

Responding to *Shelby County*: A Grand Election Bargain

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I. INTRODUCTION

The immediate reaction to the Supreme Court's decision in *Shelby County v. Holder*¹ was predictably fast, furious, and fissured.² Some lauded the decision as a long-overdue recognition that things really have changed in the South since the bad old days of mass disenfranchisement, so effectively demolished by the Voting Rights Act of 1965 (VRA).³ They view the Court as doing what Congress should have done long ago, jettisoning a coverage formula that bore little relationship to contemporary conditions and that wrongly stigmatized an entire region of the country for ancient sins.⁴ Others lamented the Supreme Court's unceremonious disposal of the civil rights movement's "crown jewel."⁵ *Shelby County*'s critics assert that voting discrimination is alive and well in covered states and counties. They believe that without the VRA's preclearance mechanism, we are likely to see redoubled efforts at "vote suppression"⁶—a term sometimes used to describe laws

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¹ 133 S. Ct. 2612 (2013).

² For further reflections on the divergent perspectives evident in the reactions to *Shelby County*, see Richard H. Pildes, *What Does the Court's Decision Mean?*, 12 ELECTION L.J. 317 (2013); David Schultz, *William Faulkner and the Dilemmas of Shelby County*, 12 ELECTION L.J. 341 (2013).

³ See Abigail Thernstrom, *A Vindication of the Voting Rights Act*, WALL ST. J. (June 26, 2013, 7:28 PM), <http://online.wsj.com/news/articles/SB10001424127887323873904578569453308090298>.

⁴ See *id.* See also Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 101 (2013) ("The extraordinary feature of Section 5 was not just its administrative reach but its labeling of part of the country as being unremedied from its past—a stigma that attached to the South but not to the covered parts of New York or New Hampshire that were not implicated in the noxious legacy of Jim Crow.").

⁵ See Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013, 3:50 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html; see also John Paul Stevens, *The Court and the Right to Vote: A Dissent*, N.Y. REV. OF BOOKS, Aug. 15, 2013, at 37, available at <http://www.nybooks.com/articles/archives/2013/aug/15/the-court-right-to-vote-dissent/>.

⁶ See, e.g., Meredith Blake, *GOP is Enacting a 'Sharknado of Voter Suppression,' Says 'Daily Show'*, L.A. TIMES (Aug. 6, 2013), <http://articles.latimes.com/2013/aug/06/entertainment/la-et-st-daily-show-voter-suppression-republicans-north-carolina-texas-20130806>; Aviva

and practices that make it more difficult for some people to vote and have their votes counted.

There is truth in both perspectives. The focus of this article, however, is on what both sides have missed. *Shelby County*'s critics are quite right to worry that the decision will embolden state legislatures to enact laws that unjustifiably restrict voting. Shortly after the decision, North Carolina enacted an extreme vote-suppression law, and other states are likely to follow.⁷ But critics overstate the utility of VRA preclearance in stopping such laws. The reality is that preclearance was most effective in curbing redistricting plans and other practices thought to weaken minority representation, particularly in local jurisdictions that might otherwise have attracted scant notice.⁸ With some very recent and high-profile exceptions, VRA preclearance was doing little to stop voting rules that impede participation. In other words, it was more effective at stopping vote dilution than vote denial.⁹ The formula also left out many places—such as Ohio—that have been repeatedly held liable for voting rights violations in recent years.¹⁰

Voting discrimination isn't just a thing of the past. It is a present-day reality. In particular, legislatures do sometimes enact voting rules with the intent and effect of making it more difficult for some eligible citizens to vote.¹¹ But the characteristics and loci of voting discrimination have changed dramatically in the almost half-century since the VRA's enactment and will continue to shift in the future. Congress failed to account for this dynamism when it reauthorized the VRA in 2006, and it's done nothing to address the serious problems with election administration in the years since. A new coverage formula is not the answer to this problem. Even if it were possible to identify states that are most problematic today, conditions on the ground are sure to keep changing in a way with which no static formula can keep pace.¹² A different approach is needed.¹³

Shen, *With Voting Rights Guttled, Florida Set to Resume Voter Purge*, THINK PROGRESS (July 25, 2013, 9:08 AM), <http://thinkprogress.org/justice/2013/07/25/2353251/florida-voter-purge-resumes-after-voting-rights-act/>; Thomas B. Edsall, *The Decline of Black Power in the South*, N.Y. TIMES (July 10, 2013, 9:34 PM), <http://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/>.

⁷ See *infra* note 36 and accompanying text.

⁸ See Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 615–16 (2005).

⁹ See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006), for a discussion of different types of restrictions on voting. Briefly, vote denial refers to practices that prevent people from voting and having their votes counted. Vote dilution refers to practices that diminish the political influence of a group.

¹⁰ See, e.g., *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (rejection of provisional ballots cast at right location but wrong precinct was likely unconstitutional); *Obama for America v. Husted*, 697 F.3d 423, 442–43 (6th Cir. 2012) (early voting rule according differential treatment to military and civilian voters was likely unconstitutional).

¹¹ See Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97 (2012), for a thorough discussion of recent barriers to participation.

¹² See Pildes, *supra* note 2, at 318.

The decision in *Shelby County* thus provides an opportunity for Congress to take constructive action to protect the vote for all eligible citizens. As any sentient observer of Congress knows, however, this is much easier said than done.¹⁴ We live in an era of intense partisan polarization, amply documented by political scientists, and that makes any type of meaningful policy reform at the federal level extremely difficult, especially when control over the executive and legislative branches is divided—and all the more so when voting issues are involved.¹⁵ If there is to be a federal legislative response to *Shelby County*, there will have to be a compromise. Both parties will have to swallow something they don't like, to achieve their most urgent priorities. And they should think big, since major reforms aren't necessarily more difficult to enact than modest ones.¹⁶

In that spirit, this article proposes a Grand Election Bargain: federal legislation that would expand the opportunities for voter registration (a priority for Democrats) while requiring voter identification (a priority for Republicans) in federal elections. Despite the improvements over the years, significant gaps in registration and participation remain for some demographic groups—especially Latinos, Asian Americans, people of limited education and income, people with disabilities, and young people. Liberalized voter registration rules, particularly same-day registration, can help include some of those most likely to be left out. And, contrary to popular belief, expanded registration opportunities do not necessarily advantage Democrats over Republicans.¹⁷

What about voter identification? Some Republicans have pushed stringent laws requiring a government-issued photo ID, succeeding in a number of states. There is no reason to believe that these laws do anything to stop fraud or enhance voter confidence.¹⁸ At the same time, the available evidence suggests that reasonable ID requirements do not have a major impact on turnout, so long as there is a failsafe for voters who lack the required ID.

