REGIONAL DIFFERENCES IN RACIAL POLARIZATION IN THE 2012 PRESIDENTIAL ELECTION: IMPLICATIONS FOR THE CONSTITUTIONALITY OF SECTION 5 OF THE VOTING RIGHTS ACT

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I. INTRODUCTION

Three years ago, when the Supreme Court last considered the constitutionality of the coverage formula of section 5 of the Voting Rights Act of 1965[1] (VRA), we submitted an amicus brief on behalf of neither party analyzing the relevance to the case of voting patterns in the 2008 election.[2] In particular, the brief, and a subsequent *Harvard Law Review* article that expanded upon it,[3] highlighted relative rates of racially polarized voting in the covered and noncovered jurisdictions to demonstrate where racial polarization had increased over time. Although some states had seen increases and others had seen decreases in the gap in candidate preferences between racial groups, the brief and article concluded that, contrary to much conventional wisdom, racial polarization had actually increased in the 2008 election, especially in the areas covered by section 5 of the VRA.

We find ourselves in much the same position now as we did three years ago. We also find ourselves coming to the same conclusions, which have become, if anything, more strongly supported by recent

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[1] 42 U.S.C. § 1973c (2006).

[2] Brief for Nathaniel Persily et al. as Amici Curiae on Behalf of Neither Party, Nw. Austin Mun. Util. Dist. No. One v. Holder (*NAMUDNO*), 129 S. Ct. 2504 (2009) (No. 08-322), *available at* http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=151457. The brief was mentioned by Justice Kennedy at the oral argument, *see* Transcript of Oral Argument at 55–56, *NAMUDNO*, 129 S. Ct. 2504 (No. 08-322), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-322.pdf, and cited by numerous commentators at the time, *see, e.g.*, Robert Barnes, *High Court to Weigh Relevance of Voting Law in Obama Era*, WASH. POST, Apr. 1, 2009, at A1; Adam Liptak, *Review of Voting Rights Act Presents a Test of History v. Progress*, N.Y. TIMES, Apr. 28, 2009, at A16; Jeffrey Toobin, *Voter, Beware*, NEW YORKER, Mar. 2, 2009, at 19; Linda Greenhouse, *There's Always Another Day*, SLATE (June 22, 2009, 1:39 PM), http://www.slate.com/id/2220927/entry/2221036.

[3] Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385 (2010).

data. Voting in the covered jurisdictions has become even more polarized over the last four years, as the gap between whites and racial minorities has continued to grow. This is due both to a decline among whites and an increase among minorities in supporting President Obama's reelection. This gap is not the result of mere partisanship, for even when controlling for partisan identification, race is a statistically significant predictor of vote choice, especially in the covered jurisdictions.

Even more now than four years ago, both sides in the VRA debate look to the most recent election to support their case. Critics of the VRA point to the reelection of the nation's first African American president, amidst record rates of minority voter turnout, as evidence of how "times have changed" since 1965. The "strong medicine"[4] of the VRA is no longer needed in the South, they argue, because the historic barriers to minority participation and office holding have largely vanished. For supporters of the VRA, the history since 1965 and the 1982 reauthorization demonstrate the continuing danger to minority voting rights in the covered jurisdictions. They point also to this past election as confirming Congress's suspicions in the reauthorization process as new obstacles to voting, such as photo identification laws and restrictions on early voting, were more prevalent in the covered states. In the run up to the 2012 election, section 5 proved it had bite, as photo ID and other laws were prevented from going into effect by the Department of Justice (DOJ) or the district court in Texas, South Carolina, and Florida, and Texas's congressional redistricting plan was found to be intentionally discriminatory.

These contrasting views of the relevance of the 2012 election may very well provide the media frame for the debate over section 5 in the current challenge to the VRA in *Shelby County v. Holder*.[5] Of course, the contending narratives of "look how far we've come" versus "see how much voting discrimination persists" are usually not the stuff of constitutional arguments. Moreover, the results of a highly salient and well-funded presidential election may seem beside the point for the constitutionality of a law that has its greatest effect in the context of local, below-the-radar election law changes.

All involved in the debate over the VRA must admit, however, that we do not know exactly what the world will look like if section 5 is struck down. Of course, the South would not revert back to Jim Crow days: politics has evolved beyond the days of threatened lynchings for

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[4] *Voting Rights: Hearings on H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the Constitution of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 110 (1965) (statement of Rep. Frank Chelf, Member, H. Comm. on the Judiciary).

