
REINFORCED POLARIZATION: HOW THE ROBERTS
COURT'S RECENT DECISION TO INVALIDATE THE
VOTING RIGHTS ACT'S COVERAGE FORMULA WILL
EXACERBATE THE DIVISIONS THAT BEDEVIL U.S.
SOCIETY

M. AKRAM FAIZER¹

As America focuses on the reasons behind the tragic August 9, 2014 killing of an African-American teenager, Michael Brown, by a White police officer in Ferguson, Missouri, commentators have seized upon the fact that fifty of the fifty-three officers employed by the Ferguson Police Department are White, while Ferguson is a municipality that is nearly 70% African-American.² Ferguson, moreover, is a municipality with a White mayor and a city council that is five-sixths White.³ This is most likely because Ferguson's African-American voter turnout for municipal elections is only 6%, which can partially be explained by the fact that Ferguson schedules its municipal elections during off-years, when racial minority voter participation is particularly low as compared to Whites.⁴ Notwithstanding the country's election and reelection of its first African-American President, this is paradigmatic in today's U.S.—a country with extremely high levels of racial political polarization and very low rates of racial minority voter participation in midterm and off-year elections.⁵ This

¹ Professor M. Akram Faizer is an Associate Professor of Law at Lincoln Memorial University's Duncan School of Law ("DSOL"). He would very much like to thank his wife, Melanie Faizer, for her loving support of him, DSOL Librarian Ann W. Long for her help in editing this piece, and DSOL student Jonathan Connor for his research assistance. Professor Faizer would also like to thank the Cumberland Law Review for its help in preparing this piece for publication.

² Matt Pearce et al., *Protestors and Police Face Off in St. Louis Suburb Over Shooting*, L.A. TIMES (Aug. 11, 2014), <http://www.latimes.com/nation/nationnow/la-na-missouri-st-louis-police-shooting-teen-20140811-story.html#page=1>.

³ *Id.*

⁴ See Ian Millhiser, *This Is the Most Important Reform Ferguson Can Enact to Give its Black Residents a Voice*, THINKPROGRESS (Aug. 18, 2014, 9:00 AM), <http://thinkprogress.org/justice/2014/08/18/3472278/this-is-the-most-important-reform-ferguson-can-enact-to-prevent-another-standoff/>.

⁵ See *id.* (discussing the disparity in African-American voter turnout during midterm and odd-year elections).

)

explains many of the country's enduring pathologies, including inordinately high levels of socioeconomic inequality and very poor educational outcomes.⁶ What is unequivocally true, however, is that U.S. democracy is nowhere near a postracial paradigm that merits ending federal supervision of state election procedures.

In *Shelby County v. Holder*,⁷ Chief Justice Roberts issued a decision that effectively neuters the Voting Rights Act (VRA),⁸ arguably the most important piece of civil rights legislation in the nation's history, enacted to ensure racial minority voting rights.⁹ His majority opinion invalidated VRA Section 4,¹⁰ which provided the coverage formula for determining which states, known as "covered jurisdictions," are required to obtain preclearance from either a three-judge panel of the United States District Court for the District of Columbia (DDC) or the U.S. Attorney General (AG) *before* changing their voting procedures.¹¹ The Roberts Court overturned the VRA because—among other things—the VRA's preclearance formula ostensibly contradicted what the Chief Justice asserts is the "fundamental principle of equal sovereignty among the States," which is nowhere stated in the U.S. Constitution.¹² This statement is incredible in its naivety and disregard of the nation's history and continued practice of pronounced racial discrimination. Although conservatives have lauded the immediate judicial outcome of the Court's decision in *Shelby County*,¹³ the Court's decisions should not only

⁶ See generally Guy-Uriel E. Charles, *Toward a New Civil Rights Framework*, 30 HARV. J.L. & GENDER 353, 353–54, 356–62 (2007) (discussing historical and contemporary racial perceptions, presenting economic data indicators by race, and analyzing the role of socio-economic factors in civic perception); R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1066–70 (2001) (discussing differences in socio-economic factors between African-Americans and White Americans and noting how these socio-economic factors affect African-American educational opportunities).

⁷ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

⁸ See *id.* at 2631.

⁹ E.g., Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 166–67 (2007) (explaining the necessity of the unprecedented congressional power exercised in enactment of the Voting Rights Act).

¹⁰ *Shelby Cnty.*, 133 S. Ct. at 2629–31.

¹¹ See 52 U.S.C. § 10304 (2012).

¹² *Shelby Cnty.*, 133 S. Ct. at 2623–24, 2629–31 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

¹³ See, e.g., Jennifer Rubin, *The Left's Nonsense Analysis of the Voting Rights Act Case*,

be evaluated according to their apparent desirability, but also according to their institutional legitimacy, jurisprudential soundness, and how they will affect and interact with both U.S. government and society. By these measures, the Court's decision in *Shelby County* is an altogether problematic use of judicial review because it risks precipitating a backlash against racial minority voting rights by state legislatures in a country with an inordinately high level of racial political polarization and a pronounced history of racial discrimination. In short, the decision will exacerbate rather than bridge the racial and socioeconomic divides that bedevil U.S. society.

Shelby County involved the Alabama County's challenge to the constitutionality of the coverage formula used in the VRA's most recent 2006 reauthorization, officially known as the "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act," because the reauthorization's coverage formula was largely unchanged from the coverage formula used in previous VRA reauthorizations.¹⁴ In effect, the fundamental issue presented was whether Congress could still reauthorize the VRA's preclearance provision as applied to covered jurisdictions under such circumstances.¹⁵ *Shelby County* and jurisprudential conservatives relied on previous court decisions that parsimoniously interpreted Congressional legislative power under the Reconstruction Amendments and alleged that Congress had no authority to reauthorize the coverage formula because minority voter registration levels and ballot access had markedly improved in recent years.¹⁶ Liberals and VRA proponents, on the other hand, relying on the Court's earlier VRA jurisprudence, disputed this assertion, arguing that Congressional power to enact the coverage formula under the

WASH. POST (June 26, 2013), <http://www.washingtonpost.com/blogs/right-turn/wp/2013/06/26/the-lefts-nonsense-analysis-of-the-voting-rights-act-case/>; George Will, Op.-Ed., *Supreme Court Is Correct on Voting Rights Act*, WASH. POST (June 26, 2013), http://www.washingtonpost.com/opinions/george-will-supreme-court-is-correct-on-voting-rights-act/2013/06/26/b15c8d84-de81-11e2-b797-cbd4cb13f9c6_story.html.

¹⁴ *Shelby Cnty.*, 133 S. Ct. at 2621, 2630–31.

¹⁵ *See id.* at 2627–28.

¹⁶ *Id.* at 2625–26.

Fifteenth Amendment is sufficiently broad to enact rational legislation of its choosing.¹⁷ The Court sided with Shelby County and conservative VRA opponents.¹⁸

This article is divided into four parts. The first part discusses the historical background of racial discrimination in voting rights that led to the VRA's enactment in 1965 based on Congress's authority to pass legislation under the Fifteenth Amendment. The second part describes the current predicament of U.S. government and society and concludes that, although the U.S. remains the world's most powerful country, it is beset by many problems: namely, pronounced racial and socio-economic cleavages that are, in part, exacerbated by the country's Byzantine political system that excessively empowers the wealthiest Americans and minimizes the number and political impact of racial minority votes. The third section analyzes the VRA's different provisions and concludes that, although voting jurisdictions have eliminated first generation voting barriers such as poll taxes and literacy tests, it is now second generation barriers that harm racial minority voting rights—especially in states with a particularly pronounced problem of racial political polarization that requires either a more prominent role in federal supervision of state and local elections or a complete rethink of election procedures to increase the political power of racial minority voters. The fourth part describes *Shelby County* in detail and concludes that the Chief Justice's decision solely focuses on first generation voting barriers to naïvely conclude the Court should use its judicial review powers to sweepingly invalidate the most important piece of voting rights legislation in the country's history. It concludes that the effect of *Shelby County* will most likely result in states harmfully exploiting and exacerbating the nation's racial divisions for partisan political purposes, and further proposes that the country replace its current single member plurality system for electing legislative candidates with a modified proportional representation system that is currently used in many Western European countries.

I. THE VRA AND THE FIFTEENTH AMENDMENT – A BRIEF

¹⁷ See *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964).

¹⁸ *Shelby Cnty.*, 133 S. Ct. at 2631.

BACKGROUND

President Lyndon B. Johnson signed the VRA into law after it was passed by supermajorities in both Congressional houses to ensure, at the height of the Civil Rights movement, franchise rights for African-Americans and other racial minorities that had systematically been denied voting rights by recalcitrant state and local governments.¹⁹ The legislation was enacted based on the Fifteenth Amendment to the U.S. Constitution, which was enacted and ratified during Reconstruction to both declare that race can no longer be used to deny voting rights and provide Congress with necessary legislative power to protect this right against racist state governments.²⁰ Section 1 provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of

19

The Voting Rights Act of 1965 was designed by the Congress to banish racial discrimination in voting which had infected the electoral processes in parts of this nation for nearly a century. Congressional Enactments in 1957, 1960, and 1964, whose purpose was to facilitate case-by-case litigation to secure equal voting rights, encountered state and local intransigence and delays in the judicial process. It yielded insignificant gains in non-white voter registration. This history is detailed in this committee’s report on the 1965 Act, House Report No. 439, 89th Congress, First Session, at 8-13. In this context the Congress, in 1965, fashioned remedial provisions to be automatically applied to certain jurisdictions on the basis of a statutory coverage formula. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Supreme Court sustained the Voting Rights Act as a valid means of effectuating the commands of the 15th Amendment. Its comments underscore the rationale of the legislation

H.R. REP. NO. 91-397 (1970), reprinted in 1970 U.S.C.C.A.N. 3277, 3278; see also Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859 (1995) (discussing generally the history of African-American voter disenfranchisement and passage of the Voting Rights Act).

²⁰ See Christopher R. Murray, Note, *Felon Disenfranchisement in Alaska and the Voting Rights Act of 1965*, 23 ALASKA L. REV. 289, 298–99 (2006) (discussing ratification and scope of the Fifteenth Amendment, connections between the Voting Rights Act and the Fifteenth Amendment, and Congress’s purpose behind enacting the Voting Rights Act); see also Melissa E. Austin, Note, *Shaw v. Reno: A Beginning for Color-Blind Reapportionment*, 2 GEO. MASON INDEP. L. REV. 495, 499–500 (1994) (citations omitted) (internal quotation marks omitted) (“The [Voting Rights Act of 1965] represented the most comprehensive attempt by Congress to rid the nation of racial discrimination that precluded blacks from voting. Congress intended to ensure that the minority franchise was meaningful.”).

race, color, or previous condition of servitude.”²¹ The enforcement provision, Section 2, provides that “Congress shall have power to enforce this article by appropriate legislation.”²²

Although the Fifteenth Amendment historically altered U.S. federalism by giving Congress the power to police state elections, Congress, until it passed the VRA, had failed to enact substantive voting-rights legislation for nearly 100 years as segregationists dominated both houses of Congress and prioritized the maintenance of a racial hierarchy in the South.²³ As a result, Blacks were effectively disenfranchised in the South because they were consistently prevented from registering to vote and serving on juries by Whites intent on preserving what was known as “Jim Crow.”²⁴ Indeed, as the liberal former Supreme Court Justice John Paul Stevens has written, the lack of voting rights legislation until the VRA’s enactment meant that the three-fifths clause—which in Article I, Section 2 shamelessly countenanced slavery in the U.S. Constitution and increased Southern representation in the House of Representatives by three-fifths of the number of slaves within Southern States—was replaced after Reconstruction by a southern 100% bonus because African-Americans, who were systematically prevented from registering to vote, were counted as voting citizens for Congressional apportionment purposes.²⁵ This artificially increased the national political power of Southern Whites and should contextualize the Chief Justice’s assertion, in *Shelby County*, that the U.S. Constitution somehow mandates equality among the several States.²⁶ Former

²¹ U.S. CONST. amend. XV, § 1.

²² U.S. CONST. amend. XV, § 2.

²³ See Jamaal Makesi Chatman, *Abstention Against Will: The Perpetual Disenfranchisement of African Americans in Voting and Politics*, 3 J. RACE GENDER & POVERTY 43, 46–51 (2012) (discussing the Fifteenth Amendment’s effects on the states, African-American voting before, during, and after Reconstruction, and adoption of the Voting Rights Act). See generally R. VOLNEY RISER, *DEFYING DISFRANCHISEMENT: BLACK VOTING RIGHTS ACTIVISM IN THE JIM CROW SOUTH, 1890–1908* (1st ed. 2010) (providing historical background of deprivation of voting rights in Jim Crow Era of the South).

²⁴ See Chatman, *supra* note 23, at 47–50.

²⁵ John Paul Stevens, *The Court and the Right to Vote: A Dissent*, N.Y. REV. OF BOOKS (Aug. 15, 2013), <http://www.nybooks.com/articles/archives/2013/aug/15/the-court-right-to-vote-dissent/> (reviewing GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* (2013)).