¹³ This article focuses on vote denial, not vote dilution. I leave to the side the question of whether updating of the coverage formula might be an appropriate means of redressing practices that dilute minority voting strength.

¹⁴ While some legislators from both parties say that a response to *Shelby County* is needed, the early signs are not encouraging for those hoping for federal legislation. See Andrew Cohen, *On Voting Rights, Discouraging Signs From the Hill*, THE ATLANTIC, (July 18, 2013, 4:12 PM), <http://www.theatlantic.com/national/archive/2013/07/on-voting-rights-discouraging-signs-from-the-hill/277894/>.

¹⁵ There is a vast literature on political polarization, which, thankfully, is peripheral to this article. For an exemplary sampling, see ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER* (2010), SEAN THERIAULT, *PARTY POLARIZATION IN CONGRESS* (2008), and Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 276–81 (2011).

¹⁶ See FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 107 (2009) (finding that it is difficult to persuade Congress to disrupt the status quo, but that when change happens it is more likely to be fundamental than incremental).

¹⁷ See *infra* Part IV.B.

¹⁸ See *infra* Part V.C.

A reasonable federal identification law might be modeled on South Carolina's requirement that was ultimately granted preclearance by a three-judge federal court, after being significantly modified from the original version enacted by the state legislature.¹⁹ That law requires that voters be asked for photo ID, but allows them to vote without it, if they indicate a reason for not having it.

The federal registration and identification rules proposed here would preempt contrary state laws in federal elections. Setting rules for congressional elections lies squarely within Congress's power under the Elections Clause,²⁰ as clarified by the Court's decision in *Arizona v. Inter Tribal Council of Arizona*.²¹ This legislation would therefore provide a uniformity in registration and identification rules that is sorely lacking in our current system. This would be an especially welcome development for voters moving across state lines, who tend to have low rates of participation.

The legislation proposed here would help more racial minorities vote and have their votes counted. But it goes beyond the approach exemplified by the current VRA, in expanding the franchise for other groups of citizens with relatively low rates of participation. This approach is thus a necessary complement to the race-based remedies available under current law, one that would expand the right to vote more generally.²² It is, in short, a proposal for a new Voting Rights Act that will address the problems of the current century rather than those of the last century.

Part II of this article briefly describes what *Shelby County* did, setting the stage for discussion of the Voting Rights Act's actual and perceived effects on election administration. Part III assesses what the preclearance regime was doing before *Shelby County*, showing that Section 5 was mostly used to stop vote dilution—including redistricting and at-large elections—but did relatively little to stop the new vote denial. Part IV examines the evidence regarding who votes and who doesn't, as well as the causes for low registration and participation among some groups. Part V proposes a Grand Election Bargain that would expand voter registration and voter identification in federal elections, providing consistent national rules that would trump contrary state and local laws, while moving us closer to the ideal of including all eligible citizens in the electorate.

¹⁹ *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

²⁰ U.S. CONST. art. I, § 4.

²¹ 133 S. Ct. 2247 (2013). For discussion of Congress's Elections Clause power after this decision, see Issacharoff, *supra* note 4, at 17–20.

²² For an argument supporting the type of approach I advocate here, see Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 *How. L.J.* 741, 757 (2006) (urging national voting rights model analogous to NVRA and HAVA, rather than race-specific remedies).

II. WHAT *SHELBY COUNTY* DID

The Supreme Court's decision in *Shelby County* effectively ended Section 5 preclearance, which had been in effect for almost half a century. This regime was originally focused on states and counties in the South and later expanded to other parts of the country with relatively low rates of registration and participation. Covered jurisdictions were required to get advance permission from either the U.S. Department of Justice (DOJ) or the federal district court in Washington, D.C. before implementing new voting changes.²³ This preclearance requirement was originally adopted in 1965 as a temporary measure, to expire in five years, but was reauthorized in 1970, 1975, 1982, and 2006. The last two reauthorizations were each for twenty-five years. Congress used a coverage formula, contained in Section 4(b) of the VRA,²⁴ based on registration and turnout data from federal elections between 1964 and 1972. That formula had not been altered since the 1975 reauthorization.²⁵

By a 5–4 vote, the Court in *Shelby County* held that this coverage formula exceeded Congress's power under the Fourteenth and Fifteenth Amendments. It relied on the principle of "equal sovereignty,"²⁶ saying that the preclearance regime imposed "current burdens" on certain states that must be justified by "current needs."²⁷ As authority for these propositions, the Court quoted its previous decision in *Northwest Austin Municipal Utility District Number One v. Holder*.²⁸ That decision, which avoided questions of Section 4's and 5's constitutionality, was joined by eight members of the Court, including two of the *Shelby County* dissenters.

The *Shelby County* majority concluded that the coverage formula—relying as it did on data more than four decades old—was not adapted to current needs and thus violated the equal sovereignty principle. The majority did not engage in a detailed discussion of the voluminous record before Congress when it last reauthorized the VRA.²⁹ It did, however, highlight the dramatic improvements in registration and turnout, particularly in the six southern states covered since the original VRA's enactment. Chief Justice Roberts pointed out that the massive white-black registration gap that existed in 1964 had practically disappeared four decades later, even reversing

²³ 42 U.S.C. § 1973c (2006).

²⁴ 42 U.S.C. § 1973b(b) (2006).

²⁵ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2620–21 (2013).

²⁶ *Id.* at 2624.

²⁷ *Id.* at 2622.

²⁸ 557 U.S. 193 (2009).

²⁹ For criticism of the Court on this point, see Ellen Katz, *What Was Wrong With The Record?*, 12 ELECTION L.J. 329, 330 (2013), and Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291612. Justice Ginsburg's dissent in *Shelby County* devotes greater attention to the record before Congress, showing persistent problems in covered jurisdictions. See *Shelby Cnty.*, 133 S. Ct. at 2635–36, 2639–44.

itself in two of those states (Georgia and Mississippi), where black registration exceeded that of whites.³⁰ In light of these changes, the Court concluded that the coverage formula was no longer justified by current needs. It was, instead, “irrational” for Congress to base preclearance coverage on such old registration and participation data.³¹

The purpose of this article is not to debate whether the Court was right or wrong to hold the coverage formula unconstitutional.³² It is, instead, to consider steps that Congress should consider in response to that decision. Toward that end, it is necessary to consider what work the preclearance regime was doing before *Shelby County*, as well as the likely consequences of striking it down.