[5] 133 S. Ct. 594 (2012).

the exercise of the franchise. But the many examples in the legislative record of voting rights violations prevented by the VRA hint at what might happen if the covered jurisdictions were otherwise unconstrained. Even if Jim Crow will not return, the familiar regional pattern of discrimination might, as new stratagems replace old ones with minority voters becoming collateral damage in increasingly vicious partisan fights.

The litigants in *Shelby County* disagree over the applicable constitutional test and the necessary evidentiary showing for upholding the VRA. In particular, the challengers assert that Congress needed to distinguish the covered from the noncovered jurisdictions, in order to demonstrate that the coverage formula captures the areas of the country (and only those areas) that pose the greatest threat to minority voting rights. From their perspective, the coverage formula can only be congruent and proportional[6] (and therefore constitutional) if it is precisely tailored to capture only "guilty" jurisdictions and no "innocent" ones.

Although defenders of the VRA point to higher rates of successful section 2 VRA cases as one example of where the covered states have distinguished themselves as voting rights violators, they also maintain that Congress need only justify continued coverage by finding persistent dangers to voting rights in covered areas alone. The coverage formula, from its inception, has always been over and underinclusive of the jurisdictions of concern. Overinclusivity is addressed by the bailout provision, which allows "good" jurisdictions to escape coverage when they can demonstrate a clean voting rights record. So long as the coverage-formula-plus-bailout regime represents a rational attempt to address the problem of minority voting rights violations, defenders argue, the law is constitutional.

The challengers' argument against the coverage formula would put Congress in an awkward position whenever justifying a geographically specific civil rights law. If the covered jurisdictions remain completely unchanged in their disrespect for minority voting rights, then the VRA is not working as promised. On the other hand, successful deterrence of voting rights violations in the covered states becomes evidence of the statute's unconstitutionality if those jurisdictions become less distinct. In the oral argument in *Northwest Austin Municipal Utility District No. One v. Holder*[7] (*NAMUDNO*), Chief Justice John Roberts described this problem as "the Elephant Whistle problem." To summarize the allegory: A guy with a whistle around his neck walks into a bar. Another guy asks him, "Why are you wearing a whistle around

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[6] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[7] 129 S. Ct. 2504 (2009).

your neck?" "It's to keep away elephants," the first responds. "How do you know it's working?" the second asks. "Do you see any elephants around here?"[8]

If the Court takes the elephant whistle problem seriously, the challenge for defenders of the VRA is to find a metric that can hint at the danger of the VRA's removal while simultaneously not suggesting it either has been ineffective or has outlived its usefulness. To some extent, the number of preclearance denials and DOJ requests for more information provide such metrics by pointing at the types of laws that would have gone into effect but for the existence of the VRA. But even those data are incomplete because they cannot pick up the VRA's deterrent effect — that is, the laws that were never proposed or passed because politicians knew they would not be allowed to go into effect. One should expect the number of laws denied preclearance to be small as compared to the number of laws that are never passed because of the VRA's deterrent effect.

II. RACIAL POLARIZATION AS AN INDICATOR OF AREAS OF MINORITY VOTING RIGHTS CONCERN

The degree of racial polarization in an electorate can be the kind of exogenous indicator of potential threats to minority voting rights that is not directly affected by the presence of VRA coverage. Although one might expect the VRA to have some indirect effect over time on metrics of racial harmony[9] — and indeed, the covered areas are very different along those metrics than they were in 1965 — the existence of adverse political preferences between minorities and whites exists by itself as a kind of danger sign as to what might happen if the VRA were to vanish.

In particular, in states with high concentrations of minorities and a white majority unwilling to cross over to vote for minority-preferred candidates, we might expect several dangers to be present from a minority voting rights perspective. The first and most obvious is that by definition, areas of high racial polarization are ones where minorities will have less of a chance of electing politicians they prefer and that will be responsive to the minority community. Indeed, this is the

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[8] *See* Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court's Stealth Hard-Liner*, NEW YORKER, May 25, 2009, at 42, 42 ("That's like the old elephant whistle," he said. "You know, 'I have this whistle to keep away the elephants.' You know, well, that's silly. 'Well, there are no elephants, so it must work.'").

