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## REFLECTIONS ON THE HISTORY AND FUTURE OF THE VOTING RIGHTS ACT IN THE WAKE OF *SHELBY COUNTY*

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### I.

At the conclusion of America's deadliest military conflict, the United States Congress sought to reconstruct a nation torn apart by civil war by enacting a program of radical social change designed to eliminate the legal disabilities shouldered by the newly freed African-American male population. Included in the numerous proposals was a series of Amendments to the U.S. Constitution: the 13th Amendment would abolish the institution of slavery; the 14th Amendment would provide equal protection and due process under law to those with former slave status; and the 15th Amendment would enable them to protect these rights via a right to vote, unencumbered by "race" or "color" discrimination. The Congress was empowered to enforce this provision with appropriate legislation.

Less than 50 years after the enactment of these historic provisions, a substantial number of African-Americans went to polling stations in the state of Alabama, the home of Shelby County, seeking to register as voters for an upcoming election. In flagrant violation of the language in the Constitution, they were turned away because of their race. Undaunted, over 5,000 of them joined a civil case to enforce the Constitution, which was heard by the Supreme Court of the United States. The Court correctly understood the gist of the plaintiffs' complaint, which was that "the great mass of the white population intends to keep the blacks from voting."<sup>1</sup> Yet,

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<sup>1</sup> *Giles v. Harris*, 189 U.S. 475, 487 (1903).

notwithstanding the stark nature of the facts, the Court denied relief, concluding that:

If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the State itself, must be given by them or by the legislative and political department of the Government of the United States.<sup>2</sup>

Decades after *Giles* was decided, the country witnessed a Second Reconstruction<sup>3</sup>—a tremendous upsurge of civil rights activism focused on the rights to vote and to quality education, housing, and jobs<sup>4</sup>—which forced all three branches of government to respond in the face of violent white racism and resistance. Among the numerous congressional responses was the enactment of an historic statute designed to carry out the mandate of the 15th Amendment. The Voting Rights Act of 1965<sup>5</sup> (“VRA” or “the Act”) did two things: First, under Section 2, it provided a cause of action to allow the United States government and private parties to file suit in federal court challenging denials or abridgements of the right to vote that were based on race or color.<sup>6</sup> Second, recognizing the sheer volume of abridgments of the right to vote taking place in states where the deepest remnants of slavery existed, and the cost and strategic difficulties of bringing such individual actions, the Act included two additional provisions: Section 4,<sup>7</sup> which established a formula for determining where the most consistent egregious violations were taking place, and Section 5, which required those jurisdictions captured by Section 4 to get future voting changes approved beforehand by the United States Government to assure that they would not deny or abridge the right to vote based on race or

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<sup>2</sup> *Id.*

<sup>3</sup> Cf. MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA (2007).

<sup>4</sup> See generally DAVID J. GARROW, PROTEST AT SELMA, MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965 (1978); BRIAN K. LANDSBERG, FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT (2007); *Bridge to Freedom* (1987) (Episode 6 of *Eyes on the Prize: America’s Civil Rights Years 1954-1985*).

<sup>5</sup> 42 U.S.C. § 1973 *et seq.*

<sup>6</sup> *Id.* § 1973(a).

<sup>7</sup> *Id.* § 1973b(b).

color.<sup>8</sup> Congress recognized the onerous nature of the requirements, by making them subject to continued renewal<sup>9</sup> to assure that they were achieving their goals. Congress also included a provision that allowed jurisdictions to “bail out” of the coverage and the preclearance requirement, if coverage was no longer warranted by existing circumstances.<sup>10</sup>

No one disputes that the 1965 VRA served its purposes well. When Congress renewed the Act in 2006, it stated that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.”<sup>11</sup> The House Report elaborated upon this success, stating that “the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982,” and added that “[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.”<sup>12</sup> The Report explained that there have been “significant increases in the number of African-Americans serving in elected offices” and a 1,000-percent increase since 1965 in the number of African-American elected officials in the six states originally covered by the VRA.<sup>13</sup>