The immediate reaction to *Shelby County* among voting rights advocates was to worry out loud that the decision would lead to vote suppression. Specifically, they expressed concern that some formerly covered jurisdictions would adopt new means of impeding participation, such as strict voter-identification laws, rollbacks of absentee and early voting, and registration restrictions.

Voting rights advocates were right to worry about measures making it more difficult to vote and have one’s vote counted. As Justin Levitt has described, many states enacted new voting restrictions in 2011.³³ The timing was not accidental. Disputes over these issues have had an unmistakable partisan cast in recent years, with Republicans generally supporting laws making it more difficult to vote, and Democrats opposing them. Accordingly, after Republicans enjoyed great success in state gubernatorial and legislative races in 2010, they made aggressive efforts to adopt rules regarding voter identification, early voting, and voter registration making it more difficult to vote.³⁴ The conventional wisdom is that these laws will hurt Democrats more than Republicans.³⁵

In the immediate wake of *Shelby County*, legislators and election officials in some covered jurisdictions took aggressive steps to adopt new restrictions on voting. The most egregious example so far is North Carolina, much of which was covered by Section 5 from its enactment in 1965 until *Shelby County*. Within a month of the decision, North Carolina’s Republican-dominated legislature passed a bill imposing a photo ID requirement,

³⁰ See *Shelby County*, 133 S. Ct. at 2626.

³¹ *Id.* at 2631.

³² For the record, I believe that *Shelby County* was wrong to strike down the coverage formula as facially unconstitutional, largely for the reasons set forth in Justice Ginsburg’s dissent. In my view, the evidence before Congress showed that the coverage formula was rationally related to current conditions, the standard the majority purports to apply. See Katz, *supra* note 29.

³³ Levitt, *supra* note 11, at 98.

³⁴ *Id.*

³⁵ For discussion of the partisan valence of battles over voter fraud and identification, see RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 41–73 (2012).

shortening the number of early voting days, and eliminating same-day registration, which was signed by its Republican governor.³⁶ There is no doubt that *Shelby County*'s removal of the preclearance bar precipitated enactment of this legislation. And North Carolina could be a harbinger of what is to come. It is likely that other states will follow its example, adopting new restrictions on voting that are unjustified by any plausible interest in sound election administration.³⁷

III. WHAT PRECLEARANCE WAS—AND WASN'T—DOING

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*. As explained below, 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.

The statistics on pre-*Shelby* preclearance decisions amply demonstrate Section 5's greater deployment against vote dilution than vote denial. I focus here on data for the period after 2000, for two reasons. First, DOJ's website organizes preclearance statistics by decade, making 2000 a convenient dividing line. Second, public attention to election administration—including issues of voting equipment, voter identification, voter registration, and provisional voting—increased dramatically starting with the contested presidential election of 2000. This makes the start of that decade an appropriate starting point. If Section 5 were effective in blocking vote denial, we would expect to see a significant number of objections starting then.

In fact, election administration rules were rarely the subjects of Section 5 objections during this period. Between 2000 and 2012, DOJ received approximately 4000 to 7000 preclearance requests per year.³⁸ With many re-

³⁶ See Rick 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. FORUM (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353068; Marti Maguire, *North Carolina Governor Signs Voter ID Law*, REUTERS (Aug. 12, 2013), available at <http://www.reuters.com/assets/print?aid=USBRE97B0UI20130812>; Michael Tackett & Phil Mattingly, *North Carolina First to Tighten Voting Laws After Ruling*, BLOOMBERG (July 25, 2013), available at <http://www.bloomberg.com/news/print/2013-07-25/north-carolina-first-to-weight-voting-laws-after-ruling.html>.

³⁷ See, e.g., Lizette Alvarez, *Ruling Revives Florida Review of Voting Rolls*, N.Y. TIMES, Aug. 7, 2013, at A1.

³⁸ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION 81 (2013), available at <http://www.justice.gov/oig/reports/2013/s1303.pdf>.

quests including multiple changes, there were between 14,000 and 20,000 changes each year as to which preclearance was sought.³⁹ There were a total of 208,047 voting changes as to which preclearance was sought.⁴⁰ During this period, DOJ issued seventy-four objection letters, which included objections to seventy-seven proposed voting changes.⁴¹

Table 1 below summarizes by category the number of submissions and objections, as well as the percentage of submitted changes that yielded an objection in each category. The largest two categories of submitted changes were “Miscellaneous” and “Annexation,” which collectively accounted for more than half of Section 5 submissions. The “Miscellaneous” category includes changes to absentee voting, election administration, and voter assistance procedures.⁴² Yet this category yielded no objections from DOJ.

What were the leading categories of objections? Redistricting changes generated many more than any other category—a total of thirty-nine objections between 2000 and 2012, over half the seventy-seven total objections DOJ made during this period. The number of Redistricting objections was almost twice that of the next highest category, Method of Election (twenty). Close to 1% of Redistricting changes yielded an objection. While this might seem low, 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%).⁴³

The Method of Election category—second highest in terms of both the number of objections and the percentage of submissions yielding an objection—includes a variety of different types of changes alleged to weaken minority voting strength.⁴⁴ It does not include election administration practices that would prevent people from casting their ballots or having their votes counted. In other words, Method of Election involves vote dilution rather

³⁹ *Id.* at 81 n.64.

⁴⁰ See *Section 5 Changes by Type and Year*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/changes.php (last visited Nov. 21, 2013).

⁴¹ This was determined using the state selection tool for each state on the Department of Justice’s website. See *Section 5 Objection Determinations*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Nov. 21, 2013). The website of the Lawyers’ Committee for Civil Rights Under Law has a similar state selection feature, allowing users to narrow by the date that the objection letter was sent. See *Voting Rights Act: Objections and Observers*, LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, http://www.lawyerscommittee.org/projects/section_5 (last visited Nov. 21, 2013) [hereinafter LCCRUL].

⁴² Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 47, 78–79 (2006).

⁴³ See *supra* Table 1.