²⁶ See *id.*

Justice Stevens wrote, “[B]oth the underrepresentation of blacks and the overrepresentation of white supremacists in the South during that period contradict the notion that the ‘fundamental principle of equal sovereignty among the States’ is a part of our unwritten Constitution.”²⁷

The VRA altered this paradigm by giving the federal government some supervisory power over state and local election procedures. The act can be summarized as follows:

1. The VRA, currently codified at 52 U.S.C. §§ 10301 to 10314, proscribes denial or abridgement of voting rights on account of race or color and authorizes the AG or any aggrieved person to commence proceedings to enforce voting guarantees under the Fourteenth and Fifteenth Amendments, provided that nothing can be construed to require members of a protected class from being elected in numbers equal to their proportion in the population.²⁸

2. Section 2, amended in 1982, prohibits the drawing of election lines in ways that improperly dilute minority voting power through measures such as at-large voting districts that minimize the ability of racial minorities to elect their chosen candidates.²⁹ Although Section 2 prohibits vote denial, its focus has been on the drawing of legislative district lines to dilute the political effect of racial minority votes.³⁰

3. Section 3 allows the AG to commence a proceeding to “bail-in” a jurisdiction that is not included by VRA Section 4’s coverage formula and petition a federal court to seek injunctive relief to prevent a voting jurisdiction from enacting changes to

²⁷ *Id.* Justice Stevens explained further:

[T]he terrorist tactics of the Ku Klux Klan and other groups devoted to the cause of white supremacy effectively prevented any significant voting at all by African-Americans, thus replacing a prewar three-fifths bonus with a post-Reconstruction bonus of 100 percent of the nonvoting African-Americans. Thus, for almost a century—until the VRA was enacted during President Johnson’s administration—the southern states’ representation in Congress was significantly larger than it should have been.

Id.

²⁸ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301 to 10314 (2012)).

²⁹ *See id.* at § 2 (codified as amended at 52 U.S.C. § 10301 (2012)).

³⁰ *Id.*

voting procedures such as, among other things, literacy tests, intimidation, threats and other voting obstructions.³¹

4. Section 4(b) provides, among other things, for a formula that determines which jurisdictions, known as “covered jurisdictions,” must seek preclearance from either the AG or the DDC before they can implement voting procedure changes of any type.³²

5. Section 4(a), a procedure whereby these “covered jurisdictions” can seek “bailout” from the coverage formula so that they no longer need to obtain preclearance before implementing voting procedure changes.³³

6. VRA Section 5 outlines the procedures that “covered jurisdictions” must undertake to obtain preclearance from either the AG or DDC to implement voting procedure changes.³⁴

In short, the VRA provides federal courts with jurisdiction to enforce voting rights in two markedly different situations. The first involves the use of federal courts nationwide to stop allegedly discriminatory voting changes and obstructions. This is known as the “bail-in” provision of VRA Section 3, which allows the AG or any “aggrieved person” to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment “in any State or political subdivision the court finds that violations” have occurred.³⁵ Put simply, the “bail-in” provision authorizes a federal court that has granted equitable relief for violations of Fourteenth and Fifteenth Amendment voting guarantees to retain jurisdiction for a period of time, during which the court may require the violating voting jurisdiction to get authorization from it before making changes to certain voting standards, practices, or procedures.³⁶ The VRA’s “bail-in” provision was *not* directly affected by *Shelby County*.³⁷

³¹ See *id.* at § 3 (codified as amended at 52 U.S.C. § 10302 (2012)).

³² See *id.* at § 4(b) (codified as amended at 52 U.S.C. § 10303(b) (2012)), *invalidated* by *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (outlining the formula used to determine “covered jurisdictions”); see also Travis Crum, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 1999 (2010).

³³ See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437 (codified as amended at 52 U.S.C. § 10303(a) (2012)).

³⁴ See *id.* at § 5 (codified as amended at 52 U.S.C. § 10304 (2012)).

³⁵ See *id.* at § 3(c) (codified as amended at 52 U.S.C. § 10302(c) (2012)).

³⁶ See *id.*; Crum, *supra* note 32, at 1999.

³⁷ *Shelby Cnty.*, 133 S. Ct. at 2631.

The constitutionality of the more important VRA provision that determines those jurisdictions, known as “covered jurisdictions,” that must seek preclearance from either the DDC or the AG before implementing voting procedure changes was, however, invalidated by *Shelby County*.³⁸ The “covered jurisdictions” formula of Section 4(b) was based on a Congressional determination as to the jurisdictions that have demonstrated a sufficient historical pattern and practice of racial discrimination in the provision of franchise rights, to subject them to VRA Section 5’s preclearance requirements.³⁹ The coverage formula was based on observed voting patterns in the 1964, 1968 and 1972 presidential elections⁴⁰ and has remained largely unchanged in subsequent VRA reauthorizations, notwithstanding the fact that ballot access has markedly changed nationwide, such that the states included within the “covered jurisdictions” formula frequently exceed non-covered jurisdictions in voter turnout levels and in the number of racial minority elected officials.⁴¹ Seizing on this discrepancy, the Court sweepingly invalidated VRA Section 4(b)’s coverage formula as unconstitutional based on a narrow conclusion that Congressional legislative power under the Fifteenth Amendment is remedial and invalid if not congruent and proportional to an existing constitutional violation.⁴² As set forth more fully below, this is based on a conservative and parsimonious reading of Congressional legislative power under the Fifteenth Amendment that liberals argue strenuously against.⁴³ Moreover, *Shelby County* omitted consideration of the previously covered jurisdictions’ unhealthy correlation between political partisanship and race, and how this has engendered problematic

³⁸ *Id.*; see also Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437 (codified as amended at 52 U.S.C. § 10303(b) (2012)), *invalidated by Shelby Cnty.*, 133 S. Ct. at 2631.

³⁹ See Crum, *supra* note 32, at 1999; see also Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4(b) to 5 (codified as amended at 52 U.S.C. §§ 10303(b) to 10304 (2012)).

⁴⁰ Crum, *supra* note 32, at 1999.

⁴¹ See *Shelby Cnty.*, 133 S. Ct. at 2625–26.

⁴² See *id.* at 2629, 2631.

⁴³ Compare *id.* at 2629 (2013) (Roberts, J., majority) (stating that Congress is limited to using current conditions when including a state in a “covered jurisdiction”), with *id.* at 2636 (Ginsburg, J., dissenting) (arguing that Congress’s judgment related to its power under the Fifteenth Amendment “warrants substantial deference”), and Stevens, *supra* note 25 (critiquing the decision in *Shelby County*).

second-generation voting barriers that harm African-American and Hispanic voters.⁴⁴ These second-generation voting barriers developed despite federal supervision of state and local election procedures under the VRA; however, states in the covered jurisdictions did feel certain constraints, such as having to seek pre-clearance under Section 5 of the VRA when implementing voting procedure changes.⁴⁵ This is now no longer the case. *Shelby County*, therefore, will unfortunately give state legislatures free rein to exploit and magnify the country's racial divisions for political purposes. The Chief Justice's decision will, in short, exacerbate the country's problematic racial divisions to its overall detriment.

II. THE U.S. AND ITS RACIAL AND ETHNIC DIVISIONS

The U.S. is the economic leader in the developed world, with a gross domestic product (GDP) estimated at over \$16.7 trillion and a per capita income of approximately \$52,800.⁴⁶ The U.S. also retains, by far, the most powerful military in the world and is unique among industrialized countries in spending over 4% of its GDP on national defense.⁴⁷ In addition, the U.S. maintains the world's reserve currency,⁴⁸ attracts highly skilled immigrants,⁴⁹ and is home to the world's leading universities⁵⁰ and companies.⁵¹ The U.S., however, has many unique problems

⁴⁴ Cf. *Shelby Cnty.*, 133 S. Ct. at 2636, 2642–44 (Ginsburg, J., dissenting).

⁴⁵ See *id.* at 2638–42; Persily, *supra* note 9, at 199–202.

⁴⁶ *United States: Economy*, THE WORLD FACTBOOK (2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html>.

⁴⁷ *Country Comparison: Military Expenditures*, THE WORLD FACTBOOK (2014), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2034rank.html?countryname=UnitedStates&countrycode=us®ionCode=noa&rank=19#us>.

⁴⁸ Eswar Prasad, *The Dollar Reigns Supreme, By Default*, 51 FIN. & DEV., no. 1, Mar. 2014, at 34, 37, available at <http://www.imf.org/external/pubs/ft/fandd/2014/03/pdf/prasad.pdf>.

⁴⁹ See Press Release, Dep't Homeland Sec., DHS Announces Proposals to Attract and Retain Highly Skilled Immigrants (May 16, 2014), <http://www.dhs.gov/news/2014/05/06/dhs-announces-proposals-attract-and-retain-highly-skilled-immigrants>.

⁵⁰ *World University Rankings 2014-2015*, TIMES HIGHER EDUC., <http://www.timeshighereducation.co.uk/world-university-rankings/2014-15/world-ranking> (last visited January 31, 2015).

⁵¹ See *Global 2000: The World's Biggest Public Companies List*, FORBES, May 2014, <http://www.forbes.com/global2000/list/>.

compared to other industrialized and emerging nations. First, it has pronounced socio-economic and racial cleavages that are aggravated by the dynamics of the country's political culture. Indeed, a recent Pew Research study demonstrates that median household wealth for Whites is 20- and 18-times greater than it is for Blacks and Hispanics, respectively.⁵² Evidence demonstrates that the U.S.' inordinately high level of income inequality is a major reason it has struggled to recover economically from the 2008 financial crisis.⁵³ The U.S.' relative unwillingness to tax its citizens to pay for needed public investments and services,⁵⁴ coupled with the fact it has a sizable portion of its population that, for historical reasons, has lower levels of human capital, education, and wealth than the White American majority,⁵⁵ worsens this problem in a country that, according to the International Monetary Fund, was recently overtaken by the People's Republic of China in terms of aggregate GDP adjusted for purchasing power parity.⁵⁶ Pithily put, the U.S. taxes its citizens as though it was a developing nation and not the world's leading industrialized country.⁵⁷ Tax revenues account for a mere 17% of U.S.

⁵² Rakesh Kochhar, *Hispanic Household Wealth Fell by 66% from 2005 to 2009: The Toll of the Great Recession*, PEW RES. HISP. TRENDS PROJECT (July 26, 2011), <http://www.pewhispanic.org/2011/07/26/the-toll-of-the-great-recession/>.

⁵³ Edward Luce, *Tepid US Recovery – It's the Middle Class, Stupid*, FIN. TIMES (June 1, 2014, 5:50 PM), <http://www.ft.com/intl/cms/s/0/753839f0-e75b-11e3-88be-00144feabdc0.html#axzz33ULLDY76>.

⁵⁴ See Mark J. Mazur, *Tax Reform and Infrastructure Investments to Boost our Economy*, U.S. DEPT TREASURY (Jan. 16, 2015), <http://www.treasury.gov/connect/blog/Pages/Tax-Reform-and-Infrastructure-Investments-to-Boost-our-Economy.aspx>; Eduardo Porter, *America's Aversion to Taxes*, N.Y. TIMES (Aug. 14, 2012), <http://www.nytimes.com/2012/08/15/business/economy/slipping-behind-because-of-an-aversion-to-taxes.html?r=0>; see also *History of the U.S. Tax System*, POLICYALMANAC.ORG (Aug. 2003), http://www.policyalmanac.org/economic/archive/tax_history.shtml.

⁵⁵ See generally Chatman, *supra* note 23, at 43 (discussing America's history of disenfranchising African-Americans in voting and politics); Nathan P. Litwin, *Defending an Unjust System*, 3 CONN. PUB. INT. L.J. 237, 238 (2003) (discussing the history of African-American disenfranchisement in the U.S. legal system); *Global 2000: The World's Biggest Public Companies List*, FORBES (May 2014), <http://www.forbes.com/global2000/list/> (discussing economic disparity between White Americans and African-Americans and Hispanics).

⁵⁶ Mike Bird, *China Just Overtook the US as the World's Largest Economy*, BUS. INSIDER (Oct. 8, 2014, 5:08 AM), <http://www.businessinsider.com/china-overtakes-us-as-worlds-largest-economy-2014-10>.

Citizens of most industrial countries have demanded more public services as they have become richer. And they have been by and large willing

GDP (compared to 45.3% for Germany, 41.1% for the United Kingdom, and 37.7% for Canada).⁵⁸ The U.S. has, accordingly, fewer resources to remediate poverty and income inequality rates that are the highest in the developed world, which, in turn, is related to racial polarization and inequality attributable to a history of discrimination against African-Americans, Hispanics, and other historically oppressed minority groups.⁵⁹

to pay more taxes to finance them. Since 1965, tax revenue raised by governments in the developed world have risen to 34 percent of their gross domestic product from 25 percent, on average.

The big exception has been the United States. In 1965, taxes collected by federal, state and municipal governments amounted to 24.7 percent of the nation's output. In 2010, they amounted to 24.8 percent. Excluding Chile and Mexico, the United States raises less tax revenue, as a share of the economy, than every other industrial country.

....

American policy makers justify our choice for low taxes with the claim that they foster economic growth. But the evidence is, at best, mixed. Since 1980, income per person has grown roughly the same across developed nations, about 300 percent, according to the International Monetary Fund. It has grown a little faster in the United States than in the European Union and Canada, but slower than in higher tax countries like Japan, Norway and Sweden.

To a large extent, this is because we have chosen a tax system that raises relatively little revenue and inflicts maximum economic harm. Every other industrial country has a national consumption tax, which can be used to raise a lot of money without distorting people's economic incentives. The United States, by contrast, relies mostly on taxes on labor and capital that damp people's drive to work and invest, putting a drag on economic growth. And the tax code is riddled with preferences and loopholes that further distort people's economic behavior.

Porter, *supra* note 54.

⁵⁸ *Country Comparison: Taxes and Other Revenues*, THE WORLD FACTBOOK (2014), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2221rank.html?countryname=UnitedStates&countrycode=us®ionCode=noa&rank=184#us>.