## II.

Writing for the majority of the Court in *Shelby County, Ala. v. Holder*, Justice Roberts, speaking of improvements in African-American voting power since the passage of the VRA, stated that “there is no doubt that these improvements are in large part *because of* the Voting Rights Act . . . . [which] has proved immensely successful at redressing racial discrimination and integrating the voting process.”<sup>14</sup> Yet in that same opinion, the Court rendered a devastating blow to this essential pivot to the Second Reconstructionist program, knocking out the formula for ascertaining which jurisdictions would be subjected to the preclearance regime.

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<sup>8</sup> *Id.* § 1973c(a).

<sup>9</sup> Congress renewed these provisions in 1970, 1975, 1982 and in 2006. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2620–21 (2013). In its most recent 2006 renewal, the reauthorizations passed the House of Representatives by a vote of 390 to 33, and the Senate by a vote of 98–0. *Id.* at 2635 (Ginsburg, J., dissenting).

<sup>10</sup> 42 U.S.C. § 1973b(a) (citing § 2(b)(1), 120 Stat. 577).

<sup>11</sup> *Shelby Cty.*, 133 S. Ct. at 2625 (quoting H.R. Rep. 109–478, at 12 (2006)).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2626.

Even when considering the stunning success of the scheme enacted in 1965, it was not a surprise to close observers that the Court took this extraordinary, unnecessary, and unjustified step. One of the earliest indications that a majority of the Court would closely scrutinize the VRA for constitutional defects appeared in the case of *City of Boerne v. Flores*,<sup>15</sup> where the Court, despite having earlier concluded that congressional exercises of its powers under the Reconstruction Amendments were “plenary,”<sup>16</sup> for the first time imposed limits on the extent of congressional power, holding that Section 5 of the 14th Amendment could only be used for remedial, as opposed to substantive purposes—“congruence and proportionality” was required between the Act and any harm that Congress was seeking to remedy.<sup>17</sup> *South Carolina v. Katzenbach*<sup>18</sup> held that Congress has “full remedial power” under the 15th Amendment, and “may use *any* rational means to effectuate the Constitutional prohibition of racial discrimination in voting.”<sup>19</sup> But the Court in *Boerne*, although citing to a number of voting rights cases in discussing the powers of Congress under the Reconstruction Amendments, did not cite to any of the decisions concerning Section 5 that were decided after the 1982 congressional extension of the Act.<sup>20</sup> In a post-*Boerne* case construing Section 5 in 1999, the Court stated that the provision raised “substantial federalism concerns,” yet held that any intrusion on state sovereignty was permitted by the 15th Amendment.<sup>21</sup> But then in the next term the Court applied a restrictive reading to the provision because, according to the Court, to do otherwise would “exacerbate the substantial federalism costs that preclearance already exacts . . . perhaps to the extent of raising concerns about Section 5’s constitutionality.”<sup>22</sup> This language in the Court’s opinions, though of no binding legal effect, sent subtle signals to lawyers and covered jurisdictions seeking to get the Act declared unconstitutional.

Senator Edward Kennedy queried Chief Justice John Roberts about the VRA when Roberts was up for confirmation to the Supreme Court in 2005. He did so because Roberts served as an attorney in the Office of White House counsel during the Reagan Administration when the VRA was up for reauthorization in 1982, and while there, wrote a number of memos and opinion articles arguing for a weakening of the Act.<sup>23</sup> In one of the memos,

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<sup>15</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>16</sup> *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

<sup>17</sup> *City of Boerne*, 521 U.S. at 520.

<sup>18</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>19</sup> *Id.* at 324.

<sup>20</sup> *See City of Boerne*, 521 U.S. at 507.

<sup>21</sup> *Lopez v. Monterey Cty.*, 525 U.S. 266, 282–85 (1999).