⁴⁴ Specifically, the “Method of Election” category includes: forty percent plurality requirement; abolishment of elected office; anti-single-shot requirement adopted; anti-single-shot requirement eliminated; concurrent terms; establishment of elected office; implementation schedule; majority-vote requirement; method of staggering terms; method of selection; method of election; nominating procedures; nonpartisan elections; number of officials; numbered positions adopted; numbered positions eliminated; open primary elections; partisan elections; plurality vote requirements; residency districts adopted; residency districts eliminated; staggered terms; term of office. *Id.* at 77–78.

Table 1. Preclearance Submissions and Objections, 2000-12

Type	Submissions	Objections	Percent
Redistricting	4,132	39	0.94%
Annexation	46,151	3	0.01%
Polling Place/Absentee & Early Voting Locations	37,995	1	0.00%
Precinct	19,182	1	0.01%
Reregistration/Purge	41	0	0.00%
Incorporation/Dissolution	2,103	0	0.00%
Bilingual procedures	1,934	3	0.16%
Method of Election	7,653	20	0.26%
Form of Government (Elective/Appointed)	519	0	0.00%
Consolidation/Division of Political Units	967	0	0.00%
Special Election	17,330	2	0.01%
Voting Methods	7,395	0	0.00%
Candidate qualifications	2,205	2	0.09%
Voter registration procedures/voter qualifications	5,400	5	0.09%
Miscellaneous	55,040	0	0.00%
Total	208,047	76	0.04%

Sources:

Section 5 Objection Determinations, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Nov. 21, 2013).

Voting Rights Act: Objections and Observers, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, http://www.lawyerscommittee.org/projects/section_5 (last visited Nov. 21, 2013) [hereinafter LCCRUL].

than vote denial.⁴⁵ While the above analysis focuses on the period since 2000, a similar picture emerges from earlier data.⁴⁶ Nicholas Stephanopo-

⁴⁵ Of the twenty changes in the Method of Election category to which there was an objection between 2000 and 2012, seven concerned the number of seats on a multi-member body, five concerned numbered posts and/or majority-vote requirements, five concerned at-large elections or multi-member districts, two concerned a shift between partisan and nonpartisan elections, and one concerned a switch from elected to appointed office. See U.S. DEP'T OF JUSTICE, *supra* note 41; LCCRUL, *supra* note 41. One of these changes (Fairfield Co., S.C., Aug. 16, 2010) concerned the addition of appointed seats to an elected board, so could fairly be categorized either as a change in the size of the board, or the appointment rather than election of officials. One could argue that the shift from elected to appointed office is a form of vote denial; but it is one of a very different flavor from election administration practices (like voter ID or the purging of lists) alleged to keep certain people from voting for any office. In any event, the key point is that the Method of Election category mostly, if not exclusively, involves vote dilution rather than vote denial.

⁴⁶ See Bruce E. Cain & Karin MacDonald, *Voting Rights Act Enforcement: Navigating Between High and Low Expectations*, in THE FUTURE OF THE VOTING RIGHTS ACT 125, 126–30 (2006) (finding that redistricting changes generated a larger number and percentage of objections compared to other categories); Nicholas Stephanopolous, *Section 2 Minus Section 5*, 2014 SUP. CT. REV. (forthcoming 2014) (manuscript at tbl.6) (on file with author) (finding a total of seventy-three objections to franchise restrictions between 1982 and present); U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION: THE DEPARTMENT OF JUSTICE'S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS 30 (2006), available at <http://www.usccr.gov/pubs/051006VRASatReport.pdf> (reporting that between 1982 and 2004, DOJ objected to 0.1% of changes involving precincts, polling places, or absentee voting, and 0.1% of changes involving voter registration).

lous counts seventy-three “franchise restrictions” for which preclearance was denied between 1982 and the present, which comes to 2.4 per year.⁴⁷ This is a higher rate of objections than for the period since 2000, but still much lower than for Redistricting changes.

Objections do not tell the whole story when it comes to the enforcement of the preclearance requirement. While DOJ objected to a very small percentage of the changes it received, it would more frequently request more information from the jurisdiction seeking preclearance. Sometimes, these requests resulted in alterations to or withdrawal of the proposed voting changes. Luis Ricardo Fraga and Maria Lizet Ocampo have published the most extensive study of More Information Requests (MIRs).⁴⁸ This study shows that Redistricting and Method of Election were the two largest sources of MIRs—further evidence that preclearance mostly affected vote dilution rather than vote denial. Fraga and Ocampo found that, between 1982 and 2005, DOJ received 387,673 preclearance requests, and issued 13,697 MIRs; in other words the DOJ requested more information about a voting change 3.5% of the time.⁴⁹ However, during the same time period, for voting changes categorized as Redistricting the DOJ issued an MIR 14.2% of the time (to 1234 out of a total of 8694 submissions).⁵⁰ For Method of Election changes, DOJ issued an MIR 18.4% of the time (on 2728 of 14,780 submissions).⁵¹

These data demonstrate the disjunction between perception and reality when it comes to what the preclearance regime was actually doing before *Shelby County*. While new barriers to participation have been prominent subjects of public, legislative, and scholarly concern—and properly so—they rarely generated objections or MIRs from DOJ. Vote dilution, and specifically redistricting and at-large elections, were much more likely to trigger a response from DOJ.

That is not to say that Section 5 was completely ineffectual when it came to vote denial. In the last year of preclearance before *Shelby County*, there were three important and highly publicized cases in which Section 5 was used against practices likely to impede participation by racial minorities. The first involved restrictions on early voting in Florida, five of whose sixty-seven counties were covered. The state enacted a statute that cut the total number of days available for early voting from twelve to eight, reducing by half the total number of hours available for early voting.⁵² These changes eliminated early voting during times, including Sundays, when it was most

⁴⁷ Stephanopolous, *supra* note 46, manuscript at tbl.6.

⁴⁸ Fraga & Ocampo, *supra* note 42.

⁴⁹ *Id.* at 57–58 tbl.3.1.

⁵⁰ *Id.* at 59–60 tbl.3.2.

