BALLOT BEDLAM

SAMUEL ISSACHAROFF†

ABSTRACT

In both law and public scrutiny, renewed attention is being given to the simple act of casting a ballot. At a time when the formal act of voting has been relaxed, and more than a third of Americans cast their ballots in a manner other than voting at the polls on Election Day, there is a decided pushback. In some sense this is hardly novel; questions of ballot integrity and ballot access have been recurring issues in the United States from Reconstruction to the Civil Rights Era. In both of these previous eras, enfranchisement and disenfranchisement had a partisan edge, but were understood to be battles over the black franchise—and properly so. Whether that remains the case is the subject of this Article.

The inquiry begins with the partisan implications of turnout and focuses primarily on the partisan dimension of new efforts at ballot restriction. This Article contends that although issues of the franchise correlate with race, as does the partisan divide between Democrats and Republicans, the new battles over ballot access do not readily lend themselves to a narrative that focuses primarily on racial exclusion. Rather, they point to a deep vulnerability of American democracy in entrusting election administration and election eligibility to local partisan control.

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† Reiss Professor of Constitutional Law, New York University School of Law. This Article was first presented as the 2014 Currie Lecture at Duke Law School. My thanks to Dean David Levi and the Duke faculty for their gracious hospitality and constructive engagement on this topic. I am indebted to the research assistance of Thad Eagles, Dohee Min, and Alec Webley.

INTRODUCTION

Every four years, election coverage focuses heavily on an elusive band of Americans thought to inhabit remote parts of the country. This mysterious group is usually termed the "undecided voters" (or occasionally the "independent voters"), whose lack of partisan affiliation and firm convictions is deemed to forecast how the oscillating center of the American political spectrum is going to tip the election. This otherwise unknown and unseen group then gathers briefly in its preferred habitat: the tightly orchestrated focus-group room of a television network. Some Americans, looking for a break from campaign attack advertisements, actually watch the deliberations of the uncertain, indulging themselves with only an occasional snicker, while thinking, "who are these people?" Even for those who want to see how people on the eve of a presidential election could in fact remain undecided, what remains unaddressed is whether the preferences of this small vacillating group are actually going to decide the election.

An alternative hypothesis would have it that this group of undecideds is not only hard to find in the real world, but also not a meaningful barometer for election forecasting. Instead, it may be that elections are not won and lost primarily in the minds of this elusive group of the undecided, but instead, following the political wisdom of Woody Allen, that 80 percent of success is just showing up.[1] On this view, the bulk of the electorate has reasonably fixed political preferences that are unlikely to shift in the waning hours of the never-ending election cycle. Consider that President Barack Obama won handily in 2008 and 2012 with more than half of the popular vote and well in excess of 60 percent of the Electoral College vote.[2] Yet in

1. *See* Lynn Vavreck, *The Myth of Swing Voters in Midterm Elections*, N.Y. TIMES (Apr. 22, 2014), http://www.nytimes.com/2014/04/23/upshot/the-myth-of-swing-voters-in-midterm-elections.html (defending this thesis). For citation to the Woody Allen quote, see Garson O'Toole, *Showing Up Is 80 Percent of Life*, QUOTE INVESTIGATOR (June 10, 2013), http://quoteinvestigator.com/2013/06/10/showing-up (discussing myriad potential sources and attributions for the quote typically attributed to Woody Allen).

2. *See Presidential Election Popular Votes 1940–2012*, ROPER CTR. PUB. OP. ARCHIVES, http://www.ropercenter.uconn.edu/elections/common/pop_vote.html (last visited Mar. 10, 2015)

2010, the Republicans won more than half of the national popular vote and swept the table, gaining control of the U.S. House of Representatives.[3] Following the story of the undecided voters would indicate that they swung heavily to Obama in 2008, to the Republicans in 2010, and then back to Obama in 2012—a rather extraordinary account of political mass migrations.

Although it is possible that such massive shifts took place, a simpler account is provided by examining the correlation between turnout and partisan success:

(Obama popular-vote totals); *2008 Electoral College Results*, U.S. ARCHIVES, http://www.archives.gov/federal-register/electoral-college/2008/election-results.html (last visited Mar. 10, 2015) (Obama 2008 Electoral College vote and popular-vote totals; percentages calculated by author); *2012 Electoral College Results*, U.S. ARCHIVES, http://www.archives.gov/federal-register/electoral-college/2012/election-results.html (last visited Mar. 10, 2015) (Obama 2012 Electoral College vote and popular-vote totals; percentages calculated by author).

3. KAREN L. HAAS, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 2, 2010, at 57–60 (June 3, 2011), *available at* http://clerk.house.gov/member_info/electionInfo/2010election.pdf.

Table 1. Voter Turnout and Partisan Success[4]

Year	Turnout (as % of citizens)	Senate Seats Gained by Successful Party	House Seats Gained by Successful Party	Successful Party
2008[5]	63.6%	8	24	Democrats
2010[6]	45%	6	64	Republicans
2012[7]	61.8%	2	8	Democrats

The simpler account is that Democrats seem to do better when voter turnout is higher, and worse when turnout is lower. Certainly there is an interactive effect such that the correlation does not establish causation, but even the simple correlation presented in Table 1 is noteworthy, and not just to the casual observer. In 2012, commentators and campaigns alike operated under the assumption that if the electorate were the same as in 2008, President Obama

4. "Successful party" is defined as the party that gained seats in that election. *See Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964 to 2012*, U.S. CENSUS BUREAU, A1 (Feb. 2012), http://www.census.gov/hhes/www/socdemo/voting/publications/historical/index.html (turnout data pulled from spreadsheet); *Election Results*, FED. ELECTION COMM'N, http://www.fec.gov/pubrec/electionresults.shtml (last visited Mar. 10, 2015) (election results for House and Senate).

5. *Compare* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 3 (2009) [hereinafter FEDERAL ELECTIONS 2008], *available at* http://www.fec.gov/pubrec/fe2008/federalelections2008.pdf (reporting that after the 2008 general election, fifty-seven Democrats would serve in the Senate and 257 in the House), *with* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2006: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 3 (2007) [hereinafter FEDERAL ELECTIONS 2006], *available at* http://www.fec.gov/pubrec/fe2006/federalelections2006.pdf (reporting that after the 2006 general election, forty-nine Democrats would serve in the Senate and 233 in the House).

6. *Compare* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2010: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 3 (2011) [hereinafter FEDERAL ELECTIONS 2010], *available at* http://www.fec.gov/pubrec/fe2010/federalelections2010.pdf (reporting that after the 2010 general election, forty-seven Republicans would serve in the Senate and 242 in the House), *with* FEDERAL ELECTIONS 2008, *supra* note 5, at 3 (reporting that after the 2008 general election, forty-one Republicans would serve in the Senate and 178 in the House).

7. *Compare* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 3 (2013) [hereinafter FEDERAL ELECTIONS 2012], *available at* http://www.fec.gov/pubrec/fe2012/federalelections2012.pdf (reporting that after the 2012 general election, fifty-three Democrats would serve in the Senate and 201 in the House), *with* FEDERAL ELECTIONS 2010, *supra* note 6, at 3 (reporting that after the 2010 general election, fifty-one Democrats would serve in the Senate and 193 in the House).

would be reelected, and if it were the same as in 2010, he would be defeated by Mitt Romney.[8]

Understood against the measure of turnout, the well-publicized meltdown of Karl Rove on national television in response to Obama's 2012 win in Ohio was no send-up.[9] Republicans genuinely believed they would win—not on the basis of poll numbers disputing the prediction of the invariably accurate Nate Silver, but on the basis of turnout projections that substantially underestimated the effectiveness of the electoral machinery that Obama for America had spent years honing.[10] In many ways, this was simply a variant of the Democratic incredulity that Republicans could win Ohio in 2004 based on a similar lack of insight into how Republican electoral-machine advances could produce a stunning turnout in Southern Ohio. Both campaigns understood the centrality of turnout in electoral battles, and there was a bit of technological leapfrogging as their campaigns adapted to the changing electoral landscape.

The changed electoral landscape exists across three different dimensions. Each is a topic unto itself, but I will only posit them here

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8. *See, e.g.*, JONATHAN ALTER, THE CENTER HOLDS: OBAMA AND HIS ENEMIES 4 (2013) ("Only 80 million Americans voted in 2010, compared to 130 million in 2008 . . . . Where were those missing 50 million voters? They would have to be lured back to the polls if Obama was to have any chance of re-election."); Ronald Brownstein, *Republicans Can't Win with White Voters Alone*, THE ATLANTIC, (Sept. 7, 2013, 8:00 AM), http://www.theatlantic.com/politics/archive/2013/09/republicans-cant-win-with-white-voters-alone/279436 ("Throughout 2012, many Republicans anticipated that the white proportion of the vote would increase from 2008 and even quietly based their polling on that assumption; but, ultimately, the white share of the vote followed the long-term trend and fell to 72 percent—exactly the level that Obama campaign manager Jim Messina projected early in the year."); Jan Crawford, *Adviser: Romney "Shellshocked" by Loss*, CBSNEWS.COM (Nov. 8, 2012, 5:57 PM), http://www.cbsnews.com/news/adviser-romney-shellshocked-by-loss/2 ("'They were right,' a Romney campaign senior adviser said of the Obama campaign's assessments [of voter turnout]. 'And if they were right, we lose.'"); Karl Rove, *Obama's Shrinking Majority*, ROVE.COM (July 12, 2012), http://www.rove.com/articles/397 (describing Obama's challenge in no small part as increasing racial-minority turnout); William Frey, *Minority Turnout Determined the 2012 Election*, BROOKINGS INST. (May 10, 2013), http://www.brookings.edu/research/papers/2013/05/10-election-2012-minority-voter-turnout-frey (conducting a post-election analysis confirming these predictions).

9. Karl Rove was a live commentator on Fox News during the 2012 count and pointedly rejected the network's own early analysis that Obama would win Ohio and with it (in essence) the Presidency. *See* Gabriel Sherman, *How Karl Rove Fought with Fox News over the Ohio Call*, N.Y. MAG. (Nov. 7, 2012, 12:49 PM), http://nymag.com/daily/intelligencer/2012/11/how-rove-fought-with-fox-over-ohio.html (including a video of the incident).

10. Crawford, *supra* note 8 (describing the failure of the Romney campaign to grasp mistakes in internal data); *see also* Nate Silver, *When Internal Polls Mislead, a Whole Campaign May Be To Blame*, N.Y. TIMES (Dec. 1, 2012, 6:01 AM), http://fivethirtyeight.blogs.nytimes.com/2012/12/01/when-internal-polls-mislead-a-whole-campaign-may-be-to-blame (describing Romney's polling failures in further detail).

and then try to assess the current battles over voter access under the assumption that these changes are real and important.

First, the parties and the electorate as a whole have become increasingly polarized. Party polarization is now at its highest levels since Reconstruction:[11] there is currently no overlap in the party delegations in Congress, meaning that no Republican votes more on the liberal side than any Democrat, and correspondingly, no Democrat votes more on the conservative side than any Republican.[12] The electorate has become similarly polarized, with a reduction in overlapping views across a range of issues, and even in overlapping sources of information.[13] Modern forms of communication, particularly cable news outlets and internet sources, allow for sharp demarcations between what may be thought of as the Fox News and MSNBC demographics.[14] As a result, there are increasingly divided sets of voters choosing from among well-differentiated candidates.[15]

The parties have responded to the hollowing out of the center and the centrality of turnout by directing their campaigns toward voter mobilization rather than appeals to the median voter,[16] as predicted by the spatial-market theories of economic theorists Harold

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11. *See* Dylan Matthews, *It's Official: The 112th Congress Was the Most Polarized Ever*, WASH. POST (Jan. 17, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/17/its-official-the-112th-congress-was-the-most-polarized-ever (examining recent DW-NOMINATE scores, which are the industry-standard means of measuring ideological polarization).

12. *See* Drew Desilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RESEARCH CTR. (June 12, 2014), http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since (tracking the polarization in Congress over time).

13. *See generally Political Polarization in the American Public*, PEW RESEARCH CTR. (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public (examining popular polarization).

14. *See* Amy Mitchell, Jeffrey Gottfried, Jocelyn Kiley & Katerina Eva Mats, *Political Polarization and Media Habits*, PEW RESEARCH CTR. (Oct. 21, 2014), http://www.journalism.org/2014/10/21/political-polarization-media-habits (documenting general trends in media polarization).

15. For an overview of the literature on the polarization of the electorate, see Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 821–24 (2014).

16. *See, e.g.*, Dan Balz, *How the Obama Campaign Won the Race for Voter Data*, WASH. POST (July 28, 2103), http://www.washingtonpost.com/politics/how-the-obama-campaign-won-the-race-for-voter-data/2013/07/28/ad32c7b4-ee4e-11e2-a1f9-ea873b7e0424_story.html ("'In the old days you would say, Here's a list of people we think are independents, go to those houses,' [Obama 2012 campaign manager] Messina said. 'But you waste your volunteers' time all over the place because despite what someone says, there are a very small amount of undecided voters.' By knowing the voters and modeling the electorate, the campaign wasted less time pounding the pavement." (quotation marks omitted)).

Hotelling and Anthony Downs.[17] A mobilization strategy requires both activist volunteers and money, and both party activists and donors are more drawn from the ideological poles of the party than is the typical voter, even the typical voter within each party. Median-voter theories of parties hewing toward the center assume a stable electoral base, something that may be true in countries with compulsory voting, such as Australia or Argentina,[18] but not where turnout may be the critical variable. There is no reason to assume that strategies aimed at capturing the median point of the overall political distribution of preferences would be more likely to increase turnout. In fact, such strategies might be counterproductive in terms of mobilizing the base.

