire its warning shot across the bow at the standards of the Voting Rights Act.\footnote{\cred{
Cites must have complete confidence in the sanctity of their right to vote, and that’s what this legislation is all about. It provides confidence that constitutional guarantees are being upheld and that no vote counts more than another. To so many of our people—our Americans of Mexican descent, our black Americans—this measure is as important symbolically as it is practically. It says to every individual, ‘Your [sic] vote is equal; your vote is meaningful; your vote is your constitutional right.’ I’ve pledged that as long as I’m in a position to uphold the Constitution, no barrier will come between our citizens and the voting booth. And this bill is a vital part of fulfilling that pledge.’\n
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81 See Shelby Cnty., 133 S. Ct. at 2621 (reauthorizing VRA without any amendments to coverage formula); see also Nw. Austin, 557 U.S. 193, at 200-01 (challenging facial constitutionality of VRA on political subdivision grounds). The Northwest Austin Court noted that during the reauthorization process, Congress “amassed a sizable record.” See Nw. Austin, 557 U.S. at 205 (emphasizing Fifteenth Amendment empowers Congress, not Judiciary to determine necessary legislation for its enforcement); see also Persily, supra note 4, at 182-83 (discussing reauthorization process). The 2006 reauthorization process began in the House in October 2005, in the Senate in April 2006, and both houses held hearings into the summer. See Persily, supra note 4, at 182-185 (noting reauthorization was passed 390-33 in House and 98-0 in Senate). Persily also believed that racial discrimination in voting had adapted to the new federal role in election administration, and “[t]he most salient threats to minority voting had evolved beyond the categories and geography contemplated by the VRA. Nevertheless, the fear and uncertainty of what the world would be like without it allowed transformation only in the direction of restoring the Act to its original meaning.” Persily, supra note 4, at 179; see Persily & Rosenberg, supra note 40, at 1675 (concluding with challenge in Northwest Austin on facial constitutionality). But see Remarks on Signing the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 2 PUB. PAPERS 1448 (Jul. 27, 2006), available at http://www.presidency.ucsb.edu/ws/index.php?pid=56662&st=&s1= (signing reauthorization of VRA into law without amendment).

The right of ordinary men and women to determine their own political future lies at the heart of the American experiment, and it is a right that has been won by the sacrifice of patriots. The Declaration of Independence was born on the stand for liberty taken at Lexington and Concord. The amendments to our Constitution that outlawed slavery and guaranteed the right to vote came at the price of a terrible civil war.... In four decades since the Voting Rights Act was first passed, we’ve made progress toward equality, yet the work for a more perfect union is never ending. We’ll continue to build on the legal equality won by the civil rights movement to help ensure that every person enjoys the opportunity that this great land of liberty offers. And that means a decent education and a good school for every child, a chance to own their own home or business, and the hope that comes from knowing that you can rise in our society by hard work and God-given talents.

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Id.\n}}
B. Welcome to Shelby County

Shelby County, Alabama initiated litigation against the federal government after the 2006 reauthorization. Since the 1982 reauthorization, Alabama had among the highest rates of successful Section 2 lawsuits despite being under "the restraining effect of §5." Shelby County did not seek a bailout, but rather brought a facial challenge to the constitutionality of Sections 4 and 5, and sought a permanent injunction against its applicability to the county. The U.S. District Court for the District of Columbia found that the sizable record gathered by the Congress was sufficient to justify the reauthorization of Section 5 and not requiring substantial changes to the Section 4(b) formula. The U.S. Court of Appeals for the District of Columbia Circuit affirmed, concluding that Section 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority workers, and that Section 5 was therefore still necessary. The Court of Appeals was not as certain about the unique federalism construction "for singling out the covered jurisdictions," however the data showed that successful Section 2 suits combined with Section 5 deterrence evidence "single[d] out jurisdictions in which discrimination is concentrated."

Justice Roberts noted that in Northwest Austin, the Court expressed serious doubts about the Constitutionality of the coverage formula because it still subjected a jurisdiction to preclearance based on behaviors from the...
late 1960-70s. The Shelby County majority held that the Section 4 coverage formula was unconstitutional, and could “no longer be used as a basis for subjecting jurisdictions to preclearance.” Roberts affirmed the new as-applied standard of review for Election Law cases originally propagated in Northwest Austin, “current burdens must be justified by current needs.” In essence, to subject a specific jurisdiction to coverage must directly relate to the problem that unique coverage seeks to address.

The Shelby County decision adopted the Northwest Austin interpretation of equal sovereignty—a concept rarely used except in cases dealing with the admission of new states to the Union—to argue that the Voting Rights Act violates the rights of States to regulate elections under the Tenth Amendment. The Court used the seminal 1960s decision in Katzenbach to hold that the doctrine of equal sovereignty can only be overcome by establishing exceptional current conditions justify “uncommon exercise[s] of congressional power.” Roberts found that the VRA’s success in rooting out invidious racial discrimination in voting stood as evidence that the unique construction—problematic for equal sovereignty—was no longer necessary. Roberts argued that the restrictions in Section 5 or the scope of the Section 4 coverage formula have not eased, despite the fact that the tests and devices have been banned since the 1960s. Section 4 cannot be Constitutional under the current burdens analysis because the data used today is dated and based on eliminated practices. Roberts noted that “history did not end in 1965,”