⁵¹ *Id.*

⁵² *Florida v. United States*, 885 F. Supp. 2d 299, 321 (D.D.C. 2012).

likely to be used by minority voters in Florida.⁵³ The court's decision stopped the rollback of early voting in the five covered counties, but not the sixty-two other counties in Florida uncovered by Section 5.⁵⁴

The other two Section 5 cases concerned voter identification. A three-judge district court blocked Texas's law requiring government-issued photo ID, generally viewed as the strictest in the country.⁵⁵ The three-judge court found that Texas's law, which it deemed "more restrictive" than those previously implemented,⁵⁶ would "almost certainly" have a retrogressive effect on minority voting.⁵⁷ Another three-judge court precleared South Carolina's voter ID law, although in a form that was substantially less stringent than as originally enacted.⁵⁸ Over the course of the Section 5 litigation, state officials agreed to an "interpretation" of the state statute under which it "does not require a photo ID in order to vote." Rather, voters could sign an affidavit indicating their reasons for not obtaining photo ID.⁵⁹ As one of the concurring justices wrote, the statute "as now pre-cleared is not the [statute] enacted," due to the "evolutionary process" that had occurred in order for the law to gain preclearance.⁶⁰ In addition to these states, Alabama, Mississippi, and Virginia had enacted voter-ID laws before *Shelby County*, to which Section 5 no longer stands as an impediment.

The preclearance actions in Florida, South Carolina, and Texas were undeniably significant. All three cases stopped practices that would have made it more difficult for racial minorities and others to vote. They were, however, the proverbial exceptions that prove the rule. In fact, they stand alone as cases in which Section 5 was effectively used to stop state laws that would impede participation and unnecessarily suppress voting. As the data reviewed above show, it was extremely uncommon for DOJ to object to election administration changes. That is not to deny that the *elimination* of preclearance has spurred formerly covered jurisdictions to adopt new barriers to voting. Ironically, this phenomenon may partly be explained by the preclearance actions in these three states. These actions may have given formerly covered states a sense that Section 5 was more potent than it really was in stopping practices that impede voting. Though difficult to prove or disprove empirically, Section 5 may have had a deterrent effect on some vote-suppressive lawmaking, even though it was rarely used to stop such practices.

⁵³ Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331, 332, 339–40 (2011).

⁵⁴ Daniel A. Smith, *EXCLUSIVE: The Effects of Florida's HB1355 Early Voting Law on Turnout*, ELECTIONSMITH BLOG (Aug. 20, 2012), <http://electionsmith.wordpress.com/2012/08/20/exclusive-the-effects-of-floridas-hb1355-early-voting-law-on-turnout/>.

⁵⁵ *Texas v. Holder*, 888 F. Supp. 2d 113, 143–44 (D.D.C. 2012).

⁵⁶ *Id.* at 138.

⁵⁷ *Id.* at 144.

⁵⁸ *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

⁵⁹ *Id.* at 32.

⁶⁰ *Id.* at 53.

That said, it is worth remembering that Section 5's efficacy depended in no small measure on how vigorously a given administration was willing to enforce it. To be more specific, it is highly doubtful that the Florida, South Carolina, and Texas preclearance actions would have unfolded in the same way had there been a Republican administration at DOJ. The new restrictions on voting of recent years—not just voter ID, but also limits on early voting and registration—have almost uniformly been adopted by Republican-controlled legislatures, over Democratic opposition. Such laws encountered little resistance during the Administration of George W. Bush. The most notable (some would say notorious) example is Georgia's 2006 voter-identification requirement. That state's photo ID law was adopted by a Republican state legislature and precleared by DOJ, over the objections of some career staff, who argued that it would have a negative effect on minority voting.⁶¹ Because administrative decisions to *grant* preclearance are not appealable, DOJ's decision to preclear a change was effectively final (though a decision *not* to preclear was judicially reviewable).⁶² Casting DOJ in the role of an adjudicator, as well as an enforcer, of Section 5 compliance was always an oddity of the preclearance regime. It made sense for DOJ to wear these two hats when the VRA was first enacted, but they fit together less comfortably in an age of sharp partisan polarization over voting issues. The dissimilar approaches to vote denial taken during the Bush and Obama Administrations exemplify the inconsistency that resulted.⁶³

Thus, even if one thinks that the Florida, South Carolina, and Texas preclearance cases illustrate Section 5's true—if not completely realized—potential when it comes to vote denial, this system left much to be desired. The broad discretion that this system gave to DOJ was easy to abuse given the slipperiness of the standard for preclearance and the unavailability of judicial review for administrative grants of preclearance.⁶⁴ For Democrats worried about vote suppression, that system may have worked fairly well during the Obama Administration,⁶⁵ but not during the Bush Administration.

⁶¹ Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 *How. L.J.* 785, 813, 815–17 (2006).

⁶² *Id.* at 817.

⁶³ The risk of partisan bias influencing the preclearance process is discussed at greater length in my article, written before the 2006 reauthorization, which suggested modifications to the preclearance process. *Id.* at 829–41.

⁶⁴ *Id.* at 824. The legal standard under Section 5, as amended in 2006, is whether the voting change has a discriminatory purpose or retrogressive effect. *See* 28 C.F.R. § 51.54 (2011).

⁶⁵ Even during the Obama Administration, Democrats worried about vote suppression had reason to be concerned about the efficacy of preclearance. The most significant example was DOJ's decision to grant preclearance to Georgia's voter verification system in 2010, after initially denying preclearance. No persuasive explanation was given for DOJ's change in position, which appeared to be an effort to forestall judicial consideration of the constitutionality of preclearance. *See* Dan Tokaji, *The Showdown Over Preclearance of Georgia's Voter Verification Program*, *ELECTION L. BLOG* (Feb. 24, 2010), <http://electionlawblog.org/?p=14241>; Ewa Kochanska, *Georgia Voter Citizenship Verification System Finally Approved by DOJ*, *EXAMINER.COM* (Aug. 24, 2010), <http://www.examiner.com/article/georgia-voter-citizenship-verifica>

For Republicans more concerned about voting fraud, just the reverse is likely to seem true. A system whose efficacy depends on the party that happens to control power raises serious questions of fairness.

There is, moreover, no telling whether the U.S. Supreme Court would have affirmed the recent preclearance denials, even if it had upheld the constitutionality of the coverage formula in *Shelby County*. The current Court has taken a skeptical approach to race-conscious government action in recent years, especially when it comes to the regulation of democratic politics. Accordingly, those who believe that Section 5 would have been a strong bulwark against vote denial, but for *Shelby County*, are relying on questionable assumptions about what the Court would have done in future cases.⁶⁶

IV. WHO VOTES, WHO DOESN'T, AND WHY

The above data suggest that Section 5's bark was bigger than its bite when it came to restrictions on participation. It may have deterred some covered jurisdictions from adopting new restrictions on voting, but it was rarely used to stop such restrictions from taking effect once enacted. Section 5 was undoubtedly more effective at curbing vote dilution than vote denial. That is not to say that preclearance was insignificant in the latter category. To the contrary, the disjunction between perception and reality probably prevented some unnecessary burdens on voting. Conversely, *Shelby County's* termination of the preclearance regime has provided an impetus for states wishing to impose new burdens on the vote.