[9] *See* Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 10–14 (2010) (supporting the creation of majority-minority districts as a tool for furthering integration); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 778–84, 787 (2008) (arguing that the creation of majority-minority districts reduces racial polarization).

theory undergirding the redistricting jurisprudence for section 2 of the VRA: although minorities will lose in a majority-rule system, there is something inherently wrong with a system in which a large racial group is systematically outvoted and unrepresented by redistricting schemes that disadvantage them.

Second, when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages. For example, a ruling party or coalition that seeks to hobble the competitive position of its adversary by making it more difficult for their constituencies to vote or campaign will inevitably discriminate against a racial group. In those circumstances, race-based discrimination becomes an efficient tool for incumbent protection or partisan advantage.

There are several responses to the claim that geographic patterns of racial polarization can be important evidence in support of the coverage formula. The first, articulated by Justice Thomas in his separate opinion in *NAMUDNO*, is that "racially polarized voting is not evidence of unconstitutional discrimination [and] is not state action."[10] Regardless of the fact that elections choose state actors and such private choices occur in a state-structured environment, individual voting, on this score, is private action, just like individual speech. Even if such private choices arise from racial animus, geographic patterns in how those choices are made are viewed as outside the realm of permissible evidence for justifying Congress's power to enforce voting rights by way of the VRA. According to this approach, only the existence of unconstitutional laws or regulations — or more properly, the relative predominance of such laws in covered areas — can justify geographically targeted voting rights laws.

Defenders of the VRA might also agree that state violations of voting rights are better evidence to support congressional efforts in this area. After all, a state that disenfranchises racial minorities, but in which there is high white crossover voting, would still be one deserving of special federal attention. If, from the beginning, one had to choose among possible metrics for determining coverage, unconstitutional laws, as opposed to voting behavior, would be the most appropriate basis for distinguishing between institutions. Of course, the original VRA combined the two, designating for coverage jurisdictions that both used a test or device and had low voter turnout. Neither individually nor in combination were those factors unconstitutional,

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[10] *NAMUDNO*, 129 S. Ct. at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part) (citation omitted).

however. Rather, they were seen as indicators of likely unconstitutional action, and the record showed that they captured most of the jurisdictions of concern. Indeed, the coverage formula was reverse engineered to do so.

The evidence required to justify the constitutionality of the coverage formula today cannot be the same that justified the law when it was enacted. Otherwise, the law would have been unconstitutional soon after it was enacted, as minority political participation and office holding increased considerably and literacy tests vanished. Moreover, the statute cannot be constitutionally disadvantaged for its unique sunset period (which had previously been considered one of its saving graces). Most civil rights laws probably accomplish their goals or improve circumstances compared to their date of passage. They do not become immediately unconstitutional as a result. Congress's decision to require reauthorization should not then trigger a constitutional test for a reauthorized law that would be different than one originally passed without a sunset period.

Nevertheless, as it is the reauthorized version of the statute that is under review, evidence of the dangers of its removal could be valuable in assessing its continued constitutionality. There are strong and weak forms of the argument that racial polarization patterns in recent presidential elections support the constitutionality of section 5. The weak form merely dispels the notion that the election and reelection of an African American President should put section 5 to rest. The persistence of racial polarization in the covered areas — and in some cases, increased racial polarization — points to the complicated trends in voter behavior masked by President Obama's reelection.

The strong version of the argument is that the differential patterns of racial polarization demonstrate the constitutionality of section 5. As with any other piece of evidence concerning this reauthorization, previous reauthorizations, or even the original VRA, the patterns of relevant conduct (in this case, racially polarized voting) do not map perfectly onto the coverage designations. There are some noncovered areas with higher rates of racial polarization than some covered areas, and vice versa.

We can, however, demonstrate that racial polarization is higher, *on average*, in the covered areas than the noncovered areas. We can also demonstrate that the extent of racial polarization in presidential elections increased over the past decade. Even when we account for partisan identification, the differences in rates of racial polarization between the covered and noncovered areas remain statistically significant.