<sup>22</sup> *Reno v. Bossier Parish School Parish Board*, 528 U.S. 320, 336 (2000).

<sup>23</sup> Adam Serwer, *Chief Justice Roberts’ Long War Against the Voting Rights Act*,

discussing the reauthorization of Section 2 of the statute, he stated that voting rights violations “should not be too easy to prove since they provide a basis for the most intrusive interference imaginable.”<sup>24</sup> Statements such as this led to a fairly intense round of questioning of Roberts by Senator Kennedy, who ultimately voted against his nomination.<sup>25</sup>

Roberts was Chief Justice when the Court agreed to hear *Northwestern Austin Municipal Utility District Number One v. Holder*<sup>26</sup> (“*NAMUDNO*”) a case arising amidst a purely Supreme Court-generated controversy around the constitutionality of Section 5<sup>27</sup> and a number of pending challenges in the lower federal courts. Ironically, the plaintiff in *NAMUDNO* deserved considerable sympathy. A small utility district in the covered jurisdiction of the state of Texas, *NAMUDNO* was governed by a board of five members, and required to preclear all election changes under Section 5, even though there was no history of race discrimination in the district. But it could not “bail out” out of coverage because it did not register its own voters.<sup>28</sup>

Roberts’ opinion for the Court left little doubt that he felt the statute was unconstitutional. The gist of the problem, according to Roberts, was not that the “remedy” of preclearance was not “congruent and proportional” to the harm it was seeking to redress. The extensive legislative record prepared by Congress in 2006 precluded such a ruling,<sup>29</sup> and even Justice Roberts was

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MOTHER JONES (Feb. 27, 2013, 4:01 AM), <http://www.motherjones.com/politics/2013/02/john-roberts-long-war-against-voting-rights-act>.

<sup>24</sup> *Id.*

<sup>25</sup> John Perr, *John Roberts Completes 30 Year Mission to Kill Voting Rights Act*, DAILY KOS (June 25, 2013, 4:27 PM), <http://www.dailykos.com/story/2013/06/25/1218903/-John-Roberts-completes-30-year-mission-to-kill-Voting-Rights-Act>.

<sup>26</sup> 557 U.S. 193 (2009).

<sup>27</sup> *Cf.* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 584 (4th ed. 2012).

<sup>28</sup> Rather than see the bailout provision as a means of providing flexibility to the statute, Roberts displayed his antagonism to the entire statutory enterprise by describing it as a “nullity” because, at the time, only 17 of the more than 12,000 covered jurisdictions had successfully bailed out of coverage. *NAMUDNO*, 557 U.S. at 211 (2009).

<sup>29</sup> As Justice Ginsburg pointed out in dissent, “The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. The compilation presents countless ‘examples of flagrant racial discrimination’ since the last reauthorization; Congress also brought to light systematic evidence that ‘intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed.’” *Id.* at 2636 (Ginsburg, J. dissenting) (quoting *Shelby Cty. Ala. v. Holder*, 679 F.3d 848, 866 (D.C. Cir. 2012)). Congress went on to find that “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 “evidence

compelled to acknowledge that Congress had “amassed a sizeable record.”<sup>30</sup> Rather, the opinion suggested that the Section 5 pre-clearance requirement violated a principle of “equal sovereignty,” a novel idea buttressed by only two citations, neither of which provided any illumination as to the meaning of such a doctrine or why it posed constitutional issues for Section 5.<sup>31</sup> The opinion referred to Section 5 as an extraordinary assertion of federal power and cited dicta from a number of cases to support this view, as if that alone made it unconstitutional; but the Court could not avoid the telling fact that it had upheld the constitutionality of each one of the numerous reauthorizations.<sup>32</sup> The Court devoted barely a paragraph to the coverage formula, suggesting that covered and non-covered jurisdictions were treated in a radically different way, while the Court saw the evidence of discrimination as suggesting more similarity than difference.<sup>33</sup> However, the Court concluded, 7–1, that rather than decide the issue of constitutionality, it was better to read the statute in such a way as to allow bailout by covered districts, even though they didn’t register their own voters.<sup>34</sup>

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of continued discrimination,” Congress concluded, “clearly showed the continued need for Federal oversight” in covered jurisdictions. *Id.* (internal citations and quotation marks omitted). The overall record demonstrated to the federal lawmakers that, “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.” *Id.*

<sup>30</sup> 557 U.S. at 205.