Second, the legal framework has also been altered. Most notably, the Supreme Court decision in *Shelby County v. Holder*[19] struck down the trigger mechanism for Section 5 of the Voting Rights Act (VRA)—the provision that forces some jurisdictions, primarily in the former Jim Crow South, to submit proposed voting changes for administrative preclearance by the Department of Justice (DOJ), or by judicial declaration in the D.C. District Court.[20] With the effective termination of Section 5, there is a legal path to implementing restrictions on voter access in states like North Carolina and Texas. Indeed, of the nine states that were completely covered under Section 5, only Virginia is not currently under uniform Republican control.[21] The termination of Section 5 came at a time when the DOJ was in Democratic hands and the previously covered states capable of restricting voter access were, by and large, under Republican control.[22]

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17. *See* Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 422 (2004) (discussing the spatial model of political distributions proposed by Downs, on the basis of work on spatial distribution by Hotelling).

18. *See Compulsory Voting*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (Feb. 17, 2015), http://www.idea.int/vt/compulsory_voting.cfm (listing all countries with some form of compulsory voting, including one obscure Swiss canton).

19. Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

20. *Id.* at 2631.

21. *See* Kennedy Elliott & Dan Balz, *Party Control by State*, WASH. POST (Dec. 28, 2013), http://www.washingtonpost.com/wp-srv/special/national/red-blue (listing states controlled by a single political party); *Jurisdictions Previously Covered by Section 5*, VOTING SECTION, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Mar. 10, 2015) (listing covered jurisdictions).

22. Elliott & Balz, *supra* note 21.

Third, the single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process. This is not intended as a normative claim, but simply as a real-world fact of life. Voting restrictions are not only likely to be found in Republican-controlled jurisdictions, but are also likely to be similar in kind across those jurisdictions.[23] Part of this could be copying or learning from the experiences of other states. But the similarity of these voting restrictions in form, and their prevalence across states with significantly different prior voting regimes and divergent demographics, points to something else. The likeliest hypothesis is that both political parties have a similar understanding of the relation between turnout and electoral outcomes, and both parties understand voting access as a threshold determinant of turnout.

This Article offers several observations about the changed legal and political environment pertaining to the right to vote. With a focus on turnout comes an appreciation that election rules matter and that control of the rules can affect balloting and results. Although this has long been known to political insiders, the battle for control of the rules of the game has not generally played out on the national stage. Unfortunately, all this changed with the contested presidential election in Florida in 2000, and the legal battles leading to *Bush v. Gore*.[24] Beginning with the run-up to the 2010 elections, and then heating up after their loss in 2012, Republicans—as the "out" party—turned to ballot-access reform as a major strategic aim, justified by the claimed need to combat fraud at the polls.[25]

In turn, the pitched battles over ballot access have brought the most basic issues of the franchise back into mainstream legal and political discourse. The coincidence between the rise of ballot-access issues and the Supreme Court's decision in *Shelby County* complicates the picture. The demise of the trigger for administrative oversight under the VRA after *Shelby County* highlights the

23. *See infra* Table 2.

24. Bush v. Gore, 531 U.S. 98 (2000).

25. *See* David Schultz, *Republicans Use Vote Suppression as Electoral Strategy*, AL-JAZEERA AM. (Oct. 29, 2014, 2:00 AM), http://america.aljazeera.com/opinions/2014/10/2014-midterm-electionsgopvotersuppressiondemocrats.html (documenting instances in which Republicans reformed ballot access); Hans A. von Spakovsky, *Voter Photo Identification: Protecting the Security of Elections*, HERITAGE FOUND. (July 13, 2011), http://www.heritage.org/Research/Reports/2011/07/Voter-Photo-Identification-Protecting-the-Security-of-Elections (justifying voter restrictions on a fraud-prevention rationale).

inevitable racial impact of any strategy to reduce Democratic voter turnout[26] or, correspondingly, of Democratic efforts to increase turnout.[27] There is an inescapable overlap between Democratic voters who might be screened out by ballot restrictions, and the minority communities whose voting rights were the object of the VRA. In many jurisdictions the efforts at partisan gain look very much like older efforts at racial exclusion. To the conventional question whether the renewed ballot restrictions should be understood in terms of race or party, the answer unfortunately is yes. Race and party are intertwined to such a large extent that it is difficult to disentangle the two when seeking a simple narrative of causation.[28] But the more difficult question is a different one: How is it that a mature democracy like the United States still allows basic rules of ballot access to be a battleground for political skirmishing?

I. THE RULES OF VOTING

As the following depiction (Table 2) shows, there is a strong correlation between Republican control of the election-administration process in a state and the efforts made to regulate ballot access more intensively in that state. Table 2 shows both states previously covered by Section 5, and those that were not covered. The operative variable in all circumstances is which party is in control in any particular state. The types of regulations include increased voter-ID requirements for in-person voting, stricter voter-registration requirements, and curtailment of early-voting opportunities. These regulations are most likely to emerge when there is a Republican governor and Republican control of the state legislature.[29] In fact,

26. *See, e.g.*, Jamelle Bouie, *Republicans Admit Voter-ID Laws Are Aimed at Democratic Voters*, THE DAILY BEAST (Aug. 28, 2013), http://www.thedailybeast.com/articles/2013/08/28/republicans-admit-voter-id-laws-are-aimed-at-democratic-voters.html (documenting examples of Republican candor about an anti-Democratic voting strategy, and studies of the racial salience thereof).

27. *See* Jonathan Martin, *At Risk in Senate, Democrats Seek To Rally Blacks*, N.Y. TIMES, Aug. 31, 2014, at A1 (describing the Democratic Party's efforts to increase minority-voter turnout).

28. *See* Richard Hasen, *Race or Party?: How Courts Should Think About Republican Efforts To Make It Harder To Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 67 (2014).

29. Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1103 (2014). The Brennan Center's latest update on voting laws noted that of the twenty-two states to have approved new voting-law regulations since 2010, eighteen states and every "strict" voter-ID state had Republican-

with the exception of a voter-ID requirement in Rhode Island and some alterations in Illinois and West Virginia, these restrictions are in force only in states under Republican control.

Table 2. New Voting Requirements Passed Since 2010[30]

STATE	VOTER ID	VOTER REGISTRATION	EARLY VOTING
Alabama	✓	✓	
Arizona		✓[31]	
Florida		✓	✓
Georgia			✓
Mississippi	✓[32]		
New Hampshire	✓		
North Carolina	✓	✓	✓
South Carolina	✓		
Texas	✓	✓	
Virginia	✓	✓	
Arkansas	✓		
Illinois		✓	
Indiana	✓		

controlled legislatures and Republican governors. Wendy Weiser & Erik Opsal, *The State of Voting in 2014*, BRENNAN CTR. FOR JUSTICE (June 17, 2014), http://www.brennancenter.org/analysis/state-voting-2014 (providing a comprehensive account of election-law changes since 2010).

30. Table 2 draws on data from the Brennan Center's compilation of state laws. *See* Weiser & Opsal, *supra* note 29. Bold text indicates states that were once completely or partly covered under Section 5. Highlighting indicates states that were under Republican control at the time of the VRA's passage. *See* VOTING SECTION, U.S. DEP'T OF JUSTICE, *supra* note 21 (listing previously covered jurisdictions). I deem a state to have been under Republican control if two out of three of the state's senate, house, and governorship were controlled by Republicans. Restrictions that were passed but later repealed are excluded.

31. Arizona's voter-registration restrictions are enacted, but they are presently judicially enjoined pending the outcome of a convoluted lawsuit aimed at requiring the federal government to include stricter proof-of-citizenship requirements on the federal registration form. *See* Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1199 (10th Cir. 2014).

32. Adopted as a constitutional amendment via voter petition rather than by the legislature. MISS. SEC'Y OF STATE, OFFICIAL TABULATION OF VOTE FOR STATEWIDE INITIATIVE MEASURE NO. 27, at 10 (Dec. 8, 2011), http://www.sos.ms.gov/links/elections/results/statewideStatewide%20Initiative%20Measure%2027%20%20General%20Election%202011%20Results.pdf.

Kansas	✓	✓[33]	
Montana		✓[34]	
Nebraska		✓	✓
North Dakota	✓		
Ohio		✓	✓[35]
Pennsylvania	✓		
Rhode Island	✓		
Tennessee	✓	✓	✓
West Virginia			✓
Wisconsin	✓	✓	✓

Consider three states: Texas, North Carolina, and Wisconsin. Under Section 5, preclearance of proposed voting changes by the DOJ was triggered by the existence of restrictive voting practices and depressed voter turnout in the 1964 presidential election. The coverage formula generated by 1964 presidential-election statistics yielded inclusion under the preclearance regime for entire states in the old Confederacy, and for some counties in other states, including Northern states such as New York or South Dakota.[36] Of the states under consideration, only Texas was subject to Section 5 under the now-defunct coverage formula. North Carolina, a border state, had been partially covered; Wisconsin was not covered at all.[37] Yet all three have adopted largely similar voter-ID laws in more-or-less the same time frame, and did so *before* Section 5 was rendered impotent in *Shelby County*.[38] These three states have little in common, save that

33. As with Arizona, Kansas's voter-registration restrictions are enjoined pending a lawsuit initiated by the secretary of state to push federal officials to help enforce proof-of-citizenship measures. *See Kobach*, 772 F.3d at 1199.

34. Montana attempted, but ultimately failed, to abolish same-day registration by referendum. *See* Damon Daniels, *Montana Voters Keep Same-Day Registration*, DEMOS (Nov. 7, 2014), http://www.demos.org/blog/11/7/14/montana-voters-keep-same-day-registration.

35. Ohio's restriction on early voting was partially the result of interventions by the Republican secretary of state. *See* Zachary Roth, *Ohio Cuts Early Voting Method Favored by Blacks*, MSNBC.COM (Feb. 25, 2014 3:24 PM), http://www.msnbc.com/msnbc/ohio-early-voting-cuts.

36. U.S. DEP'T OF JUSTICE, JURISDICTIONS PREVIOUSLY COVERED BY SECTION 5, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Mar. 10, 2015).

37. VOTING SECTION, U.S. DEP'T OF JUSTICE, *supra* note 21.

38. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), was handed down on June 25, 2013. Both Wisconsin and Texas adopted their respective voter-ID laws long before this date. *See* 2011 Tex. Gen. Laws 619–25; 2011 Wis. Sess. Laws 103–27 (Act 23). North Carolina was actively

they were, at the time of Section 5's invalidation, uniformly under Republican control.[39] Indeed, the contrast between our three cases becomes even starker when we consider the various factors identified in the Senate Report for a different provision of the VRA, Section 2,[40] which addressed diminished minority electoral opportunity. The following Senate Report factors in Table 3 can be easily statistically measured:[41]

considering its voter-ID laws before *Shelby County*, at which point its primary state-Senate sponsor ominously—and without further explanation—declared: "'So, now we can go with the full bill,'" one that included a panoply of other restrictions. N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 336 (M.D.N.C. 2014), *aff'd in part, rev'd in part sub nom.* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014), *staying order*, 135 S. Ct. 6 (2014); *see id.* at 335–38 (discussing the legislative process in depth).

39. Texas's House of Representatives was under Democratic control until 2000; North Carolina had a Democratic governor until 2013; a Republican governor took office concurrently with a state-assembly majority in Wisconsin only from 2011 onwards. For a discussion on state-legislature control, see NAT'L CONF. OF ST. LEGISLATURES, STATE PARTISAN COMPOSITION (Feb. 4, 2015), http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx. For gubernatorial election results in the relevant date range (except Texas), see NAT'L GOVERNORS ASS'N, *Gubernatorial Election Results* (Jan. 8, 2015), http://www.nga.org/cms/elections; *see also* TEX. ST. LIBR. & ARCHIVES COMM'N, *Governors of Texas, 1846-Present*, https://www.tsl.texas.gov/ref/abouttx/governors.html (last visited Mar. 10, 2015) (listing all past Texas governors; noting that Anne Richards, the last Democrat to hold the office, was succeeded by George W. Bush, a Republican, in 1995; and observing that the office has been held by Republicans ever since).

40. The Voting Rights Act Amendments of 1982 expressly overturned the Supreme Court's decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), that a plaintiff must show that the state actors being sued evinced a racially discriminatory purpose to win a Section 2 claim; instead, the VRA was clarified to require merely a showing of discriminatory effect. Voting Rights Act Amendments of 1982 § 2, Pub. L. No. 97-205 (1982), 52 U.S.C. § 10301(b) (2014). Courts have relied on the Senate report accompanying the amendments, S. REP. NO. 97-417, at 28–29 (1982), which listed various factors that might be considered in determining disparate impact. *See generally* SAMUEL ISSACHAROFF, PAMELA KARLAN & RICHARD PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 623–51 (4th ed. 2012) [hereinafter THE LAW OF DEMOCRACY] (describing the Senate Report and its factors in considerable detail). The factors from this Report have been a critically important part of litigation under the amended VRA since the Supreme Court's reliance on them in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

41. *See* THE LAW OF DEMOCRACY, *supra* note 40, at 638–39.

Table 3. Racial and Ethnic Factors

	Texas	N. Carolina	Wisconsin
Black population in 2013[42]	12.4%	22%	6.5%
Hispanic population in 2013[43]	38.4%	8.9%	6.3%
Percentage of minority legislators in 2008 of entire state legislature (black/Hispanic)[44]	29% (9%/20%)	20% (19%/1%)	1% (0%/1%)
Racial polarization: Blacks voting for Obama in 2008[45]	98%	95%	91%
Racial polarization: Whites voting for McCain in 2008[46]	73%	64%	45%
Section 5 Preclearance DOJ Objections, 2000–2013[47] (and total since 1965)	16 (207)	6 (67)	N/A
Voting-Rights Violations, 2000–2014[48]	30	4	1
Date voter-restrictive law was enacted[49]	May 27, 2011	Aug. 12, 2013	May 25, 2011
Date Republicans achieved a "trifecta" after 2000[50]	2001	2013	2011

42. U.S. CENSUS BUREAU, *State and County Quick Facts: Texas*, http://quickfacts.census.gov/qfd/states/48000.html (last visited Mar. 10, 2015); U.S. CENSUS BUREAU, *State and County Quick Facts: North Carolina*, http://quickfacts.census.gov/qfd/states/37000.html (last visited Mar. 10, 2015); U.S. CENSUS BUREAU, *State and County Quick Facts: Wisconsin*, http://quickfacts.census.gov/qfd/states/55000.html (last visited Mar. 10, 2015).

43. *See* sources cited *supra* note 42.