III. RACIAL POLARIZATION
IN PRESIDENTIAL ELECTIONS, 1984–2012

A. Racial Polarization, 1984–2008

Racially polarized voting is a term of art in voting rights law. It refers not to racist voting but to a high correlation between vote choice and race. As Justice Brennan's opinion in *Thornburg v. Gingles*[11] explained:

> [T]he legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate . . .; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates.[12]

Because the secret ballot prevents us from knowing the candidate choice of each voter by race, we need to rely on aggregated or sampled data to make inferences about how groups voted. As before, we look at survey data and ecological regression analysis to surmise the likely split of the vote along racial lines. Surveys can come from exit polls or other sources, but the sample must be large enough to get representative numbers for each of the states. Ecological regression relies only on election results and census race statistics. For each county, we can identify its racial composition and the vote share received by each candidate. With each county existing as one data point on a graph that arrays minority percentage on the X-axis and vote share received by the Democratic candidate on the Y-axis, we can estimate the likely share of the white and minority vote received by each candidate. The slope of the regression line that fits the data can also tell us how much increased vote share the Democratic candidate can expect to receive for each percent increase in the minority population of a jurisdiction. (We use the Democratic candidate for simplicity's sake; we could use the Republican candidate and it would show the same dynamic, except inverse.) The graphs present different lines for the covered and non-covered counties. By comparing the slope and Y-intercept of those lines, we can assess the relative importance of race as a predictor of presidential vote choice for each class of jurisdictions.

Our previous article detailed the well-known racial and regional differences in presidential voting patterns according to statewide exit polls from 1984 to 2004.[13] Over this period, minority voters supported the Democratic candidate relatively consistently and regardless of the coverage status of a jurisdiction. African Americans, in either type of

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[11] 478 U.S. 30 (1986).

[12] *Id.* at 62 (opinion of Brennan, J.).

[13] See Table 1 and Figure A for a summary of our findings.

jurisdiction, supported the Democratic candidate at a rate of 84%. Latinos were less pronounced or consistent in their support, but 61% of Latinos in the covered and 64% in the noncovered (or partially covered) jurisdictions supported the Democratic candidate, on average. The divergence between the covered and noncovered states is most pronounced among whites. White support for the Democrat in the covered states during this period lagged support in the noncovered or partially covered states by fourteen percentage points — 42% to 28%. Racial polarization between whites and blacks — that is, the difference in Democratic support from whites as compared to blacks — was forty-two percentage points for the noncovered jurisdictions and fifty-six percentage points for the covered jurisdictions. The gap between Latinos and whites was smaller — twenty-two percentage points for the noncovered jurisdictions and thirty-three percentage points for the covered jurisdictions.

TABLE 1. THE RACIAL GAP IN VOTING FOR DEMOCRATIC
NOMINEE, PRESIDENTIAL EXIT POLLS, 1984–2004[14]

Group	Covered	Noncovered + Partially Covered	Nation
White	28	42	39
Black	84	84	84
Latino	61	64	63
Whites			
Democrats	72	79	78
Republicans	4	9	8
Independents	28	42	40
Difference			
Black-white	56	42	45
Latino-white	33	22	24

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[14] These data were gathered from national exit polls archived at INTER-UNIVERSITY CON-SORTIUM FOR POLITICAL AND SOCIAL RESEARCH (ICPSR), https://www.icpsr.umich.edu/icpsrweb/ICPSR/access/series.jsp (last visited April 6, 2013). All cal-culations were performed using sample weights provided by the exit poll in the relevant file. In all ICPSR files, the weight variables are labeled WGT. The exit poll results are weighted to re-flect the complexity of the sampling design and to take into account the different probabilities of selecting a precinct and of selecting a voter within each precinct. The weights are defined such that the exit poll results equal the final tabulated vote within geographic regions of the states or nation. Calculations were made for each state using the within-state weights provided by the exit polls. Next, aggregate calculations were made for VRA and non-VRA regions, weighting each state by the population of interest (i.e. Whites, Blacks, Hispanics, White Democrats, White Re-publicans, and White Independents) residing in that state.