88 See Shelby Cnty., 133 S. Ct. at 2615.
89 Id. (reversing D.C. Circuit).
91 See id.; see also Gregory v. Ashcroft, 501 U.S. 452, 461-62 (1991); supra note 7 and accompanying text (articulating shift in policy from state deference to federal role in elections).
94 See id. at 2616; see also South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966), abrogated by Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013). The measures permitted in Katzenbach “were justified by the ‘blight of racial discrimination in voting’ that had ‘infected the electoral process in parts of our country for nearly a century. . . .’” South Carolina v. Katzenbach, 383 U.S. 301, 303 (1966).
the times have changed and Congress should revisit the formula used to enact Section 5 so that it can reflect whatever the conditions of voter suppression are in this country in the twenty-first century.\footnote{See id.} Finally, it rejected the assertion that the record compiled by Congress during the 2006 reauthorization process accurately reflects current, pernicious, and pervasive discrimination.\footnote{See id.} Roberts concluded, “Congress did not use that record to fashion a coverage formula grounded in current conditions. It instead re-enacted a formula based on 40-year-old facts having no logical relations to the present day.”\footnote{See id. But see Dylan Matthews, Here’s How Congress Could Fix The Voting Rights Act,\textit{Washington Post} Wonkblog (Jun. 25, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/25/heres-how-congress-could-fix-the-voting-rights-act (quoting Prof. Overton) (calling for updated coverage formula that focuses on recent offenses to minority voting rights); Spencer Overton, How to Update the Voting Rights Act, \textit{Demos PolicyShop} (Jun. 25, 2013), http://www.demos.org/blog/how-update-voting-rights-act (arguing for revival of preclearance based on recent malfeasance and public disclosure); see also Mike Lillis, Bill would revive the Voting Rights Act, \textit{The Hill Floor Action Blog} (Jan. 16, 2014, 1:07 PM), http://thehill.com/blogs/floor-action/195698-bipartisan-bills-would-bolster-voting-rights (reporting on bipartisan efforts to update coverage formula based on violations within last 15 years).}

Justice Ginsburg wrote a vigorous dissent, arguing that it was incumbent on the Court to show deference to “a Congress charged with the obligation to enforce the post-Civil War amendments by ‘appropriate legislation.’”\footnote{See Shelby Cnty., 133 S. Ct. at 2632 (Ginsburg, J., dissenting) (bridging divide between current conditions justifying federal role and historical pretext for VRA).} Ginsburg rejected the majority’s argument that stated the Government reverse-engineered the need for the VRA, because “second-generation barriers [to voting] come in various forms.”\footnote{See id. at 2635 (meaning Congress identified troublesome jurisdictions and created standards to rein them under federal thumb). Furthermore, whenever voter dilution occurs with a discriminatory purpose, it works in the same way as denying ballot access. See id.; see also Shaw v. Reno, 509 U.S. 630, 640-41 (1993) (recognizing guaranteeing equal access to polls insufficient to eliminate other racially discriminatory voting practices); Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) (“[T]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.”); Reynolds v. Sims, 377 U.S. 533, 555 (1964) (ruling on restriction imposed by states for candidate ballot access); H.R. REP. NO. 109-478, at 6 (2006) (finding developments in tactics from Bull Connor and fire hoses to insidious, subtle institutionalized discrimination). The House Report found that “[d]iscrimination today is more subtle than the visible methods used in 1065,” “the effect and results are the same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates . . . .” See H.R. REP. NO. 109-478, at 6 (2006).} Despite having Supreme Court dicta on the side of the dissent, Justice Ginsburg attempted to show that the justification for the Section 4(b) under the current
conditions formula. Since Congress reauthorized the Voting Rights Act in 1982 without changing the coverage formula, the Supreme Court reviewed two examples of purposeful racial discrimination in Alabama and, and noted 700 voting changes that were blocked because they were discriminatory.

The dissent noted that Katzenbach held that equal sovereignty “applies only to the terms upon which the States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.” Justice Ginsburg noted that the unprecedented extension of the equal sovereignty principle would be problematic, and that the inappropriate use of Katzenbach ignored the fact that all reauthorizations of the VRA cited the case thereby granting the Supreme Court the opportunity to review the “limited geographical scope” issue. Therefore, the silent overruling of Katzenbach in Northwest Austin was and is untenable.

Ginsburg concludes by showing that the majority ignored the volumes of discrimination produced by the Congress in the reauthorization process of 2006, despite using the “current conditions” formula for review, which would seem open to deferring to Congress in a situation where the legislative body produced such a volume of evidence. The majority’s

102 See Shelby Cnty., 133 S. Ct. at 2646 (Ginsburg, J., dissenting) (discussing current burdens).
103 See id. at 2639, 2640-41, 2646-47 (listing examples of federal courts responding to racial discrimination charges in Alabama and subdivisions therein); see also H.R. REP. NO. 109-478, at 21 (finding that majority of Justice rejections to voting changes found discriminatory intent).
104 Shelby Cnty., 133 S. Ct. at 2648-49 (Ginsburg, J., dissenting) (emphasis omitted); see also South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966), abrogated by Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).
105 See Shelby Cnty., 133 S. Ct. at 2649-50 (Ginsburg, J., dissenting) (outlining hoops majority jumped through to reach holding in Shelby County).
106 See id. at 2649 (highlighting approach taken to severely weaken federal efforts to enforce anti-discrimination laws in elections).
107 See id. at 2650 (addressing lack of deference shown to Congress-as-a-factfinder in public policy). Justice Ginsburg writes:

Congress designed [preclearance] ... to catch discrimination before it causes harm, and to guard against return to old ways .... Volumes of evidence supported Congress’ determination .... But, the Court insists, the coverage formula is no good; it is based on ‘decades-old data and eradicated practices.’ Even if the legislative record shows, as engaging with it would reveal, that the formula accurately identifies the jurisdictions with the worst conditions of voting discrimination, that is of no moment, as the Court sees it. Congress, the Court decrees, must ‘start[t] from scratch.’ I do not see why that should be so.