<sup>31</sup> The cases relied upon were *United States v. Louisiana*, 361 U.S. 1 (1960), which raised the question whether the Submerged Lands Act granted to Texas, Louisiana, Mississippi, or Alabama the submerged lands in the Gulf of Mexico within three marine leagues from their coasts. In holding that the Act did not grant Louisiana, Mississippi or Alabama any rights in submerged lands beyond three geographic miles from their coasts, The language of the opinion says no more than that states were entitled to “equal sovereignty upon their admission” to the Union. *Id.* at 16. Also relied upon was *Pollard v. Hagan*, 44 U.S. 212 (1845), which dealt with navigable waters in Alabama, standing for the same principle, and *Texas v. White*, 7 Wall. 700 (1869), a case decided in 1869, seeking to determine the proper ownership of bonds. None of these cases is of the slightest assistance in determining what an “equal sovereignty” principle is, or how such a principle relates to Congressional power under the 15th Amendment.

<sup>32</sup> *NAMUDNO*, 557 U.S. at 200.

<sup>33</sup> *Id.* at 204.

<sup>34</sup> *Id.* at 211. The Court was unanimous, with only Justice Thomas dissenting in part declaring the statute unconstitutional. Some observers have wondered why the liberal members of the Court joined the Roberts opinion, assisting in casting the shadow that engulfed the act since that decision. See Rick Hasen, *Are the Liberal Justices Savvy or Suckers?*, SLATE (July 1, 2013, 2:29 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/07/are\\_the\\_liberals\\_on\\_the\\_supreme\\_court\\_savvy\\_or\\_suckers.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/are_the_liberals_on_the_supreme_court_savvy_or_suckers.html); Linda Greenhouse, *The Cost of Compromise*, N.Y. TIMES OPINIONATOR

## III.

Unlike the plaintiff in *NAMUDNO*, it is far from clear why Shelby County even had standing to bring a facial challenge to the VRA, since it was clear that the statute could be constitutionally applied to it.<sup>35</sup> Where *NAMUDNO* had no history of discrimination, but was not allowed to bail out from coverage because of the wording of the statute, Shelby County was not entitled to bail out because the Department of Justice (“DOJ”) had objected to proposed changes submitted by the County.<sup>36</sup> Rather than resolve those objections in the manner that the statute provides, the County filed a lawsuit challenging the constitutionality of the statute. As Justice Ginsburg’s dissent argued, “even while subject to the restraining effect of Section 5, Alabama was found to have ‘deni[ed] or abridge[d]’ voting rights ‘on account of race or color more frequently than nearly all other states in the Union,’”<sup>37</sup> and Shelby County and its surrounding area were active players in that discrimination.

Shelby County itself was a defendant in a recent successful suit against it alleging that it maintained a discriminatory at-large electoral system.<sup>38</sup> Shortly after the resolution of that case, a city in Shelby County requested preclearance of a districting plan that would have eliminated the city’s sole majority-black district that would have been created pursuant to the consent decree it had just signed. The DOJ objected to the plan, but the city defied the DOJ and implemented the change, causing the DOJ to bring a successful lawsuit against the city to restore the seat.<sup>39</sup>

In neighboring Jefferson County, the city of Pleasant Grove engaged in purposeful discrimination by annexing all-white areas, but refusing to annex an adjacent black neighborhood. A federal court concluded that the city had shown unambiguous opposition to racial integration, both before and after the passage of federal civil rights laws, and that its strategic annexations appeared to be an attempt “to provide for the growth of a monolithic white voting block for the impermissible purpose of minimizing future black voting strength.”<sup>40</sup> As Justice Ginsburg noted, the type of manifest racial bias evident in this case was even reflected in the personal views of white

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BLOG (July 10, 2013, 9:00 PM), <http://opinionator.blogs.nytimes.com/2013/07/10/the-cost-of-compromise>.