44. NAT'L CONF. OF ST. LEGISLATURES, AFRICAN-AMERICAN LEGISLATORS 2009, http://www.ncsl.org/research/about-state-legislatures/african-american-legislators-in-2009.aspx (last visited Mar. 10, 2015); NAT'L CONF. OF ST. LEGISLATURES, LATINO LEGISLATORS 2009, http://www.ncsl.org/research/about-state-legislatures/latino-legislators-overview.aspx (last visited Mar. 10, 2015). The 2008 dataset is the latest available.

45. Vexingly, the National Exit Poll Consortium, which conducts what is considered the most reliable exit poll, chose for cost-cutting reasons to skip nineteen states, including Texas, in the 2012 presidential election. Jon Cohen & Scott Clement, *Networks, AP Cancel Exit Polls in 19 States*, WASH. POST (Oct. 4, 2012), http://www.washingtonpost.com/blogs/the-fix/wp/2012/10/04/networks-ap-cancel-exit-polls-in-19-states. Thus, I have used the 2008 exit-poll data. *Election Center 2008: Exit Polls*, CNN.COM (Nov. 2008), http://www.cnn.com/ELECTION/2008/results/polls.

46. *Election Center 2008: Exit Polls*, *supra* note 45.

47. *Voting Determination Letters for Texas*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/records/vot/obj_letters/state_letters.php?state=tx (last visited Mar. 10, 2015) (listing all objection letters interposed against Texas since the inception of Section 5); *Voting Determination Letters for North Carolina*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/records/vot/obj_letters/state_letters.php?state=nc (last visited Mar. 10, 2015) (same, for North Carolina).

48. THE PERSISTENT CHALLENGE OF VOTING DISCRIMINATION: A STUDY OF RECENT VOTING RIGHTS VIOLATIONS BY STATE, LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS 18, 22–26, 27 (2014), *available at* http://www.civilrights.org/press/2014/Racial-Discrimination-in-Voting-Whitepaper.pdf (listing violations).

49. 2013 N.C. Sess. Laws 1507 (Session Law 2013-381); 2011 Tex. Gen. Laws 619–25; 2011 Wis. Sess. Laws 103–27 (Act 23).

50. Restrictive voter-ID laws of the type under discussion in this Article were not implemented in any great number until the twenty-first century. *See generally Voting Laws*

Table 3 shows the differences in state voter composition across three states that are the subject of intensive current litigation. Despite these marked dissimilarities, each state's response was basically similar. A specific focus on the new voter-ID laws shows the overlap in both the adoption of each state's voter-ID law and the laws' ultimate content:

Table 4. Voter-ID Provisions[51]

	Texas	**N. Carolina**	**Wisconsin**
Ballots not counted without presentation of ID (either at polls or after casting provisional ballots)	Yes	Yes	Yes
Only photo IDs accepted	Yes	Yes	Yes
Only in-state photo IDs accepted	Yes	No[52]	Yes
Veteran IDs not accepted	Yes	No	Yes
Student IDs not accepted	Yes	Yes	No
Vests discretion in local official to determine whether voter bears resemblance to photo on ID	Yes	Yes	Yes
Exempts from photo-ID requirement only those who have a religious objection to being photographed or whose ID has been destroyed in a natural disaster	Yes	Yes	No
Supplemental free election photo IDs accepted[53]	Yes	No	No
Exempts absentee voting from photo-ID requirements	Yes	Yes	No

Roundup, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup (listing all proposed and enacted changes to voting laws since 2010). A "trifecta" refers to a time at which a Republican governor held office concurrently with a Republican majority in both houses of the state legislature. *See* sources cited *supra* note 39.

51. *See generally* 2013 N.C. Sess. Laws 1507 (Session Law 2013-381); 2011 Tex. Gen. Laws 619–25; 2011 Wis. Sess. Laws 103–27 (Act 23).

52. Specifically, the act permits the use of "[a] drivers license or nonoperators identification card issued by another state, the District of Columbia, or a territory or commonwealth of the United States, but only if the voter's voter registration was within 90 days of the election." 2013 N.C. Sess. Laws 1507 (Session Law 2013-381 § 2.1(e)(8)) (codified at N.C. GEN. STAT. § 163-166.13(e)(8)).

53. Supplemental free election photo IDs are state-issued IDs that enable the holder to vote, but are useless for any other purpose (by law).

II. FRAUD, VOTE SUPPRESSION, AND THE POWER OF FAITH

It is remarkable that the question of election fraud has surfaced as a hot-button political issue, with a focus on in-person vote fraud, no less. Very few elections turn so close to the margin as to be susceptible to fraudulent manipulation by individual voters pretending to be eligible to vote more than once. There are certainly examples in U.S. history of vote fraud, running from the habits of Tammany Hall operatives of throwing ballot boxes into the East River,[54] to the curious propensity of dead persons in some south-Texas counties to all vote for Lyndon Johnson, and to arrive at the polls to do so in alphabetical order.[55] Whether tossing out ballots or stuffing the ballot box, all of these mechanisms operate at the wholesale level. Trying to tip an election by retail-voter impersonation is much like trying to change the salinity of the sea by adding a box of salt. Not surprisingly, the bipartisan presidential commission, which was appointed in the wake of the 2012 election to examine proposals for election reform,[56] dismissed the claims of in-person vote fraud as insignificant, stating: "Fraud is rare, but when it does occur, absentee ballots are often the method of choice."[57]

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54. Local lore has it that the massive lever-voting machines long in use in New York City were first selected because they were too heavy to toss into the river. *See* ANDREW GUMBEL, STEAL THIS VOTE 7 (2005) ("Ballots have been bought and sold on the open market, stolen, forged, spoiled, and tossed into lakes, rivers, and oceans."); Jennifer 8. Lee, *A Love Affair with Lever Voting Machines*, N.Y. TIMES (Mar. 10, 2009, 7:15 AM), http://cityroom.blogs.nytimes.com/2009/03/10/a-love-affair-with-lever-voting-machines ("[Lever machines] became widely adopted across the entire city by 1926 because they were seen as more resistant to tampering—a tremendous problem during 19th-century elections."). My colleague, Michael Waldman, believes that this story stems from the time Henry George ran for mayor of New York against Abram Hewitt. *See* GEORGE SELDES, WITNESS TO A CENTURY 192 (2011) ("[I]t was later revealed that Tammany Hall not only stuffed the ballot boxes for Hewitt but threw many Henry George ballots and boxes into one of the rivers. Henry George was counted out. He died three or four years later.").

55. "Box 13" in Jim Wells County contained over two hundred such votes, just enough to put Lyndon B. Johnson over his opponent, Coke Stevenson, in the 1948 Democratic Primary. *See* ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT 324–30 (1991). To be fair to Johnson, he fervently believed, with some justification, that Stevenson had done the same to him four years earlier. *Id.*

56. *See* Exec. Order No. 13,639, 78 Fed. Reg. 19,979 (Mar. 28, 2013) (establishing the Presidential Commission on Election Administration).

57. PRESIDENTIAL COMM'N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 56 (2014) (citing Paul Gronke, Professor of Political Science, Reed College, PCEA Hearing Testimony, Denver, CO, at 48 (Aug. 8, 2013)), *available at* https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.

Yet once inserted into the partisan blend, vote fraud takes on a life of its own. It is difficult to disprove nonspecific allegations of fraud as illegal conduct subject to conspiracy prosecution, and thus unlikely to be broadcast. This gives some ballast to the argument that because vote fraud is undetected, it is likely occurring—a classically nonfalsifiable proposition that cannot move the terms of debate beyond matters of prior belief. The most comprehensive studies indicate both that there are virtually no established cases of in-person vote fraud, and that some people nonetheless hold strong beliefs that others have either seen or heard of actual cases.[58] Paradoxically, the level at which a voter-ID law is exacting in any particular jurisdiction does not appear to reduce the public perception of fraud, and the level of exaction may even be correlated with an increased concern over fraud[59]—perhaps the public-policy equivalent of being told not to think about hippos in tutus chasing swirling broomsticks.[60] The best predictor of individual beliefs regarding vote fraud may well be each individual's partisan affiliation. Unfortunately, one's partisan

58. *See* Robert Pastor, Robert Santos, Alison Prevost, & Vassia Stoilov, *Voting and ID Requirements: A Survey of Registered Voters in Three States*, 40 AM. REV. PUB. ADMIN. 461, 475 (2010). Pastor et al. note that 53.2 percent of registered voters surveyed in Indiana, a state with strict voter-ID laws, report hearing about fraud at another polling place, while 73.1 percent of those surveyed in Maryland, a state without strict voter-ID laws, report hearing about fraud at another polling place. *Id.* at 464, 475. *Compare* Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast (listing discrete incidents), *and* LORRAINE MINNITE, THE MYTH OF VOTER FRAUD (2010) (same), *with* Pastor et al., *supra*, at 477 (noting that one-fifth of registered voters surveyed saw or heard of fraud at their own polling place).

59. *See* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1756 (2008) (finding, through the use of a comprehensive survey instrument (and controlling for usual confounders), that fears of fraud remain flat when voter-ID laws are implemented—indeed, "those subjected to photo ID requirements believe, if anything, that fraud is more prevalent"). *But see* Pastor et al., *supra* note 58, at 464, 475 (finding a higher expectation of fraud at other polling stations in a state with less strict voter-ID laws).

60. This is a well-established phenomenon in psychology that trades under the name of "ironic process theory," whereby the further we try to push an image from our mind, the more difficult it is to do so. *See generally* DANIEL M. WEGNER, WHITE BEARS AND OTHER UNWANTED THOUGHTS (1994) (providing an authoritative study of the phenomenon as applied to psychology); FANTASIA (Walt Disney Pictures 1940) (featuring hippos in tutus, as well as swirling broomsticks).

affiliation has a powerful relationship to whether one believes in vote fraud and many other areas of policy.[61]

Faith does operate on both sides of the partisan divide. Possibly, however, there is a greater factual basis for opponents of ratcheted-up voting rules to fear that something more may be going on. For much of American history, the issue of fraud has been associated with efforts to suppress the franchise of minorities and other "out" groups.[62] The particular forms of contemporary franchise restrictions, especially the more exacting ID requirements, are susceptible to a racially disparate impact. Efforts to discern the at-risk population show that minorities are more likely to lack either a driver's license[63]

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61. In particular, partisanship is the critical lens through which the public weighs the usefulness of strict voter-ID laws. *See* Ansolabehere & Persily, *supra* note 59, at 1747 ("Party remains a significant predictor of beliefs about both Fraud and Impersonation in a multivariate analysis that controls for ideology, education, age, race, income, and region."). Party, too, is a powerful explanatory variable for belief in a variety of theories, including, but not limited to, the belief that "shape-shifting reptilian people control our world by taking on human form and gaining political power to manipulate our societies"—a belief held by nearly twice as many people who voted in 2012 for the Republican presidential candidate than for the Democratic presidential candidate. Press Release, Public Policy Polling, Democrats and Republicans Differ on Conspiracy Theory Beliefs (Apr. 2, 2013), *available at* http://www.publicpolicypolling.com/pdf/2011/PPP_Release_National_ConspiracyTheories_040213.pdf; *see also* Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011) (surveying psychological research that found that unsubstantiated factual claims indicate motivated cognition, the phenomenon in which identity is expressed through particular factual claims); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 663 (2007) (stressing that most arguments concerning voter identification have been premised on unsubstantiated factual assumptions).

62. *See generally* LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD 14–21 (2007), *available at* http://poli375engage.pbworks.com/f/Politics_of_Voter_Fraud_Final.pdf (outlining the history of voter restrictions employed against minority groups justified as preventing fraud); *see also* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997) (tying franchise eligibility to efforts to diminish the political influence of new immigrants).

63. The process-tracing approach sprang from research into the low availability of driver's licenses, which has a significant impact on economic mobility. *See generally* OFF. OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF THE TREASURY, *Answers About Identification: I Want To Open a New Account. What Type of Identification Do I Have To Present to the Bank?*, http://www.helpwithmybank.gov/get-answers/bank-accounts/identification/faq-bank-accounts-identification-02.html (last visited Mar. 10, 2015) Barbara Corkrey, *Restoring Drivers' Licenses Removes a Common Legal Barrier to Employment*, 37 CLEARINGHOUSE REV. 523 (2004); *see also* JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 3 (2005), *available at* http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf (using database matching to show that in Wisconsin, "[f]or African-Americans, only 45 percent of males and 51 percent of females have a valid drivers license," and for Hispanics, "54 percent of males and only 41 percent of females [have] a valid drivers license"); *cf.* 8 U.S.C. § 1324a(b)(1)(A)(ii) (2012) (requiring, with some exceptions, that

or another form of accepted photo identification.[64] Most studies show that this racially disparate pattern persists even when controlling for other factors such as education or income.[65] Put together, these historical and present social-science studies indicate that minority voters are more at risk of being excluded by increased voter-ID laws, and that there is reason for concern when fraud claims overlap with disfavored minority voters' claims of exclusion.

Predilection does not constitute proof, however. The fact that restrictions on the franchise in general—and voter-ID laws in particular—play to the vulnerabilities of discrete communities does not establish that there is any discernible impact, either on overall turnout or on differential turnout among various groups. Recall that somewhere between 40 and 60 percent of eligible voters do not

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employers verify the citizenship of each person they employ by use of at least one piece of secondary identification).

64. BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 1–3 (Nov. 2006), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (conducting a random poll of 987 adults adjusted for demographic factors, and finding that at least 11 percent of U.S. citizens lacked an unexpired government-issued photo ID, and that 18 percent of the elderly and 25 percent of African Americans likewise lacked such an ID, as compared to 8 percent of whites). *But see* Pastor et al., *supra* note 58, at 469 (surveying registered voters in Maryland, Mississippi, and Indiana, and finding that only 1.2 percent of total responders lacked any form of government-issued photo ID).