⁵⁹ See generally ERIK OLIN WRIGHT & JOEL ROGERS, AMERICAN SOCIETY: HOW IT REALLY WORKS 247–95 (2010) (discussing the history of inequality in American society); Facundo Alvaredo et al., *The Top 1 Percent in International and Historical Perspective*, 27 J. ECON. PERSP. 3, 3–14 (2013), available at <http://pubs.aea-web.org/doi/pdfplus/10.1257/jep.27.3.3> (discussing the evolution of income inequality in the United States as compared to other developed nations). When asked about the U.S.' long-term unemployment crisis, Pacific Investment Management Company, LLC's founder and Chief Investment Officer, Bill Gross, stated, "[o]ur labor force is too expensive and poorly educated for today's marketplace." Roger Bybee, *The 'Skills Gap' Myth*, THE PROGRESSIVE (Mar. 25, 2013), <http://progressive.org/skills-gap-myth>.

The U.S.' inability to remediate problems of low economic growth rates, income inequality, and poor quality job creation is strongly related to infirmities in U.S. democracy. The U.S.' bicameral system of government gives inordinate political power and resources to smaller, rural, and more racially homogeneous states compared to the larger states and urban areas where racial minorities are most preponderant.⁶⁰ This asymmetry is magnified by the fact that the population discrepancy between large and small states has grown dramatically in recent years, and small state senators, who frequently hold leadership and chairperson positions in the Senate, are more prone to use the filibuster as a means of preventing a vote on proposed legislation.⁶¹ This inequality is exacerbated by the Court's broad interpretation of First Amendment freedoms to invalidate campaign finance laws directed at limiting the influence of wealthy donors in American politics.⁶² It is also worsened by American federalism, which leads many states to enhance their competitiveness by cutting tax rates and slashing necessary public spending in areas such as education and public infrastructure.⁶³

Most importantly, the U.S.' arcane election system relies on a single member plurality system to elect legislators and an obscure and complex system of voter registration, which depresses voter turnout to levels that are among the lowest in the developed world.⁶⁴ Because low voter turnout rates correspond with income and racial minority status, especially in states with weak social safety nets, it is likely that the U.S.' problems of income inequality and racial polarization are exacerbated by the fact that its poorer citizens are systematically excluded from the political

⁶⁰ See Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES (Mar. 3, 2011), http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?ref=politics&_r=1&#/#smallstate.

⁶¹ *Id.*

⁶² See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339–43, 364, 372 (2010) (concluding that corporate campaign spending is speech entitled to First Amendment protection).

⁶³ See Bryan Burrough, *How Texas Became Texas and Why it Matters*, N.Y. TIMES (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/business/big-hot-cheap-and-right-a-new-look-at-texas-review.html>; Alexis Garcia, *Why Texas is Booming: How Low Taxes & Small Government are Transforming the Lone Star State*, REASON FOUND (Mar. 27, 2014), <http://reason.com/reasontv/2014/03/27/why-texas-is-booming>.

⁶⁴ *Voter Turnout*, FAIR VOTE, <http://www.fairvote.org/research-and-analysis/voter-turnout/> (last visited June 30, 2014).

system, which, in turn, moves the country's political culture to the right.⁶⁵ Daniel Weeks writes:

While income and education levels were not recorded in the survey, race and age were major factors influencing who made it to the polls on Election Day and what kind of barriers they faced. Black and Hispanic citizens, for whom the poverty rate is close to three times that of whites, were three times as likely as whites to not have the requisite I.D. and to have difficulty finding the correct polling place. They were more than three times as likely as whites to not receive a requested absentee ballot, and roughly twice as likely to be out of town on Election Day or to have to wait in long lines. They were also substantially more likely than whites to report transportation problems and bad time and location as reasons for not getting to the polls, while white voters were the most likely to cite disapproval of candidate choices. Taken together, the surveys suggest that white citizens who abstain from voting do so primarily by choice, while the majority of minority non-voters face problems along the way.⁶⁶

In short, African-American and Hispanic voters are systematically excluded from polling places in a manner not experienced or imaginable by most Whites.⁶⁷

The U.S. remains, by far, the world's strongest economy by any measure. That said, the U.S. government is increasingly incapable of addressing its citizens' needs for well-paying jobs, housing, health care, public infrastructure, social inclusion, social mobility, and an adequate safety net for poorer citizens.⁶⁸

⁶⁵ See Daniel Weeks, *Why are the Poor and Minorities Less Likely to Vote?*, ATLANTIC (Jan. 10, 2014, 7:00 AM), <http://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/>. Weeks notes that the U.S. Census data demonstrates that only 47% of eligible voters with incomes less than \$20,000 voted during the 2012 general election and just one in four voted during the 2010 mid-term elections. *Id.* This contrasts with rates of 80% and 60%, respectively, for those with incomes above \$100,000. This gap broadens if one includes convicted felons and non-citizens. *Id.*

⁶⁶ *Id.*

⁶⁷ See *id.*

⁶⁸ See Robert Pear, *States' Policies on Health Care Exclude Some of the Poorest*, N.Y. TIMES, May 25, 2013, at A1, available at <http://www.nytimes.com/2013/05/25/us/states-policies-on-health-care-exclude-poorest.html?pagewanted=all>; Constantine Von Hoffman, *Millions of U.S. Families Can't Afford Their Homes*, CBS MONEY WATCH (June 26, 2014, 4:32 PM), <http://www.cbsnews.com/news/millions-of-u-s-families-cant-afford-their-homes/>; *America's Crumbling Infrastructure: Bridging the Gap*, ECONOMIST (June 28, 2014), <http://www.economist.com/news/united-states/21605932-country-where-everyone-drives-america-has-shoddy-roads-bridging-gap>.

This inability is definitely related to pathologies in the U.S. democracy. As set forth more fully below, these infirmities are very difficult to remediate and are exacerbated by the U.S.' reliance on the single member plurality system to determine the winners of legislative elections.⁶⁹ This—in conjunction with the fact that legislative district boundaries are drawn such that racial minorities who disproportionately vote in compact inner-city districts gerrymandered by state legislatures seeking partisan advantage—results in diluting the political effect of racial minority votes, making it less likely that the U.S. government will address the problems facing racial minority and poor citizens.⁷⁰

A. Governmental Dysfunction

The U.S. is beset by a perceived dysfunction such that the political branches of U.S. government seem incapable of addressing the nation's problems.⁷¹ In their book, *It's Even Worse than it Looks*, the highly regarded scholars Thomas Mann and Norman Ornstein document how the U.S. Congressional system has broken down across partisan lines to make a bipartisan approach to legislation almost impossible.⁷² Evidence of this breakdown is apparent in the debt ceiling debacle⁷³ that led Standard and Poor's credit rating agency to downgrade the creditworthiness of U.S. government debt from AAA to AA+ in August 2011⁷⁴ and the inability of the House of Representatives to

⁶⁹ See *infra* Part II.D.

⁷⁰ See *infra* Part II.D.

⁷¹ Mortimer B. Zuckerman, *Solving America's Inequality Puzzle*, U.S. NEWS (Mar. 28, 2014), <http://www.usnews.com/opinion/articles/2014/03/28/america-has-regressed-in-income-inequality-and-social-mobility>.

⁷² See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 31–58, 67–103 (2012) (discussing dysfunction in the U.S. government as a result of political acrimony); John Stoehrer, *Opinion: Forget Bipartisanship. Expect More Gridlock*, NEWSWEEK (Nov. 25, 2014), <http://www.newsweek.com/opinion-forget-bipartisanship-expect-more-gridlock-287039> (discussing engrained conflict between Republicans and Democrats in the U.S. government).

⁷³ See Charles Riley, *S&P Downgrades U.S. Credit Rating*, CNN MONEY (Aug. 6, 2011, 8:13 PM), http://money.cnn.com/2011/08/05/news/economy/downgrade_rumors/.

⁷⁴ Nikola Swann, *United States of America Credit Rating Lowered to "AA+" Due to Political Risk, Rising Debt Burden, Outlook Negative*, STANDARD & POOR'S (Aug. 5, 2011, 8:13 PM), <http://www.standardandpoors.com/ratings/articles/en/us/?assetID=12>

find a bipartisan compromise to amend the nation's immigration laws to integrate the nation's illegal and undocumented immigrants.⁷⁵ Further manifestations of U.S. government dysfunction include the Senate's inability to pass a budget; its inability to confirm many of President Obama's nominees to either the federal judiciary or bureaucracy; the political culture's unwillingness to confront the country's long term fiscal sustainability; problems facing individual Americans such as racially polarized and inadequate public education; the unsustainably high cost of post-secondary education; and the U.S. economy's inability to produce a sufficient number of jobs that both pay a living wage and provide for social mobility.⁷⁶

B. Racial Political Polarization

The divisions between the two main political parties are worsened by the U.S.' strong level of racial polarization in voting preferences, and this reinforces the U.S.' historical racial and socio-economic cleavages. In contrast to the U.S. of 1965, where the VRA was enacted with strong bipartisan support,⁷⁷ U.S. democratic legitimacy is questioned by the fact that the vast majority of the country's racial minorities support only the Democratic Party at off-year, mid-term, and general elections—all of which

45316529563.

⁷⁵ See David Nakamura & Ed O'Keefe, *Immigration Reform Effectively Dead Until After Obama Leaves Office, Both Sides Say*, WASH. POST (June 26, 2014), http://www.washingtonpost.com/politics/immigration-reform-deal-now-unlikely-until-after-obama-leaves-office-both-sides-say/2014/06/26/945d1210-fc96-11e3-b1f4-8e77c632c07b_story.html.

⁷⁶ See Rebecca Ballhaus, *Do Obama Nominees Face Stiffer Senate Opposition?*, WALL ST. J. (Nov. 21, 2013 12:43 PM), <http://blogs.wsj.com/washwire/2013/11/21/do-obama-nominees-face-stiffer-senate-opposition/>; David Lawder, *U.S. Senate Democrats Do Not Plan to Pass Budget this Year*, REUTERS (Feb. 28, 2014, 6:29 PM), <http://www.reuters.com/article/2014/02/28/us-usa-fiscal-senate-idUSBREAIR1U420140228>; *Unequal Outcomes*, BALT. SUN (Aug. 19, 2013, 2:42 PM), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-college-race-20130819-story.html>; *Social Mobility and Inequality: Upper Bound*, ECONOMIST (Apr. 15, 2010), available at <http://www.economist.com/node/15908469>; President Barack Obama, Remarks by the President on Economic Mobility (Dec. 4, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/12/04/remarks-president-economic-mobility>). See generally INST. FOR THE STUDY OF THE AMERICAS, *BROKEN GOVERNMENT? AMERICAN POLITICS IN THE OBAMA ERA* 31–71, 97–136 (Iwan Morgan & Phillip John Davies eds., 2012) (discussing deep divides within the U.S. political system).

⁷⁷ See *supra* note 19 and accompanying text.

are increasingly determined based on voters' demographic profiles as opposed to the parties' political platforms.⁷⁸ By way of example, 95% of African-Americans voted for the Democratic Party's Presidential candidate, Barack H. Obama, in the 2012 Presidential election, while 69% of White Protestants and 79% of White Christians voted for his challenger, former Governor Willard Mitt Romney.⁷⁹ This polarization evidences how the U.S. has been incapable of remediating the divisions that prompted its Civil War: the Republican Party's support base is the old solid South of former President Franklin Roosevelt's New Deal coalition, and the Democratic Party's current base is comprised of the urban parts of the northeastern and west coast states that once formed the core of Republican Party support during the tenure of Presidents Eisenhower, Nixon, and Reagan.⁸⁰

Indeed, during the 2008 general election, Whites voted for President Obama in the former Confederate and segregationist states of Alabama, Mississippi, and Louisiana at parlous rates of 10%, 11%, and 14%, respectively.⁸¹ Sam Tanenhaus, explaining why the Republican Party is increasingly the party of White Americans, accurately described this transmogrification as changing from being the party of former U.S. President Abraham Lincoln to the party of former U.S. Vice-President and secessionist South Carolina U.S. Senator John C. Calhoun.⁸² This was not the case when Civil Rights legislation, such as the VRA, was first enacted in 1965 and passage was insured largely based

⁷⁸ See Ronald Brownstein, *Bad Bet, Why Republicans Can't Win With Whites Alone*, NAT'L J. (Sept. 5, 2013), <http://www.nationaljournal.com/magazine/bad-bet-why-republicans-can-t-win-with-whites-alone-20130905>.

⁷⁹ Joshua Bickel, *How the Faithful Voted: 2012 Preliminary Analysis*, PEW RES. RELIGION & PUB. LIFE PROJECT (Nov. 7, 2012), <http://www.pewforum.org/Politics-and-Elections/How-the-Faithful-Voted-2012-Preliminary-Exit-Poll-Analysis.aspx#rr>.

⁸⁰ See Harrison Jacobs, *These GIFs Show How Much American Politics Has Changed Since the 1900s*, BUS. INSIDER (July 1, 2014, 1:36 PM), <http://www.businessinsider.com/map-how-democrats-and-republicans-changed-2014-6>.

⁸¹ Charles Stewart III et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. 205, 214 (2013).