FIGURE A. DEMOCRATIC CANDIDATE'S SHARE OF THE
TWO-PARTY VOTE, NATIONAL EXIT POLLS, 1984–2008
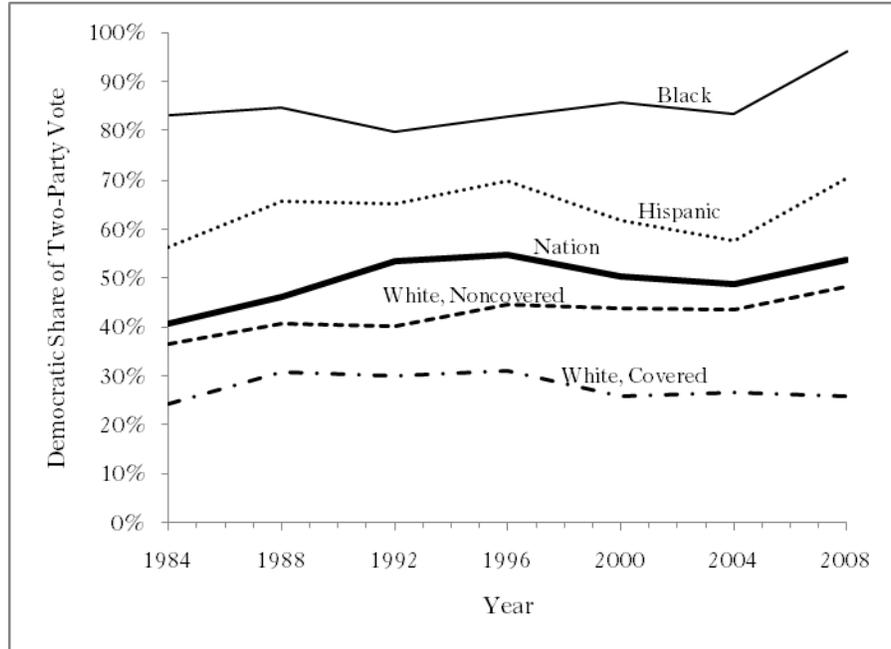
B. *Racial Polarization in 2008*

As compared to the twenty-year trend that preceded it, racial polarization increased in the 2008 presidential election. In both the covered and noncovered states, Barack Obama received a large, above-average share of the minority vote, such that the white-black and white-Latino gap increased. However, in the covered states, his voteshare among whites dropped two points from the historical average (tying the figure in 2004, we should note). In contrast, in the noncovered states, he increased his white voteshare by six percentage points.

The 2008 election highlights how racial polarization — the difference between the minority voteshare and white voteshare received by the minority-preferred candidate — can increase either through a decline in the white voteshare received by the candidate or through an increase in the minority voteshare received (or both). In the noncovered states, Barack Obama increased his voteshare among whites and minorities. In the noncovered states his share of the white vote was below average for a Democrat, while his share of the minority vote was well above average, especially among African Americans.

Table 2 compares Obama's voteshare by race with that of John Kerry's losing effort four years earlier. The exit polls illustrate that the jump in white support he received was mainly due to increases in the noncovered areas — the big exception being Virginia where he received eight points more of the white voteshare than did Kerry. However, in several covered states, white support for Obama dropped dramatically from four years earlier. In Alabama, Mississippi, and Louisiana, for example, Obama received only 10%, 11%, and 14% of the white vote respectively, which was nine, three, and ten percentage points less than Kerry received from whites in that state.[15] Despite very favorable conditions for the "out-party" candidate in 2008, Obama did not improve on Kerry's average performance among whites in the covered states and dropped significantly in several of them.

TABLE 2. RACIAL GAP IN PRESIDENTIAL VOTING
PREFERENCES, 2008 EXIT POLLS[16]

Group	Covered States		Noncovered States		Nation	
	2008 (%)	Change from 2004	2008 (%)	Change from 2004	2008 (%)	Change from 2004
White	26	0	48	4**	44	3**
Black	97	9**	96	9**	96	9**
Latino	67	16**	72	9**	70	11**
Whites						
Democrats	75	-7**	85	0	84	-1**
Republicans	4	1**	10	4**	9	3**
Independents	31	-3	50	-2	47	-2
Difference						
Black-white	71	9**	48	5**	52	6**
Latino-white	41	16**	24	5**	26	8**

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[15] *See* Ansolabehere et al., *supra* note 3, at 1422–23. As noted, Obama improved significantly among whites in Virginia, and in heavily covered states such as North Carolina and New York, he performed much better than previously. The only other outlier worth noting is the drop of six points among whites in noncovered Arkansas, where Obama nevertheless still got 31% of the white vote.