65. *See* Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Voter-ID Requirements on the Electorate: New Evidence from Indiana*, 42 PS: POL. SCI & POL. 111, 113 (2009) ("Even among likely voters [in Indiana], differences persist with respect to race. Among all registered voters, 84.2% of whites have the correct ID credential in Indiana compared to 78.0% of blacks . . . . When we only focus on likely voters, those who consistently voted in 2002, 2004, and 2006, a 6-point gap between blacks and whites is still evident."); Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate 13 (Wash. Inst. for the Study of Ethnicity & Race, Working Paper, Nov. 8, 2007), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf (finding a gap of 11.5 percent between black and white possession of voter IDs on the basis of a survey of Indiana residents); Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters* 14–17 (Am. Pol. Sci. Ass'n, Annual Meeting Paper, Sept. 1, 2007), *available at* http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf (conducting exit polls of voters in California, New Mexico, and Washington state to find that among *voters*, Latinos and blacks were not less likely to possess driver's licenses than white voters, but that racial minorities were potentially more than 20 percent less likely to possess two forms of identification as compared to white voters). *But see* M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 AM. POL. RES. 555, 571–72 (2008) (determining, after an examination of databases in Georgia, that urban and rural populations have similar rates of driver's-license possession, and finding that when measuring affluence on the basis of zip code of residence, the poor were about as likely to possess driver's licenses as the rich).

participate in federal elections.[66] The question therefore is whether the new voter restrictions affect individuals who would have voted absent such restrictions. The alternative, and perhaps more likely, hypothesis is that the same individuals who are likely to fall under an enhanced voter-ID requirement are also unlikely to vote at all, regardless of the mechanics of the voting restriction. This is a hard empirical question given that, at least for some portion of the nonvoting population, the decision whether or not to participate on election day is likely made at the margins and turns on the ease of voting, peer pressure, engagement by a candidate, competing personal obligations, and a host of such idiosyncratic factors. Undoubtedly across the mass of the American population, any encumbrances to the ability to vote will have some effect. But the issue is whether the impact of these impediments falls primarily on voters who are already marginalized from electoral engagement and who would not have voted regardless of these burdens.

To date, empirical studies have focused on the effect of voter-ID laws, but have been unable to find any substantial decline either in overall turnout or in the turnout of racial minorities as a result of these laws.[67] Most studies testing a causal relationship between voter-

66. *See supra* Table 1.

67. *See, e.g.*, Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 201 (2009) (finding that strengthened voter-ID laws were, at most, associated with a 1.1 percent decline in voter turnout); Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. ANN. SURV. AM. L. 613, 625–26 (2008) (examining several large survey sets to find that as an empirical matter, few if any voters reported being unable to vote or forced to cast a provisional ballot because of voter-ID laws); M.V. Hood III & Charles S. Bullock III, *Much Ado About Nothing? An Empirical Assessment of the Georgia Voter ID Statute*, 12 ST. POL. & POL'Y Q. 394, 394 (2012) (finding that the Georgia voter-ID law decreased overall turnout by 0.4 percent in 2008, but that no empirical evidence suggests that this effect was due to racial or ethnic discrimination); Jason D. Mycoff, Michael W. Wagner & David C. Wilson, *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. & POL. 121, 125 (2009) [hereinafter Mycoff et al., *Empirical*] ("Thus, we fail to reject the null hypothesis that voter-ID laws do not significantly affect turnout."); R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *The Effect of Voter Identification Laws on Turnout* 18 (Cal Inst. of Tech., Div. of the Humanities & Social Sci., Working Paper No. 1267R, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1084598 (analyzing data from 2000–06 and, after controlling for education and income, finding no disparate racial impact); John R. Lott, Jr., Evidence of Voter Fraud and the Impact that Regulations To Reduce Fraud Have on Voter Participation Rates 8–9 (Crime Prevention Research Ctr., Working Paper, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925611 (accounting for a variety of other factors, and finding a 2.2 percent decline in the probability of voting when states require nonphoto ID or photo ID with substitution); Jason D. Mycoff, Michael W. Wagner & David C. Wilson, *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout* 17

ID laws and turnout have determined the impact of voter-ID laws on overall *and* minority turnout to be minor at best.[68] It is easy to imagine that persons sufficiently distant from institutional arrangements providing or independently requiring a photo ID would also be more likely not to vote.[69] This is a matter of conjecture, but it is striking that relatively few persons have actually been identified as impeded by voter-ID requirements in litigation thus far,[70] a fact that

(Am. Pol. Sci. Ass'n, Annual Meeting Paper, Aug. 2007), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_50900.pdf [hereinafter Mycoff et al., *Effect of Voter Identification*] (using database matching over multiple states from the 2000–06 elections to conclude that "basic socio-demographics and other individual level characteristics such as political interest have a much larger effect on voting behavior than political context variables such as the type and degree of identification required for voting"); Timothy Vercellotti & David Anderson, Protecting the Franchise or Restricting it? The Effects of Voter Identification Requirements on Turnout 13–14 (Am. Pol. Sci. Ass'n, Working Paper, Aug. 31 2006), *available at* http://moritzlaw.osu.edu/blogs/tokaji/voter%20id%20and%20turnout%20study.pdf (looking at the 2004 election only, and finding that imposing voter-ID requirements "reduced probabilities of voting of about 3 to 4 percent for the entire sample, with larger differences for specific subgroups," in particular, poor communities of color).

68. *See, e.g.*, Alth, *supra* note 67, at 201 (finding a decline in turnout from strict voter-ID laws); Ansolabehere, *supra* note 67, at 625–26 (examining several large survey sets to find that as an empirical matter, few if any voters reported being unable to vote, or forced to cast a provisional ballot, because of voter-ID laws); Kyle Dropp, Voter Identification Law and Voter Turnout 27–30 (May 28, 2013) (unpublished manuscript), *available at* http://kyledropp.weebly.com/uploads/1/2/0/9/12094568/dropp_voter_id.pdf (finding a 2.3 percent relative decline in Democratic turnout but negligible racial impact of voter-ID laws); Hood & Bullock, *supra* note 67, at 394 (finding that the Georgia voter-ID law decreased overall turnout by 0.4 percent in 2008, but finding no empirical evidence to suggest that this effect was racial or ethnic); Mycoff et al., *Empirical*, *supra* note 67, at 125; Michael Pitts & Matthew Neumann, *Documenting Disenfranchisement: Voter Identification During Indiana's 2008 General Election*, 15 J.L. & POL. 329, 354 (2009) (finding that since the Indiana primary, ID-related provisional ballots cast in Indiana increased in concert with provisional ballots of all kinds, suggesting that the trend in provisional balloting had little if anything to do with the voter-ID law); Mycoff et al., *Effect of Voter Identification*, *supra* note 67, at 17.

69. *See* Hood & Bullock, *supra* note 65, at 573 (finding that even without strict voter-ID laws, "those [registered voters] who lack driver's licenses are generally less engaged politically" and thus less likely to vote even before a strict voter-ID law is applied). *See generally* JAN E. LEIGHLEY & JONATHAN NAGLER, WHO VOTES NOW? DEMOGRAPHICS, ISSUES, INEQUALITY, AND TURNOUT IN THE UNITED STATES 27–51 (2014) (describing in detail why poorer, urban, and black voters—precisely those constituencies that organizations like the Brennan Center have concluded lack photo IDs—might be independently dissuaded from voting).

70. In a Texas district-court case considering the constitutionality of voter-ID laws, only nine witnesses were presented as unable to vote because they lacked the proper documentation. Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at *28 (S.D. Tex. Oct. 9, 2014). In Wisconsin, only eight individuals who intended to vote in the state's elections, but who did not currently possess a qualifying photo ID, testified against Wisconsin's voter-ID laws. Frank v. Walker, 17 F. Supp. 3d 837, 854 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

seemed to sway Justice Stevens in upholding the Indiana voter-ID law in *Crawford v. Marion County Election Board.*[71]

It is perhaps too soon to be entirely sanguine about no harm, no foul. First, the empirical studies on the impact of restrictive ID practices are problematic, both because the new round of voting restrictions is so recent,[72] and also because the forms of voter-ID laws vary across jurisdictions[73] and have gotten more onerous over time.[74] There has not been enough time to test the observations against normal fluctuations in turnout (such as those associated with off-year elections) and other confounding political factors.[75] At its most

71. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 201 (2008) (noting the small number of individuals who demonstrated a burden at the trial level).

72. Daniel R. Biggers & Michael J. Hanmer, Why Voting Gets Harder: Understanding the Adoption of Voter ID Laws in the American States 2–3 (Am. Pol. Sci. Ass'n, Working Paper, 2011), *available at* http://www.gvpt.umd.edu/apworkshop/papers_fall12/B%20and%20H%20APW%209-21-12.pdf (tracing the turn from voting facilitation to voter suppression in the states in the early twenty-first century); Vercellotti & Anderson, *supra* note 67, at 4–5 (finding that no jurisdiction included in the study implemented a strict voter-ID law in which a voter was prevented from voting unless he showed a state-issued photo ID).

73. Weiser & Opsal, *supra* note 29 (surveying the variety of voter-ID laws as of the 2014 general elections).

74. *See, e.g.*, IND. CODE ANN. § 3-11-8-25.1 (West 2014) (listing acceptable IDs); *id.* § 3-11.7-5-2.5(b) (stating that a provisional ballot cast by a voter without an ID will generally not be counted unless the voter presents an ID shortly afterwards). *See generally* INDIANA SECRETARY OF ST. ELECTION DIVISION, *Photo ID Law*, http://www.in.gov/sos/elections/2401.htm (last visited Mar. 10, 2015) (describing the implementation of Indiana's voter-ID requirement). Although a voter may swear in an affidavit that he is too "indigent" to afford a photo ID, this option can be exercised only very shortly following the election rather than at the polls; the voter must make a separate trip to the county clerk's office to complete the affidavit. *See* GA. CODE ANN. § 21-2-417(a) (West 2014) (effective Jan. 26, 2006) (listing Georgia's photo-ID requirements); *id.* § 21-2-417(b) (requiring the voter to provide identification after Election Day for his provisional ballot to be counted); *id.* § 21-2-419(c) (setting a three-day time limit for the person casting a provisional ballot to demonstrate his eligibility); KAN. STAT. ANN. § 25-2908(h) (West 2014) (effective July 1, 2012) (listing acceptable forms of photo ID); *id.* § 25-3002(b)(8) ("No ballot cast shall be counted if the voter fails to provide valid identification as defined by K.S.A. 25-2908, and amendments thereto."); TEX. ELEC. CODE ANN. § 63.0101 (West 2013) (effective Jan. 1, 2012) (listing acceptable forms of photo ID); 2011 Wis. Sess. Laws 103–27 (Act 23), *enjoined by* Frank v. Walker, 17 F. Supp. 3d 837, 862–63 (E.D. Wis. 2014).

75. *See* Luke Keele & William Minozzi, *How Much Is Minnesota Like Wisconsin? Assumptions and Counterfactuals in Causal Inference with Observational Data*, 21 POL. ANALYSIS 193, 209 (2013) (describing the general difficulties implicit in utilizing the difference-in-differences approach to analyze voter turnout, since "changes in the dynamics of elections from one year to the next may invalidate key assumptions"); *see also* R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *An Empirical Bayes Approach To Estimating Ordinal Treatment Effects*, 19 POL. ANALYSIS 20, 20–21 (2011) (discussing particular methodological complexities in the difference-in-differences approach when applied to voter ID). Such factors include age, education, residential mobility, region, media exposure, mobilization (partisan and nonpartisan), voting activity in previous elections, party identification, political interest, and

simple, it would be hard to analyze black turnout in 2008 or 2012 without some account of the role of the Obama candidacy in galvanizing black turnout, regardless of the encumbrances on the franchise that may have been put in place.[76]

Even across partisan dimensions, it is hard to figure out the exact impact of the new voting restrictions. Again, among the new voting restrictions, voter ID is the most studied and most litigated topic,[77] but

political knowledge. Kaat Smets & Carolien van Ham, *The Embarrassment of Riches? A Meta-Analysis of Individual-Level Research on Voter Turnout*, 32 ELECTORAL STUD. 344, 348–56 (2013). One important element of political salience in the American context that can act as a severe, but less detectable, local confounder is a ballot initiative. *See* John G. Matsusaka, *Election Closeness and Voter Turnout: Evidence from California Ballot Propositions*, 76 PUB. CHOICE 313, 332 (1993).

76. *See generally* Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification–Voter Turnout Debate*, 8 ELECTION L.J. 85, 87 (2009) (discussing difficulties in designing studies to measure the effect of voter-ID laws on turnout). For example, any examination of the impact of vote restrictions on black turnout in 2008 and 2012 would need to confront the candidacy of Barack Obama at the head of the ballot, who both overwhelmingly captured the black vote and drove up black turnout. *See* Tasha S. Philpot, Daron R. Shaw & Ernest B. McGowen, *Winning the Race: Black Voter Turnout in the 2008 Presidential Election*, 73 PUB. OPINION Q. 995, 996–97 (2009). Further, any analysis that uses total voter turnout as a variable must disentangle other partisan variables. *See, e.g.*, Michael J. Pitts, *Photo ID, Provisional Balloting, and Indiana's 2012 Primary Election*, 47 U. RICH. L. REV. 939, 952–54 (2013) (concluding that the decrease in provisional-ballot use, far from indicating that voter ID is less of a problem than advertised in Indiana, most likely reflects high turnout from Republicans and groups more likely to possess voter IDs). There are also variations in voting reforms that make comparison between states difficult. *See* Keele & Minozzi, *supra* note 75, at 193–94 (stating that "the quality of any assumption is hard to assess outside the context of a specific empirical application"). Finally, most voting legislation is still new, having been approved only between 2012 and 2014, and some of these laws are only partially enforced because of litigation. *See, e.g.*, Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at *28 (S.D. Tex. Oct. 9, 2014).

77. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (upholding a voter-ID law against an equal-protection attack); Ne. Ohio Coal. for the Homeless v. Husted, 696 F.3d 580, 583–84 (6th Cir. 2012) (holding that a consent decree's differential treatment of provisional ballots, depending on the form of identification used by voters, likely violated those voters' equal-protection right to participate in elections on an equal basis with other citizens in the jurisdiction); Common Cause/Ga. v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009) ("[B]ased on the decision in *Crawford v. Marion County Election Board*, which upheld a similar law in Indiana . . . the burden imposed by the requirement of photo identification is outweighed by the interests of Georgia in safeguarding the right to vote." (citation omitted)); League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 472, 478–79 (6th Cir. 2008) (finding that plaintiffs made sufficient allegations against the legality of a state voter-ID law to state a claim under the Ohio Constitution's equal-protection and substantive-due-process clauses, but not its procedural-due-process clause); N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 334 (M.D.N.C. 2014) (holding that the plaintiffs failed to show a likelihood of success on the merits of their VRA claims), *aff'd in part, rev'd in part sub nom.* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014), *staying order*, 135 S. Ct. 6 (2014); Frank v. Walker, 17 F. Supp. 3d 837, 880 (E.D. Wis. 2014) (enjoining a voter-ID law under Section 2),

here too the evidence is weak as to any partisan effect. Part of the effect, oddly, seems to be a paradoxical increase in the determination of communities—particularly minority communities—to vote in the face of perceived efforts at disenfranchisement, a countermobilization that might increase Democratic-leaning turnout.[78] Some of the lack of effect might be a problem of the means of voter restrictions not matching the intended targets. For example, putting the backlash against restrictive voting laws aside, strict voter-ID laws requiring documentary proof of citizenship upon registration disproportionately exclude women who have changed their surnames

rev'd, 768 F.3d 744, 745 (7th Cir. 2014) (finding that subsequent action by the Wisconsin Supreme Court sufficiently altered the balance of equities to merit a stay of an injunction); Texas v. Holder, 888 F. Supp. 2d 113, 115 (D.D.C. 2012) (holding that the state failed to show that its voter-ID law would not lead to retrogression in the position of racial minorities with respect to their effective exercise of electoral franchise), *vacated and remanded*, 133 S. Ct. 2886 (2013); Stewart v. Marion Cnty., No. 1:08-CV-586-LJM-TAB, 2010 WL 1579672, at *1 (S.D. Ind. Apr. 16, 2010) (rejecting a poll-tax attack on a voter-ID law); Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 72 (Ga. 2011) (finding that "the [challenged statute was not] an impermissible qualification on voting . . . [because it did] not deprive any Georgia voter from casting a ballot in any election"); League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758, 760–61 (Ind. 2010) (finding that the state's requirement that in-person voters display a government-issued photo ID did not impose an additional qualification in violation of the state constitution); Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *26 (Pa. Commw. Ct. Jan. 17, 2014) (holding that the state's voter-ID law violated the state constitution's fundamental right to vote, but did *not* violate the federal or state equal-protection clauses, despite a claim that the state statute had disproportionately adverse effects on certain minority groups); City of Memphis v. Hargett, 414 S.W.3d 88, 104–06 (Tenn. 2013) (holding that the Tennessee Voter Identification Act's photo-ID requirement was narrowly tailored to achieve the state's compelling interest in the integrity of the election process, and that the burden of travel time was not, without more, sufficient to render the requirement unconstitutional); Milwaukee Branch of NAACP v. Walker, 851 N.W.2d 262, 265–66 (Wis. 2014) (approving voter-ID requirements under a "saving construction"—that the Division of Motor Vehicles must not require documents for which a voter must pay a fee to a government agency); League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302, 305–06 (Wis. 2014) (finding that the challenged statute did not impose an unconstitutionally unreasonable restriction on the right to vote); *cf.* Serv. Emp. Int'l Union, Local 1 v. Husted, No. 2:12-CV-562, 2012 WL 5497757, at *1–3 (S.D. Ohio Nov. 13, 2012) (summarizing the complex history of the consent decree in Ohio, which ensures that voters without a photo ID can still cast counted ballots).

78. *See* Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95, 97–99 (2014) (articulating the mobilization thesis with regard to early-voting changes); Jack Citrin, Donald P. Green & Morris Levy, *The Effects of Voter ID Notification on Voter Turnout: Results from a Large-Scale Field Experiment*, 13 ELECTION L.J. 228, 235 (2014) (finding that alerting voters to the existence of a voter-ID requirement via direct mail may boost turnout by as much as 2 percent).

since birth,[79] and laws looking for currently valid driver's licenses disproportionately disadvantage the elderly[80]—both of whom lean Republican.[81]

* * *

Although the empirical picture of ballot access is complicated, its prominence as a legal and political issue is clear. For the first time since the Civil Rights Era, courts are confronting voting-rights claims that turn not on the allocation of electoral opportunity across different voting systems or on redistricting configurations, but on basic right-to-vote issues. The restrictions implemented to date may not be particularly effective, but they are currently the subject of intensive litigation in many states, most notably in North Carolina, Texas, and Wisconsin.[82] The next question concerns the proper legal framework for considering the new voting-rights challenges—specifically, whether the tools used to deny the franchise when race was the predominant paradigm for doing so continue to do the work today.

79. *See* BRENNAN CTR. FOR JUSTICE, *supra* note 64 (reporting the results of a random poll of 967 adults (adjusted for demographic factors), which found that a full 34 percent of voting-age women did not have ready access to any proof of citizenship with their current legal name).

80. *See id.* (finding that 18 percent of the elderly lack a valid photo ID); PAWASARAT, *supra* note 63, at 1, 11 (using database matching to find that 23 percent of persons age sixty-five and over, or 177,399 people, do not have a Wisconsin state ID or driver's license, but that the overwhelming majority of those people are white).

81. *Exit Polls 2012: How the Vote Has Shifted*, WASH. POST (Nov. 6, 2012), http://www.washingtonpost.com/wp-srv/special/politics/2012-exit-polls/table.html (describing the alignments of various demographic groups with the political parties, and the change of these alignments over time); Dahlia Lithwick, *Ladies' Choice: Voter ID Laws Might Suppress the Votes of Women. Republican Women*, SLATE (Oct. 24, 2013, 11:26 AM), http://www.slate.com/articles/double_x/doublex/2013/10/how_voter_id_laws_might_suppress_the_votes_of_women_republican_women.html; *see also* Biggers & Hanmer, *supra* note 72, at 12 ("[The elderly's] proclivity to vote, combined with weaker attachments to the Democratic Party, make[] them an attractive segment to preserve in the electorate and removes any potential partisan advantage in restricting their access to the polls.").

82. *See* Weiser & Opsal, *supra* note 29 (listing the principal examples of such litigation); *see also Major Pending Election Administration Cases*, MORITZ COLL. OF LAW AT THE OHIO STATE UNIV., http://moritzlaw.osu.edu/election-law/major-pending-cases (last visited Mar. 10, 2015).

III. RACE AND PARTISANSHIP IN VOTING-RIGHTS LAW

A. The Evolution of the Modern Right To Vote

Much of modern political-process law emerges from the historic exclusion of black voters. Even cases that marked the Supreme Court's first insertion into the political thicket, notably *Baker v. Carr*,[83] were racially charged because the rural communities seeking to retain representational hegemony were also in part warding off the development of a minority presence in the urban political machines.[84] This is a common account, and even a glance at the table of contents of the *Law of Democracy* casebook that I coauthor reveals the tremendous weight of racial-justice cases in virtually all areas of law regulating politics, save perhaps campaign finance.[85]

Examined more closely, however, the cases differentiate themselves across three primary dimensions. In the first instance are challenges over basic access to the franchise beginning in the post–Civil War era and continuing through the early phase of the Civil Rights Movement. After the battle for women's enfranchisement was resolved by the Nineteenth Amendment, black exclusion from voting through the legacy of Jim Crow became the dominant vehicle for the development of an affirmative right of political participation.[86] This first generation of simple participation yielded the great efforts of the VRA to suspend the operation of literacy tests and the like, and impose the government filter of preclearance under Section 5 to

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83. Baker v. Carr, 369 U.S. 186 (1962).

84. For a discussion of the role of the Memphis Democratic organization, including the early African-American local leaders, in bringing the *Baker* litigation to the Supreme Court and pushing the Kennedy administration to support their claim to equipopulational representation, see Stephen Ansolabehere & Samuel Issacharoff, *The Story of* Baker v. Carr, *in* CONSTITUTIONAL LAW STORIES 271–94 (Michael C. Dorf ed., 2d ed. 2004).

85. *See generally* THE LAW OF DEMOCRACY, *supra* note 40.

86. Professor Lani Guinier first described this sequence as the first generation of voting cases, followed by the second generation of representation claims, and the third generation of effective-participation-in-governance claims. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–1126 (1991); *see generally* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994) (discussing the development of voting-rights litigation). Pam Karlan and I used slightly different concepts to characterize the same point about the progression of claims from the simple act of participation in voting forward to the capacity to elect candidates of choice to office. *See generally* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992); Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993).

prevent the reintroduction of any devices that might adversely affect ("retrogress"[87]) the ability of minorities to vote.

The early efforts to foster political integration began with a simple syllogism. Black voters were concentrated in the South; black voters could not vote because of registration requirements and other barriers, including outright intimidation and violence; so as a result, no black candidates could get elected to office in the face of determined white obstruction.[88] Congress responded with federal registrars capable of opening up the voter-registration process, and with the removal of polling-place barriers though Section 5.[89] Federal intervention proved spectacularly successful as black-voter participation rose dramatically.[90] Today's voting landscape is unrecognizable. Indeed, the registration and participation figures for black voters, for all practical purposes, are equivalent to those of white voters.[91]

With the restored enfranchisement of black voters, however, came a series of structural obstacles that prevented black voting from being translated into black officeholding. This second generation of voting claims asserted that certain voting practices, primarily multimember districts or at-large elections, magnified the voting power of cohesive white majorities under conditions of racially polarized voting. The Supreme Court began to recognize these vote-dilution claims in the 1970s,[92] and Congress unleashed a strong statutory response to continued minority exclusion in the 1982

87. Beer v. United States, 425 U.S. 130, 141 (1976) ("In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

88. *See generally* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter QUIET REVOLUTION IN THE SOUTH] (discussing the state of affairs in the South before and after the VRA).

89. *Id*.

90. *See, e.g.*, Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2626 (2013) (documenting the early successes of the VRA in general and Section 5 in particular).

91. THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) 2–4, U.S. CENSUS BUREAU (2013), *available at* http://www.census.gov/prod/2013pubs/p20-568.pdf; *see also* Hope Yen, *A Census First: Black Voter Turnout Passes Whites*, NBCNEWS.COM (May 8, 2013), http://usnews.nbcnews.com/_news/2013/05/08/18131900-a-census-first-black-voter-turnout-passes-whites.

92. *See, e.g.*, White v. Regester, 412 U.S. 755, 767 (1973) (sustaining a district court's finding that the city of Dallas's use of multimember districts in primary elections prevented the black community from "enter[ing] into the political process in a reliable and meaningful manner").

amendments to Section 2.[93] Subsequently, in the *Shaw v. Reno*[94] line of cases,[95] the Supreme Court drew a constitutional line around the extent to which Congress, DOJ, or state redistricting bodies could use race-specific line drawing to enhance minority representation.

As with the first generation of voting-access cases, the results of the second generation of election-to-office cases are stunning in terms of obtaining minority representation. Getting minority candidates into office, what is termed "descriptive representation," was the signature success of the second generation of voting-rights cases. To take the simplest example, before the VRA, the number of African Americans in Congress was always in the single digits; in the 112th Congress, there were forty-three black representatives, a fairly consistent number for the past ten years.[96] With the exception of single-office positions (such as senator or governor), minority representation is well entrenched. Even in single-office positions, minorities have made significant inroads by being elected as mayors and even governors in nonminority majority cities and states,[97] and, most obviously, by being elected as President of the United States.[98]

Finally, a third set of claims involved the ability to have an effective voice in governance. In a simpler form, these cases

93. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(a), 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(a) (2012)); *see* Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (noting that "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone"). For a discussion of the transformative effect of vote-dilution litigation, primarily under Section 2, see Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in* QUIET REVOLUTION IN THE SOUTH, *supra* note 88, at 21.

94. Shaw v. Reno, 509 U.S. 630 (1993).

95. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 258 (2001) (upholding the majority–minority congressional districts created in North Carolina post-*Shaw*); Bush v. Vera, 517 U.S. 952, 954 (1996) (plurality opinion) (applying strict scrutiny to strike down bizarrely shaped majority–minority Texas congressional districts); Miller v. Johnson, 515 U.S. 900, 912 (1995) (holding that bizarre shape was not a threshold requirement of a claim of racial gerrymandering under *Shaw*); *Shaw*, 509 U.S. at 642 (holding that plaintiffs' allegation that North Carolina's redistricting legislation was "so extremely irregular on its face that it could rationally be viewed only as an effort to segregate the races for purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification" was sufficient to state a claim upon which relief could be granted under the federal Equal Protection Clause).

96. JENNIFER E. MANNING & COLLEEN J. SHOGAN, CONG. RESEARCH SERV., RL30378, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870–2012, at 2 (2012).

97. *See generally Major African American Office Holders Since 1641*, BLACKPAST.ORG, http://www.blackpast.org/aah/major-african-american-office-holders (last visited Mar. 10, 2015).

98. Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES (Nov. 4, 2008), http://www.nytimes.com/2008/11/05/us/politics/05elect.html?pagewanted=all&_r=0.

demanded that newly elected black officeholders have the same prerogatives of office as did their white predecessors. In the most significant (and unsuccessful) such suit, a newly elected black county commissioner challenged a requirement that the entire board of commissioners approve the awarding of any county contract, which left the lone black commissioner subject to being outvoted on proposed expenditures. The prior system, on the other hand, had allowed each commissioner to award contracts unilaterally in an assigned geographical area.[99]

Most notably, and most significantly for present purposes, demands for a fair share of governmental power ran headlong into the descriptive-representation objective of the second generation of cases. In *Georgia v. Ashcroft*,[100] a redistricting deal engineered by black state legislators reduced the black population percentage of black-majority districts so as to spread around more Democratic votes.[101] Under the then-conventional interpretation of Section 5, any reduction in the percentage of the black voting-age population in a black-majority district was presumed retrogressive and unlawful.[102] If the sole test for permissible redistricting under Section 5 were the ability of minority voters to elect a candidate of their choice to office, then perforce a reduction in the minority percentage of the district would increase electoral vulnerability. The overall effectiveness of the black vote might be enhanced by the ability to form coalitions with white crossover voters, but the guarantee of minority representation would be imperiled.[103]

From the perspective of political power, however, taking a black-majority district from 68 to 77 percent black was not a further guarantee of black electoral success. Rather, it represented a diminution of black electoral impact, as the additional black votes were wasted in the overpacking of an already effective electoral bloc. For Georgia Congressman John Lewis and the drafters of the proposed Georgia redistricting plan, the excess black votes were also critical Democratic votes. The drafters hoped that a more efficient

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99. *See* Guinier, *supra* note 86, at 1144. For such a claim, see Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 497 (1992).

