
COMMENTS

BEYOND THE DISCRIMINATION MODEL ON VOTING

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Retirement with dignity was denied to section 5 of the Voting Rights Act of 1965¹ (VRA). If ever a statute rose to iconic status, a superstatute amid a world of ordinary legislation,² it was the VRA. In the course of not quite half a century, the Act was pivotal in bringing black Americans to the broad currents of political life — a transformation that shook the foundations of Jim Crow, triggered the realignment of partisan politics, and set the foundation for the election of an African American President.

Deciding when the time has come is never easy. We see the athlete one step too slow to carry the team, the tenor no longer able to hit the necessary C, the pop star straining to hide the arthritic hip. Invariably there are the moments that recall stardom, be they increasingly seldom. But ultimately each waning icon is allowed to step down gracefully, carried by the fans basking in the memories of faded glory.

What President Lyndon Johnson introduced to America as the crown jewel of the civil rights era has now been struck down by the Supreme Court as timeworn, no longer constitutionally responsive to the America that the Act itself helped create out of the overt racialism of the American South. According to the Court in *Shelby County v. Holder*,³ civil rights–era concerns could no longer justify requiring certain jurisdictions to obtain Department of Justice (DOJ) approval before altering voting procedures. For instance, until the Court’s decision, Shelby County, Alabama, was subject to administrative preclearance because less than fifty percent of its citizens voted in the 1964 presiden-

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¹ 42 U.S.C. §§ 1973 to 1973bb-1 (2006 & Supp. V 2011).

² See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES 27 (2010) (describing the VRA as the paradigmatic superstatute embodying deeper constitutional values than ordinary legislation: “Indeed, superstatutes sometimes rival Constitutional rules, bending an ambiguous or even hostile Constitutional tradition to acquiesce in superstatutory innovations. For example, the Voting Rights Act has not only changed the character of our democracy, it has altered our Constitutional federalism as well.”).

³ 133 S. Ct. 2612 (2013).

tial election.⁴ For the Court's majority, that was simply too long ago, leaving section 4, the VRA's coverage formula, out of touch with current reality: "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."⁵

A constitution demanding a respect for the dignity of the states and contemporary proof of a close fit between means and ends when race-based distinctions are drawn allows no room for sentiment. "That is no country for old men," wrote William Yeats of the willingness to cast aside the once vibrant but now rendered "a paltry thing."⁶ And a Court no longer attached to the past glories of the Act looked with disregard at an odd legislative structure that tied its regulatory framework to turnout statistics from the 1964 presidential election. As a formal matter, the Court struck down only the formula and left untouched the constitutionality of the VRA's preclearance structure. The Court took pains to leave open the prospect of a renewed coverage formula, one that does not turn on what seventy- and eighty-year-old voters did a half century ago, perhaps sending our currently dysfunctional Congress on a new wayward journey: "Congress may draft another formula based on current conditions."⁷ But despite the Court's care to avoid ruling on section 5, it was the indignity that "[s]tates must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own"⁸ that provided the unacceptable constitutional insult.⁹

The Court's unromantic constitutional ruling should prompt rethinking whether the regulatory model of prior federal approval of voting changes is truly responsive to the voting problems of today. The critical assumptions of the challenged provisions of the Act cor-

⁴ Shelby County brought suit challenging its obligation to submit all proposed changes for preclearance by the DOJ pursuant to section 5 of the VRA. The Court's decision avoided frontally addressing the constitutionality of section 5 by instead focusing on the formula in section 4 of the Act for determining which jurisdictions are subject to preclearance, which turned on two factors: (1) whether the state "had maintained a test or device as a prerequisite to voting as of November 1, 1964," and (2) whether fewer than fifty percent of voting-age residents voted or were registered to vote in the presidential election of 1964. *See id.* at 2619, 2631. While this formula has received periodic updates, most notably to include three boroughs of New York City in 1970 and the entire state of Texas in 1975, the covered districts remained largely unchanged from 1965 to the most recent renewal of the Act in 2006. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 520–26 (4th ed. 2012).

⁵ *Shelby Cnty.*, 133 S. Ct. at 2631.

⁶ W. B. YEATS, *Sailing to Byzantium*, in 1 *THE COLLECTED WORKS OF W. B. YEATS* 197, 197 (Richard J. Finneran ed., 2d ed. 1997).

⁷ *Shelby Cnty.*, 133 S. Ct. at 2631.

⁸ *Id.* at 2624.

⁹ Only Justice Thomas, concurring in full with the Court's opinion, would have reached further to strike down section 5 of the Act as well. *See id.* at 2631–33 (Thomas, J., concurring).

responded to a world in which overt racial exclusion meant that black citizens faced first-order impediments simply to getting registered to vote and in which only the federal government could assume the responsibility to challenge the persistence of Jim Crow. For much of post-Civil War American history, the prospect for goal-oriented abuse of election processes has been directed largely — though never exclusively — at black Americans.¹⁰ As a result, for much of American history, voters' vulnerability to disenfranchisement played out largely along race lines. Because of this, the defining law of democracy in America is heavily the law of black enfranchisement, either directly or even indirectly as in *Baker v. Carr*.¹¹ But different times call for different measures, and the Court's decision, however wrenching, should compel taking stock of what has changed since 1965.

Although I wrote a decade ago about the increasing disjunction between section 5 and the realities of contemporary political life,¹² and though I also cautioned in Senate testimony in 2006 about the constitutional vulnerability of the Act's aging structure,¹³ a part of me nonetheless gasped when sentence was pronounced. I had cut my teeth as a lawyer handling voting rights cases in the South and the first trial I had ever seen was a section 5 preclearance action that served as a riveting rebuke to the last throes of open racism in the Georgia political establishment.¹⁴

But even in the 1980s when I was handling these cases, section 5 was receding in importance as voting rights moved into the domain of political power, not simply access to the franchise. Doctrinally, the transformative push was not to maintain the status quo under the non-retrogression mandate of section 5¹⁵ but to transform the electoral land-

¹⁰ There has always been a strategic component to efforts at disenfranchisement, though not always playing out along modern partisan cleavages. Even during the height of the Jim Crow period, black disenfranchisement was driven in significant part by the partisan political ambitions of the more conservative, large landowning white elite to destroy effective political coalitions of black and poorer white populists. See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 301–05 (2000).

¹¹ 369 U.S. 186 (1962) (finding that state apportionment claims are subject to review in federal court under the Equal Protection Clause of the Constitution).

¹² See Samuel Issacharoff, Essay, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1728 (2004).

¹³ See *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 13–14 (2006) [hereinafter *Hearing*] (statement of Samuel Issacharoff).

¹⁴ *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (denying preclearance to a Georgia redistricting plan in spite of the fact that there was no clear retrogression, due to evidence of discriminatory purpose).

¹⁵ See, e.g., *Beer v. United States*, 425 U.S. 130, 141 (1976) (“[A] legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the ‘effect’ of diluting or abridging the right to vote on account of race within the meaning of § 5.”).

scape using the 1982 amendments to section 2 of the VRA.¹⁶ Even in those days, the formal structure of section 5 had accomplished much of its purpose, removing the literacy tests and other barriers to black enfranchisement. The task at hand was to challenge at-large elections and to create the electoral conditions not just for black citizens to vote, but also for these black voters to elect their chosen candidates to office. It was a heady time as one after another exclusively white legislative council began to be integrated. The stage was set for a transformed politics and the formal rigidity of section 5 was not quite keeping up.

Later, in the 1990s, section 5 had a brief reawakening when it became the fulcrum for the DOJ's efforts to compel the creation of strong majority-minority districts in the South. The so-called "max black" strategy cemented minority political representation in Congress, but at the paradoxical cost of furthering the partisan realignment of the South.¹⁷ It was the section 5 objections to Democratic redistricting efforts in North Carolina in the 1990s that gave rise to *Shaw v. Reno*¹⁸ and the ensuing constitutionalization of limits on racial considerations in gerrymandering.¹⁹ Where once the Act broke the political lockhold of the all-white southern Democratic Party, the revitalized Republican Party now had a strong ally in its control of the DOJ in every decennial redistricting cycle until 2010, when for the first time since the enactment of the VRA in 1965 the Democratic Party controlled the

¹⁶ Section 2 of the VRA affirmatively forbids laws that directly or indirectly deny or abridge the right to vote on the basis of race. Unlike section 4, which mandates preclearance of new voting laws by the DOJ, section 2 creates a private cause of action, under which citizens affected by a restrictive voting law even in districts not subject to section 5 preclearance may file suit. Congress amended section 2 in 1982 to reach beyond the constitutional prohibition on purposeful discrimination. Because amended section 2 focused on all electoral practices that *resulted* in a denial or abridgment of minority voters' right to elect candidates of choice to office, it became the basis for the attack on at-large and multimember electoral districts that overrewarded majority voting blocs. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1845–50 (1992).

¹⁷ See ISSACHAROFF, KARLAN & PILDES, *supra* note 4, at 841–46 (documenting the partisan realignment of Alabama in the 1990s). See generally Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 290–97 (2011) (chronicling the critical role of the Act in stimulating the ideological purification and sorting of the major political parties).

¹⁸ 509 U.S. 630, 658 (1993) (striking down a North Carolina redistricting effort if the irregular shape of the proposed district could be shown to have no rational explanation except racially biased gerrymandering).

¹⁹ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (following *Shaw* to strike down the majority-black Georgia Eleventh Congressional District on the grounds that the DOJ's "max black" strategy that encouraged the district's creation was not narrowly tailored to serve a compelling government interest). This pattern continued into the 2000s. See Rick Pildes & Dan Tokaji, *What Did VRA Preclearance Actually Do?: The Gap Between Perception and Reality*, ELECTION L. BLOG (Aug. 19, 2013, 4:39 AM), <http://electionlawblog.org/?p=54521> (showing that thirty-nine of the seventy-six objections lodged under section 5 between 2000 and 2012 concerned redistricting issues and that only five of the seventy-six addressed voter registration or eligibility issues).