[16] **p<0.01. Exit poll data for 2004 come from the ICPSR. Exit poll data for individual states for 2008 come from CNN. *Local Exit Polls*, CNN ELECTION CENTER 2008, http://www.cnn.com/ELECTION/2008/results/polls/#ALP00p1 (last visited April 26, 2013).

C. *Racial Polarization in Presidential Elections, 2000–2012*

We can further demonstrate the shifts in rates of racial polarization by analyzing the actual election returns by county and comparing them to each county's demographic makeup. This method is critical in comparing 2012 with previous years, because the national exit poll was not taken in all states in 2012. In particular, only four of the covered states (Arizona, Floria, Mississippi, and Virginia) were in the 2012 exit poll sample. In order to encompass all of the covered states, we analyze the aggregate election results, rather than the exit polls.

We can display the regressions as both a table and a graph. The three key features of the regression line are (1) the Y-intercept or constant, which indicates the likely white support for the Democratic nominee; (2) the steepness or slope of the line, which reveals how closely related the racial composition of a district is to voteshare won by the Democratic nominee (a forty-five-degree line would suggest that each one-percent increase in the black plus Hispanic share of the county's population translates into one-percent vote for the Democratic candidate); and (3) the fit or R-squared value, which indicates how good the regression line fits the data (that is, how close are the various data points to the line and therefore how easy it is to predict the Democratic voteshare when knowing only the minority population share of the county). Each measure is helpful in assessing racial polarization and comparing polarization between the covered and noncovered counties.

As is clear from Figure B and Table 3, racial polarization according to all three statistics has been increasing in the covered jurisdictions over the last twelve years. The Y-intercept (or constant) has gone lower each year: from 0.247 in 2000 to 0.198 in 2012, suggesting average white support in the covered counties has dropped from roughly 25% to just under 20%. The same cannot be said for white support in the noncovered jurisdictions, which has hovered around 41% for the period, with the exception of 2008 where Obama won about 45% of the white vote (on average) in the noncovered counties. Consistent with the fact that Obama won a higher share of the minority vote, the slope (or steepness of the regression line) and R-squared have increased considerably in the two Obama elections as compared to their predecessors, and the differences remain great between the covered and noncovered jurisdictions. This suggests that racial composition is not only a better predictor of voteshare in the covered counties than the noncovered counties, but that it is becoming an increasingly better predictor of voteshare over time. In other words, if all one knew was the racial composition of a county, one can more accurately predict the voteshare of Obama in 2012 than for any candidate in the previous three elections.

FIGURE B. DEMOCRATIC PRESIDENTIAL SUPPORT BY COUNTY MINORITY PERCENTAGE, 2000–2012[17]