100. Georgia v. Ashcroft, 539 U.S. 461 (2003).

101. *Id.* at 469.

102. *See* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 140 COLUM. L. REV. 1710, 1717 (2004).

103. *See* Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1569 (2002).

use of black votes would maintain Democratic control of the state legislature, including committees chaired by black Democrats.[104]

Because the plan diminished minority concentrations in favor of a political gambit to maintain fleeting Democratic power at the statewide level, it was necessarily suspect. In the first place, it drew the ire of state Republicans, for whom efficiency in the use of Democratic votes was, unsurprisingly, not a priority.[105] But it also ran afoul of the second generation of voting-rights cases, which had been defined by the prospect of securing black and other minority representation through a primary focus on safe minority districts. The Republican concern and the traditional civil-rights orthodoxy came together in a Republican-controlled DOJ, which objected to the proposed redistricting on the grounds that it adversely affected minority-voting prospects.[106] In a flight of irony, Congressman Lewis's redistricting plan was ultimately upheld 5–4 in the Supreme Court in *Georgia v. Ashcroft*, over the strong dissent of the four most-liberal members of the Court.[107]

The complicated breakdown in *Georgia v. Ashcroft* shows that conceiving of this third phase of voting concern with real political empowerment as being narrowly a matter of hiring and contracting decisions misses the broader object of political power. Axiomatically, minorities are minorities. In any electoral system, minorities will be at risk of being overwhelmed by majority preferences so long as the axes of political division are cast in terms that separate the majority from the minority. Indeed, this was the logic of the second generation of cases attacking at-large elections for compounding the inherent majority advantage.[108]

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104. *See Ashcroft*, 539 U.S. at 469–70 (quoting several black leaders who developed the plan at issue); Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 24–26 (2004).

105. *See Ashcroft*, 539 U.S. at 471 (noting that no Georgia Republicans voted for the plan); *Georgia Plan Gives Edge to Democrats*, N.Y. TIMES (Sept. 30, 2001), http://www.nytimes.com/2001/09/30/us/georgia-plan-gives-the-edge-to-democrats.html (reporting that Republicans "vowed to challenge the plan in federal court").

106. *Ashcroft*, 539 U.S. at 472–73.

107. *Id.* The irony was that a Republican DOJ challenged the plan in terms of racial justice, though the deal had been brokered by politician John Lewis, the hero of the civil-rights era. Congress subsequently purported to overturn the ruling in the 2006 amendment of Section 5. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, *as recognized in* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2621 (2013).

108. In any system with predictable cleavages, a 60–40 majority will win 100 percent of the representation if there is a single election. If the electorate is subdivided in fair fashion, the

Paradoxically, cohesive minorities should do better than their percentage share of the electorate in any single-peaked electoral arrangement if they can be the turnkey for the majority coalition. The second generation of voting cases sought to establish a minority presence in the halls of government, but as will be developed below, they did so almost exclusively outside the context of divided partisan power. Once minority representation took hold, and once the formerly single-party Democratic South became a focal point for partisan battles, the question of the tension between protections for minority safe seats and a viable Democratic coalition came to the fore. It is possible to present enclaves of minority power as a form of federalist experiment in joint governance,[109] but that view accepts a cramped domain for minority political power at the margins of the national playing field. Cases such as *Georgia v. Ashcroft* show that the stakes are not about isolated enclaves of minority decisionmaking, but rather about the realities of broad minority political power in a freighted partisan environment. In like fashion, it is possible to cast the current battles over the franchise using the terms of the first generation of voting-rights activism in securing the baseline ability to register and to vote. But in each circumstance, the partisanship adds a complication that, as this Article will develop, compromises the remedial effectiveness of the historic civil-rights approaches.

B. Voting Rights and Bipartisan Competition

The question of minority voting rights has never been altogether separate from partisan politics. Black enfranchisement first occurred under the Republican-controlled Reconstruction administration, and the first wave of black elected officials from the South were uniformly Republican, dedicated sons of the Party of Lincoln.[110] The Redemption constitutions of the South, which were the source of the voting-rights battles of the late twentieth century, were the product of a Democratic recapture of political power. Everything—from poll taxes, literacy tests, and grandfather clauses to the use of at-large elections—was the product of an effort to consolidate white Democratic power against the integrationist force known as

minority should obtain substantial representation. *See* Issacharoff, *supra* note 86, at 1860 (defending the VRA challenge as a Madisonian response to the risk of majority faction).

109. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 60–71 (2010).

110. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877, at 281–307 (3d ed. 2002).

"carpetbaggers."[111] Even then, claims of fraud and misuse of the franchise abounded, perhaps with some justification in the heated partisan environment of the late nineteenth-century South.[112]

Undoubtedly, the focus of the Redemption period was on the restoration of white power through the cradle-to-grave commands of Jim Crow.[113] Recently, however, more attention has been paid to the complex political dynamics of the period, particularly to the overlay between racial politics and broader political currents.

North Carolina provides a prime example. By the time of the passage of its 1900 constitution, blacks were one-third of the North Carolina population.[114] In 1894, a Republican, Daniel Russell, was elected governor by a coalition that also chose the majority of the state legislature and sent a black representative to Congress.[115] The election prompted massive violence by the Red Shirts, a marauding outfit linked to the Ku Klux Klan, and also a climate of intimidation

111. *See, e.g.*, ALA. CONST. of 1901, art. VIII, §§ 178, 183–84, 194; ARK. CONST. of 1874, amend. VIII; DEL. CONST. of 1897, art. V, § 4; FLA. CONST. of 1885, art. VI, § 8; GA. CONST. of 1877, art. II, § 1; LA. CONST. of 1913, art. 197, §§ 3–5; LA. CONST. of 1913, art. 198; MISS. CONST. of 1890, art. 12, §§ 241, 243; N.C. CONST. of 1876, art. VI, § 4 (amended 1900); S.C. CONST. of 1895, art. 2, § 4; S.C. CONST. of 1895, art. 11, § 6; TENN. CONST. of 1870, art. IV, § 1; TEX. CONST. of 1876, art. VI, § 2; TEX. CONST. of 1876, art. VII, § 3; VA. CONST. of 1902, art. II, §§ 18, 20–21, 35; VA. CONST. of 1902, art. XIII, § 173. It was not only the southern states that imposed constitutional restrictions on the franchise in a way that would now be considered suspect. The California Constitution of 1879, for example, provided that "no native of China, no idiot, no insane person . . . , and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State . . . ." CAL. CONST. of 1879, art. II, § 1. For a compendium of state constitutions of the early twentieth century, see THE STATE CONSTITUTIONS AND THE FEDERAL CONSTITUTION AND ORGANIC LAWS OF THE TERRITORIES AND OTHER COLONIAL DEPENDENCIES OF THE UNITED STATES OF AMERICA (Charles Kettleborough ed., 1918). For their disenfranchising motive, see generally MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908 (2001).

112. FONER, *supra* note 110, at 384–85 (noting that corruption "thrived in the Reconstruction South because of the specific circumstances of Republican rule").

113. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955) (describing the structure of Jim Crow segregation).

114. UNIV. OF VA. LIBRARY, *Historical Census Browser*, http://mapserver.lib.virginia.edu/php/start.php?year=V1900 (last visited Mar. 10, 2015) (using the variables of "total population," "negro males," and "negro females"); STATE DEMOCRATIC EXECUTIVE COMMITTEE OF NORTH CAROLINA, THE DEMOCRATIC HAND BOOK 1898, at 37, *available at* http://docsouth.unc.edu/nc/dem1898/dem1898.html ("The population of North Carolina is divided into two races—the white and black. About two-thirds of the entire population are white, and about one-third is black.").

115. *See The Election of 1898 in North Carolina: An Introduction*, UNIV. OF N.C. LIBRARIES, http://exhibits.lib.unc.edu/exhibits/show/1898/history (last visited Mar. 10, 2015) (discussing the "fusion" ticket).

and fraud, leading to a white Democratic recapture of the state legislature in 1898.[116] North Carolina's formal adoption of Jim Crow by a narrow margin in 1900 was not simply an act of racism; it was, as Professor Richard Pildes has described,[117] a political defeat of Piedmont populism and interracial politics at the hands of a highly partisan vision of white Democratic politics. Similar battles raged for decades throughout the South. In Texas's White Primary Cases,[118] for example, blacks were excluded from the vote because of the white population's fear that they would provide the tie-breaking votes in the longstanding battle between range populists and the conservative gentry.[119]

Redemption and Jim Crow are a complicated tale of the reassertion of white Democratic control against the Republican Party's efforts to maximize black representation, and against an incipient biracial populism that, as in North Carolina, had gained significant traction. That history of biracial populist activism was somewhat obscured by the time the Civil Rights Movement mobilized after World War II. For as long as the South was both formally under Jim Crow and solidly Democratic, the partisan considerations and partisan legacy of black exclusion were obscured. Race was a sure enough proxy for the manner in which control over voting cemented one party's rule, just as the South was a convenient enough proxy for the dominion of racialist exclusion. Black voting rights were antithetical to the Jim Crow status quo, but for more than one reason. Most evidently, the prospect of the black franchise was a deep threat to white supremacy, and the elimination of the black franchise was the central organizing principle of early twentieth-century

116. *See* H. Leon Prather, Sr., *We Have Taken a City: A Centennial Essay*, *in* DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY 15 (Timothy B. Tyson & David S. Cecelski eds., 1998); *see also, e.g.*, *White Men Show Determination To Rid Themselves of Negro Rule*, MORNING STAR (Nov. 2, 1898), http://exhibits.lib.unc.edu/exhibits/show/1898/item/2161 (reproducing a newspaper article from Wilmington, North Carolina, lauding a "masterly speech" at a Red Shirt rally advocating that "if a negro constable [comes] to a white man with a warrant in his hand he [leaves] with a bullet in his brain," and favorably reporting that "[m]any negros have taken their names from the registration list").

117. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 314 (2000).

118. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lock-Ups of the Political Process*, 50 STAN. L. REV. 643, 652–68 (1998) (discussing the White Primary Cases).

119. For an account of the role of black exclusion in cementing conservative control of the Democratic Party, see *id.* at 653.

constitutional reforms.[120] But even beyond the South, claims to racial justice also threatened the fragile fault lines of the ruling Democratic coalition. Professor Ira Katznelson's new work on the New Deal informs once again the strange mix of protectionism, social populism, and deep racism that merged uncomfortably in the southern Democratic Party, and then infused a corresponding tension on the national Democratic Party's reliance on the Dixiecrats.[121]

The white-Democratic stranglehold on the South also obscured any immediate partisan implications of the incipient voting-rights struggles. In retrospect, this is most clearly observable with regard to the second-generation claims for equality of representational opportunity. As played out in the courts, particularly in the aftermath of the 1982 amendments to Section 2 and the Supreme Court's recasting of the VRA in *Thornburg v. Gingles*,[122] vote-dilution claims turned primarily on proof of racially polarized voting between a cohesive white majority and a sizeable black minority. Proof consisted of a crude but powerful bivariate regression model that showed, in jurisdiction after jurisdiction, that the white vote correlated with the candidates prevailing in heavily white precincts, and that the black vote correlated with the candidates preferred in heavily black precincts.[123] These correlations established that, but for the at-large system of elections, blacks could have constituted a majority in a district that would have elected a representative of their choice to office.[124]

Whether presenting constitutional or statutory claims, these vote-dilution cases resulted in the dismantling of multimember electoral districts around the country. The result was the election of minorities to all levels of state and local office, often for the first time since Reconstruction. Paradoxically, the other beneficiary was the Republican Party, which was also able to start electing candidates to

120. *See* THE LAW OF DEMOCRACY, *supra* note 40, at 107–19 (giving examples of race as an animating feature of Alabama electoral reforms).

121. *See* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 29–58 (2013).

122. Thornburg v. Gingles, 478 U.S. 30 (1986).

123. *See id.* at 52–74 (upholding this analysis for vote-dilution claims); Issacharoff, *supra* note 86, at 1850–53.

124. *See Gingles*, 478 U.S. at 47–50 (describing these necessary conditions for claims of vote dilution).

office, initially as a minority political party. For the Republicans, this was often the first electoral toehold since Reconstruction.[125]

Almost unmentioned in the VRA is the tremendous partisan realignment that occurred after the Civil Rights Movement. Although not an intended beneficiary of the Civil Rights Movement, the southern Republican party rose to dominance, first able to vie for office in smaller districts and then able to play on white fear and resentment over black political gains. In the North, perhaps paradoxically, the urban Democratic Party—which had long been marked by ethnic ward politics and generous patronage—proved more permeable to a new black political machine. The national Democratic Party, though long a bastion of the Dixiecrats, became the party of President Truman's integration of the military, of President Kennedy's eloquent attacks on Jim Crow, and of President Johnson's civil-rights legislation and Great Society programs.[126]

Simply put, the black vote became the black Democratic vote; no modern political analysis can escape this fact. It is not simply that blacks consistently vote over 90 percent for Democratic candidates. As Professor Randall Kennedy well argues, for all of the Obama campaign's appeals to a broad constituency, the decisive push that propelled President Obama to victory in 2008 came from a massive black turnout[127]—a pattern that was repeated in 2012.