White House at the time of the decennial Census. And, truth be told, the Act took on different dimensions once hitched to partisan interests. By 1992, I found myself helping represent the State of Texas in litigation over the denial of preclearance to a redistricting plan that allowed Texas's three additional congressional districts *all* to be allocated to minority voting constituencies — a denial, courtesy of a Republican DOJ, that already reeked of partisan misuse of the Act.²⁰

By the time of the last extension of section 5 in 2006, the debate over the future of voting rights enforcement had turned into a rather sterile exchange over how different the world had become and the legal significance of that difference. On the one hand, the proponents of the new-era approach looked to black electoral advances to proclaim the era of racial discrimination ended, a claim that took on greater force with the election of President Obama in 2008.²¹ On the other hand, advocates of the VRA pointed to large swaths of the country, largely overlapping with the covered jurisdictions under section 5, where polarized voting patterns persisted, where some number of requests for additional information from the DOJ were issued, or where affirmative lawsuits charging abridgement of minority voting rights had been filed under section 2 of the VRA.²² The Court temporized in *Northwest Austin Municipal Utility District No. One v. Holder (NAMUDNO)*,²³ substituting a strained statutory construction of how jurisdictions could potentially bail out of section 5 coverage.²⁴ Ultimately, however, the constitutional conflict emerged foursquare and the familiar five-to-four split of the Court ensued in *Shelby County*.

²⁰ *Texas v. United States*, 802 F. Supp. 481 (D.D.C. 1992).

²¹ For a summary of the arguments presented to Congress during the 2006 reauthorization of section 5 of the VRA, see *Hearing, supra* note 13, at 8–10 (statement of Richard L. Hasen, Professor of Law, Loyola Law School).

²² In her *Shelby County* dissent, Justice Ginsburg noted that the evidence marshaled in 2006 by proponents of the VRA, exceeding 15,000 pages, “presents countless ‘examples of flagrant racial discrimination’ since the last reauthorization; Congress also brought to light systematic evidence that ‘intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed.’” 133 S. Ct. at 2636 (Ginsburg, J., dissenting) (quoting *Shelby County v. Holder*, 679 F.3d 848, 866 (D.C. Cir. 2012)). Judge Tatel of the D.C. Circuit also reviewed the evidence in favor of renewal, finding “numerous ‘examples of modern instances’ of racial discrimination in voting,” in addition to other indirect evidence that such discrimination remained prolific. *Shelby Cnty.*, 679 F.3d at 865 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997)). This evidence of ongoing discrimination included “hundreds of instances in which the Attorney General . . . objected to proposed voting changes,” as well as the fact that “over 800 proposed voting changes” were withdrawn or modified between 1990 and 2005 in response to “more information requests” (MIRs). *Id.* at 866. Judge Tatel also observed sources in the legislative history showing that “the average number of objections [to proposed changes to voting laws] per year has not declined, suggesting that the level of discrimination has remained constant as the number of proposed voting changes, many likely quite minor, has increased.” *Id.* at 867.

²³ 129 S. Ct. 2504 (2009).

²⁴ *Id.* at 2513–16.

Shelby County thus closes the chapter on the most important and most successful of the civil rights laws from the 1960s. For the majority of the divided Court, the preclearance requirements of the VRA for changing electoral practices stigmatized sovereign states and no longer bore a logical relation to the voting problems of today. At the same time, the Court in *Arizona v. Inter Tribal Council of Arizona*²⁵ reaffirmed expansive congressional powers under the Elections Clause.²⁶ The two Supreme Court cases invite a comparison of the distinct sources of federal power over elections and an examination of their relative potential effectiveness in controlling the renewed battles over voter eligibility. The argument presented is that current voting controversies, unlike the concerns of racial exclusion under Jim Crow, are likely motivated by partisan zeal and emerge in contested partisan environments. The conclusion is a proposed administrative process based on the Elections Clause that can potentially be more effective than the VRA approach struck down in *Shelby County*.

I. INTO THE FRAY: *SHELBY COUNTY* AND THE LEGACY OF THE CIVIL RIGHTS ERA

For all its historic significance, *Shelby County* broke surprisingly little new ground doctrinally. The decision itself rested on two sources of constitutional doctrine, each more than a little odd. First, the Court invoked “the principle that all States enjoy equal sovereignty”²⁷ to create a dignitary interest offended by “disparate treatment of the States.”²⁸ Although the dissent tried to cabin such equal treatment to the conditions for admission into the Union,²⁹ Chief Justice Roberts relied on this principle to impose a high justification threshold on congressional action that treats some states differently than others. While the equal dignity requirement may be of questionable original constitutional pedigree,³⁰ the foundation was set in *NAMUDNO*,³¹ a decision

²⁵ 133 S. Ct. 2247 (2013).

²⁶ *Id.* at 2253.

²⁷ *Shelby Cnty.*, 133 S. Ct. at 2618.

²⁸ *Id.* at 2619.

²⁹ *Id.* at 2648–50 (Ginsburg, J., dissenting).

³⁰ See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV L. REV. 2003, 2007–08 (2009) (skeptically reviewing the emerging federalism norm for its lack of textual mooring); Nina Totenberg, *Whose Term Was It? A Look Back at the Supreme Court*, NPR (July 5, 2013, 3:35 AM), <http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court> (quoting Stanford Law Professor Michael McConnell as stating that “[t]here’s no requirement in the Constitution to treat all states the same” (internal quotation marks omitted)).

³¹ 129 S. Ct. 2504, 2513 (2009) (permitting a Texas district to seek bailout from the section 5 preclearance requirement, while noting that the VRA’s “preclearance requirements and its coverage formula raise serious constitutional questions”).

that was joined by the Court's liberal wing — as Chief Justice Roberts recounted with some obvious glee.³² In reality, the equal-sovereignty doctrine captures less the constant differentiation of the states for purposes of routine legislative enactments than the perceived continued stain on the South from its racialist past. The issue was never addressed forthrightly by the majority but its presence was everywhere. The extraordinary feature of section 5 was not just its administrative reach but its labeling of part of the country as being unremedied from its past — a stigma that attached to the South but not to the covered parts of New York or New Hampshire that were not implicated in the noxious legacy of Jim Crow. As Franita Tolson prophetically noted following *NAMUDNO*, “[t]he free-floating federalism norm poses the most problems for section 5 of the VRA.”³³

On more familiar footing, the Court also invoked a means-ends fit requirement that remedial legislation under the enforcement mandates of the Constitution must comport to the actual findings by Congress: “[T]he Act imposes current burdens and must be justified by current needs,” and any “disparate geographic coverage [must be] sufficiently related to the problem that it targets.”³⁴ Oddly, the Court then shifted away from the doctrinally mandated requirement that Congress’s actions be held to an exacting “congruence and proportionality” from *City of Boerne v. Flores*.³⁵ Instead, Chief Justice Roberts conspicuously returned time and again to a far more accommodating standard of “rational[ity]” or “logical relation.”³⁶ It is unclear whether the seeming-

³² See *Shelby Cnty.*, 133 S. Ct. at 2630 (“[F]our years ago, in an opinion joined by two of today’s dissenters, the Court expressly stated that ‘[t]he Act’s preclearance requirement and its coverage formula raise serious constitutional questions.’ The dissent does not explain how those ‘serious constitutional questions’ became untenable in four short years.” (second alteration in original) (citation omitted) (quoting *NAMUDNO*, 129 S. Ct. at 2513)); see also Adam Liptak, *Steady Move to the Right*, N.Y. TIMES, June 28, 2013, at A1 (“Chief Justice Roberts has proved adept at persuading the court’s more liberal justices to join compromise opinions, allowing him to cite their concessions years later as the basis for closely divided and deeply polarizing conservative victories.”); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 19 (2010) (identifying instances of dicta returning as the basis to alter earlier settled law).

³³ Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1254 (2012).

³⁴ *Shelby Cnty.*, 133 S. Ct. at 2622 (quoting *NAMUDNO*, 129 S. Ct. at 2512) (internal quotation marks omitted).

³⁵ 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

³⁶ *Shelby Cnty.*, 133 S. Ct. at 2625, 2627–31. Chief Justice Roberts compared the current decision with *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), which held that “the coverage formula [was] rational in both practice and theory.” *Id.* at 330. He found that “[h]ere, by contrast, the Government’s reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one . . . that failure to establish even relevance is fatal.” *Shelby Cnty.*, 133 S. Ct. at 2628. In particular, the attempt to sustain the continued use of section 4 based upon empirical

ly lax standard of review is an invitation to greater congressional latitude or just a taunting reminder of how far off the mark the Court's majority considered this particular piece of legislation. Nonetheless, the VRA is now the most significant congressional act struck down by the Court under rational relations review.³⁷

As played out in the Supreme Court, Chief Justice Roberts could point to the paucity of enforcement actions under the Act as evidence of the disconnect between the stringent administrative oversight and the current on-the-ground reality in the transformed covered jurisdictions.³⁸ In the most recent presidential election, African American turnout exceeded white turnout in most of the covered jurisdictions.³⁹ Chief Justice Roberts saw these changes as the result of the VRA: "The Act has proved immensely successful at redressing racial discrimination and integrating the voting process."⁴⁰ Yet Congress reauthorized the Act "as if nothing had changed."⁴¹ The result was that Congress "reenacted a formula based on 40-year-old facts having no logical relation to the present day."⁴²

For Justice Ginsburg, the relative absence of enforcement was proof of the importance of continued vigilance and the small number of actual objections a hint of the lurking dangers should the guard come down: "Throwing 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."⁴³ As with all debates premised on a counterfactual of what might happen under altered circumstances, no evidence could disprove either side's null-set hypothesis.

claims of problems of vote dilution in covered jurisdictions "simply highlights the irrationality of continued reliance on the § 4 coverage formula." *Id.* at 2629. Had Congress "started from scratch" in designing a coverage formula, "[i]t would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time." *Id.* at 2630-31. *But see id.* at 2651 (Ginsburg, J., dissenting) ("Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of sync with conditions on the ground in covered areas.").

³⁷ This form of rationality review with bite was also present this Term in *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act).

³⁸ *Shelby Cnty.*, 133 S. Ct. at 2626 (noting DOJ objections to only 0.16% of submissions in the decade prior to the last reenactment).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2629.