⁸² Sam Tanenhaus, *Original Sin; Why the GOP is and Will Continue to be the Party of White People*, NEW REPUBLIC (Feb. 10, 2013), <http://www.newrepublic.com/article/112365/why-republicans-are-party-white-people#>.

on the support and cooperation of liberal Republicans from northeast, mid-west, and upper mid-western states such as Everett Dirksen, Charles Halleck, and Bill McCulloch.⁸³ Today, Congressional Republicans—inordinately from the south and southwest—feel little incentive to remediate racial inequalities because their support base is less-educated Whites who are relatively hostile to racial minority interests. Meanwhile, racial minorities unquestioningly support the Democratic Party by a lopsided margin.⁸⁴ This racial political polarization problem is further evidenced by the fact that President Obama was reelected by a decisive electoral-college margin of 332–206 and a majority of the popular vote, but won a meager 27% of the White, Southern vote and only 39% of the White vote nationwide.⁸⁵

Because of its unhealthy correlation between race and political partisanship, the U.S. is unique in the developed world in its inability to develop sufficient social welfare programs for its poorer citizens.⁸⁶ Crudely put, poor Whites disproportionately vote for the Republican Party, while racial minorities, regardless of income, overwhelmingly vote for the Democratic Party.⁸⁷ This has led the Republican Party to view second-generation voting barriers, such as racial gerrymandering of election districts to dilute the political effect of racial minority votes and voter identification requirements that disproportionately disenfranchise racial minorities, as key to its success.⁸⁸

⁸³ Bruce Bartlett, *The GOP is the Party of Civil Rights*, WALL ST. J. (July 16, 2008, 12:01 AM), <http://online.wsj.com/news/articles/SB121617172687056531>; Bill Keller, Op-Ed., *An Unsung Hero of Civil Rights*, N.Y. TIMES (Jan. 19, 2014), http://www.nytimes.com/2014/01/20/opinion/keller-an-unsung-hero-of-civil-rights.html?_r=0.

⁸⁴ See Brownstein, *supra* note 78.

⁸⁵ Kevin Drum, *The Democrats' Southern White Problem*, MOTHER JONES (Nov. 13, 2012, 5:46 PM), <http://www.motherjones.com/kevin-drum/2012/11/democrats-southern-white-problem>; see Brownstein, *supra* note 78.

⁸⁶ Ingrid Phillips Whitaker & Victoria Time, *Devolution and Welfare: The Social and Legal Implications of State Inequalities for Welfare Reform in the United States*, 28 SOC. JUST., no. 1, 2001, at 76, 82.

⁸⁷ See Brownstein, *supra* note 78.

⁸⁸ Andrew Cohen, *How Voter ID Laws Are Being Used to Disenfranchise Minorities and the Poor*, ATLANTIC (Mar. 16, 2012, 12:10 PM), <http://www.theatlantic.com/politics/archive/2012/03/how-voter-id-laws-are-being-used-to-disenfranchise-minorities-and-the-poor/254572/>.

C. Voter Identification Laws

The racial imbalance in political partisanship explains why Republican Party controlled legislatures have enacted voter identification laws that will effectively disenfranchise a disproportionate number of poor African-Americans, despite the complete absence of voter fraud nationwide.⁸⁹ These laws generally require prospective voters not only to register to vote with a state board of election, but also to present state-issued identification such as a driver's license prior to being allowed to vote.⁹⁰ Studies show that racial minorities, for income and geographic reasons, are less likely to possess these pieces of identification.⁹¹

Texas, by way of example, has seen its population expand dramatically due to a disproportionate increase in racial minority residents and the Texas economy's stellar performance in job creation since the 2008 financial crises.⁹² It recently sought to enact a voter identification law that was enjoined from going into effect by the DDC since it would have imposed inordinate burdens on racial minority voters.⁹³ Although the proposed Texas law required provision of free identification cards at Department of Public Safety (DPS) offices, the DDC found this an insufficient safeguard to minority voting because Texas has no DPS offices in 81 of the state's 254 counties and the cheapest supporting

⁸⁹ See Stephen Ansolabehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 206–10 (2013); see also 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/>.

⁹⁰ Wendy Underhill, *Voter Identification Requirements/Voter ID Laws*, NCSL (Oct. 31, 2014), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

⁹¹ Gary Martin, *Study: Voter ID Laws Hurt Minorities, Poor*, HOUS. CHRON. (July 18, 2012), <http://www.chron.com/news/article/Study-Voter-ID-laws-hurt-minorities-poor-3717595.php> (noting that minorities disproportionately live in low-income areas of inner cities).

⁹² STATE BUDGET CRISIS TASK FORCE, REPORT OF THE STATE BUDGET CRISIS TASK FORCE: TEXAS REPORT 6–7 (Nov. 2012), <http://www.statebudgetcrisis.org/wpcms/wp-content/images/Texas-Report.pdf>.

⁹³ See *A Few Obvious Fixes Would Aid Voter ID Law*, FORT WORTH STAR-TELEGRAM (Sept. 7, 2013), available at http://www.contracostatimes.com/ci_24065360/recent-editorials-from-texas-newspapers.

document needed to obtain the free identification, a birth certificate, costs \$22.⁹⁴ The DDC concluded the law “imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty.”⁹⁵

Similarly stringent voter ID legislation signed into law by Republican Governor of North Carolina, Pat McCrory, will likely have the effect of depressing African-American voter turnout, and will therefore likely lower the number of Democratic voters at political primary, off-year, mid-term, and general elections.⁹⁶ North Carolina’s law not only requires the presentation of government-issued voter identification at the polls, but substantially shortens early voting from seventeen to ten days and eliminates same-day voter registration, both of which are disproportionately relied upon by African-American voters.⁹⁷

Voter identification laws have been enacted in 34 states nationwide, of which 31 are in force, despite the complete absence of any evidence of voter fraud.⁹⁸ In *Crawford v. Marion County Election Board*, the Roberts Court analyzed the constitutionality of Indiana’s voter identification law.⁹⁹ Despite the state’s complete lack of evidence of in-person voter fraud, the Court concluded that the Indiana voter identification law in question

⁹⁴ *Id.*

⁹⁵ *Id.* (quoting *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013)).

⁹⁶ See Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, WASH. POST, (Aug. 12, 2013, 5:50 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/>.

⁹⁷ *Id.*; Denis McAllister, *Fourth Circuit Blocks Parts of NC Election Law*, COURTHOUSE NEWS SERVICE (Oct. 1, 2014, 7:00 PM), <http://www.courthousenews.com/2014/10/01/72012.htm>.

⁹⁸ See Underhill, *supra* note 90. As Andrew Cohen of the *Denver Post* reported,

Flummoxed by the lack of evidence of widespread voter fraud, frustrated at the push-back by civil libertarians and others who see the new generation of Republican voting-law tactics as discriminatory, conservative activists and their corporate sponsors around the country have moved on to the next best thing: calling out what they call “voter fraud deniers.”

Andrew Cohen, *Guest Commentary: Proving Voter Fraud is Elusive*, DENVER POST, (Sept. 19, 2012, 12:01 AM), http://www.denverpost.com/ci_21519784/proving-voter-fraud-is-elusive.

⁹⁹ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (plurality opinion) (reviewing the constitutionality of an Indiana statute “requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government”).

served an important state interest in minimizing voter fraud and safeguarding voter confidence, and that the state's interest outweighed the burden the law placed on the right to vote.¹⁰⁰ Assessing the burdens the law imposed on Indiana voters, the Court noted that the Indiana voter identification law allowed for the provision of free identification to those who could establish their identity and residency for voting purposes.¹⁰¹ Moreover, accommodations were available for indigent voters or those with religious objections.¹⁰²

In light of the burdens noted by the majority and the state interest at issue, the Court concluded:

In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes “excessively burdensome requirements” on any class of voters. A facial challenge must fail where the statute has a “plainly legitimate sweep.” When we consider only the statute’s broad application to all Indiana voters we conclude that it “imposes only a limited burden on voters’ rights.”¹⁰³

Accordingly, *Crawford* requires that ballot access restrictions, such as voter ID laws, need only satisfy a balancing test between a state’s interest and the burden on voting rights.¹⁰⁴ Justice Souter’s dissent, however, argued that the state’s interest in preventing voter fraud and protecting confidence in the electoral system does not justify the burden that the voter ID law placed on voters.¹⁰⁵ The burdens on franchise rights cited by Justice Souter include travel costs and fees necessary to obtain the required identification that would impose substantive barriers to poorer voters that cannot be justified by the state’s purported

¹⁰⁰ *Id.* at 194–97, 202–04.

¹⁰¹ *Id.* at 186.

¹⁰² *Id.* at 186 (citations omitted).

A voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election. A voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk’s office within 10 days.

Id.

¹⁰³ *Id.* at 202–03 (citations omitted).

¹⁰⁴ See *Crawford*, 553 U.S. at 189–90, 204.

¹⁰⁵ *Id.* at 237 (Souter, J., dissenting).

objective in enacting the law—namely, voter fraud prevention, the modernization of election procedures, and engendering public trust in election procedures.¹⁰⁶ Justice Souter concluded that, given the lack of legitimate evidence of voter fraud presented by the state, the law unjustifiably places an unconstitutional burden on voting rights, particularly as applied to old and poor voters.¹⁰⁷

Crawford's holding provided broad leeway for states to implement voter identification laws.¹⁰⁸ In view of the especially pronounced racial political polarization problem, Republican-controlled legislatures that were—before *Shelby County*—covered jurisdictions now have particular incentive to enact partisan voter ID laws to depress racial minority and, therefore, Democratic votes. By way of example, neither the DDC nor the AG would have precleared North Carolina's recently enacted voter identification law¹⁰⁹ in view of the law's likely discriminatory impact on minority voters.¹¹⁰ The fact that preclearance is no longer required means that laws of this type might have dramatic political consequences in a country where states award the entirety of the Electoral College votes, for Presidential election purposes, to the candidate that wins the popular vote, regardless of the margin of victory.¹¹¹ To illustrate, President Obama carried Virginia, Ohio, and Florida by very small margins—less than 1% and 3% of the popular vote in the 2012 Presidential election—between himself and former Governor Romney.¹¹² It is plausible that the results would have been different had these states been able to introduce voter ID laws that are set to be fully implemented before the 2014 mid-term and the 2016 general

¹⁰⁶ *Id.* at 211–15, 225–35.

¹⁰⁷ *Id.* at 236–37.

¹⁰⁸ *See id.* at 204 (plurality opinion).

¹⁰⁹ Blake, *supra* note 96.

¹¹⁰ *See* Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, FRONTLINE (June 26, 2013, 2:58 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/with-voting-rights-act-out-states-push-voter-id-laws/>.

¹¹¹ *See generally* Neil Berch, *Reform the Electoral College*, W. VA. UNIV. POL. SCI. BLOG (Jan. 17, 2013), http://polisci.wvu.edu/political_science_blog/2013/1/17/reform-the-electoral-college (discussing the history of the Electoral College and calls for reform).

¹¹² *Presidential Election Results*, NBCNEWS.COM, <http://elections.nbcnews.com/ns/politics/2012/all/president/#.VM09CCvF86o> (last updated Jan. 31, 2015).

election.

D. Racial Gerrymandering and Vote Dilution

Racial political polarization also explains why Republican-controlled legislatures have racially gerrymandered Congressional and state legislative districts to create majority-minority districts and thereby “dilute” the political effect of minority votes.¹¹³ The effect of partisan-motivated racial gerrymandering is clearly evidenced in numerous southern states that were previously VRA “covered jurisdictions.”¹¹⁴ In Virginia, the Republican Party won eight of the State’s eleven seats in the U.S. House of Representatives, notwithstanding the fact that President Obama carried the State by three percentage points.¹¹⁵ In North Carolina, Republicans carried eleven of the State’s thirteen House seats even though former Governor Romney carried the State by only two percentage points.¹¹⁶ In Georgia, Governor Romney defeated the incumbent President by a 53%–45% margin, but Republicans won nine of Georgia’s fourteen House seats.¹¹⁷ In Florida, President Obama won the state by nearly one full percentage point,¹¹⁸ but Republicans won seventeen of

¹¹³ See Manny Fernandez, *Federal Court Finds Texas Voting Maps Discriminatory*, N.Y. TIMES (Aug. 28, 2012), <http://www.nytimes.com/2012/08/29/us/federal-court-calls-texas-voting-maps-discriminatory.html>.

¹¹⁴ See E. Tammy Kim, *Alabama’s Racial Gerrymandering Goes Before Supreme Court*, ALJAZEERA AM. (Nov. 12, 2014, 6:16 PM), <http://america.aljazeera.com/blogs/scrutiner/2014/11/12/alabama-s-redistrictingplangoesbeforesupremecourt.html>. See generally *Jurisdictions Previously Covered by Section 5*, JUSTICE.GOV, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Jan. 31, 2015) (detailing states, counties, and townships covered by Section 5 prior to the *Shelby County* decision). The covered jurisdictions include the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia; counties in California, Florida, New York, North Carolina and South Dakota; and townships in the State of Michigan. *Id.*

¹¹⁵ John Schwartz, *State Highlights*, N.Y. TIMES, <http://elections.nytimes.com/2012/results/states/virginia> (last visited Jan. 31, 2015).

¹¹⁶ Stephanie Strom, *State Highlights*, N.Y. TIMES, <http://elections.nytimes.com/2012/results/states/north-carolina> (last visited Jan. 31, 2015).

¹¹⁷ Patricia Cohen, *State Highlights*, N.Y. TIMES, <http://elections.nytimes.com/2012/results/states/georgia> (last visited Jan. 31, 2015).

¹¹⁸ *2012 Florida Presidential Results*, POLITICO, <http://www.politico.com/2012-election/results/president/florida> (last updated Nov. 19, 2012, 2:48 PM).