<sup>35</sup> See, e.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“Facial challenges . . . must establish that no set of circumstances exists under which the Act would be valid.”).

<sup>36</sup> *Shelby Cty.*, 133 S. Ct. at 2621.

<sup>37</sup> *Id.* at 2645 (Ginsburg, J., dissenting).

<sup>38</sup> *Dillard v. Crenshaw Cnty.*, 748 F. Supp. 819 (M.D. Ala. 1990).

<sup>39</sup> See *Shelby Cty.*, 133 S. Ct. at 2646.

<sup>40</sup> *Id.*

members of the Alabama legislature who, as part of an FBI investigation, were overheard referring to African-Americans as “Aborigines” as they discussed fears of a large African-American voter turnout for a referendum.<sup>41</sup>

The prevalence of such stark contemporary racism in a covered Section 5 jurisdiction, literally at the core of what Section 5 was designed to target, makes it astonishing that it could have standing to raise a facial challenge to the constitutionality of the statute.<sup>42</sup> Yet without any acknowledgement of a blatantly result-oriented relaxation of the standing rules, Roberts went on to cut and paste from his exceedingly deficient 2009 opinion. Like *NAMUDNO*, the *Shelby County* decision rests on the mystical doctrine of “equal sovereignty,” but says very little more to explain what the doctrine means than what was said in 2009.<sup>43</sup> Indeed, as venerable conservative Judge Richard Posner described it, “[t]his is a principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle . . . . [t]he opinion rests on air.”<sup>44</sup>

#### IV.

Thus, along with its infamous election law companions from the 21st century, *Bush v. Gore*<sup>45</sup> and *Citizens United v. Federal Election Commission*,<sup>46</sup> five Republican-appointed Supreme Court Justices have trounced logic and precedent to produce groundbreaking rulings that have no conceivable rationale other than to buttress the national political strength

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<sup>41</sup> *Id.* at 2647.

<sup>42</sup> The cases are clear. *See* *United States v. Raines*, 362 U.S. 17, 24–26 (1960) (finding a federal statute proscribing deprivations of the right to vote based on race constitutional as applied to the state officials before the Court, even if it could not constitutionally be applied to other parties); *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J. dissenting) (“Where, as here, a state or local government raises a facial challenge to a federal statute on the ground that it exceeds Congress’ enforcement powers under the Civil War Amendments, the challenge fails if the opposing party is able to show that the statute “could constitutionally be applied to *some* jurisdictions.”).

<sup>43</sup> The Court added an additional citation, a 1911 case, *Coyle v. Smith*, 221 U.S. 559 (1911), which, like the cases previously relied upon, shed no light on the constitutionality of Section 5, and were sitting dormant in the case books in 1965, as well as during the time that the Court upheld previous congressional reauthorizations. As has been argued earlier, the facts on the ground have hardly changed so much as to give these old cases such new bite.

<sup>44</sup> Richard Posner, *The Voting Rights Act Ruling Is About The Conservative Imagination*, SLATE (June 26, 2013, 12:16 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/the\\_supreme\\_court\\_and\\_the\\_voting\\_rights\\_act\\_striking\\_down\\_the\\_law\\_is\\_all.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html).

<sup>45</sup> *Bush v. Gore*, 531 U.S. 1046 (2000).