⁴³ *Id.* at 2650 (Ginsburg, J., dissenting).

II. VOTER PROTECTION AND THE NEW EQUAL PROTECTION JURISPRUDENCE

With the passage of time since 1965, section 5 seemed superseded because of the shift from the issue of access to the ballot to the issues of representation and the political empowerment of minorities. Paradoxically, the issue of access to the franchise returned to the fore in recent years as part of a partisan effort to restrict that access in order to diminish the political impact of vulnerable constituencies. In 2012, for example, twenty-four states passed laws that sought to impose some form of voter restriction, either through identification requirements or through restrictions on access to early voting.⁴⁴ To an unavoidable extent, these laws likely had, at least in some parts of the country, a disparate racial impact. But the racial impact was likely the means rather than the end: “[W]hen 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.”⁴⁵

The likelihood that a state would have introduced restrictive voter identification laws in recent years turns on one variable: Republican control of the state legislature.⁴⁶ No state under Democratic control passed significant voter identification laws or sought to restrict early voting or voter access in the run-up to the 2012 presidential elections.⁴⁷ For example, passage of a restrictive voter registration law in Pennsylvania prompted one exultant Republican congressman to proclaim that the state had just been delivered to the candidacy of Governor

⁴⁴ John G. Tamasitis, Survey of South Carolina Law — Election Law, “*Things Have Changed in the South*”: How Preclearance of South Carolina’s Voter Photo ID Law Demonstrates that Section 5 of the Voting Rights Act Is No Longer a Constitutional Remedy, 64 S.C. L. REV. 959, 963 (2013) (“In 2012 alone, fourteen states sought to enact voter ID requirements where none had existed before, and ten states sought to strengthen laws already in place.”).

⁴⁵ Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 209 (2013).

⁴⁶ See, e.g., WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES IN 2012, at 9–10 (2011), available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf (providing a comprehensive review of restrictive voting laws implemented in 2011 for the 2012 election, all by Republican-dominated legislatures except for a weak photo ID bill in Democratic-controlled Rhode Island); Ari Berman, *The GOP War on Voting*, ROLLING STONE, Aug. 30, 2011, <http://www.rollingstone.com/politics/news/the-gop-war-on-voting-20110830> (accusing the Republican party of seeking to suppress Democratic voters by passing restrictive voting laws); Michael Cooper, *New State Rules Raising Hurdles at Voting Booth*, N.Y. TIMES, Oct. 3, 2011, at A1 (“Republicans, who have passed almost all of the new election laws, say they are necessary to prevent voter fraud, and question why photo identification should be routinely required at airports but not at polling sites.”).

⁴⁷ WEISER & NORDEN, *supra* note 46, at 9–10.

Romney,⁴⁸ a claim that proved wrong as a matter of law and fact.⁴⁹ While some of the states that sought to implement restrictive voter access laws were covered by section 5, there was no concentration of such laws in the covered jurisdictions.⁵⁰ Notably, in all the litigation prompted by these laws, section 5 had force only in Texas and Florida.⁵¹

In terms of crafting a post-*Shelby County* regime of legal protection of the right to vote, the question for today is how much of the terrain the civil rights model still captures. For section 5, this means a conspicuous mismatch between the covered jurisdictions and the flashpoints of voting claims now focused on partisan battleground states such as Colorado, Florida, Ohio, and Pennsylvania. In no state was ballot access more tightly fought and more generative of major doctrinal developments than in Ohio. The Ohio litigation from 2004 to 2012 shows a new model emerging from the courts, one grounded on a non-civil rights vision of fundamental guarantees that partially takes its inspiration from, of all places, *Bush v. Gore*.⁵²

The centrality of Ohio in the contested presidential elections of 2004, 2008, and 2012 concentrated ballot-access challenges before the Sixth Circuit. That court in turn has elaborated a new equal protection jurisprudence across cases involving the use of inferior voting machines in some parts of the state,⁵³ the disparities in election administration across counties,⁵⁴ and the inconsistent treatment of

⁴⁸ Aaron Blake, *Everything You Need to Know About the Pennsylvania Voter ID Fight*, WASH. POST (Oct. 2, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/10/02/the-pennsylvania-voter-id-fight-explained> (Republican House Majority Leader Mike Turzai listed the party's state legislative accomplishments to include "[v]oter ID, which is going to allow Governor Romney to win the state of Pennsylvania").

⁴⁹ See *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012) (granting a preliminary injunction against the Pennsylvania voter ID law); *President Map*, N.Y. TIMES, <http://elections.nytimes.com/2012/results/president> (last updated Nov. 29, 2012) (interactive feature displaying 2012 election results, including President Obama's win in Pennsylvania with 52% of the vote).

⁵⁰ See WEISER & NORDEN, *supra* note 46, at 13 (showing that among nineteen states enacting restrictive voter identification laws in 2011 and 2012, only three of those states — Alabama, South Carolina, and Texas — were subject to preclearance).

⁵¹ See *Texas v. Holder*, 888 F. Supp. 2d 1113 (D.D.C. 2012) (denying preclearance to Texas voter ID law); *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012) (denying preclearance to a portion of a voting law that reduced the number of early-voting days and early-voting hours, but upholding voting restrictions for recent movers). Additionally, South Carolina obtained approval for its voter ID requirement. *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012). Only Texas's voter ID law was completely thwarted by section 5. For a review of all litigation arising from 2012 voting restrictions, see cases cited *infra* note 143.

⁵² 531 U.S. 98 (2000) (per curiam).

⁵³ See *Stewart v. Blackwell*, 444 F.3d 843, 848 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007).

⁵⁴ See *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008).

provisional ballots.⁵⁵ In each case, panels of the Sixth Circuit came back to *Bush v. Gore* as standing for the proposition that the right to vote encompasses, in the language of *Bush v. Gore*, “more than the initial allocation of the franchise. *Equal protection applies as well to the manner of its exercise.*”⁵⁶ The Sixth Circuit cases are noteworthy not because they are distinct from developments in other circuits — there is so far no significant judicial resistance to confronting the new election challenges, although the number of such cases remains limited thus far — but rather because the partisan stakes in Ohio have pushed the issue most aggressively in the political and judicial arenas.

In *Hunter v. Hamilton County Board of Elections*,⁵⁷ the most expansive of the Sixth Circuit cases prior to 2012, the court focused on the statement in *Bush v. Gore* that there is a constitutional requirement under equal protection to ensure the “nonarbitrary treatment of voters.”⁵⁸ From this, the Sixth Circuit established the new equal protection of the franchise: “state actions in election processes must not result in ‘arbitrary and disparate treatment’ of votes.”⁵⁹ As a matter of doctrine, the new equal protection of the right to vote expanded judicial scrutiny beyond the constricted categories of outright denial of the franchise and protection of vulnerable minorities against mistreatment on account of race or some other specified characteristic. Rather than carve out new categories of specific entitlements, such as a certain number of early-voting opportunities or specific identification opportunities, the new equal protection limited the prospects for strategic manipulation of access to the franchise by state officials, most notably the partisan aspirations of legislatures or elected secretaries of state. In practical terms, this doctrine meant that Ohio was free to alter the conduct of elections, but that the combination of a suspected constriction of voting opportunities and a lack of substantial reasons for it would be constitutionally fatal.

This new equal protection was tested and strengthened in two major 2012 cases challenging the restriction on early voting for nonmilitary voters⁶⁰ and the disqualification of provisional ballots cast at the wrong precinct as a result of pollworker error.⁶¹ In each case, the appellate court upheld lower court injunctions against Ohio’s regulatory restrictions on the ability to cast a vote. And, in each case, the court

⁵⁵ See *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011).

⁵⁶ *Bush*, 531 U.S. at 104 (emphasis added); see *Hunter*, 635 F.3d at 234; *League of Women Voters*, 548 F.3d at 477; *Stewart*, 444 F.3d at 859–60.

⁵⁷ 635 F.3d 219.

⁵⁸ *Id.* at 234 (quoting *Bush*, 531 U.S. at 105) (internal quotation marks omitted).

⁵⁹ *Id.* (quoting *Bush*, 531 U.S. at 104).

⁶⁰ See *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012), *stay denied*, 133 S. Ct. 497 (2012). Disclosure: I served as one of the lawyers for Obama for America in this litigation.

⁶¹ See *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012) (per curiam).

ruled with panels of Republican and Democratic appointees on the frequently fractious Sixth Circuit proclaiming the need to calibrate the level of equal protection scrutiny to “[t]he precise character of the state’s action and the nature of the burden on voters.”⁶² As applied in *Obama for America v. Husted*,⁶³ a case turning on eve-of-election attempts to limit early-voting access, the Sixth Circuit elaborated the new model of equal protection:

If the State merely placed “nonsevere, nondiscriminatory restrictions” on all voters, the restrictions would survive if they could be sufficiently justified. On the other hand, if the State merely classified voters disparately but placed no restrictions on their right to vote, the classification would survive if it had a rational basis. However, the State has done both; it has classified voters disparately and has burdened their right to vote. Therefore, both justifications proffered by the State must be examined to determine whether the challenged statutory scheme violates equal protection.

. . . .

Although states are permitted broad discretion in devising the election scheme that fits best with the perceived needs of the state, and there is no abstract constitutional right to vote by absentee ballot, eleventh-hour changes to remedial voting provisions that have been in effect since 2005 and have been relied on by substantial numbers of voters for the exercise of their franchise are properly considered as a burden To conclude otherwise is to ignore reality.⁶⁴

This new equal protection helps insulate the right to vote from naked efforts at partisan manipulation. Though an election law is not unconstitutional merely because it might reflect in part partisan motivations, the Supreme Court, in cases like *Crawford v. Marion County Election Board*,⁶⁵ had left open the possibility, or perhaps even suggested more strongly, that a restriction on voting whose only plausible justification was pure partisanship might well not survive constitutional scrutiny. As Justice Stevens wrote for the *Crawford* plurality: “If [partisan] considerations had provided the only justification for a photo identification requirement, we may also assume that [such a law] would suffer the same fate as the poll tax at issue in *Harper [v. Virginia State Board of Elections]*.”⁶⁶

Recent years, culminating in the 2012 presidential election, have seen a continuing evolution in the constitutional jurisprudence of the right to vote. The 2000 election raised awareness for all, including, unfortunately, partisan legislatures, of the potential outcome impact of

⁶² *Obama for Am.*, 697 F.3d at 428.