Florida's twenty-seven House seats.¹¹⁹ In South Carolina, Romney carried the popular vote by a 54%–44% margin,¹²⁰ but the Republican Party won a lopsided six of seven House seats; moreover, in a paradigmatic example of vote dilution, the sole Democratic winner, Congressman Jim Clyburn, carried his district with more than 94% of the popular vote.¹²¹ Similar patterns are found throughout the South and nationwide. For example, in Ohio, the President won the Buckeye State by nearly two percentage points in 2012,¹²² but the Republican Party won an overwhelming twelve of sixteen House seats.¹²³ Indeed, the Republicans won 234 of the nation's 435 house seats, notwithstanding the fact that Democrats received 1.6 million more votes nationwide.¹²⁴

The problem of racial gerrymandering should not be overstated. Vote-dilution of racial minority votes is an inherent aspect of American democracy because the country uses the single member plurality electoral system¹²⁵ to elect legislators and not a proportional representation¹²⁶ paradigm as used in Western Europe¹²⁷ and New Zealand.¹²⁸ This, in conjunction with the fact

¹¹⁹ 2012 Florida House Results, POLITICO, <http://www.politico.com/2012-election/results/house/florida> (last updated Nov. 19, 2012, 2:48 PM).

¹²⁰ 2012 South Carolina Presidential Results, POLITICO, <http://www.politico.com/2012-election/results/president/south-carolina> (last updated Nov. 19, 2012, 2:48 PM).

¹²¹ 2012 South Carolina House Results, POLITICO, <http://www.politico.com/2012-election/results/house/south-carolina> (last updated Nov. 19, 2012, 2:48 PM).

¹²² 2012 Ohio Presidential Results, POLITICO, <http://www.politico.com/2012-election/results/president/ohio> (last updated Nov. 19, 2012, 2:48 PM).

¹²³ 2012 Ohio House Results, POLITICO, <http://www.politico.com/2012-election/results/house/ohio> (last updated Nov. 19, 2012, 2:48 PM).

¹²⁴ FED. ELECTION COMM'N, FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 79–177 (Eileen J. Leamon & Jason Bucelato eds., 2013), available at <http://www.fec.gov/pubrec/fe2012/federaelections2012.pdf>.

¹²⁵ “Under the plurality system, the candidate with the most votes in a single election round wins, regardless of whether that candidate receives an absolute majority of votes.” Rebecca B. Morton & Thomas A. Rietz, *Majority Requirements and Minority Representation*, 63 N.Y.U. ANN. SURV. AM. L. 691, 691 (2008).

¹²⁶ “Proportional representation is a system in which seats in representative bodies are awarded to parties in proportion to the votes they receive in the election, sometimes subject to some minimum vote requirement.” *Id.* at 691 n.2.

¹²⁷ OFFICE FOR PROMOTION OF PARLIAMENTARY DEMOCRACY, EUROPEAN PARLIAMENT, ELECTORAL SYSTEMS: THE LINK BETWEEN GOVERNANCE, ELECTED MEMBERS AND VOTERS 18 (2011).

¹²⁸ *Story: Electoral Systems*, THE ARA: THE ENCYCLOPEDIA OF N.Z., <http://www.tea>

that African-Americans and Hispanics disproportionately live in geographically compact inner cities¹²⁹ means that, absent adoption of a proportional representation paradigm, racial minority vote-dilution will be an inherent aspect of American democracy so long as racial imbalances continue in American living patterns. That said, racial political polarization has, for historical reasons, been systematically more pronounced in what were the VRA Section 4 covered jurisdictions¹³⁰ and the VRA Section 5 preclearance procedures at least provided some safeguard against partisan legislative excess.¹³¹ The issue of racially motivated partisan gerrymandering and voter identification laws, however, was disregarded by the Roberts Court in *Shelby County*.

III. VRA PROVISIONS, SECOND GENERATION VOTING BARRIERS, AND THE COURT'S FLAWED ANALYSIS

A. *VRA Section 2 and its Inconsistency with the Fourteenth Amendment*

VRA Section 2 was amended in 1982 to deal with the proliferation of at-large voting districts that were instituted by previously segregationist states to minimize the likelihood of racial minorities being elected to office.¹³² The logic is as follows. Suppose a city has five members that are elected to the state legislature. Assume further that 40% of the city's population is Black and there is pronounced racial imbalance in living patterns and political preferences such that if typical single-member plurality districts were used, White voters would be able to elect three of

ra.govt.nz/en/electoral-systems/page-6 (last visited Jan. 27, 2015).

¹²⁹ U.S. CENSUS BUREAU, PATTERNS OF METROPOLITAN AND MICROPOLITAN POPULATION CHANGE: 2000–2010, at 33, available at <http://www.census.gov/content/dam/Census/library/publications/2012/dec/c2010sr-01.pdf>.

¹³⁰ VRA covered jurisdictions included the entire states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, in addition to parts of Arizona, Hawaii, Idaho, and North Carolina. U.S. DEPT. OF JUSTICE, *Sec. 4 of the Voting Rights Act*, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Jan. 28, 2015).

¹³¹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2642 (2013) (Ginsburg, J., dissenting).

¹³² See *U.S. v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1556 (11th Cir. 1984) (“[T]he amended version of section 2 was intended to apply to the problem of vote dilution.”); see also Voting Rights Act of 1965, Pub. L. No. 97-110, § 2, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301 (2012)).

the five candidates, while Blacks would be able to elect two candidates. If, on the other hand, at-large districts were in place, such that if each voter chooses five candidates, it can be expected the city would elect 5 White candidates, presumably by a 60–40% majority. VRA Section 2 was amended to protect against this problem.¹³³ It prohibits any voting change or practice, including redistricting plans, applied or imposed by any state or political subdivision, which results in the denial or abridgment of the right to vote based on race, color, or linguistic minority status.¹³⁴ The law provides that a violation is established if it is shown, by a totality of the circumstances, that elections are not a viable means for sufficiently preponderant minorities to elect the candidates of their choice.¹³⁵ This was, notwithstanding the Fourteenth Amendment’s Equal Protection Clause, interpreted to require states to create or maintain majority-minority voting districts, because this facilitates the process of enabling racial minorities to elect racial minority candidates as their representatives.¹³⁶

Although VRA Section 2 was amended in 1982 to remediate at-large election schemes that had the effect of preventing racial minorities from electing the candidates of their choice,¹³⁷ federally mandated majority-minority districts dilute the statewide political effect of racial minority votes. This is because VRA Section 2, as interpreted, creates a manifest tension between assisting racial minorities in electing racial minority candidates and the associated state-wide vote dilution of racial minority votes.¹³⁸

¹³³ See *Marengo Cnty. Comm’n*, 731 F.2d at 1556.

¹³⁴ Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301(a) (2012)).

¹³⁵ *Id.* (codified as amended at 52 U.S.C. § 10301(b) (2012)).

¹³⁶ See L. PAIGE WHITAKER, CONG. RESEARCH SERV., R42482, CONGRESSIONAL REDISTRICTING AND THE VOTING RIGHTS ACT: A LEGAL OVERVIEW 2–3 (2014), available at <http://www.fas.org/sgp/crs/misc/R42482.pdf>; see also *Thornburgh v. Gingles*, 478 U.S. 30, 63 (1986).

¹³⁷ S. REP. NO. 97-417, at 5–6 (1982); see also *Gingles*, 478 U.S. at 47 (stating that the “essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives”).

¹³⁸ See *Georgia v. Ashcroft*, 539 U.S. 461, 491 (Kennedy, J. concurring) (noting the inherent conflict between Sections 2 and 5 of the Voting Rights Act); Ilya Shapiro, *Shelby County v. Holder: Section 5 of the Voting Rights Act Conflicts With Section 2, Which Provides the Proper Remedy for Racial Discrimination in Voting*, SCOTUSBLOG,

This tension was evidenced in *Easley v. Cromartie*,¹³⁹ where the Supreme Court upheld the constitutionality of North Carolina's 12th Congressional District—created at the behest of former President George H. W. Bush's Justice Department to provide a second majority-minority district for African-American voters—because the Court found that the Legislature's purpose in forming the district was political rather than racial.¹⁴⁰ The key background fact in *Easley* is that racial political polarization led North Carolina's then-Democratic legislature to initially create only one majority-African-American Congressional district so as to minimize vote-dilution of African-American Democratic votes statewide.¹⁴¹ This, however, came into conflict with the Justice Department's interpretation of Section 5, which required the creation of a second majority-minority and therefore a second safe Democratic Congressional district,¹⁴² perhaps to facilitate Republican interests statewide and in Congress, because transferring African-American voters into a majority-minority district translates into fewer African-Americans voting in adjacent districts.

Although VRA Section 2 represented a laudable attempt to enable African-Americans to elect their chosen candidates, it has unfortunately resulted in statewide vote dilution of racial minority votes and is premised on the constitutionally dubious supposition that requiring states to racially gerrymander voting districts to facilitate the election of racial minority candidates is the

(Feb. 14, 2013, 12:12 PM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-section-5-of-the-voting-rights-act-conflicts-with-section-2-which-provides-the-proper-remedy-for-racial-discrimination-in-voting/>.

¹³⁹ *Easley v. Cromartie*, 532 U.S. 234 (2001).

¹⁴⁰ *Id.* at 258; see also Richard L. 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, 68–69 (2014) (discussing the role of George H. W. Bush's Justice Department in creating of a second majority-minority district).

¹⁴¹ Hasen, *supra* note 140, at 67–68. See generally *Ashcroft*, 539 U.S. at 480 (majority opinion) (“In order to maximize the electoral success of a minority group, a State may choose to create a certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice.”).

¹⁴² *Id.* at 68; cf. *Ashcroft*, 539 U.S. at 491 (Kennedy, J. concurring) (noting that “considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5”).

best means of protecting racial minority political interests.¹⁴³ Indeed, although racist Dixiecrats opposed racial minorities from being elected to office when VRA Section 2 was amended in 1982, conservative and populist Republicans today are all too willing to facilitate the creation of majority-minority legislative districts because it facilitates Republican Party interests both statewide and in Congress.¹⁴⁴ In effect, Republican-controlled legislatures have cooperated with racial minority candidates to abuse VRA Section 2 and racially gerrymander Congressional and state legislative districts to create majority-minority districts and “dilute” the political effect of minority votes.¹⁴⁵

VRA Section 2 was amended to largely remedy the problem of at-large voting districts that appeared in the South to insure against the election of racial minority candidates.¹⁴⁶ After at-

¹⁴³ See generally Thomas B. Edsall, *The Decline of Black Power in the South*, N.Y. TIMES OPINIONATOR BLOG (July 10, 2013, 9:34 PM), <http://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/?hp&page-wanted=print> (discussing the political developments in the American south following the implementation of the Voting Rights Act).

¹⁴⁴ See Ari Berman, *How the GOP Is Resegregating the South*, NATION (Feb. 12, 2012), <http://www.thenation.com/article/165976/how-gop-resegregating-south#> (“In virtually every state in the South, at the Congressional and state level, Republicans—to protect and expand their gains in 2010—have increased the number of minority voters in majority-minority districts represented overwhelmingly by black Democrats while diluting the minority vote in swing or crossover districts held by white Democrats.”).

¹⁴⁵ See, e.g., Manny Fernandez, *Federal Court Finds Texas Voting Maps Discriminatory*, N.Y. TIMES (Aug. 28, 2012), <http://www.nytimes.com/2012/08/29/us/federal-court-calls-texas-voting-maps-discriminatory.html>. As to how this affects African-American political power, the highly regarded academician and journalist Thomas Edsall writes:

Republicans in control of redistricting have two goals: the defeat of white Democrats, and the creation of safe districts for Republicans. They have achieved both of these goals by increasing the number of districts likely to elect an African-American. Black voters are gerrymandered out of districts represented by whites of both parties, making the Democratic incumbent weaker and the Republican incumbent stronger. . . . [T]he Republican takeover of state legislatures has left black and Hispanic citizens without effective representation—representation that can come only from the majority party. The racialization of the two parties, most noticeable in the South, will work to keep minority Americans at the margins of power, *hindered from shaping the policies that determine social and economic mobility and the overall quality of life.*

Edsall, *supra* note 143 (emphasis added).

¹⁴⁶ S. REP. NO. 97-417, at 5–6 (1982).

large voting districts were discontinued, VRA Section 2 was interpreted to require states to create legislative districts that would most likely, based on their demographic profile, elect racial minority candidates to office.¹⁴⁷ Although this has resulted in a relatively high number of African-American elected officials in Congress and nationwide, it has often, because of vote-dilution, resulted in fewer Democrats being elected statewide, fewer committee chairmanships, and therefore less racial minority political power nationwide.¹⁴⁸ This belies the VRA's goal of advancing and protecting racial minority interests.¹⁴⁹ The fact that *Shelby County* invalidated VRA Section 4, but left VRA Section 2 intact, represents the worst scenario for racial minority voters because VRA Sections 4 and 5 had been used to place a check on racial gerrymandering of the type incentivized by Section 2.¹⁵⁰

¹⁴⁷ See generally *Thornburg v. Gingles*, 478 U.S. 30, 55–58, 63–64 (1986) (discussing Congress's intent in amending Section 2 and applying Congress's intent to the facts of the case).

¹⁴⁸ See Juliet Eilperin, *What's Changed For African Americans Since 1963, By the Numbers*, WASH. POST (Aug. 22, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/22/whats-changed-for-african-americans-since-1963-by-the-numbers/>; Ed Kilgore, *African-Americans and Statewide Offices*, WASH. MONTHLY (Mar. 16, 2012 12:50 PM), http://www.washingtonmonthly.com/political-animal-a/2012_03/africanamericans_and_statewide036104.php; see also Edsall, *supra* note 143 (“African-American Democratic officials—according to data compiled from academic research and the Web sites of state legislatures—have been relegated to minority party status. Equally important, an estimated 86 African-Americans who spent years accumulating seniority have lost their chairmanships of state legislative committees to white Republicans.”).