<sup>46</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).



of a right-wing Republican Party increasingly focused on destroying Black political power and entrenching itself in the political arena.<sup>47</sup>

Unlike 1982, when a “bipartisan” Congress amended the VRA to overturn a Supreme Court decision demanding a showing of discriminatory intent before a plaintiff could prevail on a Section 2 voting rights claim,<sup>48</sup> the current Congress is far more polarized, and the Republican Party has nothing to gain, and all to lose, by “fixing” the problem created by the *Shelby County* decision.<sup>49</sup> Indeed, taking advantage of the chaos caused by the decision, the very states that were covered by Section 5 have been moving rapidly to implement changes that would not have been precleared by the DOJ had Section 5 survived. In almost all of these instances, the changes are being pushed by the state Republican Party counterparts to those in Congress whose cooperation would be necessary to amend the statute.<sup>50</sup> Even if serious bipartisan sentiment existed to take on the issue, it is not clear what changes, if any, would satisfy the five-Justice majority in *Shelby County* under the purported rationale that underlies the decision. Such difficulty in coming up with another formula is the most likely reason

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<sup>47</sup> Cf. Thomas B. Edsell, *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/?nl=opinion&emc=edit\\_ty\\_20130711](http://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/?nl=opinion&emc=edit_ty_20130711).

<sup>48</sup> See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>49</sup> On congressional polarization, see THOMAS MANN & NORMAN ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012); John Aloysius Farrell, *Divided We Stand*, National Journal (May 29, 2013, 9:13 PM), <http://www.nationaljournal.com/magazine/divided-we-stand-20120223>. On the lack of organized opposition to the 1982 Amendments, see ABIGAIL THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 113 (1987). Many have noted that the Republican Party has developed huge gains from majority-minority districts. See, e.g., Ari Berman, *How the GOP Is Resegregating the South*, THE NATION, Jan. 20, 2012, available at <http://www.thenation.com/article/165976/how-gop-resegregating-south#axzz2YU7SxtsU> (noting that “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” and that in North Carolina, had placed “half the state’s black population of 2.2 million people, who vote overwhelmingly for Democrats, into a fifth of all legislative and Congressional districts”).

<sup>50</sup> See Chris Kromm, *The Voting Rights Act and the Future of Southern Politics*, FACING SOUTH (June 27, 2013, 5:53 PM), <http://www.southernstudies.org/2013/06/the-voting-rights-act-and-the-future-of-southern-p.html>; Ari Berman, *Why Are Conservatives Trying to Destroy the Voting Rights Act?*, THE NATION, Feb. 25, 2013, available at <http://www.thenation.com/article/172685/why-are-conservatives-trying-destroy-voting-rights-act#ixzz2ZQ8vjEQ>.

why Congress did not attempt to do so in 2006.<sup>51</sup> So, movement from Congress seems quite unlikely at this point.<sup>52</sup>

A number of ideas have been put forward that would allow the Executive Branch to take action that does not require the acquiescence of Congress. One proposal calls for attorneys representing plaintiffs in voting rights cases that were awaiting Section 5 preclearance to ask the local U.S. District Court where the case is pending and to retain jurisdiction over the case under Section 3 of the VRA,<sup>53</sup> a rarely used section of the statute which gives U.S. district judges authority, in cases where there have been findings of 14th and 15th Amendment violations, to retain jurisdiction over the case and deny further changes from being implemented if they would violate the VRA or the Constitution.<sup>54</sup> In cases involving jurisdictions with egregious voting histories, this is a mechanism that will allow federal judges to perform the work done by the DOJ under Section 5. An obvious advantage of this strategy is that it requires no additional resources for the plaintiffs and does not require any congressional action.<sup>55</sup>

Another proposal would require that the Department of Justice allocate to each U.S. Attorney's office in a jurisdiction covered by Section 5 at least one trained U.S. Attorney who would have the responsibility for overseeing and responding to proposed changes that would have triggered objections under Section 5 and to prepare litigation under Section 2 of the statute, where necessary. Once in litigation, the plaintiff could ask for relief under Section 3 along with other provisions. Other proposals would extend this

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<sup>51</sup> Issacharaoff, Karlan & Pildes, *supra* note 27, at 573.