From the beginning of the vote-dilution case law, however, partisan competition was excluded from consideration. Just as the Supreme Court had to stretch to find state action when the Texas Democratic Party was the only game in town in the White Primary Cases,[128] so too did the Supreme Court's description of the wrong in vote-dilution cases steer clear of any role for political parties competing for minority votes. Indeed, many of the factors of the vote-dilution inquiry that the Court identified early on would make little sense in the context of active political competition. The Court's

125. Peter Applebome, *Rising G.O.P. Tide Overwhelms the Democratic Levees in the South*, N.Y. TIMES (Nov. 11, 1994), http://www.nytimes.com/1994/11/11/us/1994-elections-south-rising-gop-tide-overwhelms-democratic-levees-south.html (noting that congressional redistricting in the early 1990s "helped both blacks and Republicans").

126. *See* Merle Black, *The Transformation of the Southern Democratic Party*, 66 J. POL. 1001, 1007–12 (2004) (discussing this shift in Democratic Party membership, specifically in the South).

127. RANDALL KENNEDY, THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY 66–105 (2011).

128. Issacharoff & Pildes, *supra* note 118, at 652–60.

attention to the slating of candidates by a unified set of political bosses,[129] for example, was used to test for monopolistic control of the electoral process, something that would dissipate in the context of meaningful electoral contestation.

Almost without fail, the cases establishing vote dilution could not grapple with bipartisan competition. The secret undercurrent of the political-exclusion cases is that they addressed only claims of exclusive Democratic control of southern jurisdictions or urban northern settings. In part, the exclusive focus on political contests in a one-party dominated jurisdiction was a methodological question, as the presence of party-line voting complicated the use of a simple regression model that looked at race and votes cast as the only variables.[130] More significantly, once there were two parties involved, the racial dimensions of a candidate's loss fell out of focus.

One of the first vote-dilution cases, *Whitcomb v. Chavis*,[131] set the stage for decades of subsequent difficulties addressing the entangled issues of race and politics. In *Whitcomb*, the constitutional claim was that multimember state legislative districts defeated the electoral prospects of what the Court described as "a racial minority group [that] inhabited an identifiable ghetto area in Indianapolis."[132] On the facts presented, the inner-city black voters supported the Democratic Party, but the broader voting community elected Republicans to office.[133] For the Court, "the failure of the ghetto to have legislative seats in proportion to its population emerge[d] more as a function of losing elections than of built-in bias against poor Negroes."[134] More bluntly, "As our system has it, one candidate wins, the others lose."[135]

129. White v. Regester, 412 U.S. 755, 767 (1973); Zimmer v. McKeithen, 485 F.2d 1297, 1303 (5th Cir. 1973).

130. *See* Cousin v. Sundquist, 145 F.3d 818, 825 (6th Cir. 1998); Sanchez v. Colorado, 97 F.3d 1303, 1317 n.25 (10th Cir. 1996); League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 884 (5th Cir. 1993); Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 305–06 (D. Mass. 2004); Session v. Perry, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004); Anthony v. Michigan, 35 F. Supp. 2d 989, 1009 app. tbl. IV (E.D. Mich. 1999); Brown v. Bd. of Comm'rs, 722 F. Supp. 380, 392 (E.D. Tenn. 1989); Bradford Cnty. NAACP v. City of Starke, 712 F. Supp. 1523, 1534 (M.D. Fla. 1989); Windy Boy v. Big Horn Cnty., 647 F. Supp. 1002, 1009–10 (D. Mont. 1986).

131. Whitcomb v. Chavis, 403 U.S. 124 (1971).

132. *Id.* at 131.

133. *Id.* at 152.

134. *Id.* at 153.

135. *Id.*

Being outvoted could not justify a claim for relief unless there was proof of "being denied access to the political system."[136]

Whitcomb refused an invitation to find Republican electoral success unconstitutional, even in the face of black voting allegiance to the Democratic Party—a result that seems constitutionally inevitable. But *Whitcomb* also refused to address the proper distribution of electoral results along racial lines, as well as among any of the constituent groups of pluralist politics.[137] Justice O'Connor's difficult concurrence in *Thornburg v. Gingles* resurrected the concern of *Whitcomb*, and left open the possibility that a court should consider "all other relevant factors" affecting minority political opportunity.[138]

When the focus of representation shifted from at-large elections to the redistricting of single-constituency seats, the representational issue could no longer be avoided. Nor did the emergent Republican Party in the South allow the Court the ability to address minority exclusion without partisan implications. North Carolina's constitutional redistricting cases, beginning with *Shaw v. Reno*, presented the Court with bizarre district lines seemingly shouting out racial entitlement.[139] For the majority of the Justices, particularly Justice O'Connor, this redistricting scheme was simply a line too far, a point at which "appearances do matter."[140] The expressive dimension[141] of overt state commitment to racial considerations framed the Court's inquiry and the ensuing prohibition on states' exclusive reliance on racial considerations in redistricting.[142]

Unaddressed by the Court was the fact that both in North Carolina and nationally, black votes were Democratic votes, and the underlying redistricting battles had a clear partisan cast. To begin with, North Carolina Democrats had tried to redistrict in a fashion

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136. *Id.* at 154.

137. *See id.* at 156 (asking about the representation for, inter alia, union members, university groups, and religious and ethnic groups).

138. *See* Thornburg v. Gingles, 478 U.S. 30, 99 (1986) (O'Connor, J., concurring).

139. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 610 (1993) ("When the gerrymander has a visible racial component, the Court implicitly reasons, the districting decision flashes the message: 'RACE, RACE, RACE.'").

140. Shaw v. Reno, 509 U.S. 630, 647 (1993).

141. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–16 (1993) (describing the "expressive harms" that the *Shaw* Court recognized).

142. Bush v. Vera, 517 U.S. 952, 957–58 (1996) (describing this harm and providing the framework for judicial review of *Shaw* claims).

that would allow greater black representation while leaving intact the electoral bases of the incumbent congressional delegation, including its rich set of seniority privileges. That effort prompted an objection from the Republican-led DOJ, with the anticipated effect of breaking up historic Democratic power bases.[143] Instead, the Democratic legislature "scrimshawed" black districts, to use the late Professor John Hart Ely's evocative Melvillean term,[144] attempting both to create black descriptive representation and to preserve Democratic control over these districts. Only after an entire decade and four trips to the Supreme Court did a sheepish Court discover as an "evidentiary" matter that "race in this case correlates closely with political behavior," and that the record could not disentangle the two.[145]

No more successful than the attempt to find a line between racial and partisan considerations is the case law engaging the numerical distribution of black votes to maximize partisan impact. In cases like *Georgia v. Ashcroft*, the protector of black political aspirations was the Republican-controlled DOJ, which found that greater concentration of black voting strength (and corresponding weakening of Democratic voting power) was required under Section 5.[146] Alternatively, in *Page v. Bartels*, Republican litigants in New Jersey challenged a Democratic gerrymander of the state on the grounds that the efficient spreading of Democratic votes resulted in minority-vote dilution in violation of Section 2.[147] Not surprisingly in light of the partisan interests at play, in the last throes of Section 5 prior to *Shelby County*, it was the Republican legislature of Alabama that read the nonretrogression standard of the VRA most aggressively as requiring (or at least permitting) the packing[148] of black (Democratic) voters—a

143. *See* Ronald Smothers, *Fairness or Racial Gerrymander? Justices Study "Serpentine" District*, N.Y. TIMES, Apr. 16, 1993, at B7 (detailing the political maneuvering that led to the district lines at issue).

144. John Hart Ely, *Confounded by* Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 492 (2002).

145. Easley v. Cromartie, 532 U.S. 234, 257 (2001).

146. *See* Issacharoff, *supra* note 102, at 1717 ("[I]t would be an irony of historic proportions if the VRA were to emerge as a brake on black political aspirations in the heart of the Deep South.").

147. Page v. Bartels, 144 F. Supp. 2d 346, 348 (D.N.J. 2001). For a comparison of Georgia and New Jersey in this respect, see generally Issacharoff, *supra* note 102.

148. "Packing" is a term of art in redistricting parlance, referring to the overconcentration of voters beyond that necessary to elect. *See* Pamela S. Karlan, *All over the Map: The Supreme*

reading of the VRA that has been resisted in the Supreme Court by the Alabama Democratic Party and various civil-rights groups.[149] Even in the most recent Term of the Supreme Court, the overlay between partisan considerations and traditional civil-rights protections has confounded attempts to regulate improper behavior through a simple discrimination model.

IV. VOTE DENIAL IN AN ERA OF PARTISAN COMPETITION

A. Complications in the Voting-Rights Model

As the VRA aged, the gap between its regulatory structure and the issues of the day grew. After the early onslaught against pervasive at-large electoral systems across the country, Section 2 diminished in its litigation centrality.[150] Similarly, the number of DOJ objections denying preclearance under Section 5 plummeted, raising questions about its continued relevance.[151] By the time the Court reengaged with the constitutionality of Section 5 in *Shelby County*, the majority and dissent parted ways on whether there was any longer a factual predicate for coverage under the VRA.[152] For the majority, the lack of

Court's Voting Rights Trilogy, 1993 SUP. CT. REV. 245, 250 (referring to "packing," "stacking," and "cracking" as the tools of vote dilution).

149. *See* Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1239 (M.D. Ala. 2013) (noting Alabama's argument that it "preserved the majority-black districts with roughly the same percentage of black voters to comply with the nonretrogression principle of section 5 of the Voting Rights Act"); *see also* Brief for Appellants at 25–36, *Ala. Legislative Black Caucus*, 134 S. Ct. 2695, No. 13-1138 (Aug. 13, 2014) (arguing that Section 5 does not require black-population percentages, or "BPPs"); Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., in Support of Appellants at 12–16, *Ala. Legislative Black Caucus*, 134 S. Ct. 2695 Nos. 13-895, 13-1138 (Aug. 20, 2014) (arguing that Section 5 does not require maintaining a "specific minority population percentage in majority-minority districts"); Brief of the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of Appellants at 4–9, *Ala. Legislative Black Caucus*, 134 S. Ct. 2695, Nos. 13-895, 13-1138 (Aug. 20, 2014) (arguing that racial quotas under Section 5 are "constitutionally suspect").

150. *See* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 13–14 (2008) (describing this decline in Section 2 claims).

151. *See* Peyton McCrary, *How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005*, 57 S.C. L. REV. 785, 821 (2006) (discussing this decline in Section 5 claims).

152. *See* Richard L. Hasen, *Congressional Power To Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 188–93 (2005) (outlining the difficulty of providing evidentiary support for the preclearance provisions when renewing the VRA).

objections was an indication that the VRA had run its course.[153] Meanwhile, for the dissent, "Throwing out preclearance when [the VRA] 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."[154]

Neither of the central provisions of the VRA fits the current circumstances particularly well. Section 5 is most concerned with the actual mechanics of voting, but its extraordinary administrative review of state regulations was applied only to limited parts of the country.[155] Even when in force, Section 5 would not have covered efforts to diminish voting opportunities in Ohio, Pennsylvania, or Wisconsin. Moreover, Section 5's effectiveness hinged on the reluctance of jurisdictions to risk administrative rejection by DOJ. That reluctance was increasingly overcome in the later years of Section 5, meaning that the primary effect of the VRA was to switch the burden of proof onto a jurisdiction that failed to secure preclearance from DOJ.

Section 2 is an even poorer fit. The legislative history of the VRA's 1982 amendments reflects the genesis of the modern VRA as an attempt to create an easier path for vote-dilution cases than that compelled under the constitutional standard of *City of Mobile v. Bolden*.[156] As interpreted in *Thornburg v. Gingles*, the purpose of Section 2 is to weigh the legitimacy of the electoral results that obtain from how the votes are tabulated,[157] not whether they were cast properly in the first place, or were somehow subject to improper impediments. Since 1982, there has been little effort to address voting access through Section 2, and Section 2's use in this area is currently a matter of dispute in district courts. For example, courts in Ohio[158] and

153. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2626 (2013) (calling it "illuminating" that "[i]n the last decade before reenactment, the Attorney General objected to a mere 0.16 percent" of proposed changes in covered jurisdictions).

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

155. *See* 28 C.F.R. pt. 51, app. (2012) (listing the covered jurisdictions).

156. City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (noting that facially neutral state action must have a discriminatory purpose to violate the Fifteenth Amendment).

157. *See generally* JAMES A. GARDNER, WHAT ARE CAMPAIGNS FOR? THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS (2009) (describing the tabulation function of elections).

158. *See* Ohio State Conference of NAACP v. Husted, No. 2:14-CV-404, 2014 WL 4377869, at *1 (S.D. Ohio Sept. 4, 2014) (granting the plaintiff's motion for a preliminary injunction), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *staying order*, 135 S. Ct. 42 (2014).

Wisconsin[159] found sufficiently adverse racial impact so as to render voter-ID laws improper, but a North Carolina court reached the opposite conclusion over similar voting requirements.[160]

The question of the day is whether the traditional civil-rights models can and should be amended to try to recapture the primary regulatory means to contest improper ballot restrictions. The prior redistricting cases indicate that even before the latest Supreme Court rulings, the introduction of partisanship was already a complicating factor in even commonly litigated areas of voting-rights law.[161] Nor is recourse to direct constitutional claims of discrimination likely to be availing. Professor Daniel Tokaji captures the modern dynamic: "While intentional discrimination is difficult to establish, existing evidence supports the conclusion that identification requirements, outdated voting equipment, and felon disenfranchisement laws bear most heavily on African American and Latino voters."[162]

Even if one could craft a purely effects-based statutory test, something that might run afoul of the congruence-and-proportionality standard of *City of Boerne v. Flores*,[163] many of the current restrictions on registration and ballot access are difficult to assess in terms of likely racial impact. Take, for example, North Carolina's recent revocation of a state-law provision allowing seventeen-year-old high-school students to preregister for voter eligibility through their schools and be added automatically to the rolls once they turn eighteen.[164] A challenge based on racial impact would have to show not only differential registration rates along black–white grounds, but also a difference in the use of alternative registration mechanisms, and an ultimate impact not only on voter

159. *See* Frank v. Walker, 17 F. Supp. 3d 837, 900 (E.D. Wis. 2014) (holding that the balance of harms weighed against issuing a stay pending appeal), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

160. *See* N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 384 (M.D.N.C. 2014), *aff'd in part, rev'd in part and remanded sub nom.* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014), *staying order*, 135 S. Ct. 6 (2014); *see also* MORITZ COLL. OF LAW, *supra* note 82. *See generally* Weiser & Opsal, *supra* note 29 (listing principal litigation).