⁶³ 697 F.3d 423.

⁶⁴ *Id.* at 432, 442 (citations omitted).

⁶⁵ 553 U.S. 181 (2008).

⁶⁶ *Id.* at 203 (plurality opinion).

even small-scale alterations of electoral rules. That lesson was not lost on the courts. Most of the efforts at vote suppression in conjunction with the 2012 presidential election were thwarted, though only a few by the operation of traditional civil rights–based voting laws. Instead, a new constitutional jurisprudence is emerging from the lower courts, responding to the more overt manipulations of the ballot for partisan ends, and based on a novel form of intermediate scrutiny that tests in a serious way a legislature’s actual justifications for new regulations of the voting process. The question now is whether the new constitutional doctrines can be harnessed to an effective regulatory vehicle for voter protection.

III. THE ELECTIONS CLAUSE: AN ALTERNATIVE CONSTITUTIONAL GUARANTEE OF ELECTORAL INTEGRITY

The emergence of a new constitutional guarantee of the right to vote outside the formal strictures of the Voting Rights Act, and not resting on the historically central question of racial exclusion, raises the question whether any response to *Shelby County* can rest on a broader set of guarantees of the franchise. *Shelby County*’s focus on evidence of vote suppression invites this exact inquiry. In *Shelby County*, the Court relied heavily on the perceived mismatch between the regulatory burden and the corresponding evidentiary basis for the coverage formula of section 4 that triggers preclearance under section 5. The fact that the preclearance requirement of section 5 is based on the remedial powers of Congress under the Reconstruction Amendments proves to be a source of constitutional vulnerability rather than strength. In cases such as *Boerne*, the Court imposed a tight means-ends requirement for remedial statutes that turned on “congruence” of the remedy and the identified harm.⁶⁷ In *Shelby County*, this meant that the passage of time since the inception of the VRA’s coverage formula wore away at the remedial justification of the statutory scheme.⁶⁸ As framed in *Boerne*, “[t]he appropriateness of remedial

⁶⁷ *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (“While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.” (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966))).

⁶⁸ See *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307–08 (1964) (“This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” (alteration in original) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960))). But see *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (“[W]e reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral in-

measures must be considered in light of the evil presented.”⁶⁹ The increased emphasis on the remedial powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment places theoretical and evidentiary pressure on the state of the congressional record in enacting legislation.⁷⁰ Congress is obligated to match the claimed remedial purpose to an increasingly narrow proof of its remedial objectives.⁷¹ On this score, the Court deemed the record before Congress for the 2006 reauthorization of the trigger mechanism for section 5 coverage simply too thin to support such an intrusive legislative scheme.

However, the level of constitutional scrutiny should drop when Congress exercises powers directly granted by the Constitution rather than powers inherited pursuant to the enforcement of the Equal Protection Clause.⁷² A long line of authority establishes broad congres-

terests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” (alteration in original) (footnote omitted) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

⁶⁹ 521 U.S. at 530 (citing *Katzenbach*, 383 U.S. at 308).

⁷⁰ See Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1131–32 (2001) (arguing that Section 5 of the Fourteenth Amendment should be interpreted under the “rational relationship” test of *McCulloch v. Maryland*, not the “congruence and proportionality” test of *Boerne*); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique*, Morrison, and the Future of Federal Antidiscrimination Law, 2000 SUP. CT. REV. 109, 115 (arguing that *United States v. Morrison* transformed the congruence and proportionality test of *Boerne* “from a tool to divine whether Congress’s objectives were constitutionally proper into a limitation on the means Congress permissibly may adopt to achieve otherwise valid legislative ends”); Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 457–58 (2000) (claiming the Court’s rigid interpretation of the congruence and proportionality standard of *Boerne* has been used to increase the power of the judiciary while stifling Congress’s ability to legislate under the Fourteenth Amendment); see also *Boerne*, 521 U.S. at 508 (“Although Congress certainly can enact legislation enforcing the constitutional right to the free exercise of religion, its § 5 power ‘to enforce’ is only preventive or ‘remedial.’” (citation omitted) (quoting *Katzenbach*, 383 U.S. at 326)); *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”).

⁷¹ For example, in *Coleman v. Court of Appeals*, 132 S. Ct. 1327 (2012), the Court struck down a provision of the Family and Medical Leave Act as applied to the states. Because of the lack of proof that the failure to provide sick leave to take care of oneself was the product of animus against women, “the Court held that self-care leave did not address gender discrimination and therefore did not qualify as a legitimate abrogation of sovereign immunity under Section 5 of the Fourteenth Amendment.” *The Supreme Court, 2011 Term — Leading Cases*, 126 HARV. L. REV. 176, 317 (2012).

⁷² This is the argument that underlay the Court’s reasoning on the sweep of congressional power under the Elections Clause. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013) (finding that the exercise of congressional power under the Elections Clause “necessarily displaces some element of a pre-existing legal regime erected by the States”); see also *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932) (“In exercising this power, the Congress may supple-

sional power to enforce its “general supervisory power,”⁷³ including the power to supplant state regulations by “substitut[ing] its own.”⁷⁴ This authority has remained intact, even with the Court’s developing Eleventh Amendment jurisprudence, which carves out a protected zone for core state functions that remains relatively impervious to generalized federal regulation under the Commerce Clause.⁷⁵ Similarly, direct federal regulation is unaffected by the concern for impermissible federal commandeering of state functions presented by congressional attempts to compel state undertakings for federal programs directly.⁷⁶

In the clearest analogue, Congress in the National Voter Registration Act of 1993⁷⁷ (NVRA) required states to follow specified federal practices for voter registration. The biggest immediate effect of the NVRA was to require states to alter their driver’s license forms to provide a detachable tab for voter registration through a provision popularly known as the “motor-voter” law.⁷⁸ Although codified alongside the Voting Rights Act, the motor-voter law was based on the federal Elections Clause,⁷⁹ which provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any

ment these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It ‘has a general supervisory power over the whole subject.’” (quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)); *Ex parte Yarbrough*, 110 U.S. 651, 660–61 (1884) (stating broadly that Congress has implied authority to pass legislation supporting and enforcing enumerated constitutional rights, including rights under the Elections Clause). The discussion of *Inter Tribal Council* follows *infra* pp. 110–12.

⁷³ *Siebold*, 100 U.S. at 387.

⁷⁴ *Smiley*, 285 U.S. at 366–67; see also *Yarbrough*, 110 U.S. at 660–61; Tolson, *supra* note 33, at 1218 (“[T]he Elections Clause . . . has a decentralized organizational structure that appears to mimic federalism but in reality concentrates final policymaking authority in only one sovereign — Congress.”).

⁷⁵ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (“Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (limiting Congress’s power to abrogate state immunity via the Age Discrimination in Employment Act under the Fourteenth Amendment); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (“It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. This jurisdictional bar applies regardless of the nature of the relief sought.” (citations omitted)). See generally Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1 (discussing the historical development of the Eleventh Amendment from the time of its inception).

⁷⁶ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012); *Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992) (“Congress may not simply ‘commande[e]r’ the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” (alteration in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981))).

⁷⁷ 42 U.S.C. §§ 1973gg to 1973gg-10 (2006).

⁷⁸ *Id.* § 1973gg-3.

⁷⁹ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013).

time by Law make or alter such Regulations.”⁸⁰ Thus, the motor-voter law rooted the federal interest in the direct exercise of constitutionally prescribed powers, rather than in the remedial confines of the enforcement provisions of the Fourteenth and Fifteenth Amendments.

The Elections Clause is accordingly an affirmative grant of regulatory power to Congress for policing the states that provides a different constitutional mooring than do the equal protection norms of the Reconstruction Amendments. Altering the source of federal authority also changes the constitutional inquiry from asking about the sufficiency of the federal interest to inquiring more narrowly whether Congress did indeed exercise its authority. The motor-voter law survived all constitutional challenges, including those asserting that by forcing states to implement a federal law, including bearing the cost of the implementation, Congress was either commandeering state officials or otherwise compromising the integrity of state fiscal autonomy.⁸¹ As found by the Seventh Circuit in the leading case on point, when acting pursuant to the Elections Clause, “Congress can, as in the law fixing a uniform date for federal elections, regulate federal elections *and* force the state to bear the expense of the regulation.”⁸² In the pithy words of Judge Posner, when acting under the Elections Clause, “Congress was given the whip hand.”⁸³

Even as the Court was limiting the scope of remedial power under the Reconstruction Amendments,⁸⁴ its other major voting case of the Term set out a different measure of federal authority. In *Inter Tribal Council*, the Court struck down an attempt by Arizona to require all prospective voter registrants to provide some verification of citizenship — an unchallenged requirement for voting in Arizona state elec-

⁸⁰ U.S. CONST. art. I, § 4.

⁸¹ See, e.g., *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336–37 (4th Cir. 2012) (holding that the NVRA preempted a Virginia law that prohibited disclosure of completed voter registration applications, in spite of the possibility that revelation of personal information required on the form might discourage voter registration in some instances); *Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 837 (6th Cir. 1997) (holding that the NVRA does not violate the Tenth Amendment and is a constitutional exercise of congressional power under the Elections Clause); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1416 (9th Cir. 1995) (“Clearly, the Constitution denies to the states any power to obstruct the exercise by Congress of its power to ‘make or alter’ the ‘Times, Places and Manner’ of electing ‘Senators and Representatives,’ nor does it impose on the United States the burden, always heretofore borne by the states, of defraying the costs incurred by such alterations.”).

⁸² *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995). Among counsel for the first-named party in this case was a newly minted lawyer by the name of Barack H. Obama, a former officer of this *Law Review*.