¹⁴⁹ The highly regarded African-American columnist Cynthia Tucker further supports the assertion that the proliferation of majority-minority districts has in fact harmed African-Americans nationwide:

If black voters think they have made substantial gains simply by having more black representatives in Congress, they're wrong. They'd have more influence if they were spread through several legislative districts, forcing more candidates to court them.

The political landscape has been transformed since the Voting Rights Act was passed in 1965 and amended 17 years later. The election of a black president shows that American voters are willing to look beyond a candidate's skin color. It's time to give up racial gerrymandering, which turned out not to be quite so benign.

Cynthia Tucker, *As I See It: Black House Districts Work to Republicans' Advantage*, *uexpress* (June 4, 2011), <http://www.uexpress.com/as-i-see-it/2011/6/4/black-house-districts-work-to-republicans>.

¹⁵⁰ See Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 77 (2014).

This issue was completely disregarded by the Chief Justice in *Shelby County*.¹⁵¹

B. *The “Bail-In” Procedures Under VRA Section 3*

The “bail-in” provision of VRA Section 3 allows the AG to commence a suit seeking a federal court order adjudicating a voting jurisdiction to have violated voting rights.¹⁵² Should the federal court adjudicate the lawsuit in the AG’s favor, it retains jurisdiction to supervise the jurisdiction’s voting procedures until all issues of racial voting discrimination have ended.¹⁵³ *Shelby County* did nothing to affect the “bail-in” procedure outlined in VRA Section 3, which remains fully intact.¹⁵⁴ Although conservatives might argue this provides ample grounds to police racial discrimination in voting, this must be contextualized because “bailing in” jurisdictions is an extremely expensive and time-consuming process that is almost impossible for the AG to police in a continent-sized country with some 4,678 voting jurisdictions.¹⁵⁵ While the “bail-in” provision authorizes federal courts to impose clearance requirements on jurisdictions that have been adjudicated to have violated either the Fourteenth or Fifteenth Amendments with respect to voting rights, this is burdensome, expensive, time-consuming, and extremely difficult to prove.¹⁵⁶ It applies to all jurisdictions in the following ways:

1. It allows the AG to petition a federal court to seek injunctive relief to prevent a voting jurisdiction from enacting changes to voting procedures, such as literacy tests, intimidation, threats, or coercion that allegedly discriminate against potential minority voters.¹⁵⁷

2. It requires federal courts to order the Director of the

¹⁵¹ See *Shelby Cnty v. Holder*, 133 S. Ct. 2612 (2013).

¹⁵² Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10302(c) (2012)).

¹⁵³ *Id.*

¹⁵⁴ See *Shelby Cnty.*, 133 S. Ct. at 2631 (holding Section 4 of the VRA unconstitutional but making no determination as to the constitutionality of Section 3).

¹⁵⁵ See U.S. ELECTION ASSISTANCE COMM’N, ELECTION ADMINISTRATION AND VOTING SURVEY FAQs, http://www.eac.gov/research/election_administration_and_voting_survey_faqs.aspx (last visited Jan. 30, 2015).

¹⁵⁶ See Crum, *supra* note 32, at 2033.

¹⁵⁷ Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10302(c) (2012)).

Office of Personnel Management to send federal observers to insure against local voting procedures that would violate either the Fourteenth or Fifteenth Amendments.¹⁵⁸

3. Upon a federal court finding of intentional discrimination and discriminatory effect, the court may issue an order entitling the affected individuals to exercise their voting rights.¹⁵⁹

4. The AG may then petition the district court to convene a three-judge district court panel, in the venue where the alleged voting infringement took place, to determine the entire case alleging voter discrimination by local officials.¹⁶⁰

5. Upon a finding by the three-judge panel that intentional discrimination against voting rights has occurred, the lower federal court shall retain jurisdiction over the offending jurisdiction's voting procedures until it is satisfied that any discriminatory voting issues have been resolved or until the AG has approved the voting changes at issue.¹⁶¹

As outlined above, the VRA "bail-in" provision limits any jurisdiction's ability to conduct its elections if, at the AG's behest, a three-judge federal district court panel finds the jurisdiction has intentionally violated voting rights based on race, national origin or color. The "bailed in" jurisdiction must subsequently have either the same three-judge federal court panel or the AG approve its election procedures before such voting procedures can go into effect.¹⁶²

Attorney General Eric Holder commenced "bail-in" proceedings against Texas based on its redistricting plan that a federal court found to have diluted the political effect of Black and

¹⁵⁸ *Id.* (codified as amended at 52 U.S.C. § 10302(a) (2012)).

¹⁵⁹ *See id.* (codified as amended at 52 U.S.C. § 10302(c) (2012)); *see also* Jeffers v. Clinton, 749 F. Supp. 585, 586–87 (E.D. Ark. 1990); Crum, *supra* note 32, at 2006; Paul M. Wiley, *Shelby and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights After Shelby County v. Holder*, 71 WASH. & LEE L. REV. 2115, 2129–30 (2014). *But cf.* The Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014) (proposing to bring any violation of voting rights, whether intentional or not, within the scope of Section 3, except for voter identification laws).

¹⁶⁰ *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 Stat. 437 (codified as amended at 52 U.S.C. § 10302(c) (2012)); 28 U.S.C. 2284(a).

¹⁶¹ *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 Stat. 437 (codified as amended at 52 U.S.C. § 10302(c) (2012)); 28 U.S.C. 2284(a).

¹⁶² *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 Stat. 437 (codified as amended at 52 U.S.C. § 10302(c) (2012)).

Hispanic votes.¹⁶³ This is because Section 3 is only available to “bail-in” a jurisdiction if a court has already determined the jurisdiction intentionally discriminated on the basis of race or ethnicity in its proposed voting change or redistricting plan.¹⁶⁴ The fact that Section 3 requires both a prior challenge to the voting change and a subsequent court action to “bail-in” the offending jurisdiction, makes it very expensive and will result in many “sub-threshold” discriminatory voting changes going unchallenged.¹⁶⁵ This is evidenced by the paucity of “bail-in” cases that have resulted in a change to proposed redistricting plans and the Congressional findings that preclearance is necessitated by the inadequacy of “bail-in” case-by-case suits “because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in [such] lawsuits.”¹⁶⁶

The obvious problem with this paradigm for enforcing voting rights is the difficulty in proving intentional discrimination and the expense and time-consuming nature of the litigation. Perhaps more fundamentally, the AG is capable of policing only the most egregious voting rights violations in a continent-sized country with nearly five thousand voting jurisdictions.

C. *The Importance of VRA Section 4 and the Harmful Consequence of its Invalidation*

The potentially abusive aspect of VRA Section 2 and the overall ineffectiveness of VRA Section 3 explains why *Shelby*

¹⁶³ See Devlin Barrett, *Holder Targets Texas in New Voting-Rights Push*, WALL ST. J. (July 25, 2013), <http://online.wsj.com/news/articles/SB10001424127887324110404578627692123727574?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2F%2FSB10001424127887324110404578627692123727574.html>; Drew Singer, *Court Rejects Texas Redistricting Maps*, REUTERS (Aug. 28, 2012), <http://reuters.com/article/2012/08/28/us-usa-texas-voter-id-idUSBRE87R14020120828>.

¹⁶⁴ See Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 Stat. 437 (codified as amended at 52 U.S.C. § 10302(c) (2012)); Crum, *supra* note 32, at 2006.

¹⁶⁵ See Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 Stat. 437 (codified as amended at 52 U.S.C. § 10302(c) (2012)); Paul M. Wiley, *supra* note 159, at 2140–41 (discussing the need for a court to find discriminatory voting practices and justification for equitable relief before retaining jurisdiction for clearance purposes).

¹⁶⁶ See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), *abrogated by Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *see also* Crum, *supra* note 32, at 2027–28.

County is so harmful: it invalidated VRA Section 4's coverage formula and effectively nullifies federal preclearance enforcement of minority voting rights.¹⁶⁷ VRA Section 5 required "covered jurisdictions" that Congress determined had demonstrated a historical pattern and practice of denying African-American and other racial minorities the right to vote to submit all proposed voting procedure changes to either a three-judge panel of the DDC or the AG for "preclearance" before voting procedure changes could go into effect.¹⁶⁸ "Under VRA Section 4(b), a state or political entity is a 'covered jurisdiction' if, during the 1964, 1968 or 1972 presidential election, it 1) maintained an illegal 'test or device,' such as, among other things, a literacy test, and 2) had voter turnout below fifty percent."¹⁶⁹ "Enacted in 1965 as a temporary provision, Section 5 has been reauthorized four times: in 1970, 1975, 1982, and 2006."¹⁷⁰ Although the coverage formula and bailout process have changed since 1965, the structure of the original Act, until *Shelby County*, remained intact.¹⁷¹ The covered jurisdictions included the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia; counties in California, Florida, New York, North Carolina and South Dakota; and townships in the states of Michigan and New Hampshire.¹⁷² These covered jurisdictions needed to obtain pre-approval from either the AG or the DDC before any changes to voting procedures could be finalized and implemented.¹⁷³ In effect, the VRA's preclearance provision required them to demonstrate that even minor voting changes had neither the purpose nor effect of discriminating on the basis of race, color, and, in some circumstances, heritage or language.¹⁷⁴

¹⁶⁷ See *Shelby Cnty.*, 133 S. Ct. at 2631.

¹⁶⁸ See Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 439 (codified as amended at 52 U.S.C. § 10304 (2012)); Crum, *supra* note 32, at 1999.

¹⁶⁹ Crum, *supra* note 32, at 1999 (citing 42 U.S.C. § 1973b (codified as amended at 52 U.S.C. § 10303(b) (2012))).

¹⁷⁰ Crum, *supra* note 32, at 2000.

¹⁷¹ *Id.* at 1999.

¹⁷² *Id.* at 1999 n.26 (citing 28 C.F.R. app. § 51 (2009)); *Jurisdictions Previously Covered by Section 5*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited July 30, 2014).

¹⁷³ See Voting Rights Act of 1965, Pub. L. No. 89-110, § 5(a), 79 Stat. 437 (codified as amended at 52 U.S.C. § 10304(a) (2012)).

¹⁷⁴ *Id.*

In *South Carolina v. Katzenbach*¹⁷⁵ the Warren Court that concluded the preclearance requirements of VRA Section 5 to be constitutionally valid: “Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”¹⁷⁶ The Court further concluded that Congress’s coverage formula was proper because Congress had evidence of actual voting discrimination in the vast majority of covered jurisdictions and “was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by . . . the Act.”¹⁷⁷

VRA Section 4(b)’s invalidation, however, was adumbrated in *City of Boerne v. Flores*,¹⁷⁸ wherein the Rehnquist Court invalidated the Religious Freedom and Restoration Act (RFRA) as applied to the states because the Congressional power used to pass remedial legislation under the Fourteenth Amendment was valid only where manifestly congruent and proportional to a constitutional wrong committed by a state.¹⁷⁹ Because the legislative authorizations in both the Fourteenth and Fifteenth Amendments provide that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article,”¹⁸⁰ it was clear that limits on Congressional power under the Fourteenth Amendment to pass only remedial legislation should also apply to legislation enacted under the Fifteenth Amendment, such as the VRA.¹⁸¹ This explains the rationale behind Shelby County’s legal challenge to VRA Section 4(b)—namely, the claim based on *City of Boerne* that the coverage formula, which might have been remedial, congruent, and proportional when the VRA was first enacted in 1965, could no longer be characterized as such because racial minority voter registration levels and ballot access had so markedly improved in the intervening years. Indeed, during oral argument in *Shelby County*, the Chief Justice confronted Solicitor General Donald B. Verrilli with the assertion

¹⁷⁵ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *abrogated by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

¹⁷⁶ *Id.* at 324.

¹⁷⁷ *Id.* at 329; Crum, *supra* note 32, at 2001.

¹⁷⁸ 521 U.S. 507 (1997).

¹⁷⁹ *Id.* at 533–36; *see also* Calvin Massey, *The Effect of Shelby County on Enforcement of the Reconstruction Amendments*, 29 J.L. & POL. 397, 398–99 (2014).

¹⁸⁰ U.S. CONST. amend. XIV, § 5; *see also* U.S. CONST. amend. XV, § 2.

¹⁸¹ *See City of Boerne*, 521 U.S. at 516–18.

that Mississippi, a covered jurisdiction under VRA Section 4, had the highest ratio of Black voter turnout compared to White voter turnout, while Massachusetts had the lowest.¹⁸² Problematically for the Chief Justice's perspective, this is most likely because the House and Senate reports reauthorizing the VRA treat Hispanic voters as White; this artificially lowers the White voter turnout rate, because a disproportionately high rate of Hispanics are non-citizens and therefore ineligible to register as voters, and Massachusetts has a higher proportion of resident non-citizens compared to Mississippi.¹⁸³

The Chief Justice's analysis, accordingly, focused on perceived differences between the voting discrimination of the past and today:

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.¹⁸⁴

The Chief Justice's claim that the nation is no longer divided along voting lines, however, is contradicted by the obvious racial polarization in U.S. voting patterns and the use of second-generation voting barriers to limit racial minority ballot access and dilute the effect of racial minority votes.¹⁸⁵ Although this polarization is found nationwide, it is especially pronounced in the previously covered jurisdictions, which, as a result, have become the Republican Party's base.¹⁸⁶ All of this was unfortunately

¹⁸² Louis Jacobson, *Was Chief Justice John Roberts Right About Voting Rates in Massachusetts, Mississippi?* TAMPA BAY TIMES (Mar. 15, 2013), <http://www.politifact.com/truth-o-meter/statements/2013/mar/05/john-roberts/was-chief-justice-john-roberts-right-about-voting/>.