2000

2004

2008

2012

_____
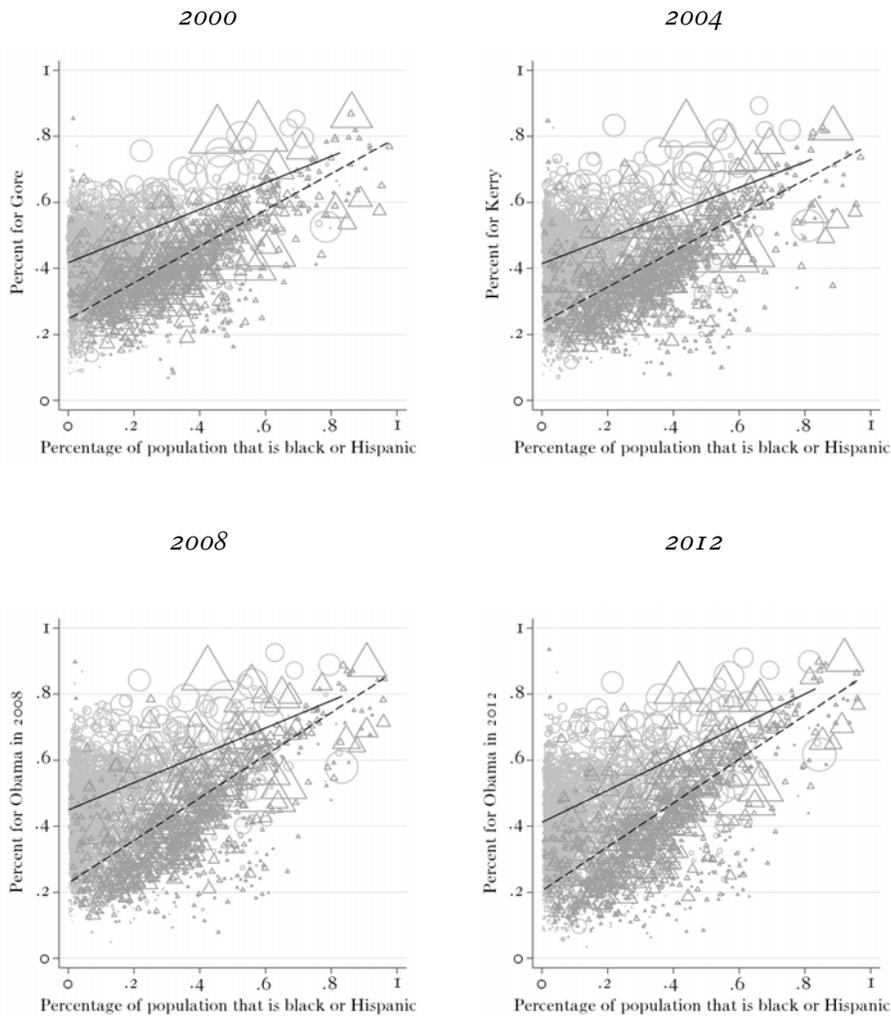
[17] Racial data by county for each presidential election was calculated according to the data files from the U.S. Census Bureau. AMERICAN FACTFINDER, http://factfinder2.census.gov (last visited April 26, 2013). For the 2000 election, the 2000 decennial census was used. For the 2012 election, the 2010 decennial census was used. For the 2004 and 2008 elections, the racial composition of each county was linearly interpolated using the 2000 and 2010 data. Other methods, such as using the American Community Survey racial data, reveal similar results.

TABLE 3. REGRESSION ESTIMATES FOR COUNTY SUPPORT
FOR DEMOCRATIC CANDIDATE BASED ON MINORITY
POPULATION SHARE, 2000–2012[18]

	2000		2004		2008		2012	
	Covered	Non-covered	Covered	Non-covered	Covered	Non-covered	Covered	Non-covered
Black and Hispanic percentage of county population	0.549 (0.020)	0.402 (0.012)	0.541 (0.021)	0.384 (0.013)	0.645 (0.022)	0.413 (0.013)	0.677 (0.023)	0.478 (0.013)
Constant	0.247 (0.008)	0.417 (0.003)	0.235 (0.009)	0.414 (0.004)	0.228 (0.010)	0.449 (0.004)	0.198 (0.010)	0.409 (0.004)
N	844	2,269	844	2,265	844	2,265	844	2,266
R-squared	0.47	0.33	0.44	0.27	0.50	0.31	0.52	0.36

IV. ISN'T THIS ALL ABOUT PARTISANSHIP?

As striking as the above data may be, sophisticated observers might reduce these findings to the well-known story that whites in the South have been steadily fleeing the Democratic Party over time. An active debate exists in voting rights caselaw and scholarship concerning whether a high correlation between race and partisanship should allay concerns about racial polarization.[19] However, just as we detailed three years ago, so too today the difference in candidate preferences observed in the covered counties cannot be *explained away* simply by party, even if partisanship is, admittedly, a more powerful variable than race in predicting vote choice.

Our article demonstrated this in two ways. First, using the American National Election Studies, we included many other variables in regressions with the dependent variable being white voters' vote choice. Even when controlling for party, ideology, church attendance, religiosity, union membership, age, income, and education, residence in a covered state remained a statistically significant negative factor in predicting the vote choice of whites in the 2008 election, but not in the 2004 election.[20] Second, using data from the 2008 Cooperative Con-

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[18] Standard errors are in parentheses. All cell entries are statistically significant. Covered counties are listed in *Section 5 Covered Jurisdictions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 3, 2013), and bailed-out counties are listed in *Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited May 3, 2013).

[19] *See* Ansolabehere et al., *supra* note 3, at 1395.

[20] *Id.* at 1428–29.

gressional Election Survey, we also examined voting in the Democratic primary election that year. After controlling for all of the factors mentioned above, we still found that whites in the covered states were less likely to vote for President Obama than for Hillary Clinton. In other words, even when limiting the analysis to Democrats — that is, taking party out of the equation — differences in the behavior of white voters in the covered and noncovered states remained.