Id. Furthermore, the Court sent a demand to a Congress that was not only unlikely to bring up a bill to draft a new and update coverage formula, but was also unable to achieve anything closely resembling a functioning legislative body. See Chris Cillizza, Worst. Congress. Ever. The case in charts, THE FIX BLOG (Oct. 31, 2013 at 3:42 PM), http://www.washingtonpost.com/blogs/the-
decision to throw “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.” The majority’s reverse-
engineering charge was countered by the context of reauthorization in 2006
compared to the challenge of drafting the VRA in 1965: one was forging a
new legislative frontier while the other was determining whether the usual
bad actors still required federal oversight. The Congress concluded that
preclearance was needed, and it was not the Supreme Court’s job to ignore
the record produced by the legislative branch.

See Shelby Cnty., 133 S. Ct. at 2650 (Ginsburg, J., dissenting) (providing colorful analogy to
Roberts opinion in Shelby County and election law cases generally); see also Katz, supra note 6,
at 1616 (noting departure from traditional reviews and Roberts Court strict worldview).
Katz argues that the Roberts Court requires the electorate to be completely engaged, essentially writing
decisions that command attention and full—some would say idealistic—participation at levels
that would make campaign operatives salivate. See Katz, supra note 6, at 1616. The author
continues that this approach “implicitly rejects the role the Court and Congress have repeatedly
played in the electoral arena, and the portrait of the American voter on which federal involvement
has previously been premised.” See id. at 1616.

See Shelby Cnty., 133 S. Ct. at 2650 (Ginsburg, J., dissenting); see also Persily, supra note 4, at 174 (arguing driving force of reauthorization was fear of not having VRA).

See Shelby Cnty., 133 S. Ct. at 2650-51 (Ginsburg, J., dissenting) (highlighting
tergovernmental branch debate over what is needed in securing nondiscriminatory elections).
Of note, the shift in authority and positions in election law is striking, whereas before 1965 the
state retained plenary powers to regulate elections, the VRA changed all that and shifted the
IV. THE STATE OF OUR DEMOCRACY: WHAT SHOULD IT BE, AND HOW DO WE GET THERE?

Consider “what is the state of our democracy, what should it be, and how do we get there?”

Shelby County bestowed new freedom on states in former preclearance jurisdictions, presenting the first new framework through which litigators and policymakers viewed voting rights since the Civil Rights Era. In election law, partisan politics can never be ignored, and political realities, however fleeting those may be, must at least be considered when judges make rulings from the bench. While there is merit in reviewing a coverage formula that was adopted during the Nixon Administration, the political reality is that the Congress will likely not be able to adopt a new standard that worked as well as the old preclearance formula. Considering political realities is not necessarily the Court’s

power—at least in covered states—extensively towards the federal government. See supra notes 2, 3, 4, 9 and accompanying text (noting traditional deference to state election administration changed in late 1950s to early 1960s), see also Hearing, supra note 27 (statement of U.S. Representative Jerrold Nadler) (criticizing Shelby County decision for violating Congress’s role as legislative fact finder). Specifically, Congressman Nadler argued, “[t]he Court, arrogating to itself the quintessentially congressional power to decide what facts are relevant and what constitutes an appropriate remedy, struck down the formula in Section 4, eviscerating and rendering a nearly dead letter the preclearance provisions of Section 5.”

See Hearing, supra note 27 (statement of U.S. Representative Jerrold Nadler).

Timothy O. Wilkerson, Adjunct Professor, Opening Lecture for Course in Election Law at Suffolk Univ. Law School (Sept. 9, 2013).

See supra notes 3, 4, 9, 10, 110 and accompanying text (depicting modern approach to federal role in election law and administration).

See Shelby Cnty., 133 S. Ct. at 2647 (Ginsburg, J., dissenting) (pushing for jurisprudence and policymaking that takes issues as they are rather than should be). Justice Ginsburg refused to concede the hill on the facts presented to the Court’s and Congress prior to reauthorization:

The Court does not contest that Alabama’s history of racial discrimination provides a sufficient basis for Congress to require Alabama and its political subdivisions to preclear electoral changes. Nevertheless, the Court asserts that Shelby County may prevail on its facial challenge to § 4’s coverage formula because it is subject to § 5’s preclearance requirement by virtue of that formula.... This misses the reality that Congress decided to subject Alabama to preclearance based on evidence of continuing constitutional violations in that State.

Id. at 2647 n.9.

See id. at 2629 (majority opinion) (holding argues for updating coverage formula to deal with today’s problems). Chief Justice Roberts argued that:

The [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future....To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in Northwest Austin, and we make it clear again today.
problem or job, majorities in Congress come and go after all, but this decision nevertheless leaves target groups—racial minorities and the elderly—susceptible to voter dilution. A renewed coverage formula should take into account the successes of the last four generations in race relations, but still be equipped to combat regressive and suppressive voting administration tactics.