161. *See, e.g.*, Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 446 (1974) (invalidating a loyalty-oath rule designed to exclude the Communist Party from organized politics).

162. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 701 (2006).

163. City of Boerne v. Flores, 521 U.S. 507, 530 (1997) ("[T]here 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.").

164. *N.C. State Conference of NAACP*, 997 F. Supp. 2d at 378–79.

registration, but presumably on the ability of minority voters to elect a candidate of their choice to office. Perhaps not surprisingly, on first review, a North Carolina district court upheld the state's reforms against challenges under the voting-rights laws.[165] At the end of the day, and perhaps not surprisingly, voting-rights models intended to ferret out racial motivation or differential electoral impact based on race translate poorly to a setting in which issues of race overlap with considerations of partisanship—perhaps inextricably so.

B. A Law of Democracy Through the Prism of Race

When the first edition of *The Law of Democracy* appeared in 1998, one striking feature was the centrality of Alabama in so many of the cases that defined the field. It was as if, the authors joked amongst themselves, the field could be called the Law of Alabama. The star turn for Alabama was no accident. The original design of the federal Constitution contained a Faustian bargain over slavery.[166] The federal government, and by extension federal constitutional commitments, were conspicuously removed from the internal political arrangements of the states. One reflection of the compromise leading to the drafting and ratification of the Constitution is that the original document did not embody a textual commitment to democracy.[167] Some democratic principles are implicated by the required regular rotation of elected officials. There are also some antimonarchical concepts carried through the Guarantee Clause.[168] But there was no textual identification of the structures of democratic politics, nor of how the internal electoral affairs of the states were to be conducted. As a corollary, control over political participation and the structure of

165. *See id.* at 370 (finding that the denial of a preliminary injunction preventing this law from taking effect would not irreparably harm the plaintiffs).

166. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2264 (2013) (Thomas, J., dissenting) ("Even if the convention had been able to agree on a uniform federal standard [for voting qualifications], the Framers knew that state ratification conventions likely would have rejected it. Madison explained that 'reduc[ing] the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention.' Justice Story elaborated that setting voter qualifications in the Constitution could have jeopardized ratification, because it would have been difficult to convince States to give up their right to set voting qualifications." (citations omitted)).

167. *See generally* THE LAW OF DEMOCRACY, *supra* note 40, at 7–10 (discussing the origins of the constitutional text).

168. For an expansive reading of the Republican Guarantee Clause, see generally Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000).

elections was left to local authorities. Alabama achieved the role of innovator because it used its powers of local control to drive the politics of racial exclusion.

Race bore the burden of creating a law of democracy in the United States for two reasons—one obvious, one perhaps less so. First, because the Reconstruction Amendments established citizenship and voting rights based on race, there was a more accessible legal basis for a claim of a denial of fundamental democratic rights. Race provided the opening wedge into cohering a broader national commitment to political rights. But much more significant was the role of race in defining the contours of a constitutional law of the political process that began to emerge in the mid–twentieth century. Race so heavily infused every contested area of constitutional politics, again save perhaps the emergence of campaign-finance law, that it provided a certain enough proxy for the emerging constitutional law of political engagement. Once the Nineteenth Amendment's passage in 1920 definitively settled the issue of women's voting rights, the continued force of Jim Crow was the crucible for judicial engagement with the political process.

But *Bush v. Gore* dramatically revealed that the fault lines in the politics of voting were shifting. After the notable successes of the VRA interventions, the center of gravity of the VRA shifted from states with remaining legacies of Jim Crow to states like Florida and Ohio that were becoming the dividing lines in the partisan wars. These are states that, although no doubt having minority populations, are tightly divided between Democratic and Republican voters, and that offer a rich harvest of power for tipping voting margins for control in all areas, from state legislative power to blocs of votes in the Electoral College. To concretize the transformed electoral environment, today's shorthand description of the law of democracy is more likely to be the law of Ohio than the law of Alabama.

What defines modern case law is the toxic combination of local political control over the election machinery and national political impact in terms of either congressional redistricting[169] or Electoral

169. There is a longstanding dispute over whether gerrymandered redistricting is a result of partisan imbalance and greater partisan rancor, or whether the blue–red divide is instead a product of the "big sort" of like-minded communities gravitating closer toward each other, with Democrats in the urban areas and Republicans in the suburban and rural areas. Although the sorting effect is no doubt present, the revealed belief of political insiders is that authority over redistricting matters greatly. Consider, for example, Pennsylvania's voting results in 2008 and 2012 under redistricting plans drawn first by Democrats and then by Republicans. Though

College votes. The pattern is the same regardless of the racial composition of the state, or whether the state has a Jim Crow lineage. The forms of voter restrictions look different in a formerly covered Section 5 jurisdiction like Texas, in a partially covered one like North Carolina, or in a noncovered jurisdiction like Wisconsin. The tools of limitation focusing on the ID requirement for voting are the same in a state with a large minority population, like Mississippi, and in one with a small minority population, like New Hampshire. Similarly, newly imposed restrictions on early voting and on ease of registration are basically the same in a state with a mobilized minority electorate, like Ohio, and in one without such an electorate, like Nebraska.[170] Indeed, one of the lead innovators on restrictive voter practices is Kansas, a state with a relatively small minority population.

To repeat the main point, what unifies those states creating new ballot restrictions is that they are under Republican control, and what separates those states from jurisdictions that have resisted the tide of new constraints is that the latter are under Democratic control. Today's "ballot bedlam" is a reflection of the importance of turnout in a fraught partisan environment.

At bottom, the issue is whether it is time to address the new voting claims in their partisan guise, rather than continue to repackage voting practices based on the racial impact of select jurisdictions. As Justice Stevens wrote for the *Crawford* Court, "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 Board of Elections*]."[171] But partisanship is rarely so unvarnished as to stand alone, as Justice Stevens seems to require. At the same time, the main argument of this Article is that we should resist the efforts to fill the void by placing all doctrinal weight on claims of racial discrimination. Three developments suggest that the

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President Obama won the state handily each time with about 55 percent of the vote, his voting margins were almost entirely concentrated in Philadelphia, giving some support to the sorting thesis. In 2008, Democrats took twelve of the state's nineteen House seats. In 2012, after a Republican-run redistricting and after the loss of one congressional seat from reapportionment, the Democrats won only five of the state's eighteen seats. Absent a renewed sorting through massive population transfer during these four years, the only variable accounting for which party controlled the congressional delegation seems to be which party controlled the redistricting plans.

170. *See supra* Table 2.

171. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 203 (2008). *Harper* can be found at *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

historical doctrinal reliance on race to police the political system should yield to a direct focus on the integrity of the electoral system.

First, as developed above, the category of race increasingly fails to capture the primary motivation for what has become a battlefield in partisan wars. The efforts to use voter access as a partisan lever are as likely to emerge in states with and without significant minority populations. The fact that even minority impact is at best speculative introduces real problems in using class forms of civil-rights enforcement. Coupled with this is the weakness in the civil-rights model following *Shelby County*, and the problematic efforts to force vote-denial claims into the vote-dilution structure of Section 2.

Second, as the center of gravity in voting claims shifted to the frontlines of the partisan battles, so too did the doctrines toward nonracially defined constitutional protections. Ohio became ground zero for the presidential elections of 2004, 2008 and 2012. In repeated cases in the Sixth Circuit, where the partisan stakes raised the issue of partisan manipulation of voting rules most aggressively in the political and judicial arenas, a new constitutional doctrine emerged requiring "the nonarbitrary treatment of voters."[172] From this, the Sixth Circuit established a new test for equal protection of the franchise: "[S]tate actions in election processes must not result in 'arbitrary and disparate treatment' of votes."[173] In each case, the Sixth Circuit relied on the language from *Bush v. Gore* that the right to the franchise entails "more than the initial allocation of the franchise. *Equal protection applies as well to the manner of its exercise.*"[174] Applied to eve-of-election alterations in early voting in Ohio in 2012, the Sixth Circuit explained that

> [a]lthough 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

172. Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 234 (6th Cir. 2011) (quotation marks omitted) (quoting League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 477 (6th Cir. 2008)).

173. *Id.* (quoting Bush v. Gore, 531 U.S. 98, 104 (2000)).

174. *Bush*, 531 U.S. at 104 (emphasis added).

> considered as a burden . . . . To conclude otherwise is to ignore reality.[175]

Third, alongside the constriction of federal civil-rights power in *Shelby County*, the Court employs an expansive reading of the federal regulatory power over federal elections. The Elections Clause of the Constitution gives Congress plenary authority to override state regulations with regard to the time, place, and manner of federal congressional elections.[176] As summarized by Judge Richard Posner, when acting under the Elections Clause, "Congress was given the whip hand."[177] In *Arizona v. Inter Tribal Council of Arizona, Inc.*,[178] the Court confronted an Arizona requirement of proof of citizenship as a condition of voting—in itself perfectly permissible, but put into force by a modification of the federal forms used for registration in federal elections.[179] In striking down the Arizona law, Justice Scalia brushed aside the federalism concerns underlying *Shelby County*, ruling that "*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."[180]

In sum, the combination of the diminishing explanatory force of race as the critical motivation of the new laws, the emergence of a constitutional jurisprudence on a nondiscrimination account of the right to vote, and the prospect of federal regulatory power being exercised on the basis of control over federal elections all point to a pivot away from the inherited civil-rights approaches. I have elsewhere developed an argument about what a federal administrative regime might entail,[181] and I will not describe here the institutional form that a federalized guarantee of electoral integrity might take. But the key question for the present discussion is whether

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175. Obama for Am. v. Husted, 697 F.3d 423, 442 (6th Cir. 2012) (White, J., concurring in part and dissenting in part), *cert. denied*, 133 S. Ct. 497 (2012). Disclosure: I served as one of the lawyers for Obama for America in this litigation.

176. U.S. CONST. art. I, § 4, cl. 1.

177. Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995).

178. Arizona v. Inter Tribal Council of Ariz., 133 S. Ct. 2247 (2013).

179. *Id.* at 2252.

180. *Id.* at 2257 n.6.

181. *See generally* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013) (proposing an administrative process founded on the Elections Clause).

continuing to envision the inherited civil-rights model as the unique regulatory framework continues to be effective.

CONCLUSION: THE PARTICULAR AND THE UNIVERSAL

Twenty years ago, I began my first substantial article in this area by asking why the facilitation of black-voter registration and black voting had not made voting-rights litigation obsolete.[182] Ten years ago, I began a different article by asking, in similar fashion, whether Section 5's ability to enable black electoral advances had made the continued vitality of that provision of the VRA a victim of its own success.[183]

In 1992, I could argue that the incomplete second phase of voting-rights reform had left minorities still outside the legislative arena. In the language of *United States v. Carolene Products, Co.*,[184] there was no capacity to turn to the ordinary workings of the political process to redress the debilities of discrete and insular minorities who were still unable to form part of the governing calculus in American politics.[185] But by 2004, the example of *Georgia v. Ashcroft* reflected the changed dynamics of political success. Electoral success allowed minorities to "pull, haul, and trade" in politics,[186] and in the accompanying compromises, pacts, and coalitions that come from the real world of politics.[187] The Supreme Court's constitutional confrontation with the VRA's legacy in *Shelby County* forces these debates to the fore once again.

Shelby County compels a reevaluation of the extent to which the particularized protections of the right to vote through the paradigm of racial exclusion and racial oppression continue to shape contemporary battles of access to the ballot. Beyond the racial dimensions, the history of racial exclusion from the franchise has always had a strong component of maintaining incumbent political

182. *See generally* Issacharoff, *supra* note 86 (questioning why voting-rights litigation is not obsolete and arguing that the insulation of voting-rights law from neoconservatives is a species of affirmative action).

183. *See generally* Issacharoff, *supra* note 102 (asking whether the success of Section 5 has compromised its mission).

184. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

185. *Id.* at 153 n.4.

186. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

187. *See* Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 50 (2003) (interpreting the VRA's results).

power. But race bore the burden of much of the law of democracy, and with this burden, it provided a basis for the transformation of the constitutional protections of basic democratic rights. Undoubtedly, race in American history has been a dominant theme in defining the just protections of our society, and the twentieth-century fight for racial justice in politics carried with it other dimensions for redressing structural frailties in American democracy. But history has altered the mix, and as wisely observed by Dean David F. Levi in his prior role as a judge, "The history of election law is one of change and adaptation."[188]

Focusing on the dominant partisan motivation for the manipulation of ballot access suggests that we have reached a point at which we can provide a strong measure of racial justice through means not burdened with the particular legal and political freight of race. Claims of racial justice have historically served as the primary—and oftentimes exclusive—means of assailing the misuse of authority over the political process, whether for racial or other ends. The weakening of protections for the right to vote under the civil-rights laws comes at the same time as a restored constitutional interest in voting and political integrity, as well as a reaffirmation of muscular federal authority over all voting in federal elections. Just as the racial impact of the new voting restrictions is a byproduct of partisan-inspired efforts to manipulate ballot access, so too may it be protected as a broader recasting of the protections of the electoral system from local partisan abuse.

The push to seek generalized protections for electoral integrity rather than particular protection for vulnerable groups is part of a much broader debate over whether more general structural approaches capture enough of the distinct interests of the more vulnerable groups in our society.[189] Credible critics like Professors Spencer Overton[190] and Samuel Bagenstos[191] urge the contrary, fearing that—like Justice Ginsburg in *Shelby County*—a lowering of the guard will reveal the unique vulnerabilities still borne by minorities. But the changed legal and political dynamics suggest that it is time for

188. Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1303 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1998), *rev'd*, 530 U.S. 567 (2000).

189. For a similar claim about generalizing the protections of equal-protection law, see generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

190. Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 23 (2013).

191. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After* Shelby), 123 YALE L.J. 2838, 2870 (2014).

the law of democracy to recognize that we really are in the era of the law of Ohio. And with the question so posed, battleground states like North Carolina look very much like the Ohio of today, and not so much like the Alabama of old.