¹⁸³ Persily, *supra* note 9, at 197–98.

¹⁸⁴ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2628 (2013). The Chief Justice described the criteria justifying use of the coverage formula as “evidence of actual voting discrimination” [which] shared two characteristics: ‘the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average.’ *Id.* at 2625 (citing *Katzenbach v. McClung*, 379 U.S. 294, 330 (1966)).

¹⁸⁵ See Ansolabehere et al., *supra* note 89, at 206; NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL., *DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA* 6 (2011).

¹⁸⁶ See Ansolabehere et al., *supra* note 89, at 206.

omitted by the Chief Justice.¹⁸⁷

In addition to ignoring racial polarization and increasing attacks on minority ballot access, the Chief Justice's opinion represents what some scholars would call "the most dramatic exercise of judicial review over federal law since the *Lochner* era."¹⁸⁸ Former Justice John Paul Stevens, criticizing *Shelby County*, focused on the Court's institutional illegitimacy to invalidate the VRA's coverage formula over the wisdom of legislation adopted by Congress, based on its broad powers to enact legislation under the Fifteenth Amendment, which cannot be questioned by the federal government's unelected branch.¹⁸⁹ He writes:

The several congressional decisions to preserve the preclearance requirement—including its 2006 decision—were preceded by thorough evidentiary hearings that have consistently disclosed more voting violations in those states than in other parts

¹⁸⁷ In a recent Harvard Law Review essay on the continued relevance of the VRA's coverage formula, Professors Stephen Ansolabehere, Nathaniel Persily, and Charles Stewart III focus on the particularly high rate of racial political polarization in the former covered jurisdictions, stating:

Voting in the covered jurisdictions has become even more polarized over the last four years, as the gap between whites and racial minorities has continued to grow. This is due both to a decline among whites and an increase among minorities in supporting President Obama's reelection. This gap is not the result of mere partisanship, for even when controlling for partisan identification, race is a statistically significant predictor of vote choice, especially in the covered jurisdictions. . . . To be sure, the coverage formula does not capture every racially polarized jurisdiction, nor does every county covered by section 5 outrank every noncovered county on this score. However, the stark race-based differences in voting patterns between the covered and noncovered jurisdictions taken as a whole demonstrate the coverage formula's continuing relevance.

Id. at 206, 220.

¹⁸⁸ Persily, *supra* note 9, at 252. Persily, predicting in his 2007 Yale Law Journal article that the VRA would not be overturned, stated:

The VRA remains the gold standard for exercises of congressional power to enforce civil rights. . . . Were the Court to strike down the new VRA as exceeding congressional power (even based on the eminently reasonable arguments as to why Congress has overstepped its bounds) it would be exercising its muscle of judicial review to an unprecedented extent. Perhaps this is why even Justice Scalia has suggested that he would allow stare decisis to apply to congressional actions under section 5 of the Fourteenth Amendment that concern race and has recognized compliance with the VRA as a compelling state interest.

Id.

¹⁸⁹ See Stevens, *supra* note 25.

of the country. Those decisions have had the support of strong majority votes by members of both major political parties. *Not only is Congress better able to evaluate the issue than the Court, but it is also the branch of government designated by the Fifteenth Amendment to make decisions of this kind.*¹⁹⁰

Following *Shelby County*, state legislatures, no longer encumbered by preclearance requirements, will have free reign to impose “second generation” barriers to minority voting power, with the help of VRA Section 2.¹⁹¹ Although the Chief Justice’s opinion states that these problems were never meant to be remediated by the Act’s preclearance provisions,¹⁹² this is belied by the fact that preclearance was most frequently used by the Justice Department to remediate vote-dilution and not ballot access. In support of this thesis, Professor Daniel Tokaji writes:

While Shelby County has prompted some state legislators and election officials to seek new restrictions on voting, it does not follow that the preclearance regime was an effective weapon against voting discrimination in election administration. This paradox arises from the disjunction between perception and reality when it comes to preclearance before Shelby County. . . . Section 5 was much more effective with respect to vote dilution than vote denial. *The statute was mostly used to block practices believed to weaken the strength of racial minorities’ votes, not those that prevent people from voting or having their votes counted. Put another way, Section 5 was mostly a tool for promoting equal representation rather than equal participation.*¹⁹³

Further, Congress, after an extensive inquiry into the continued need for the VRA in 2006, found precisely that which the Chief Justice denied: that “second-generation barriers to minority voting” such as racial gerrymandering and at-large voting systems required continued federal oversight under the VRA.¹⁹⁴

¹⁹⁰ *Id.* (emphasis added).

¹⁹¹ See *Shelby Cnty.*, 133 S. Ct. at 2631.

¹⁹² *Id.* at 2629.

¹⁹³ See Tokaji, *supra* note 150, at 77 (emphasis added). Tokaji’s analysis showed that “the percentage of Redistricting changes yielding an objection (.94%) was over three and one-half times that of the next highest category, again Method of Election (.26%). . . . Vote dilution, and specifically redistricting and at-large elections, were much more likely to trigger a response from DOJ.” *Id.* at 78, 80.

¹⁹⁴ See *Shelby Cnty.*, 133 S. Ct. at 2634–36 (Ginsburg, J., dissenting). Justice Ginsburg noted in detail:

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating

The Chief Justice's position that the VRA's preclearance provisions have nothing to do with second-generation voting barriers, such as stringent voter identification laws and minority vote-dilution, is further contradicted by the Roberts Court's decision in *Perry v. Perez*.¹⁹⁵ *Perry* involved a lawsuit brought by various plaintiffs alleging that Texas' redistricting plans discriminated against Latinos and African-Americans and intended to dilute their voting strength.¹⁹⁶ In a *per curiam* opinion, the *Perry* Court concluded that where a VRA-covered jurisdiction's proposed redistricting plan could not be pre-cleared by either the AG or the DDC in time for a forthcoming election, and was borne of a massive population change that renders reliance on its previous district map infeasible, the district court adjudicating the legality of the challenged redistricting plan "should take guidance" from the legally challenged plan in "drafting an interim plan" because the challenged plan "reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth."¹⁹⁷ *Perry*, applying the VRA's preclearance provisions to prevent minority-vote dilution, rebuts the Chief Justice's assertion that the VRA's preclearance provision has nothing to do with minority vote-dilution.

The Chief Justice's focus on ostensible changes in voting patterns to conclude the VRA's coverage formula is outdated and therefore unconstitutional is problematic for two reasons. First, it completely disregards second-generation voting barriers that

first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials. But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions.

Id. at 2636.

¹⁹⁵ *Perry v. Perez*, 132 S. Ct. 934 (2012).

¹⁹⁶ *Id.* at 940. "Latinos and African-Americans accounted for three-quarters of Texas' population growth since 2000." *Id.*

¹⁹⁷ *Id.* at 941.

Congress specifically cited when it reenacted the coverage formula. Second, it is an overly aggressive and unnecessarily intrusive use of judicial review that takes too narrow a view of Congressional legislative power under the Reconstruction Amendments, both because the VRA's most recent reauthorization was set to expire in 2031, and because covered jurisdictions retained their entitlement to "bail out" from preclearance requirements under very favorable terms.

D. VRA Bailout

Perhaps the greatest flaw in the Chief Justice's decision is its failure to acknowledge that "covered jurisdictions" always retained the ability to "bailout" from the coverage formula under very favorable terms.¹⁹⁸ Indeed, far from the Chief Justice's claim that "covered jurisdictions" were forced to suffer an irrevocable and permanent handicap that deprived them of equal treatment in a federal system of government, the VRA's coverage formula, in conjunction with the bailout provision, provided the proper incentive to covered jurisdictions to accommodate the electoral needs of their racial and ethnic minorities, and thereby end federal supervision of their election procedures in a manner that is straightforward, easy, and cost-effective.¹⁹⁹ The VRA bailout provision enabled jurisdictions to forego the VRA's preclearance requirements if they could prove "that any tests or other devices they had used as a prerequisite to registering to vote had not been used with the purpose or effect of discriminating on the basis of race or color."²⁰⁰ According to J. Gerald Herbert, the bailout provisions are "tailored in such a way as to require covered jurisdictions to prove nondiscrimination in voting on the very issues that Congress intended to target when it enacted the special remedial provisions in the first place."²⁰¹ Herbert writes: "The current bailout provisions, by granting state and local governments with a history of discrimination an alternative to some of the act's more intrusive requirements, ensure

¹⁹⁸ See Crum, *supra* note 32, at 2029–30.

¹⁹⁹ J. Gerald Herbert, *An Assessment of the Bailout Provisions of The Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006* 257, 270–71 (Anna Henderson ed., 2007), available at https://www.law.berkeley.edu/files/ch_10_herbert_3-9-07.pdf.

²⁰⁰ *Id.* at 257.

²⁰¹ *Id.* at 258.

that the act remains consistent with sound principles of federalism.”²⁰²

Until *Shelby County*, covered jurisdictions seeking a bailout had to demonstrate both a ten-year record of nondiscriminatory voting practices and current efforts to expand minority participation in all aspects of the political process.²⁰³ This required them to demonstrate that in the previous ten years:

1. No test or device has been used to determine voter eligibility with the purpose or effect of discrimination;

2. No final judgments, consent decrees, or settlements have been entered against the jurisdiction for racially discriminatory voting practices;

3. No federal examiners have been assigned to monitor elections;

4. There has been timely preclearance submission of all voting changes and full compliance with Section 5; and

5. There have been no objections by either the AG or the DDC.²⁰⁴

6. Jurisdictions seeking a bailout also had to address first- and second-generation voting barriers before being bailed out; that is, they had the burden of proving nondiscrimination in all aspects of their voting and electoral processes. This burden included a showing that, at the time the bailout is sought:

7. Any dilutive voting or election procedures have been eliminated;

8. Constructive efforts have been made to eliminate any known harassment or intimidation of voters;

9. They have engaged in other constructive efforts at increasing minority voter participation such as expanding opportunities for convenient registration and voting, and appointing minority election officials throughout all stages of the registration/election process.²⁰⁵

10. They have not violated “any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race

²⁰² *Id.*

²⁰³ *Id.* at 262.

²⁰⁴ *Id.* at 262–63.

²⁰⁵ Herbert, *supra* note 299, at 263.

or color” in the past ten years.²⁰⁶

The purpose behind the bailout formula was to achieve the VRA’s goals.²⁰⁷ In effect, the bailout option gave “covered jurisdictions” the incentive to “move beyond the status quo and improve accessibility to the entire electoral process for racial and ethnic minorities.”²⁰⁸ The ease of this process is evidenced by the numbers; for example, between 1982 and *Shelby County*, the Justice Department approved all 12 applications for bailout.²⁰⁹

The fact “covered jurisdictions” can effectively “bail out” from the VRA’s preclearance requirements on favorable terms effectively rebuts the Chief Justice’s assertion that the VRA’s coverage formula permanently treats covered jurisdictions as irrevocably unequal.²¹⁰ Indeed, the fact that so many of them failed to do so²¹¹ should have given the Court pause before invalidating the VRA’s coverage formula on the premise that it is no longer congruent and proportional under its parsimonious interpretation of Congressional legislative power under the Reconstruction Amendments.²¹²

IV. *SHELBY COUNTY* AND ITS POLICY CONSEQUENCES

The Chief Justice invalidated the Act’s preclearance provision based on a conservative and federalist jurisprudence that limits Congressional power in favor of greater state autonomy to conduct election procedures.²¹³ This is the traditional conservative view of federalism as a source individual empowerment based on the several States competing for the affection of citizens and businesses. This conservative and federalist view is contrasted by Justice Ginsburg’s liberal jurisprudence that favors both deference to Congressional statutes and a prominent role for the federal government in protecting racial minorities and other vulnerable individuals from historically oppressive state

²⁰⁶ *Id.* at 265 (quoting Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10303 (2012))).

²⁰⁷ *Id.* at 266.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 270.

²¹⁰ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013); Hebert, *supra* note 204, at 258.

²¹¹ See Hebert, *supra* note 204, at 271.

²¹² See *Shelby Cnty.*, 133 S. Ct. at 2627–30.

²¹³ See *id.*

legislatures. Although the Chief Justice's jurisprudence resonates powerfully in the political culture, which remains both conservative and individualistic, its weakness is evidenced by a naïve indifference to the country's continued difficulty in having underrepresented minorities participate in the political process on equal terms. By way of example, his decision makes no reference whatever to racial polarization in voting patterns, when this is among the most obvious pathologies of U.S. democracy. Furthermore, his disregard of problems such as racially-based gerrymandering to dilute the political effect of minority votes gives short shrift to the most obvious problem facing minority voters in states with a history of discrimination that suffer from racial polarization in all aspects of civic life. Evidence of this pathology is demonstrated not only by the manifest racial tensions exacerbated by the racial composition of government officials in Ferguson, Missouri, but also by the fact that U.S. political culture has seized on exit polls to show that Hispanics voted for President Obama over former Governor Romney by a margin of 71–29%, demonstrating a compelling need for bipartisan “immigration reform.”²¹⁴ This same political culture, however, has been completely silent about the fact that the President won an absurdly high 95% of the African-American vote in the 2008 election, while only 10%, 11%, and 14% of Whites voted for the President in Alabama, Mississippi and Louisiana, respectively.²¹⁵ The Chief Justice also completely failed to acknowledge that covered jurisdictions that objected to their status as such had free opportunity to seek bailout under very favorable terms.