Briefly putting electoral politics aside, the elimination of the preclearance coverage formula presents Congress with an opportunity to redraft the VRA with a coverage formula that reflects advancements the country has made, while keeping a fresh and workable policy structure that ensures vigorous oversight for bad actors. In today’s political climate, the prospects for passage of a new coverage formula seem dim. In the 113th Congress, the Republican majority in the House draws its margin from jurisdictions previously covered under the preclearance formula. North Carolina, the Southeastern states, and particularly Texas send Republicans to the House in large numbers. With increasing changes to

Id. at 2629-30 (citation omitted).

See id. at 2642 (Ginsburg, J., dissenting) (arguing preclearance keeps country from rolling back to overt voter discrimination). Justice Ginsburg pointed out:

[C]onditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. 2006 Reauthorization § 2(b)(1). But Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made.

See id.; see also Persily, supra note 4, 215-26 (writing on historical conditions that justified the VRA’s “burden” on states).

Cf. Shelby Cnty., 133 S. Ct. at 2619 (recognizing existence of ongoing voting discrimination notwithstanding increasing African American voter turnout in covered states); Shelby Cnty., 133 S. Ct. at 2642 (Ginsburg, J., dissenting) (arguing need for preclearance to protect against “subtler second-generation” voting discrimination); Pildes, supra note 24, at 756 (suggesting shift from Section 5’s model to more uniform national oversight of voting practices). Pildes argues that preclearance is not an essential element of voter protection and that renewed efforts of developing “federal oversight should, perhaps, move from attempting to be selectively targeted on specific jurisdictions to being of uniform national scope.” See Pildes, supra note 24, at 756.

See Jurisdictions Previously Covered By Section 5, supra note 15 (listing bad actor jurisdictions); see also Castro, supra note 15 (describing conditions for voters in Texas).

the demographic makeups of those states, partisans have taken steps to restrict voter access, and when legislatures change voting laws to protect incumbents the Supreme Court has approved those changes.120

After Shelby County, the federal role in stopping—or at least reviewing—possibly discriminatory and restrictive voting laws has been severely cut back.121 Without the Section 4 formula, the Supreme Court has paroled previously covered jurisdictions.122 States are still subject to Sections 2 and 5, preventing voting legislation that carry discriminatory effects and purpose, but without the catchall preclearance review process, the Department of Justice and individual challengers to state action are left to deal with each issue on a case-by-case basis.123 By refocusing on Tenth Amendment powers to administer elections, the Supreme Court has increased the burden on challengers to state laws, requiring substantial showings of injury that will prove both adverse effects with an invidious purpose.124 Compare this standard with the Court’s position regarding voter identification laws in Crawford, where the state did not need to establish concrete examples of voter fraud, but only needed to show legitimate state interest.125 The framework is unfair, politically motivated,


121 See Matthews, supra note 99 (noting changes in electoral policy landscape after Shelby County); Overton, supra note 99 (suggesting modernizing VRA by updating preclearance and requiring public disclosure).

122 See Matthews, supra note 99 (noting changes in electoral policy landscape after Shelby County); Overton, supra note 99 (arguing for revival of preclearance based on recent malfeasance and public disclosure).

123 See South Carolina v. Katzenbach, 383 U.S. 301, 327-28 (1966) (discussing need for broad federal response rather than case-by-case handling of VRA claims), abrogated by Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013); Hearing, supra note 27 (statement of Prof. Spencer Overton) (discussing justification, ramifications, and scope of eliminating preclearance from VRA and resolving issues case-by-case); see also Chapin, supra note 11, at 327 (writing on need for data-intensive research before challenging voting laws after Shelby County); Katz, supra note 6, at 1023 (reviewing anecdotal evidence of case-by-case litigation prior to preclearance); cf. About Section 5 of the Voting Rights Act, supra note 11 (discussing DOJ workload on VRA claims); supra note 11 and accompanying text (citing conditions federal government works under to enforce VRA).

124 See supra note 9 and accompanying text (examining Tenth Amendment federalism principles and federal evidentiary challenges with administering fair elections).

and does no service to the health of the American experiment.  

In a vacuum, without consideration of context, the Chief Justice’s call for an updated coverage formula provides an opportunity for America to have a conversation about the state of race in this country. The VRA protects rights that are far too precious—and preservative—to leave in the hands of standards set when America had not considered the impact of the internet and social media on politics, much less whether Senators George McGovern or Ted Kennedy could present a serious challenge to President Nixon in 1972. In lies the problem however, by striking down the Section 4 coverage formula, Roberts punted the VRA back to the 113th Congress. The 535 members sworn in on January 4, 2013 represented a body that would set records for inaction, stalemate, and claimed the Do-Nothing-Congress title belt from the 1946 class that was successfully assailed by Harry Truman in the 1948 presidential election.

The Chief Justice’s statement that “history did not end in 1965” is informative. Race relations are undeniably different today than they were in the Johnson Administration, many would say that the country is substantially different than the Clinton Era on the 1990s. Racism or state

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126 See Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2642-43 (2013) (Ginsburg, J., dissenting) (showing political incentive for “prevent[ing] changes in the existing balance of voter power”). The studies Justice Ginsburg referenced in her dissent established that voting patterns were more racially polarized in jurisdictions, states, and political subdivisions that were covered under the preclearance regulatory regime. See id. at 2643. Justice Ginsburg made a poignant comparison, “just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have greater need for prophylactic measures to prevent purposeful race discrimination.” Id.