In considering what should be done next, this article takes up the challenge suggested by Chief Justice Roberts's opinion for the *Shelby County* majority. I do not mean the challenge of drawing a new coverage formula, which some advocates and scholars advocate and is embodied in a bill introduced in January 2014.⁶⁷ Rather, I refer to the challenge of examining contemporary data on registration and participation, just as Congress did when it first enacted the VRA in 1965, before considering what new legislative remedies might be adopted. Section A examines data turnout from the last two presidential election cycles on who votes and who doesn't. Section B dis-

tion-system-finally-approved-by-doj; Erin Ferns Lee, *Advocates Baffled by DOJ Approval of Controversial Voter Verification Law*, PROJECT VOTE VOTING MATTERS BLOG (Aug. 26, 2010), <http://www.projectvote.org/blog/2010/08/advocates-baffled-by-doj-approval-of-controversial-voter-verification-law/>.

⁶⁶ Professor Pildes and I discuss this point in our blog posts. See Rick Pildes & Dan Tokaji, *What Did VRA Preclearance Actually Do?: The Gap Between Perception and Reality*, ELECTION L. BLOG (Aug. 19, 2013, 4:39 AM), <http://electionlawblog.org/?p=54521> [hereinafter Pildes & Tokaji, *VRA Preclearance Blog Post*]; Rick Pildes & Dan Tokaji, *What Did VRA Preclearance Actually Do?: The Gap Between Perception and Reality Part II*, ELECTION L. BLOG (Aug. 21, 2013, 8:11 AM), <http://electionlawblog.org/?p=54638> [hereinafter Pildes & Tokaji, *VRA Preclearance Part II Blog Post*].

⁶⁷ The possibility of adopting a new coverage formula is addressed below. See *infra* Part V.A. The bill is entitled "The Voting Rights Amendment Act of 2014," and may be found at www.leahy.senate.gov/download/1-16-14-senate-bill.

cusses research regarding the impact of election administration on voter participation.

A. *Registration and Turnout Disparities*

Recall that the *Shelby County* majority criticized Congress for using a coverage formula reliant on registration and voting data from 1964 to 1972, notwithstanding the changes that have occurred since then—including a diminution in the black-white turnout gap in covered states.⁶⁸ Even if one believes (as I do) that it was wrong to hold the coverage formula unconstitutional,⁶⁹ the majority had a point. It is worth examining current data on registration and voting. That includes not only racial gaps in registration and voting, but also other gaps that may call for remediation.

Why are contemporary data on registration and voting worth a close look? To some, the answer will seem obvious. Starting in the late nineteenth century, the Supreme Court has recognized that the right to vote is “a fundamental political right, because preservative of all rights.”⁷⁰ The idea is that the opportunity to vote is necessary to ensure that all of our interests are protected. To the extent that certain groups vote at lower rates, their interests are more likely to be disregarded by those in power.

At the heart of the fundamental right to vote, then, is the systemic interest in ensuring that certain interest groups aren’t left out of democratic politics. To be sure, voting isn’t sufficient to ensure that a group’s interests are protected. Inequalities in the system of representation (like partisan gerrymandering or racial vote dilution) or governance (like the unequal influence that may arise from money in politics) can also result in some people having less voice in the decisions made by elected leaders.⁷¹ Voting isn’t everything, but it is a precondition for citizens seeking to protect their interests through the political process. To the extent that some groups vote at lower rates than others, their other rights and interests are in jeopardy. The paradigmatic example, of course, is the mass disenfranchisement of African Americans in the South from the late nineteenth century—ironically, the same time that the Court first declared the right to vote fundamental—until the second half of the twentieth century. The abysmally low registration and voting numbers for southern blacks made it easy to design a coverage formula that included the worst perpetrators of disenfranchisement.

Of course, we now no longer see the same barriers to participation that existed in the South circa 1965 anywhere in the country today. But that is

⁶⁸ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2625–27, 2630–31 (2013).

⁶⁹ See *supra* note 32.

⁷⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁷¹ For helpful discussion of the distinction among three components of the right to vote—participation, aggregation (or representation), and governance—see Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249 (1993), and Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 121, 125 (Mark E. Rush ed., 1998).

not to say that all barriers to equal participation have been demolished. The barriers are more subtle and thus more difficult, in some respects, to remedy than those that existed half a century ago. Examining contemporary data on who votes and who doesn't is essential, if we are to diagnose the problems with our system of registration and voting and to design effective remedies.

A good starting point is the U.S. Census Bureau's Current Population Survey (CPS), which includes questions on registration and voting in even-numbered years. The discussion that follows examines disparities in several dimensions: race and ethnicity, income, education level, age, disability, and residential mobility. Data for the last two presidential elections are summarized below in Table 2.

The majority opinion in *Shelby County* highlighted the reduction in the turnout gap between blacks and whites in the original covered jurisdictions. While the reduction (and in some cases reversal) of this gap was most dramatic in Southern states, other parts of the country have experienced similar changes. As the headline to the Census Bureau's press release announcing the results of its most recent CPS put it, "Blacks Voted at a Higher Rate Than Whites in the 2012 Election."⁷² Overall, 61.8% of eligible citizens reported voting in the November 2012 presidential election. As shown in Figure 1 (below), 66.2% of African American citizens voted, compared to 64.1% of whites.⁷³

While this is an encouraging development, there remains a black-white gap in non-presidential elections. Between presidential and midterm elections, black drop-off tends to be larger than white drop-off. In 2010, 48.6% of whites reported voting, compared to 43.5% of blacks.⁷⁴ And of course, the impressive black turnout in 2008 and 2012 is attributable to the candidacy of Barack Obama, in no small part. It is quite possible that white turnout will again exceed black turnout in 2016. Despite these caveats, the marked decrease (if not complete elimination) of the black-white turnout gap is indeed an important sign that times have changed. *Shelby County* had that much right.