To confirm our prior findings from the survey data and our current findings from the ecological regressions, we turn to an analysis of the relevant data from the Survey of the Performance of American Elections (SPAE). The SPAE includes approximately 200 voters from every state in the country and is chiefly used to compare the voting experience between different states. Even with roughly 9,000 respondents, individual state effects might be difficult to unearth. However, by aggregating the covered and noncovered states together we can, at least, get a sense of whether partisanship accounts for all of the racial differences between voters in the covered and noncovered states. We should also note that our findings have now been confirmed by analysis of newly available data from the 2012 Cooperative Congressional Election Survey.

As Table 4 below confirms, the race of the voter continues to constitute a statistically significant factor in determining vote choice even after controlling for party. Even in the stripped-down first regression, race plays a more important role in the covered than the noncovered states in determining vote choice, as the substantially higher R-squared demonstrates. After adding party to the regression, however, race does not "drop out." Of course, when including party, much more of the variance in vote choice can be explained for both the covered and noncovered states, but race in the 2012 election remains a statistically significant factor in vote choice.[21] The moral of the story is that differences in party identification did not account for all of the differences between racial groups in their choice of presidential candidates in 2012 or 2008.

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[21] Interestingly, when controlling for party, Hispanic race is not significant in 2008 for the covered jurisdictions but becomes significant in 2012. This is no doubt due to the fact that President Obama increased his Hispanic voteshare in 2012 while losing Anglo-white voteshare.

TABLE 4. RELATIONSHIP OF RACE AND PARTY TO VOTECHOICE FOR OBAMA, 2008 AND 2012[22]

a. Linear regression, not controlling for party

	2008			2012	
	Covered	Noncovered		Covered	Noncovered
Race = black	0.64 (0.03)	0.47 (0.02)		0.68 (0.04)	0.49 (0.02)
Race = Hispanic	0.25 (0.07)	0.26 (0.03)		0.34 (0.05)	0.26 (0.03)
Constant	0.32 (0.03)	0.48 (0.01)		0.29 (0.04)	0.46 (0.02)
N	1,614	7,164		1,534	6,819
R-squared	0.27	0.06		0.34	0.07

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[22] *See* PEW CTR. ON THE STATES, ELECTION ADMINISTRATION BY THE NUMBERS (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Elections_By _The_Numbers.pdf; CHARLES STEWART III, 2012 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS _Assets/2012/CharlesStewart-Day%201.pptx.

b. Linear regression, controlling for party

	2008			2012	
	Covered	Noncovered		Covered	Noncovered
Race = black	0.23	0.14		0.22	0.12
	(0.05)	(0.02)		(0.05)	(0.02)
Race = Hispanic	0.08	0.07		0.12	0.10
	(0.07)	(0.02)		(0.03)	(0.03)
Party	0.39	0.42		0.41	0.43
	(0.03)	(0.01)		(0.02)	(0.01)
Constant	0.42	0.49		0.41	0.48
	(0.03)	(0.01)		(0.03)	(0.01)
N	1,610	7,019		1,477	6,631
R-squared	0.62	0.55		0.69	0.59

IV. CONCLUSION

Reasonable people can disagree about the relevance of the 2012 election or even racially polarized voting patterns to the constitutionality of the coverage formula for section 5 of the Voting Rights Act. Indeed, we view our findings more as a response to the notion that the election and reelection of an African American President settles the constitutional question in favor of the VRA's detractors. If anything, the opposite is true. To be sure, the coverage formula does not capture every racially polarized jurisdiction, nor does every county covered by section 5 outrank every noncovered county on this score. However, the stark race-based differences in voting patterns between the covered and noncovered jurisdictions taken as a whole demonstrate the coverage formula's continuing relevance.

In particular, for those looking for a way to distinguish the covered jurisdictions from the noncovered jurisdictions, and to do so without running afoul of the "elephant whistle" problem, differential rates of racially polarized voting provide an ideal metric. There can be no doubt that the covered jurisdictions differ, as a group, from the noncovered jurisdictions in their rates of racially polarized voting. There can also be no doubt that voting in the covered jurisdictions as a whole is becoming more, not less, polarized over time.