127 See id. at 2629 (majority opinion) (stating “history did not end in 1965” and equal sovereignty principles should guide VRA review).

128 See id. (requiring current conditions to determine regulatory burdens imposed on states in regulating elections); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 202-03 (2009) (establishing current burdens-current conditions construction); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (recognizing voting as a fundamental right); Capen v. Foster, 29 Mass. (12 Pick.) 485, 489 (1852) (holding score of legislative authority to regulate administration of elections). “[I]t is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly, and convenient manner...” See Capen, 29 Mass. (12 Pick.) at 494.

129 See Shelby Cnty., 133 S. Ct. at 2629 (“[I]f [Congress] is to divide the States [it] must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in Northwest Austin, and we make it clear again today.”).

130 See Cillizza, supra note 107 (analyzing problems associated with 113th Congress); Klein, supra note 107 (articulating 113th Congress’s unpopularity using public policy metrics and polling data).

131 See Shelby Cnty., 133 S. Ct. at 2629.

132 See Beer v. United States, 425 U.S. 130, 140 (1976) (discussing need for preclearance
sponsored discrimination today rarely takes the form of George Wallace at
the University of Alabama, or Bull Connor in Selma.\textsuperscript{133} The absence of
Manichean narratives in today’s society reflects our modern benefit of
hindsight on a bygone era, and that worldview leaves litigators and voting
rights advocates susceptible to judges who favor a colorblind over color-
conscious worldview from the bench. Several members of Congress have
introduced a bill that would reestablish preclearance in jurisdictions that
had discriminatory voting laws within the last fifteen years; leaving four of
the nine states subject to preclearance.\textsuperscript{134}

The bill introduced on January 16, 2014 by Senator Patrick Leahy,
Representative Jim Sensenbrenner, and Representative John Conyers
interestingly does not include voter identification laws as a sign of “bad-
acting.”\textsuperscript{135} News coverage of the bill took quotes from liberal activists
incensed by the exclusion.\textsuperscript{136} Suspending the inevitably political
ramifications for a moment, there does not have to be an invidious intent or
result when instituting a voter identification law.\textsuperscript{137} In Indiana, the state

structure to allow for changes in racial discrimination over time); see also supra note 33 and
accompanying text (citing impact and merits of streamlined administrative procedure under VRA
rather than case-by-case litigation).
\textsuperscript{133} Cf. Shelby Cnty., 133 S. Ct. at 2645 (Ginsburg, J., dissenting) (highlighting notoriously
hateful and violent events that pushed VRA to passage); Ellement, supra note 3, at 267-70
(discussing development of VRA and events that led to changes after passage); Persily, supra
note 4, at 177 (noting preclearance necessary to more effectively respond to rapidly passed
discriminatory state legislation). Preclearance was a sound “remedy...because case-by-case
adjudication of voting rights lawsuits proved incapable of reining in craft Dixiecrat legislatures
determined to deprive African Americans of their right to vote, regardless of what a federal court
might order.” Persily, supra note 4, at 177; see supra note 29 and accompanying text (detailing
historical pretext for VRA).
\textsuperscript{134} See Lillis, supra note 99 (reporting on bipartisan efforts to update coverage formula based
on violations within last 15 years).
\textsuperscript{135} See id. (reporting on bipartisan efforts to update coverage formula based on violations
within last 15 years).
\textsuperscript{136} See id. (reporting on bipartisan efforts to update coverage formula based on violations
within last 15 years).
handed” restrictions on voters are permissible if it satisfies \textit{Anderson} test); Anderson v.
Celebrezze, 460 U.S. 780, 788 (1983) (“Although these rights of voters are fundamental, not all
restrictions imposed by the States on candidates’ eligibility for the ballot impose constitutionally-
suspect burdens on voters’ rights to associate or to choose among candidates.”). \textit{Anderson}
found that an early filing deadline for independent candidates for President in Ohio placed an
unconstitutional burden on voting and associational rights of the candidate’s supporters. See
\textit{Anderson}, 460 U.S. at 785-86. \textit{Anderson} promulgated a balancing test—widely used in Election
Law dicta—to weigh the intrusiveness of the state action against the interests of the voters. See
id. at 789. The test calls the courts to consider:

The character and magnitude of the asserted injury to the rights protected by the First
and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify
took measures to reach the widest swath of potential citizens who would need an ID card. Texas did not attempt that same level of effort, and like the Lone Star State, other states have been slapped by federal courts for wading into voter discrimination’s invidious weeds. To implement voter identification laws without discriminatory impact, state governments would have to make a substantial financial investment—such as the relaxation of fees for alternative identification, keeping regional state offices open and staffed longer to service would-be voters—likely requiring more revenue from the taxpayers.

By compelling marginalized groups to put between $15 and $35 down for a photo ID, Republican legislators carry less risk of blowback from the electorate for naked electoral discrimination. The fee presents a politically significant issue for progressive activists, but the effect is minimized in jurisdictions that retain deep Republican roots. Texas is significant because some political scientists and observers believe the tide is shifting, and the line between a wedge issue for the MSNBC crowd and

and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden plaintiff’s rights.