⁷² *Blacks Voted at a Higher Rate than Whites in 2012 Election – A First, Census Bureau Reports*, U.S. Census Bureau (May 8, 2013), <http://www.census.gov/newsroom/releases/archives/voting/cb13-84.html>. Michael McDonald, however, concludes that this is partly untrue. While he agrees that blacks voted at a higher rate than non-Hispanic whites in 2012, he believes that 2008 was actually the first election in which this occurred. See Michael McDonald, *2012 Turnout: Race, Ethnicity, and the Youth Vote*, HUFFPOST POLLSTER (May 8, 2013, 4:59 PM), http://www.huffingtonpost.com/michael-p-mcdonald/2012-turnout-race-ethnic_b_3240179.html. Professor McDonald attributes the Census Bureau's error in the CPS to the treatment of non-responses. The concern he raises calls for caution with respect to the precision of CPS data, but doesn't affect the point made here: that some groups of eligible citizens are significantly less likely to register and vote than others.

⁷³ THOM FILE, U.S. CENSUS BUREAU, *THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) 3* (2013), available at <http://www.census.gov/prod/2013pubs/p20-568.pdf>.

⁷⁴ U.S. CENSUS BUREAU, Table 4b, *Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2010*, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html>.

Table 2. Registration and Voting Rates: Citizen Voting-Age Population: 2008 and 2012

		2008		2012	
		Registration	Voting	Registration	Voting
Race and Ethnicity	White (Non-Hispanic)	73.5	66.1	73.7	64.1
	Black	69.7	64.7	73.1	66.2
	Hispanic	59.4	49.9	58.7	48.0
	Asian	55.3	47.6	56.3	47.3
Income	Less than \$10,000	61.8	49.0	63.2	46.9
	\$10,000-\$14,999	63.1	51.2	59.5	45.8
	\$15,000-\$19,999	66.4	55.9	62.8	50.4
	\$20,000-\$29,999	67.1	56.3	67.7	55.8
	\$30,000-\$39,999	71.1	62.2	69.2	58.4
	\$40,000-\$49,999	72.6	64.7	73.8	63
	\$50,000-74,999	78.2	70.9	77.4	68
	\$75,000-\$99,999	81.9	76.4	81.7	73.8
	\$100,000-\$149,999	84	78.4	84.9	76.9
\$150,000 and over	86	81.6	87.1	80.2	
Educational Attainment	Less than 9th grade	49.1	38.1	49.3	37.1
	High school not completed	51.1	39.9	50.6	38.3
	High school graduate	64.1	54.9	63.7	52.6
	Some college or assoc. degree	75.3	68.0	74.3	64.2
	Bachelor's degree	81.2	77.0	81.7	75.0
Advanced degree	85.8	82.7	85.7	81.3	
Age	18-24	58.5	48.5	53.6	41.2
	25-34	66.4	57.0	66.1	53.5
	35-44	69.9	62.8	71.4	61.2
	45-54	73.5	67.4	73.6	65.3
	55-64	76.6	71.5	77.4	70.7
	65-74	78.1	72.4	79.7	73.5
	75 and over	76.6	67.8	79.1	70.0
Disability	No disability	71.4	64.5	71.5	62.5
	Any disability	68.1	57.3	69.2	56.8
Length of residence	1-6 months	69.7	57.3	66.6	51.5
	7-11 months	70.1	58.9	68.6	53.3
	1-2 years	74.8	65.3	73.3	60.6
	3-4 years	80.4	72.6	77.3	66.4
	5 years or longer	85.3	77.8	84.9	75.9

Sources:

For 2008: *Voting and Registration in the Election of November 2008 - Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html> (last revised Nov. 9, 2010).

For 2012: *Voting and Registration in the Election of November 2012 - Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (last revised May 8, 2013).

Things aren't so rosy when it comes to other demographic groups, including racial and ethnic minorities. Perhaps most striking is the lower rate of registration and voting among Hispanic⁷⁵ and Asian American citizens, compared to blacks and whites.⁷⁶ That is true in presidential elections, as

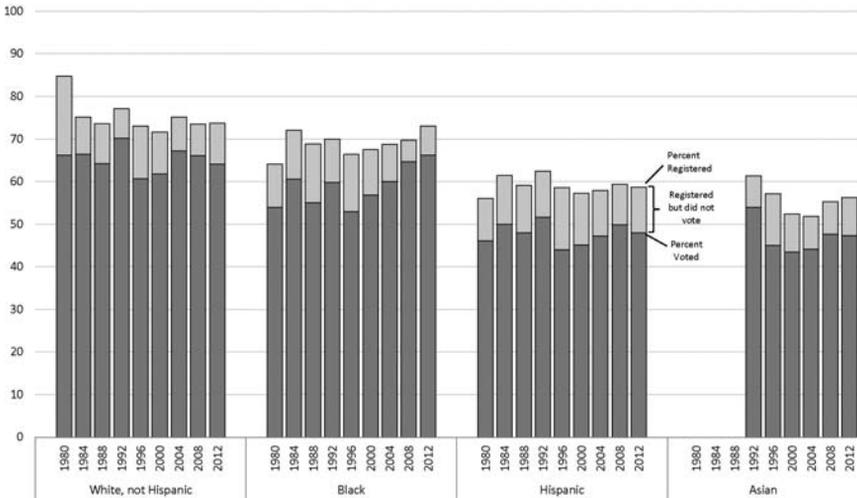
⁷⁵ The Census Bureau's "Hispanic" category includes Latinos.

⁷⁶ For purposes of this discussion, I use the term "whites" to refer only to non-Hispanic whites.

well as midterm elections. In 2012, less than half of both Hispanic (48.0%) and Asian American (47.3%) citizens reported voting, compared to over 64% of both whites and blacks.⁷⁷ Figures 1 and 2 depict the ethnic gap over time, with Hispanic and Asian American citizens consistently registered and voting at lower levels in both presidential and midterm elections.⁷⁸ Registration and participation by these groups consistently lag behind those of both blacks and whites.

Figure 1

**Percent Registering and Voting by Race and Hispanic Origin:
Presidential Elections**



Note: Percent of the citizen civilian noninstitutionalized population, age 18 and over.
Source: Current Population Survey, Voting and Registration Supplements, Historical table A-6.
Available: <http://www.census.gov/hhes/www/socdemo/voting/index.html>

There are even greater disparities in turnout based on income and education level. Higher education and income levels are highly correlated with voting. The correlation between voting and education level has remained consistent over time.⁷⁹ In 2012, for example, college-educated citizens were more than twice as likely to vote as those with less than a ninth-grade education (75.0%, compared to 37.1%).⁸⁰ Registration appears to be a serious barrier

⁷⁷ FILE, *supra* note 73, at 3. Hispanic and Asian American turnout was also significantly lower than black and white turnout in 2010. *Voting Hot Report 1996–2010*, *supra* note 74.