Disregarding these issues, the Chief Justice's decision in *Shelby County* sweepingly invalidates the key provision of the most important piece of voting rights legislation ever enacted by U.S. Congress. Justice Ginsberg's dissent describes the Chief Justice's decision to invalidate preclearance when it has worked and is continuing to work as “throwing away your umbrella in a

²¹⁴ See Thomas Ferraro, *Will Immigration Reform Get Killed in Republican-Led House?*, REUTERS (May 25, 2013, 10:26 PM), <http://www.reuters.com/article/2013/05/26/us-usa-immigration-republicans-idUSBRE94P01820130526>.

²¹⁵ Scott Clement & John Cohen, *2012 Voters: The Deepest Racial Split Since '88*, WASH. POST (Oct. 25, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/10/25/2012-voters-the-deepest-racial-split-since-88>; *Election Analysis Shows Only 10% of Whites in Alabama Voted for Obama*, EQUAL JUST. INITIATIVE (Nov. 17, 2008), <http://www.eji.org/node/236>.

rainstorm because you are not getting wet.”²¹⁶ Further, the Court lacked institutional competence to strike the Act’s coverage formula. Former Justice Stevens criticized that

[t]he [Chief Justice’s] opinion fails, however, to explain why such a decision should be made by the members of the Supreme Court. The members of Congress, representing the millions of voters who elected them, are far more likely to evaluate correctly the risk that the interest in maintaining the supremacy of the white race still plays a significant role in the politics of those states. After all, that interest was responsible for creating the slave bonus when the Constitution was framed, and in motivating the violent behavior that denied blacks access to the polls in those states for decades prior to the enactment of the VRA.²¹⁷

The result of this “judicial activism” is that State legislators nationwide will be given free rein to reinforce the nation’s racial divisions for parochial partisan purposes. The highly regarded liberal Washington Post columnist E. J. Dionne explained:

The *Shelby County* ruling will make it far more difficult for African Americans to challenge unfair electoral and districting practices. For many states, it will be a Magna Carta to make voting more difficult if they wish to.

. . . .

In less-diplomatic language, existing majorities may try to fix election laws to make it far more difficult for their opponents to toss them from power in later elections. Republican legislatures around the country have passed a spate of voter suppression laws disguised as efforts to guarantee electoral “integrity” for just this purpose.²¹⁸

Accordingly, the *Shelby County* decision effectively guts the VRA by leaving intact only the nationwide “bail-in” mechanism that is both expensive, time-consuming, and an altogether insufficient safeguard for protecting minority voting rights, as well as

²¹⁶ *Shelby Cnty.*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

²¹⁷ Tal Kopan, *Stevens Criticizes Court’s VRA Ruling*, POLITICO (July 22, 2013, 2:50 PM), <http://www.politico.com/blogs/under-the-radar/2013/07/stevens-criticizes-supreme-courts-voting-rights-act-168910.html> (providing a video and transcript of the former Justice’s criticisms).

²¹⁸ E.J. Dionne, Jr., Op-Ed., *The Supreme Court Furthers Conservative Goals*, WASH. POST (June 26, 2013), http://www.washingtonpost.com/opinions/ej-dionne-the-supreme-court-furthers-conservative-goals/2013/06/26/c0d21f92-de98-11e2-963a-72d740e88c12_story.html.

VRA Section 2, which, as set forth above, has, if anything, exacerbated the problem of racial vote-dilution.²¹⁹

Although after *Shelby County* Congress can reauthorize VRA Section 4(b) under a new coverage formula,²²⁰ this would require both Congressional Houses to agree on the composition of states and jurisdictions that would be included under the formula. This is implausible, both in view of the level of political partisanship, racial political polarization, and divided government that characterizes American politics today.²²¹ Indeed, the Court's decision will embolden Southern Republican opposition to any reauthorization because opposition to the VRA has been both legitimized and politicized by the Court and because any reauthorization will inordinately affect Southern Republicans, as they are the base of their party, which, for partisan reasons, has a pronounced incentive to both minimize and dilute the political effect of racial minority votes.

The most likely political effect of *Shelby County* is that states and other jurisdictions will further implement problematic second-generation voting barriers to minority voting and thereby reinforce the historical racial cleavages that bedevil U.S. society. As previously mentioned, the Republican-controlled legislature and the Republican Governor of North Carolina recently enacted a stringent voter identification law that will have the effect of depressing African-American voter turnout, which, because of the state's unhealthy correlation between race and political partisanship, will lower the number of Democratic voters.²²² Therefore, this voter ID law will most likely exacerbate the existing high levels of racial polarization in North Carolina politics to the detriment of both its government and people. This is a problematic result for the Chief Justice because, but for his decision, North Carolina would most likely have never proposed such a draconian law and, if it did, neither the AG nor the DDC would likely have authorized the proposal.²²³ For the sake of both the

²¹⁹ See *Shelby Cnty.*, 133 S. Ct. at 2631.

²²⁰ See Shereen Marisol Meraji, *What Would a 2013 Voting Rights Act (Section 4) Look Like?*, NPR (June 26, 2013 4:34 PM), <http://www.npr.org/blogs/codeswitch/2013/06/26/195907874/what-would-a-2013-voting-rights-act-section-4-look-like>.

²²¹ See *supra* note 72 and accompanying text.

²²² See *supra* notes 96–97 and accompanying text.

²²³ See *supra* notes 126–27 and accompanying text.

country and the Court, one hopes North Carolina is not a paradigmatic example.

The importance of preclearance should not be overstated— at the time the VRA was reauthorized, AG objection to preclearance requests decreased from over 4% in the first five years after the VRA was first enacted, to between .05% and 0.23% from 1983–2002, with an annual objection rate since the mid-1990s of less than 0.2%.²²⁴ Moreover, second-generation voting barriers to racial minority voters are inherent in the country's single member plurality system of awarding legislative seats. The use of single member plurality districts, in conjunction with the country's racial imbalance in living patterns, accounts for much of the country's racial minority vote-dilution because racial minorities tend to live in compact urban inner cities, while Whites disproportionately live in suburbs and rural communities.²²⁵ This, however, should be contextualized by the fact that the preclearance regime was plausibly a necessary, but insufficient, means of protecting racial minority voters in a racially polarized climate. This is demonstrated by the fact that the AG, since 1982, sent over 800 requests for more information regarding proposed voting changes, which led voting jurisdictions to withdraw potentially discriminatory submissions in 205 instances and alter proposed voting procedure changes in many others.²²⁶

To paraphrase the Russian philosopher Nikolai Chernyshevsky, what is to be done? How do we insure maximal racial minority participation in our politics without engendering a backlash against minority rights? One option is for states to take redistricting away from state legislatures and leave it in the hands of a bipartisan group of experts, which is what California does.²²⁷ However, this solution will still result in racial minority vote dilution, albeit to a lesser degree, because of racial imbalance in living patterns. Ideally, the political culture will change

²²⁴ Persily, *supra* note 9, at 199.

²²⁵ See Nate Silver, *Geography, Not Voting Rights Act, Accounts for Most Majority-Minority Districts*, N.Y. TIMES FIVETHIRTYEIGHT (June 25, 2013, 4:22 PM), <http://fivethirtyeight.blogs.nytimes.com/2013/06/25/majority-minority-districts-are-products-of-geography-not-voting-rights-act/>.

²²⁶ Persily, *supra* note 9, at 200.

²²⁷ Michael B. Marois, *California's Redistricting Shake-Up Shakes Out Politicians*, BLOOMBERG BUS. (Mar. 21, 2013), <http://www.bloomberg.com/bw/articles/2013-03-21/californias-redistricting-shake-up-shakes-out-politicians#p2>.

and there will cease to be so strong a correlation between race and political partisanship, such that the incentive to use second-generation voting barriers will disappear. This is very unlikely to materialize in the near future because the wealth and income gap between African-Americans and Whites remains enormous, with Whites collectively owning 88.4% of the country's wealth, while African-Americans collectively own a paltry 2.7%.²²⁸ Moreover, it is implausible that substantial numbers of African-Americans will support the Republican Party, a political party espousing tax cuts and expenditures that, if anything, will exacerbate this inequality.

There is, however, the option of replacing single member plurality districts with a form of modified proportional representation, as used in Western European countries.²²⁹ Though this might seem far-fetched, most Americans disapprove of Congress, which currently has an abysmal approval level.²³⁰ There would be no need for any constitutional amendment to make such a change, as this can be accomplished at the state level.²³¹ The benefits of such a reform are obvious—namely, the end of vote-dilution altogether and increased voter participation because every voter will perceive their vote to have political implications.²³² Further advantages include the election of more women to office and government policies that are more aligned with those of median voters.²³³ It is perhaps no coincidence that the countries that have instituted some form of proportional representation have done the best job at serving their citizens' needs

²²⁸ Stephen L. Carter, *What Would Thomas Piketty Think of Affirmative Action?*, BLOOMBERG VIEW (Apr. 24, 2014, 11:16 AM), <http://www.bloombergview.com/articles/2014-04-24/what-would-thomas-piketty-think-of-affirmative-action>.

²²⁹ See *supra* notes 128–30 and accompanying text.

²³⁰ See Jeffrey M. Jones, *Congress Job Approval Starts 2014 at 13%*, GALLUP POL. (Jan. 14, 2014), <http://www.gallup.com/poll/166838/congress-job-approval-starts-2014.aspx>.

²³¹ See U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”)

²³² See *Voter Turnout Statistics by Country*, ACCURATE DEMOCRACY, http://www accuratedemocracy.com/d_stats.htm (last visited July 30, 2014).

²³³ *Why Proportional Representation? A Look at the Evidence*, FAIR VOTE CANADA, <http://www.fairvote.ca/wp-content/uploads/2014/01/Why-Proportional-Representation.pdf> (last visited July 30, 2014).

in terms of balanced and sustainable economic growth, while providing a safety net for poorer citizens and minimizing regionalism.²³⁴ Recognizing that proportional representation has a tendency to reward more extreme parties that make legislative compromises more difficult, states can remediate this by implementing a popular vote threshold, like Germany does, before allocating seats.²³⁵

CONCLUSION

The Supreme Court's decision to invalidate VRA Section 4(b)'s coverage formula nullifies the VRA's preclearance provision and therefore effectively ends the most important piece of federal legislation protecting minority voting rights in a country that remains highly polarized on both racial and socio-economic grounds. Making matters worse, the Court left VRA Section 2 intact, which incentivizes the abuse of racial gerrymandering at the state legislative level to the overall detriment of racial minorities nationwide.

The Court's decisions should not only be evaluated accord-

²³⁴ By this I mean that countries that use Proportional Representation to allocate legislative seats, including Germany, Norway, Denmark, Sweden, Australia, New Zealand, Netherlands, Luxembourg, Ireland, Iceland, Finland, Austria, and others, have done a better job than countries such as the United States, United Kingdom, France, and Canada at remediating inequality and insuring higher living standards for all citizens. See, e.g., Tami Luhby, *Global Income Inequality: Where the U.S. Ranks*, CNN MONEY (Nov. 8, 2011, 4:18 PM), http://money.cnn.com/2011/11/08/news/economy/global_income_inequality/; see also Kochhar, *supra* note 52. Note also how countries with single member plurality systems of government, such as the United Kingdom, Canada, and the United States have pronounced regional cleavages, with a referendum on Scottish independence from the United Kingdom, which took place in September 2014, Quebecers having nearly voted for independence from the rest of Canada in 1995, and the United States with its pronounced red and blue state divide. See, e.g., *Scotland Referendum: Scotland Votes 'No' to Independence*, BBC (Sept. 19, 2014, 10:51 AM), <http://www.bbc.com/news/uk-scotland-29270441>; Fred Hiatt, *The Red State/Blue State Divide is Worsening*, WASH. POST, (Apr. 21, 2013), http://www.washingtonpost.com/opinions/fred-hiatt-the-red-stateblue-state-divide-is-worsening/2013/04/21/df830b7a-a90c-11e2-8302-3c7e0ea97057_story.html.

²³⁵ Germany, to avoid rewarding extreme parties, requires a party to obtain 5% of the popular vote before it can be allocated seats in the Bundestag. Cf. Leon Manganarian, *How Germany's Election System Works: What to Watch for Today*, BLOOMBERG BUS. (Sept. 21, 2013), <http://www.bloomberg.com/news/articles/2013-09-21/how-germany-s-election-system-works-what-to-watch-for-today>.

ing to the apparent desirability of their outcomes, but also according to their institutional legitimacy, jurisprudential soundness, and how these outcomes will affect and interact with both U.S. government and society. By these measures, the Court's decision in *Shelby County* is an altogether problematic use of judicial review because it risks precipitating a backlash and retrogression against racial minority voting rights by state legislatures in a country with an inordinately high level of racial political polarization and a pronounced history of racial discrimination. The Roberts Court's defense to this would be that Congress has authority to enact a new coverage formula, provided it is congruent and proportional to a pattern and practice of discrimination under the Court's limited reading of Congressional power under the Reconstruction Amendments. Congress, however, will most likely be unable to pass effective legislation to protect minority voters in the hyper-partisan political environment that characterizes today's Washington.

In view of these challenges, what can be done? One option is for states to change their laws and allow bipartisan commissions to undertake redistricting, instead of their legislatures. However, this process can still be abused and will, based on living patterns, still lead to racial minority vote-dilution. The best outcome would be for states to revitalize American democracy by replacing today's single member plurality system for electing representatives, at both the state and nationwide level, with a proportional representation paradigm that is currently used in many of the best-performing democracies as measured in terms of voter participation, economic growth, job creation and welfare state provision. Barring this outcome, *Shelby County* will exacerbate, rather than bridge, the racial and socio-economic divides that bedevil U.S. society.