Id. at 789.

See Crawford, 553 U.S. at 198-99, 209 (discussing “minimal burdens” in Indiana’s “generally applicable” voter identification statute).

See Texas v. Holder, 888 F. Supp. 2d 113 (2012) (outlining myriad of constitutional problems Texas’s SB 14 presented when reviewed), vacated, 133 S. Ct. 2886 (2013). Texas argued that SB 14 was written facially neutral, so it was entitled to less strict review. See id. at 143. However, this was a diversionary argument because, had Texas outlined SB 14 on racial lines, it would have been facially discriminatory. See id. The VRA was written to deal with both facially neutral and facially discriminatory laws. See id. Furthermore, Election Law dicta does not favor a pre-set litmus test for challenges; instead relying on Anderson sliding scale analysis. See Crawford, 553 U.S. at 210-11; Burdick v. Takushi 504 U.S. 428, 434 (1992); Anderson, 460 U.S. at 789.

See Holder, 888 F. Supp. 2d at 117-18 (addressing limited access for voters to regional DPS office for IDs under SB 14). SB 14 required voters to travel to a regional DPS office to obtain an EIC card. See id. Only 81 of Texas’s 254 counties have such an office, and they typically have shorter operational hours. See id.; see also Langholz, supra note 12 (examining parameters within which voter identification statutes could pass constitutional muster prior to Crawford).

Cf. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2642-43 (2013) (Ginsburg, J., dissenting) (noting general incentive for legislators in majority to take steps to retain power). This is distinguishable from practices that correlate on racial lines because of party identification because, rather than incumbency protection, Ginsburg argues that race is the predominant factor. See id.

See Lillis, supra note 99 (noting progressive displeasure with bipartisan efforts to draft preclearance legislation).
an electoral majority in Texas could—hyperbole aside—become blurred.\textsuperscript{143} If voter identification laws were legitimate—not in the state interest context—but in the political intent context—the state government in Texas would not limit the accessibility of regional offices to provide EIC cards, and would make the identification cards available without any up-front or secondary fee.\textsuperscript{144} This is where politics meets the law, and where litigators and progressive lawmakers alike can unite behind a common theme: if the state legislators were concerned about a legitimate state interest—combating voter fraud—why make the new identification cards so difficult to obtain?\textsuperscript{145} Logically, this weakens the argument about combating voter fraud pushed by conservative and moderate lawmakers: with more people who can obtain valid state ID there will be less in-person voter fraud.\textsuperscript{146} When Texas creates hurdles for Latino voters to obtain EICs, they are not fighting voter fraud.\textsuperscript{147} The legislators are trying to minimize the electoral impact of a voting bloc that does not generally share the same values as Republican voters, while keeping the state’s costs to a minimum.\textsuperscript{148} If the

\begin{footnotesize}
\begin{enumerate}
\item See discussion \textit{supra} note 16 (discussing theories regarding Texas becoming presidential and electoral battleground state due to population shifts).
\item See \textit{Shelby Cnty.}, 133 S. Ct. at 2643 (Ginsburg, J., dissenting) (arguing for federal involvement in safeguarding voting rights when racial majorities prevent minority access). Justice Ginsburg saw this issue as the “quintessential political problem requiring a political solution.” See id. at 2633; see also \textit{Holder}, 888 F. Supp. 2d at 117-18 (reviewing accessibility issues under Texas’s SB 14 for voters obtaining EIC).
\item Cf. \textit{South Carolina v. Katzenbach}, 383 U.S. 301, 313-14 (1966) (reviewing need for federal legislation to keep pace with rapidly shifting discriminatory strategies), abrogated by \textit{Shelby Cnty. v. Holder}, 133 S. Ct. 2612 (2013). Chief Justice Earl Warren summarized the need for preclearance in his decision, and it answers the rhetorical question asked in the text: 
\begin{quote}
Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls. 
\end{quote}
\textit{Id.} at 314.
\item See \textit{Langholz}, \textit{supra} note 12, at 788-92 (discussing education and outreach programs associated with voter identification statutes statewide). Of all the sources the author cites, none relate to the efforts taken by Texas prior to, during, or after the drafting, implementation, and litigation associated with SB 14. See \textit{generally} Langholz, \textit{supra} note 12.
\item See \textit{Holder}, 888 F. Supp. 2d at 125, 142-43 (outlining several inconsistencies identified by DOJ during SB 14 litigation in federal court).
\item See \textit{Shelby Cnty.}, 133 S. Ct. at 2645 (Ginsburg, J. dissenting) (detailing factors that pushed VRA to passage); \textit{Holder}, 888 F. Supp. 2d at 121 (reviewing history in Southern states that led to VRA); see also \textit{Ellement}, \textit{supra} note 3, at 261-62, 265-66 (discussing historical
\end{enumerate}
\end{footnotesize}
average, fair-minded voter were forced to pay for a program that serves pure partisan interests, the voters could punish the Republican legislators responsible. However, by serving purely partisan interests, the average voter has to provide less tax dollars towards the voter identification program, because the goal is to keep certain people out of the ballot box, rather than fight voter fraud.

If the Justice Department reviewed 5000 Section 5 claims and over 15,000 voting changes annually, the burden on government litigators, as well as organizations such as the League of United Latin American Citizens, to respond to each potential Voting Rights Act violation without a preclearance catchall is immense. Some scholars actually believe the activities leading to VRA and preclearance; supra note 29 and accompanying text (noting VRA intent to dispel “blight” of racial discrimination in democratic process).