⁸³ *Id.*

⁸⁴ In addition to *Shelby County*, the Court went even further to limit the scope of such remedial power when it held the State of Texas to a more exacting compelling interest standard for state rather than congressional remedial action. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421–22 (2013).

tions — for federal elections as well. Arizona’s claimed interest in stopping illegal aliens from voting ran headlong into a less scrutinized provision of the NVRA that requires states to use a standardized voter registration form for federal elections, distinct from the detachable tab on a driver’s license application at issue in the motor-voter cases.⁸⁵ “The NVRA requires States to provide simplified systems for registering to vote in *federal* elections”⁸⁶ including a standardized form for mail-in voter registration.⁸⁷ Under the statute, the federal form trumps absent authorization by the nearly moribund Election Assistance Commission (EAC) for a state-specific amendment to the form.⁸⁸

Writing for a seven-Justice majority, Justice Scalia gave the most expansive account to date of federal power under the Elections Clause. The opinion put the Elections Clause on a higher rung of full federal power than even the Commerce Clause, “the other enumerated power whose exercise is most likely to trench on state regulatory authority.”⁸⁹ Unlike the exercise of congressional power under the Commerce Clause, “*all* action under the Elections Clause displaces some element of a pre-existing state regulatory regime, because the text of the Clause confers the power to do exactly (and only) that.”⁹⁰

The opinion went further to contrast the specific constitutional grant of federal authority over time, place, and manner of voting in federal elections with the more generalized exercise of federal power at issue under the Supremacy Clause. Justice Scalia carefully distinguished the Court’s preemption cases as resting on a weaker grant of federal power:

There is good reason for treating Elections Clause legislation differently: The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to “make or alter” state election regulations. When Congress legislates with respect to the “Times, Places and Manner” of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States. . . . Moreover, the federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker here. Unlike the States’ “historic police powers,” the States’ role in regulating congressional elections — while weighty and worthy of

⁸⁵ See 42 U.S.C. § 1973gg-7 (2006).

⁸⁶ *Young v. Fordice*, 520 U.S. 273, 275 (1997).

⁸⁷ As summarized by the Court, “Section 1973gg-2(a)(2) of the Act requires a State to establish procedures for registering to vote in federal elections ‘by mail application pursuant to section 1973gg-4 of this title.’ Section 1973gg-4, in turn, requires States to ‘accept and use’ a standard federal registration form.” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013).

⁸⁸ *Id.* at 2252.

⁸⁹ *Id.* at 2257 n.6.

⁹⁰ *Id.*

respect — has always existed subject to the express qualification that it “terminates according to federal law.”⁹¹

While confirming the plenary authority of Congress with regard to the time, place, and manner of voting in federal elections, the opinion took pains to distinguish the powers of the states to set voter qualifications under the Elections Clause.⁹² This limitation does not necessarily change preexisting jurisprudence under the Elections Clause, but it does remove any constitutional doubt over the difference between Congress’s power in the remedial setting as compared with situations where it relies on direct constitutional authority.⁹³ Notably, the Court rejected the approach of Justice Kennedy’s concurrence, which would have allowed a balancing of congressional versus state interests in potentially limiting federal authority.⁹⁴

Nor did the majority opinion limit the ability of Congress to reach most of the major voting concerns of recent years.⁹⁵ Whether we go back to the notorious efforts of Ohio Secretary of State Kenneth Blackwell to reject voter registration forms presented on a particular bond of paper,⁹⁶ or to the voter identification battles of the 2012 elec-

⁹¹ *Id.* at 2256–57 (footnote omitted) (citations omitted) (quoting U.S. CONST. art. I, § 4, cl. 1; *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁹² *See id.* at 2253–55.

⁹³ The Court had not previously emphasized the difference in Congress’s authority in these two settings. For instance, as the Court sets out, the decision upholding Congress’s ability to mandate voter eligibility for eighteen-year-olds in *Oregon v. Mitchell*, 400 U.S. 112 (1970), rested on the Fourteenth Amendment rather than the Elections Clause. *Inter Tribal Council*, 133 S. Ct. at 2258 n.8.

⁹⁴ *Inter Tribal Council*, 133 S. Ct. at 2260 (Kennedy, J., concurring) (“There is no sound basis for the Court to rule, for the first time, that there exists a hierarchy of federal powers so that some statutes pre-empting state law must be interpreted by different rules than others, all depending upon which power Congress has exercised.”).

⁹⁵ Some of the early commentary on *Inter Tribal Council* looked to the reaffirmation of the power of the states to regulate voting qualifications as some form of Trojan horse, bearing new assaults on congressional power over voting. *See* Marty Lederman, *Pyrrhic Victory for Federal Government in Arizona Voter Registration Case?*, SCOTUSBLOG (June 17, 2013, 3:02 PM), <http://www.scotusblog.com/2013/06/pyrrhic-victory-for-federal-government-in-arizona-voter-registration-case>. I am unpersuaded by this reading of the case in light of its forceful account of the Elections Clause. *See supra* notes 89–90 and accompanying text.

⁹⁶ Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1227–28 (2005). For a more detailed description of the controversies arising from Ohio in the 2004 presidential election, *see id.* at 1220–40.

tion cycle,⁹⁷ or to the preelection alteration of early voting times,⁹⁸ the federal power under the Elections Clause is sufficiently broad to sweep all such practices under the ambit of federal regulation. Simply put, in the aftermath of *Shelby County* and *Inter Tribal Council*, it is time to rethink the basic model of federal supervision of improper state electoral practices in federal elections. Instead of the limited race-driven use of equal protection and the Fifteenth Amendment, there is untested room for expansion of congressional intervention under the Elections Clause.⁹⁹ Thus, the combination of the expanded authority of Congress under the Elections Clause and the reemergence of election-access litigation under the Constitution points to alternative statutory responses to contemporary voting controversies.

IV. A NEW ADMINISTRATIVE APPROACH TO VOTING RIGHTS

Shifting the constitutional mooring to the Elections Clause thus permits a reexamination of the regulatory framework used to combat improper manipulation of voter eligibility and the exercise of the franchise. Abstracted from the equal protection focus on discrimination, the problem in voting takes on the classic dimensions of a conflict of interest. Using the power over elections to further the aims of a subset of the population is an example of a broader problem in which agents responsible for the welfare of distant principals may be tempted to further their own objectives at the expense of the dependent group. Election officials are entrusted with administration of a system fraught with the potential for ends-oriented misbehavior, whether predicated on race, partisanship, personal gain, political favoritism, or outright corruption. The potential for corruption is certainly present anytime an official stands as the gatekeeper for desired goods. But it is the

⁹⁷ See, e.g., *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (holding that a Texas photo ID requirement was likely to have a retrogressive effect on minority voter registration and therefore was not eligible for preclearance under the Voting Rights Act); *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012) (upholding a South Carolina photo ID requirement, which had an exception for voters with any valid reason for not obtaining an ID, but denying preclearance for the 2012 elections due to insufficient time to implement the law); *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636 (Minn. 2012) (upholding language in a proposed constitutional amendment to require voters to show photo ID, although the amendment was subsequently defeated at the ballot, see Jim Ragsdale, *Voter ID Drive Rejected*, STAR TRIB. (Nov. 7, 2012, 3:02 PM), <http://www.startribune.com/177667691.html>); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012) (granting a preliminary injunction against a Pennsylvania voter ID law).

⁹⁸ *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012), *stay denied*, 133 S. Ct. 497 (2012).

⁹⁹ It is not my purpose here to engage the likelihood of such action under present conditions of partisan paralysis in Congress. My aim is simply to examine the constitutional plane after this Term's decisions and to fashion what an appropriate federal guarantee of the right to vote might look like.

combination of all the incentives for manipulation that stands out in the electoral context.

Examined in principal-agent terms, the likelihood for agency cost rises when the incentives push toward predictable aims.¹⁰⁰ The United States is unique among advanced democracies in allowing election administration by those who stand to benefit from the rules they create or enforce.¹⁰¹ American elections are typically run by elected officials or persons they appoint.¹⁰² In the dramatic Florida presidential vote in 2000, for example, the election apparatus of the state was run by Katherine Harris, the secretary of state, who also served as state co-chair of the election campaign of George W. Bush.¹⁰³ The state's chief legal officer with authority over elections was Attorney General Bob Butterworth, who was also the chair of the state election campaign of Al Gore.¹⁰⁴ Direct partisan involvement in election administration compromises process-based protections of electoral integrity.¹⁰⁵

Applying this analytic framework, section 5 can in part be understood as a response to the compromised functioning of the election apparatus in the heartland of Jim Crow. Election officials who should have been charged with oversight of an election system responsive to the broad needs of the polity were instead active participants in using their authority to maintain white supremacy. Section 5 corresponds to a strong prohibitory regulatory response combining a prohibited set of practices and a formal process of *ex ante* review of the decisionmaking of compromised public agents.

Focusing on the incentives for agent misbehavior in turn raises questions about how to deal with conflicts of interest. In general, we can identify three basic ways in which law responds to improper in-

¹⁰⁰ This is an application of the classic formulation of public choice theory in JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 3–9 (1962). *See also* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 21–33 (1991); MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 42–89 (2009).

¹⁰¹ Redistricting is the most notable area where the United States alone allows partisan actors to design the electoral rules that stand to benefit them or their political brethren. *See* Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769 (2013). For a general account of the problems created in election administration by partisan control of election administration, see Heather K. Gerken, *Getting from Here to There in Redistricting Reform*, 5 DUKE J. CONST. L. & PUB. POL'Y 1 (2010).

¹⁰² Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 127 (2009) (observing that “decentralization and partisanship remain the two dominant characteristics of American election administration” (emphasis omitted)); Saul Zipkin, Policy Essay, *Administering Election Law*, 95 MARQ. L. REV. 641, 650 (2012) (reviewing literature chronicling the consequences of partisan control of election processes).

¹⁰³ *See Behind the Bias Claims*, BBC NEWS (Nov. 14, 2000, 5:36 PM), <http://news.bbc.co.uk/2/hi/americas/1023507.stm>.