<sup>52</sup> On July 17th the Senate Judiciary Committee held a hearing on the *Shelby County* decision in which two Republicans showed up: one, Senator Grassley, left early; the other, Senator Cruz, argued that Section 2 was sufficient to deal with voter discrimination. The House held a hearing the next day, and one of the reporters present afterwards reported that "it looks like some key House Republicans don't want to be known for killing the Voting Rights Act, but they'd be happy with it dead." Ari Melber, *Some Republicans Quietly Cheer End of Voting Rights Act*, MSNBC, THE CYCLE (Jul 18, 2013, 2:40 PM), <http://tv.msnbc.com/2013/07/18/republican-hearing-confronts-voting-rights-act>.

<sup>53</sup> 42 U.S.C. § 1973a(c).

<sup>54</sup> The court would not allow the change unless the court found that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, in contravention of the voting guarantees set forth in section 1973b(f)(2)" of the VRA—language which is identical to Section 5. *Id.*

<sup>55</sup> See Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 992 (2012); see also Travis Crum, *An Effects Test Pocket Trigger*, ELECTION LAW BLOG (July 8, 2013, 8:36 AM), [http://electionlawblog.org/?p=52659&utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+electionlawblog%2FuqCP+%28Election+Law%29](http://electionlawblog.org/?p=52659&utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+electionlawblog%2FuqCP+%28Election+Law%29).

idea throughout the United States, in essence covering every U.S. Attorney's office.<sup>56</sup> This would of course be much more resource intensive. A few proposals requiring congressional changes would, for example, define coverage jurisdictions as those which have violated federal election laws in recent years, capturing many of the problematic Southern states;<sup>57</sup> create a legislative provision providing a "universal right to vote,"<sup>58</sup> or follow mandatory disclosure of electoral changes under legislation authorized by a similar type of regulation as that existing under the Elections Clause of the Constitution.<sup>59</sup>

## V.

It is difficult to be optimistic that the VRA will be fixed by the current Congress. What will therefore be necessary is an unusually active DOJ working to counter regressive state legislative plans and an active population mobilized to utilize the ballot box, among other popular initiatives. Working together to change the political complexion of the Republican-leaning state governments may bring about necessary changes for a better, more accessible political process.

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<sup>56</sup> Professor Lani Guinier initially put forth this idea in a discussion on National Public Radio. See *Talk of the Nation: What Changes After Supreme Court Ruling On Voting Rights Act* (NPR radio broadcast June 25, 2013), available at <http://www.npr.org/2013/06/25/195557564/what-changes-after-supreme-court-ruling-on-voting-rights-act>.

<sup>57</sup> Professor Lani Guinier initially put forth this idea in a discussion on National Public Radio. See *Talk of the Nation: What Changes After Supreme Court Ruling On Voting Rights Act* (NPR radio broadcast June 25, 2013), available at <http://www.npr.org/2013/06/25/195557564/what-changes-after-supreme-court-ruling-on-voting-rights-act>.

<sup>58</sup> Editorial, *The Future of Voting Rights*, June 29, 2013, available at [http://www.nytimes.com/2013/06/30/opinion/sunday/the-future-of-voting-rights.html?ref=opinion&\\_r=1&](http://www.nytimes.com/2013/06/30/opinion/sunday/the-future-of-voting-rights.html?ref=opinion&_r=1&).

<sup>59</sup> See Samuel Issacharoff, *So the VRA Is Gutted. Here's How to Still Fight Voter Discrimination*, THE NEW REPUBLIC (June 28, 2013), <http://www.newrepublic.com/article/113672/voting-rights-act-overturned-how-still-fight-voter-discrimination#> (last visited Aug. 7, 2013); see also 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 . . .").