See Pitts, supra note 16, at 1580-81 (discussing Pildes’s advocacy for discriminatory effect standard in maintaining accountable and competitive districts). What Pitts and Pildes are addressing correlates to Justice Ginsburg’s point about majoritarian incentives to retain power. Cf. Shelby Cnty., 133 S. Ct. at 2643 (Ginsburg, J., dissenting). Even though incumbency protection is more likely a general principle across ideologies, the efforts to restrict voter access that have received the most widespread notoriety occur in overwhelmingly Republican districts, states, and political subdivisions. See Persily, supra note 4, at 177 (noting Dixiecrat policies spawned VRA preclearance); Pildes, supra note 16 (discussing Republican safe seats after GOP controlled redistricting in 2010).

See Shelby Cnty., 133 S. Ct. at 2642-43 (Ginsburg, J., dissenting) (inferring incentive for legislators to retain power can fall along racial divides); see also Shelby Cnty. v. Holder, 679 F.3d. 848, 865-73 (D.C. Cir. 2013) (summarizing recent suppressive tactics Congress used as evidence to renew VRA). The record provides a glimpse at other tactics besides voter identification statutes used by so-called “second generation” bad actors:

Consideration of this evidence is especially important given that so-called “second generation” tactics like intentional vote dilution are in fact decades-old forms of gamesmanship. That is, “as African Americans made progress in abolishing some of the devices whites had used to prevent them from voting,” both in the late nineteenth century and again in the 1950s and 1960s, “officials responded by adopting new measures to minimize the impact of black reenfranchisement.” These measures—“well-known” tactics such as “pack[ing]” minorities into a single district, spreading minority voters thinly among several districts, annexing predominately white suburbs, and so on—were prevalent “forms of vote dilution” then, and Congress determined that these persist today. Specifically, Congress found that while “first generation barriers”—flagrant attempts to deny access to the polls that were pervasive at the time of Katzenbach—have diminished, “second generation barriers” such as vote dilution have been “constructed to prevent minority voters from fully participating in the electoral process.” Although such methods may be “more subtle than the visible methods used in 1965,” Congress concluded that their “effect and results are the same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates of choice.”

Shelby Cnty., 679 F.3d. at 865 (citations omitted); see Pitts, supra note 16, at 1580-81 (reviewing political impact of unaccountable and uncompetitive districts).

See Beer v. United States, 425 U.S. 130, 140 (1976) (restating speed at which legislatures
revival of preclearance is not necessary if federal legislation were passed requiring every state making a voting change that had been challenged to show concrete evidence and examples justifying the restriction on voters. This shifts some burden of proof back onto the state trying to restrict the vote. This is a compromise option, currently there is no requirement on the state to show evidence justifying the voting restriction, and the plaintiff bears the burden of showing discriminatory intent and purpose. While states are entitled to latitude in administering elections, courts should still lean against restrictions on voters, rather than tipping the scales to preserving the traditional state prerogative. By forcing the states to show examples justifying their restrictions on voters, Congress can balance the burdens on both parties.

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152 See Matthews, supra note 99 (quoting Prof. Overton) (calling for updated coverage formula that focuses on recent offenses to minority voting rights); see also Pildes, supra note 24 (discussing alternative approaches to combating voter suppression beyond preclearance construction).


154 See Shelby Cnty., 679 F.3d. at 865-73 (summarizing recent suppressive tactics Congress used as evidence to renew VRA); supra note 59 and accompanying text.


156 See Bush v. Vera, 517 U.S. 952, 959-60 (1996) (requiring state to show race was not
system considers the traditional prerogative of the state to be more important, more essential, more fundamentally worthy of preservation, than the citizenry’s right to participate in the democratic process.157

This works in two ways. First, this method retains respect for the plenary powers of the states to regulate and administer elections according to their judgment because the burden of proving discriminatory intent and purpose remains the standard.158 Considering in Texas v. Holder the plaintiffs needed to essentially catch the Texan legislators and David Dewhurst red handed to prove intent, the states can retain enough plausible deniability to maintain their robust legislative and administrative prerogative.159 The burden of proof remains on the plaintiff, it remains high, and the Tenth Amendment is paid its due service.160

Second, compelling states to provide concrete examples to justify the restrictions preserves the solemn goal of civic engagement, “eliminates solutions in search of problem” legislating, and acts as a disclosure mechanism for legislators acting to preserve partisan interests through invidious discrimination.161 Other areas of election law require evidence of predominant factor in redistricting map drawing); Tashjian, 479 U.S. at 217 (compelling state to establish valid interest in preventing party from regulating primary); Karcher v. Daggett 462 U.S. 725, 742 (1983) (compelling states to show almost no population deviation in congressional districting); see also Persily, supra note 4, at 216 (shifting burden of proof to jurisdictions under VRA construction requires determinations be nonpartisan).

157 See Shelby Cnty. v. Holder, 133 S. Ct. 2621, 2624 (2013) (making equal sovereignty and state’s rights arguments superseding current justification for VRA’s unique federal construction); Crawford, 553 U.S. at 204 (holding state interest outweighed limitations to participation outlined by the plaintiff). Justice Stevens argued:

The state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners’ facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting “the integrity and reliability of the electoral process.”