¹⁰⁴ *See id.*

¹⁰⁵ Tokaji, *supra* note 102, at 143–46.

centives created by conflicts of interests.¹⁰⁶ The most direct is ex ante rules of express prohibition, as found in the criminal law. Alternatively, it is possible to regulate substantive outcomes ex post through the use of more general liability rules whose substantive contours emerge through the case law, with the tort system being the clearest example. Finally, there are mechanisms of procedural regulation that control not so much the substance of the decisionmaking, but the ability of conflicted actors to participate. Here the clearest examples are recusal rules for judges and the prohibitions on corporate officers authorizing business contracts with firms in which they hold an interest. These process rules do not assess the substance of a judicial ruling to detect prejudice, nor do they examine the underlying contract to determine whether the transaction was prudent. Rather, they remove the conflicted actors from the realm of potential decisionmaking prophylactically.¹⁰⁷

Section 5 corresponds to an older, highly formal vision of ex ante controls on the range of permissible conduct. Under section 4 of the Act, as originally designed, certain practices were simply prohibited, such as the use of literacy tests.¹⁰⁸ Section 5 was designed to prohibit the reintroduction of the specified procedures by requiring administrative preclearance by the DOJ or the D.C. District Court prior to any new implementation. The category of prohibited conduct expanded with *Beer v. United States*¹⁰⁹ to include any “changes . . . that would lead to a retrogression in the position of racial minorities.”¹¹⁰ Professors

¹⁰⁶ For further elaboration on these typologies, see generally Samuel Issacharoff, *Legal Responses to Conflicts of Interest*, in CONFLICTS OF INTEREST 189 (Don A. Moore et al. eds., 2005).

¹⁰⁷ See *id.* at 197–200.

¹⁰⁸ Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438–39 (codified as amended at 42 U.S.C. § 1973b (2006 & Supp. V 2011)); see also Issacharoff, *supra* note 12, at 1710–12.

¹⁰⁹ 425 U.S. 130 (1976).

¹¹⁰ *Id.* at 141. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court’s interpretation of *Beer* veered away from a strict test of “retrogression” into a broader totality-of-the-circumstances analysis. *Id.* at 479–80. For more on *Ashcroft*, and its relation to *Beer*, see Meghann E. Donahue, Note, “*The Reports of My Death Are Greatly Exaggerated*”: Administering Section 5 of the Voting Rights Act After *Georgia v. Ashcroft*, 104 COLUM. L. REV. 1651, 1685 (2004) (arguing that existing decisions provide a workable framework under which *Ashcroft* could be implemented by section 5 administrators in the future); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 35–36 (2004) (arguing that in *Ashcroft* “the Court transformed section 5 into a victim of its own success,” *id.* at 36 by interpreting the retrogression standard of *Beer* to require nothing more than “good faith” from legislators, rather than substantial analysis of the effect that proposed changes to legislation would have on minorities’ ability to elect the candidates of their choice); and Michael J. Pitts, *Georgia v. Ashcroft: It’s the End of Section 5 as We Know It (and I Feel Fine)*, 32 PEPP. L. REV. 265, 284–90 (2005) (arguing that *Ashcroft* harmonizes the Court’s interpretation of section 5 of the VRA with the limits on congressional enforcement power enumerated since *Boerne*, making it more likely that section 5 will withstand future constitutional review); see also Nathaniel Persily, *The Promises and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 234–45 (2007) (describing and analyzing the

Guy-Uriel Charles and Luis Fuentes-Rohwer captured this well when they wrote: “Under this model, Congress identifies both violators and violations. More specifically, it deploys positive law and uses the courts to closely monitor violators and prevent or remedy violations. . . . This is the world within which section 5 currently operates and the world that some voting rights activists are trying to preserve.”¹¹¹

As time wore on, the regulatory mechanism appeared increasingly removed from the perceived harm, as manifested by the vanishingly small number of submissions that actually elicited any form of administrative objection from the DOJ.¹¹² There is no necessary reason that civil rights enforcement needs to take this particular command-and-control form of *ex ante* prohibitions, although the tendency is clearly in that direction.¹¹³ Perhaps the weight of the prohibitions on intentional discrimination push the field in that direction, or perhaps, as noted by the Court when it first upheld the Voting Rights Act, the gravity of the concerns requires that the benefits of “time and inertia” be shifted against potential wrongdoing.¹¹⁴ In order to do so, the commands of

amended version of section 5 passed by Congress in 2006, which was intended to return to the *Beer* standard of retrogression, but left substantial questions unanswered). For a broader discussion of *Beer* and cases following it, see generally ISSACHAROFF, KARLAN & PILDES, *supra* note 4, at 546–57.

¹¹¹ Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131, 132 (2013).

¹¹² There were seventy-three such objections in the period between January of 2000 and December of 2012 and none in the first half of 2013, or a mean of 5.4 per year (ranging from a high of twenty objections in 2002 to a low of one in 2005). See *Voting Rights Act: Objections and Observers*, LAW COMMITTEE FOR C.R. UNDER L., http://www.lawyerscommittee.org/projects/section_5 (last visited Sept. 29, 2013). To be fair, one can never gauge from conduct under legal constraint what the conduct would be absent such constraints. Fear of being ticketed does keep speeders in check (imperfectly) and relatively orderly traffic patterns do not counsel abandoning police enforcement. At the time of the 2006 extension of the VRA, proponents of the Act ferreted out the statistics about requests for additional information from the DOJ. See Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 419 (2008); Persily, *supra* note 110, at 200. Presumably, this attendant vigilance is a stand-in both for the ongoing deterrent effect of section 5 and for the eagerness to misbehave on behalf of the covered jurisdictions. Further, the existence of section 5, and the possible threat of a DOJ objection, do give minority groups additional leverage in negotiations, which may in turn depress intended or unintended maltreatment of minority voters. Pamela S. Karlan, *The Reconstruction of Voting Rights, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS* 34, 43–44 (Guy-Uriel E. Charles et al. eds., 2011); cf. Justin Levitt, *Section 5 as Simulacram*, 123 YALE L.J. ONLINE 151, 164 & n.47 (2013) (observing that a vast majority of objections lodged by the DOJ under section 5 concerned changes at the county, municipal, school board, or special district level, protecting smaller jurisdictions with fewer resources for large-scale responsive litigation).

¹¹³ A partial exception may be found in the domain of sexual harassment law and some areas of employment discrimination cases under Title VII. Here an *ex post* assessment of the employer’s internal policies and procedures can utilize liability rules to cabin improper conduct. See CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* 83–88 (2010).

¹¹⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

section 5 had to be clear and static, a fixed rule trying to hold back the subtle changes of politics. Outside the domain of civil rights law, it is hard to come up with a similar regulatory regime that is premised on a fifty-year-old trigger formula that operates by presuming against all change. The problem ultimately is a “static regulatory structure” unable easily to account for changed circumstances; the fact remains, “electoral politics is nothing if not dynamic.”¹¹⁵ Indeed, the account in *Shelby County* of the effect of the different historical circumstances does introduce some attention to the form of the regulatory model,¹¹⁶ even leaving aside the question of the fit of a coverage formula triggered by events a half century ago.

Shelby County compels a reexamination of the administration of electoral protections. One reading of the Court’s opinion is that the race discrimination structure of section 5 could not be justified in light of the increasing distance between the prohibitions and the distinct practices of racial exclusion that lie at the heart of the Voting Rights Act. Part of the problem is the Court’s intuition that race and politics are intertwined in a way that makes Ohio as likely a site of election manipulation affecting minority voters as Mississippi, if not more so. The Voting Rights Act’s focus on the states of the former Confederacy was always an imperfect proxy for both racial exclusion and improper election administration — but for much of its history the VRA was close enough for comfort. Unfortunately, in the absence of broader protections for the right to vote, claims of improper conduct had to be channeled into the “suffocating category of race,” as I have argued in other election-related contexts.¹¹⁷ As the race discrimination nexus becomes more attenuated, the constitutional mooring erodes.

If the *ex ante* race discrimination model cannot survive after *Shelby County*, what alternatives are available? The most attractive alternative would be to take election administration away from any connection to politics, using a process-based approach to remove improper agent incentives. Indeed, insulating election administration from potential misuse stands at the heart of the “procedural guarantees” in the Code of Good Practice in Electoral Matters developed by the European Commission for Democracy Through Law.¹¹⁸ The Commission requires that “[a]n impartial body . . . be in charge of ap-

¹¹⁵ Charles & Fuentes-Rohwer, *supra* note 111, at 132.

¹¹⁶ See *Shelby Cnty.*, 133 S. Ct. at 2624–27.

¹¹⁷ Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630–31 (2002).

¹¹⁸ The “Venice Commission,” as it is known, oversees European interests in rooting democracy in Eastern Europe. EUROPEAN COMM’N FOR DEMOCRACY THROUGH LAW, CODE OF GOOD PRACTICE IN ELECTORAL MATTERS: GUIDELINES AND EXPLANATORY REPORT (2002), available at <http://www.venice.coe.int/webforms/documents/CDL-AD%282002%29023rev.aspx>.

plying electoral law,” that independence be guaranteed at all levels of election administration, and that the administration of elections be overseen by a permanently staffed central electoral commission.¹¹⁹ All these measures are designed to promote the “administrative authorities’ independence from those holding political power.”¹²⁰

Perhaps alone among mature democracies, the United States resists this move toward administrative independence. There is a peculiar American fixation with maintaining direct popular control of state officials through elections, extending even to a unique use of elections for state court judges in about half of the states. The United States has more positions subject to popular election than any other democracy,¹²¹ and there appears to be a reluctance to take matters from the political arena and entrust them to administrative control. Somehow, the fear that administrators will not be truly independent or will be prone to capture leads to a notable preference for first-order political control, even over the administration of politics itself.¹²² Once entrusted to the domain of politics, the door rarely swings back toward relatively more neutral administration.

A new administrative approach to the problem of election manipulation must therefore be considered in the context of the closure of two regulatory pathways. *Shelby County* removes the VRA’s ex ante prohibition from the agenda, and the American distrust of expertise limits the ability to move administration to nonpartisan hands. This leaves a liability-based ex post regime as a potential alternative form of regulation. Instead of the command-and-control efforts to anticipate and prohibit all deleterious changes, as existed under section 5 of the VRA, one could look at regulations that might prove superior to section 5 along two critical dimensions. First, after-the-fact enforcement may be more surgically efficient than the preclearance regime in a way, as suggested by the trifling number of objections currently yielded by the system. And a liability regime, by being more efficient, can be applied broadly, thereby reaching beyond the problematic geographical confines of section 5 and its attachment to a trigger largely produced by 1964 voting results.¹²³

¹¹⁹ *Id.* at 10.