Crawford, 553 U.S. at 204 (citation omitted).

158 See Shelby Cnty., 133 S. Ct. at 2623-24 (discussing DOJ attempt to prove discriminatory purpose by compelling testimony from Texas legislature, Lieutenant Governor); Texas v. Holder, 888 F. Supp. 2d 113, 119 (D.D.C. 2013) (discussing federalism concerns in context of determining discriminatory purpose), vacated, 133 S. Ct. 2886 (2013). The court denied the federal government’s request for all “legislative acts or a legislator’s motivations with respect to the bill.” Holder, 888 F. Supp. 2d at 119 (internal quotation marks omitted); see Katz, supra note 6, at 1634-35 (reviewing how Rehnquist Court handled VRA-10th Amendment implications); Persily, supra note 4, at 215-26 (discussing how VRA changed 10th Amendment role of states in administering elections).

159 See supra notes 56-57 and accompanying text (discussing privileged communications for legislators during deliberation).

160 See Holder, 888 F. Supp. 2d at 119 (interpreting VRA to minimizing federal intrusions in denying government’s request for legislative materials).

161 See Parson, supra note 67, at 94 (noting opponent of voter ID consider restrictive
harm, specifically discrimination claims under Section 5 of the Voting Rights Act, to prove a claim. Here is where the Tenth Amendment compromise occurs, because the default answer to this issue is that courts and the Congress should not dictate how legislatures in sovereign states make public policy. Framed in that way, it would seem as though compelling states to show cause for their policy decisions would destroy the delicate balance in federalism. However, this is precisely what measures unnecessary absent voter fraud evidence). Parson argues:

Opponents consider the photo identification requirement as a new poll tax, the descendent of the insidious poll taxes that were common in the South and meant to disenfranchise black voters. Milwaukee Representative Gwen Moore called the measure “a solution in search of a problem. It would disenfranchise the elderly, disabled, poor, students and ethnic minorities.

In step two of the analysis, the court evaluated the history and pattern of abuse. The court distinguished the evidence of voting discrimination in the 2006 Reauthorization legislative record in two overlapping ways. First, the court separated the evidence into incidents of intentional discrimination, which show a discriminatory purpose, and circumstantial evidence, which primarily illustrates discriminatory effect. Second, the court evaluated the specific types of evidence, including evidence relied upon in City of Rome to uphold the 1975 extension and evidence reviewed by Congress in the 2006 Reauthorization legislative history.

Burns, supra note 15, at 245.


Prominent among these decisions is the Rehnquist Court’s 1999 decision in Lopez v. Monterey County., California. Acknowledging the “substantial ‘federalism costs’” resulting from the VRA’s “federal intrusion into sensitive areas of state and local policymaking,” Lopez recognized that the Reconstruction Amendments “contemplate” this encroachment into realms “traditionally reserved to the States.” Lopez affirmed as constitutionally permissible the infringement that the VRA’s Section 5 preclearance process “by its nature” effects on state sovereignty, and applied Section 5 broadly, finding that a County’s nondiscretionary implementation of state law must be precleared.

Katz, supra note 6, at 1634-35.
occurs in redistricting cases when the court is presented with a district that is “so bizarre on its face that [the district] is ‘unexplainable on grounds other than race.’” So while plaintiffs still bear the burden of establishing a cohesive minority voting bloc that is thwarted by a majority voting group in a district, the bizarre shape of the district immediately pressures the state into showing justification as to why their remains cohesive, unity of interests. If it works, to the extent it does, in redistricting, a minimal burden shifting on the states to show concrete examples of voter fraud is not a bridge too far.

V. CONCLUSION

The Supreme Court’s decision in Shelby County endorsing the “current burdens justified by current conditions” formula for evaluating state legislation aimed at restricting voting rights has left vulnerable populations exposed, public and nonprofit litigators overwrought, and given the public more reason to distrust yet another American institution. The Court’s adherence to color-blind rather than color-conscious jurisprudence does an immense disservice to target populations who have experienced a history of racial discrimination at the voting booth. Moreover, it further entrenches current electoral majorities, deepening the political polarization in the American electorate. Ironically, for a Court that reflects rightward ideology that focuses heavily on judicial restraint and judicial economy, the Court’s action—which benefits Republican candidates—does nothing to advance fiscal conservatism. Shelby County likely drives up discovery costs and leaves the federal court system clogged with a litany of challenges to the hundreds of state statutes administering new election regimes. The Court’s decision to defer to Congress—while welcome in other areas of Constitutional law—fails to acknowledge a body that is suffering through a historically frustrating period of paralysis, inaction, and hyper-partisanship. Professor Wilkerson challenged his students to assess the state of our democracy, and question where it should be. If a right preserves all rights, it is incumbent on the state to relinquish power, so that its government authority is legitimized rather than

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167 See Latin American Citizens, 548 U.S. at 526-27 (adding additional factors to consider through Gingles Test); Gingles, 478 U.S. at 48-49 (determining test in redistricting challenges under discrimination claims).
marginalized. “There are moral absolutes,” and a society that impinges on the rights of its citizens to participate in a representative democracy is not living up to the ideals of self-government, inhibiting the potential of a free and great people.

Joseph P. McCarthy

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169 The West Wing: We Killed Yamamoto (NBC television broadcast May 15, 2002).