¹²⁰ *Id.*

¹²¹ ISSACHAROFF, KARLAN & PILDES, *supra* note 4, at 120 (“[T]he United States has more elections for more levels of government with more elective offices at each level than any other country in the world.”).

¹²² See Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 78–80 (2004) (observing this phenomenon in the context of the reluctance to adopt redistricting commissions as has every other democracy with territorial electoral districts).

¹²³ There has never been a serious proposal for extending the coverage of section 5 nationwide, largely as a result of the administrative burden and the likely inability of the DOJ to handle such

The object would be to devise a less costly and less intrusive form of regulation, and one that could be implemented nationwide. As a general matter, fixed rules attempting to govern conduct anticipatorily are more generic than flexible standards that can be tailored to specific circumstances on an adjudicated basis.¹²⁴ This is a specific application of the familiar distinction between regulation by rules versus standards.¹²⁵ Here the question is whether there are gains that can be realized by relaxing the regulatory framework in favor of litigated enforcement by private or public actors. In the world of voting rights, this issue can be illustrated in the difference between the limited non-retrogression mandate of section 5 and the broader nondilution of minority voting strength under the less specific liability rules of section 2 of the Voting Rights Act.¹²⁶

Liability is generally superior to ex ante regulation where harms do not fall into predictable patterns and will typically be more efficient where private parties have equal or superior knowledge about costs and risks as compared to third party regulators.¹²⁷ By contrast, regulation will be more effective when there is a risk that actors will *not* internalize all costs, as when enforcement by private actors will be unlikely.¹²⁸ Much regulatory policy turns on the effort to anticipate and

a burden. The only serious suggestion for nationwide coverage comes in Heather K. Gerken, Essay, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708 (2006), although the proposed “opt-in” feature of coverage would significantly alter the scope of the Act. Extending section 5 nationwide would resolve the Court’s concern in *Shelby County* about the stigmatic differential treatment of some states, but it would not resolve the rationality of the means-ends fit.

¹²⁴ See Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 378–80 (2007).

¹²⁵ See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

¹²⁶ Examples of cases in which state conduct that was previously precleared was subsequently struck down under section 2 of the Voting Rights Act include: *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (holding a Texas congressional redistricting plan violated section 2 of the VRA by moving many Latino voters to one “opportunity district,” diluting the number of Latinos remaining, even though it maintained the same number of opportunity districts statewide); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (holding that the use of multimember districts for legislative apportionment in North Carolina violated the Voting Rights Act); *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006) (striking down a South Dakota redistricting plan on the grounds that it discriminated against Indian voters in two districts covered by section 5); *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996) (striking down a Mississippi redistricting plan); and *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (striking down a Louisiana redistricting law).

¹²⁷ See Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 359 (1984). The basic division between liability rules and categorical rules derives from the work on property found in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹²⁸ See Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 719 (1996).

prohibit illegal behavior, or to retain the flexibility of a liability regime, or both.¹²⁹

Overwhelmingly this critical approach to the use of after-the-fact liability rules instead of ex ante fixed regulation has been developed in the domain of the relation between administrative action and tort liability or property protection. These are the classic points of intersection between the modern administrative state and the operation of traditional common law principles. By contrast, scant attention has been directed at the tradeoffs in the domain of public law, an area where the question is not one of administrative versus common law enforcement. Public law enforcement does not yield an easy cost-benefit calculus of the sort that has driven the economic analyses of private law enforcement.

But this does not mean that such an examination of the potential benefits of an ex post liability regime should not be undertaken in the domain of election law protections. A new liability approach could take as its point of departure the combination of expansive federal power under the Elections Clause, the increasing mismatch between the narrow civil rights model and the nature of contemporary threats to the right to vote, and the lack of fit between election flare-ups in battleground or contested jurisdictions and a geographically bound domain based centrally on electoral activity in 1964.

Specifically, the easiest place to start is by compelling states to disclose alterations of voting rules or practices, as they will affect the conduct of federal elections. Disclosure regimes are an attractive form of regulation because they do not compel a preordained outcome and they do not stand as a presumptive barrier to innovation. The key to a disclosure regime is not simply the transparency of the information provided, but its utility in promoting follow-on enforcement. Of its own force, disclosure is like the useless warnings on consumer products alerting us to the risk of hitting our finger with a hammer or falling off the top rung of a ladder.¹³⁰ Rather, the object must be the use of disclosure to increase the exposure of potential misconduct and to incentivize deterrence. A task force from the Treasury Department recently spearheaded the federal government's efforts to harness what is

¹²⁹ See, e.g., Charles D. Kolstad et al., *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888, 888 (1990) ("One of the most noticeable features of current policy dealing with externality-generating activities in a wide number of areas is that *ex ante* and *ex post* policies are very frequently used jointly."); Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 N.Y.U. J. INT'L L. & POL. 931, 932 (2003) (arguing that regulators and ex post court assessments both respond to the problem of gaps in laws that are necessarily "incomplete" as promulgated).

¹³⁰ See generally ARCHON FUNG ET AL., *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007). For effective use of disclosure to redirect consumer conduct, see generally OREN BAR-GILL, *SEDUCTION BY CONTRACT* (2012).

termed “smart disclosure” to allow informed consumer oversight. Among the recommendations of the task force were computer-readable bills that consumers could use to shop their various insurance and consumer contracts to competitors.¹³¹

Let me conclude by offering a proposal that draws together congressional authority under the Elections Clause with the insights from smart disclosure, which recommend giving information to the affected population in a form that permits informed decisionmaking or after-the-fact enforcement.¹³² The regulation of securities markets by the Securities and Exchange Commission (SEC) provides an alternative model based on administrative reporting in a fashion that facilitates both private and public enforcement. Securities offerings have to be registered with the SEC, not preapproved. Congress could command that for all federal elections there be a reporting of all changes made to election practice within a fixed period of any federal election to a federal agency such as the Federal Election Commission or the Department of Justice (or even the woe-begotten Election Assistance Commission).¹³³ Such disclosure would have to identify the changed practice and the reason for the change. The disclosure could further require a “voting impact statement,” borrowed from the environmental impact requirements under the National Environmental Policy Act of 1969.¹³⁴ The impact statement need not be elaborate, only a statement of the likely anticipated effect on access to the ballot and any known anticipated impact on minority voters in particular. To this could be added an important regulatory innovation of Dodd-Frank: the requirement that a responsible official sign under oath that the submitted information is true.¹³⁵ Finally, the receiving federal agency

¹³¹ See NAT’L SCI. & TECH. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, SMART DISCLOSURE AND CONSUMER DECISION MAKING: REPORT OF THE TASK FORCE ON SMART DISCLOSURE 7 (2013), available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf. For my own contribution to this literature, see Samuel Issacharoff, *Disclosure, Agents, and Consumer Protection*, 167 J. INSTITUTIONAL & THEORETICAL ECON. 56 (2011).

¹³² I presented a rudimentary precursor to this proposal to Congress at the time of the reauthorization of section 5 in 2006. See *Testimony of Professor Samuel Issacharoff, NYU School of Law, on the Reauthorization of Section 5 of the Voting Rights Act*, 5 ELECTION L.J. 326 (2006); cf.

Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 744, 756 (2006) (arguing, on the eve of the 2006 VRA renewal, for the need for non-civil rights-modeled protections of the franchise).

¹³³ The powers of the Election Assistance Commission under the NVRA was the narrow question at issue in *Inter Tribal Council* where the Court noted that the EAC is completely dysfunctional and there is not a single active commissioner at present. 133 S. Ct. at 2260 n.10.

¹³⁴ 42 U.S.C. § 4332(C) (2006).

¹³⁵ See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5361(a)(1) (2012).

would be charged with immediate Internet posting of the relevant submissions.

The disclosure would then set the template for either DOJ challenge or private party challenge, with the disclosure serving as the *prima facie* evidentiary basis. This result both facilitates prosecution and review, and forces transparency and accountability on administrative conduct prompted by partisan or other malevolent objectives.

The changes from section 5 are significant. First, the new approach would not be geographically confined and would not be limited to specified practices, or even to a narrow retrogression standard. As such, new congressional enactments could be directed to the broader issues presented in recent cases, such as the Ohio presidential ballot litigation. Second, the burden would be limited to the electronic transmission of information by election administrators who would be required to submit only a short account of what they are actually doing. There would be no preclearance in the section 5 sense; all changes could be implemented immediately subject to subsequent challenge and potential court injunction. Finally, the combined effect would be to lessen the litigation burden on those challenging suspected official misconduct. The critical work of spotting changes would be greatly simplified and the burdensome discovery task of establishing the state justification for conduct would be eliminated. Forcing disclosure would thereby facilitate statutory or constitutional challenges to state actions on the grounds that the stated official reasons for voting restrictions were pretextual or that there was insufficient correspondence between the stated aims and the means selected — either of which could be effectively scrutinized even under a rational relations standard of review.¹³⁶ Perhaps most significantly, like the SEC approach,

¹³⁶ Even before the current Term, the Court has used a stricter rational relations review to hold statutes unconstitutional under the Equal Protection Clause and the Due Process Clause. *Lawrence v. Texas*, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring in the judgment) (“Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”); *see also Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (striking down on equal protection grounds an amendment to the Constitution of Colorado that “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians,” *id.* at 624); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447–50 (1985) (holding that a municipal zoning ordinance requiring special use permits for homes for the intellectually disabled violated the Equal Protection Clause); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (declaring a federal statutory provision that barred persons living in households containing one or more unrelated members from participating in the federal food stamp program to be invalid under the Due Process Clause of the Fifth Amendment).

this disclosure plus ex post challenge regime allows both private and public enforcement.¹³⁷

While the proposed regulatory approach is designed to facilitate litigation of the form seen in the 2012 election cycle, the proposal (as well as *Shelby County*) leaves unaffected section 2 of the Voting Rights Act¹³⁸ and § 1983 suits claiming intentional discrimination violative of the Fourteenth and Fifteenth Amendments.¹³⁹ Nonetheless, the proposed approach should facilitate discrimination claims by compelling state authorities to precommit to the purposes of new election rules. It is of course possible that manipulations of voting rules at the local level in nonpresidential or nonfederal election cycles will pass under the radar, leaving some groups vulnerable in the absence of a firm regulatory regime, such as preclearance. The claim is not to comprehensive perfection, but to a regulatory approach that captures more of the contemporary issues than one designed in 1965.

A new regulatory environment leaves open the question whether if you build it, will they indeed come? In the securities context, the clear gains from securities fraud litigation make broad-scale private enforcement an attractive enterprise for private lawyers.¹⁴⁰ The same financial incentives are not present in the confines of public law. Even the prospect of recovering an attorneys' fees lodestar under the federal fee-shifting statutes cannot compensate for the risks associated with this kind of contingency litigation.¹⁴¹ But politics is a distinct domain that does not correspond to the narrower monetary incentives of the financial markets.¹⁴²

¹³⁷ There is a private right of action to compel submission of plans to the DOJ but not to challenge the outcome of administrative preclearance under section 5. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969) (“[A]ppellants may seek a declaratory judgment that a new state enactment is governed by § 5. Further, after proving that the State has failed to submit the covered enactment for § 5 approval, the private party has standing to obtain an injunction against further enforcement, pending the State’s submission of the legislation pursuant to § 5.”).

¹³⁸ Chief Justice Roberts makes this point expressly. *Shelby Cnty.*, 133 S. Ct. at 2619.

¹³⁹ Section 1983 provides a private right of action to any party who is deprived of constitutional or other civil rights by any person acting “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.” 42 U.S.C. § 1983 (2006).

¹⁴⁰ Private enforcement is estimated to result in approximately twenty percent more recoveries for securities fraud than those obtained by the SEC or DOJ directly. See Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 *YALE J. ON REG.* 253, 280 (2007).

¹⁴¹ The Supreme Court has rejected any effort to build into 42 U.S.C. § 1988 any enhancements or multipliers based on contingency risk, see *City of Burlington v. Dague*, 505 U.S. 557, 561–63, 567 (1992), or extraordinary public-serving results in litigation brought under 42 U.S.C. § 1983 or equivalent civil rights statutes, see *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1674 (2010).

¹⁴² For example, nonstate actors have come to play a central role in redistricting litigation, see generally Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 *B.U. L. REV.* 563 (2013), even though financial incentives are more remote than in litigation over economic harms, such as securities litigation.

The 2012 election cycle offers reason for optimism. Without the benefit of any favorable disclosure regime, the fact remains that the implementation of nearly all proposed restrictions on voting access were defeated in litigation prior to the 2012 election.¹⁴³ Instead, in state after state, litigation was undertaken by public interest organizations, opposition political parties, and local activists.¹⁴⁴ A strategy aimed at relieving the litigation burden on after-the-fact challenges

¹⁴³ See *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012) (upholding South Carolina photo ID requirement, which had an exception for voters with a valid reason for not obtaining an ID, for future elections (but not the 2012 election, since there was insufficient time to implement the law)); *Texas v. Holder*, 888 F. Supp. 2d 113, 143–44 (D.D.C. 2012) (denying preclearance to Texas photo ID requirement, since it was likely to have a retrogressive effect on minority voter registration); *Florida v. United States*, 885 F. Supp. 2d 299, 303, 357 (D.D.C. 2012) (denying preclearance to Florida law reducing the number of early voting days and hours, while upholding new provision preventing voters who have recently moved between counties from changing their legal address at polling places and restricting such voters to casting a provisional ballot subject to review by county election officials); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1157–58 (N.D. Fla. 2012) (granting preliminary injunction against Florida’s enforcement of several restrictions on voter-registration drives, including deadlines, reporting, and recordkeeping requirements for organizations conducting such drives); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211, at *8 (Pa. Commw. Ct. Oct. 2, 2012) (granting a preliminary injunction against a Pennsylvania voter ID law); *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Ct. Mar. 12, 2012) (issuing a permanent injunction barring enforcement of Wisconsin voter photo ID law); *Milwaukee Branch of the NAACP v. Walker*, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6, 2012) (granting temporary injunction barring enforcement of Wisconsin voter photo ID law). *But see* *Voting for Am., Inc. v. Andrade*, 488 F. App’x 890, 904 (5th Cir. 2012) (granting emergency motion to stay the district court’s injunction against enforcement of Texas laws regulating third-party voter registration); *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 651 (Minn. 2012) (denying petition seeking to strike from 2012 election ballot a proposed constitutional amendment that would require voters to show photo ID). For a review of restrictive voting laws passed and challenged in 2012, see WEISER & NORDEN, *supra* note 46, at 9–10, detailing and analyzing voting legislation passed in 2012. For a detailed study of South Carolina’s (ultimately successful) struggle to preclear its voter photo ID act, see Tamasitis, *supra* note 44. John Tamasitis juxtaposes the South Carolina act with other voter ID restrictions passed in the 2012 election cycle to argue that section 5 of the Voting Rights Act is no longer a congruent exercise of congressional power under the Fifteenth Amendment. *See id.* at 991–93. His survey of 2012 voter ID laws is also relevant here. Tamasitis observes that of the seventeen states that had enacted legislation as of 2012 requiring a form of photo ID to be presented at the polls, South Carolina, Texas, Mississippi, Alabama, Wisconsin, and Pennsylvania were unable to implement their laws before the 2012 election. Of those states, South Carolina, Texas, Mississippi, and Alabama are covered under the VRA and therefore required to receive preclearance. *See id.* at 963–64.

¹⁴⁴ In an important new paper, Charles and Fuentes-Rohwer point to the maturation of what they term “third-party groups” (TPGs) as a major development in the world of voting rights protection. These TPGs were exceedingly limited in 1965 and could not possibly contest the resilience of voting discrimination. *See* Charles & Fuentes-Rohwer, *supra* note 111, at 133, 142–48. As succinctly stated by Jack Greenberg, the successor to Thurgood Marshall as Director-Counsel of the NAACP Legal Defense & Education Fund: “For most of this century, the NAACP was the only civil rights organization that made a difference.” JACK GREENBERG, *CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT* 15 (2004). By contrast, Charles and Fuentes-Rohwer point in particular to the success of TPGs in Arizona in defeating efforts to restrict the franchise. Charles & Fuentes-Rohwer, *supra* note 111, at 144–45.

should not only ease the burden on private enforcement but might create a corresponding deterrent effect on wayward public officials.¹⁴⁵

CONCLUSION

Despite the sunset provision of section 5 of the VRA, laws, once instituted, resist change. Justice Scalia caustically commented at oral argument that racial entitlements, once vested, are difficult to dislodge through the normal operation of the political process.¹⁴⁶ Justice Scalia is wrong to associate this phenomenon specifically with issues of race. Once interests become vested, the historic division between gainers and losers under a law creates a natural constituency for the gain,¹⁴⁷ and the required affirmative act of reauthorization cannot overcome the inertial tendencies for the status quo to remain in force. It may be that no one starting from scratch at the time of the last reauthorization of section 5 in 2006 would have drafted a law so cumbersome. Who would have started from turnout in the 1964 presidential election when structuring a regulatory regime? Or who would have thought of areas of the country with troublesome histories of improprieties in voting administration and not included Ohio? Only path dependence can explain the precise form of section 5 as authorized in 2006, despite many heroic efforts to create post hoc justification explaining why the South is still basically different.¹⁴⁸

The combination of *Shelby County* and *Inter Tribal Council* provides an opportunity to overcome political stasis and perhaps devise a more effective regulatory regime to protect the franchise. The object

¹⁴⁵ Public litigation does not correspond to all the customary incentive structures operating on private actors. Partisan officials may well take short-term measures to stay in office, even at the risk of later sanctions, which would be borne by the successors in office anyway. At the same time, public officials tend to aspire to higher office and may not wish to be personally associated with unlawful conduct. Both former Governor Bob Taft and current Senator Sherrod Brown were first elected to Ohio statewide office as Secretary of State.

¹⁴⁶ Transcript of Oral Argument at 47, *Shelby Cnty.*, 133 S. Ct. 2612 (2013) (No. 12-96).

¹⁴⁷ This is particularly the case if gains are concentrated in an active minority and losses are diffuse and of little immediate consequence to the majority. See MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION* 53–60 (1965).

¹⁴⁸ Writing for the three-judge court below, Judge Tatel gave a powerful summary of the evidence that had been marshaled by advocates in the case and various amici and academics. *Shelby County v. Holder*, 679 F.3d 848, 865–72 (D.C. Cir. 2012). All to little avail. Subsequently, an interesting study of Google search terms presented a worrisome and at times menacing picture of a persistent regional prevalence for out-and-out racism, which is not easily ignored. Seth Stephens-Davidowitz, *The Cost of Racial Animus on a Black Presidential Candidate: Using Google Search Data to Find What Surveys Miss* 2–3 (Mar. 24, 2013) (unpublished manuscript), available at <http://www.people.fas.harvard.edu/~sstephen/papers/RacialAnimusAndVotingSethStephensDavidowitz.pdf>; see also Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping*, 102 CALIF. L. REV. (forthcoming 2014) (manuscript at 16–37), available at <http://ssrn.com/abstract=2262954> (suggesting methodological tests for ascertaining the extent of discrimination by nonminority voters).

is not to park section 5 over a more robust constitutional mooring¹⁴⁹ but to devise a way of stopping ends-oriented manipulation of the voting process to the disadvantage of those not holding incumbent political power.

¹⁴⁹ An amicus brief filed on behalf of a number of constitutional law professors correctly anticipated the likely outcome in *Shelby County* and *Inter Tribal Council* and advocated using the Elections Clause to limit a facial challenge to section 5. See Brief of Gabriel Chin et al. as *Amici Curiae* in Support of Respondents at 13, *Shelby Cnty.*, 133 S. Ct. 2612 (2013) (No. 12-96) (“This Court has long acknowledged the importance of Congress’ Elections Clause power, and consequently provided Congress broad leeway to exercise it. It is up to Congress, finally, to determine when state laws concerning federal elections should be modified.”).