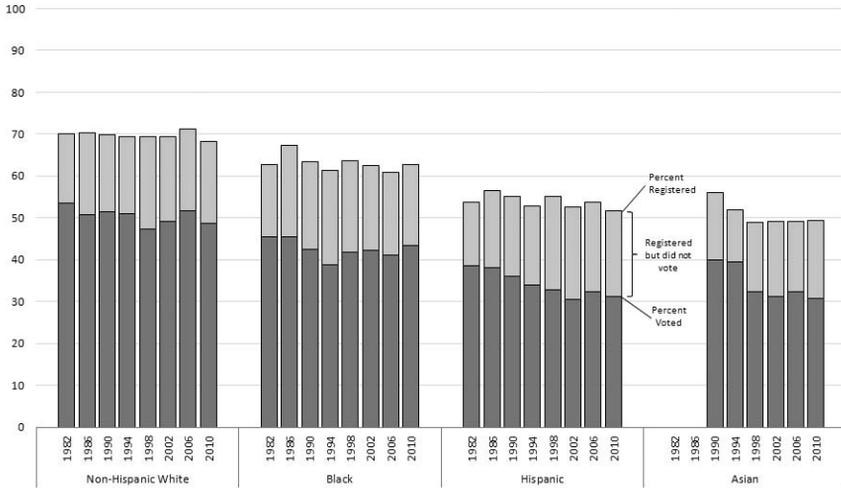
⁷⁸ See Michael McDonald, *Democracy in American Elections*, in *IMPERFECT DEMOCRACIES: THE DEMOCRACY DEFICIT IN CANADA AND THE UNITED STATES* 91, 94 (Patti Tamara Lenard & Richard Simeon eds., 2012).

⁷⁹ See *Percent Voting by Educational Attainment*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/historical/a2-educational.jpg> (last visited Dec. 26, 2013).

⁸⁰ See *supra* Table 2. For social science assessments of the reasons for the link between education and voting, see Rachel Milstein Sondheimer & Donald P. Green, *Using Experiments*

Figure 2

**Percent Registering and Voting by Race and Hispanic Origin:
Congressional Elections**



Note: Percent of the citizen civilian noninstitutionalized population, age 18 and over.
Source: Current Population Survey, Voting and Registration Supplements, historical table A-4.
Available: <http://www.census.gov/hhes/www/socdemo/voting/index.html>



for less-educated voters in particular.⁸¹ There are similar gaps with respect to income level. In 2012, 80.2% of those earning \$150,000 and over voted, compared with just 45.8% of those earning less than \$15,000.⁸² Higher levels of economic segregation—that is, settings in which rich and poor voters are less likely to confront each other in daily life—are associated with lower turnout for those at the bottom end of the spectrum.⁸³ The implication is that day-to-day interactions with a group of people who do (or do not) vote have a strong influence on one’s own behavior.

Age is another characteristic strongly associated with the likelihood of voting or not voting, notwithstanding the Obama campaigns’ highly publicized efforts to bring out the youth vote in both his runs for the presidency. Even in 2008, the peak year for youth voting in recent history, just 48.5% of citizens eighteen to twenty-four years voted, compared to 72.4% of those sixty-five to seventy-four.⁸⁴ In 2012, the youth vote slipped to 41.2%, while

to Estimate the Effects of Education on Voter Turnout, 54 AM. J. POL. SCI. 174 (2010), and Steven Tenn, *The Effect of Education on Voter Turnout*, 15 POL. ANALYSIS 446 (2007).

⁸¹ See *supra* Table 2 (reporting that 81.7% of those with a bachelor’s degree but only 49.3% of those with less than a ninth-grade education were registered in 2012).

⁸² See *supra* Table 2.

⁸³ See generally James K. Galbraith & J. Travis Hale, *State Income Inequality and Presidential Election Turnout and Outcomes*, 89 Soc. Sci. Q. 887 (2008).

⁸⁴ McDonald, *supra* note 72.

voting among the sixty-five to seventy-four cohort increased slightly to 73.5%.⁸⁵

One might suspect that disability status is correlated with lower voting, but the overall gap between the people with and without disabilities is now surprisingly modest. According to the 2012 CPS, citizens with no disability reported voting at a 62.5% rate, compared to 56.8% for those reporting any disability. There was virtually no registration gap between citizens with and without a disability (71.5% versus 69.2%). There were, however, some turnout disparities among subgroups of people with disabilities. Those with ambulatory difficulties voted at a 56.3% rate. Other people with disabilities voted at lower rates, including those with cognitive difficulties (44.8%), self-care difficulties (46.7%), and independent living difficulties (47.3%).⁸⁶ Still, disability access is an area in which great progress has been made over the years. These improvements are likely due to the accommodations required by the Americans with Disabilities Act of 1990 and the Help America Vote Act of 2002.

Residential mobility is also negatively correlated with voting, with recent movers voting at a lower rate than other citizens. In 2012, citizens who had been at their current residence between one and six months reported voting at a rate of just 51.5%, compared to 75.9% for those who had been at their current residence for five years or more.⁸⁷

In sum, the data on voting show that some demographic groups are significantly more likely to vote than others. Blacks and whites have voted at close to the same rates in the last two presidential elections, though there remains a slight gap in midterm turnout. Hispanic and Asian American voters are much less likely to be registered and vote than either blacks or non-Hispanic whites. Those with low income and educational attainment levels vote at much lower levels. Older citizens are still more likely to vote than young people. There is a modest turnout gap between people with and without disabilities, though it is larger for people with certain disabilities. Finally, recent movers are less likely to vote than people who have lived at their current residence for a longer time.⁸⁸

B. *The Impact of Election Administration*

While some of the details have changed over time, the disparities summarized above are well established. But what drives people to vote (or not)? And what can be done to increase participation? There is an abundance of research attempting to explain why people do and do not vote. One recent

⁸⁵ *Id.*

⁸⁶ *Reported Voting and Registration by Sex, Employment Status, Class of Worker, and Disability Status: November 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (follow hyperlink to download XLS for Table 6) (last revised May 8, 2013).

⁸⁷ *See supra* Table 2.

⁸⁸ *Id.*

meta-study of ninety different voter turnout studies found over 170 different variables whose possible effects have been examined.⁸⁹ Consistent with the CPS data, race, education, income, and age were all associated with turnout.⁹⁰ The meta-study concluded that it was “difficult to get a good grip on those factors that matter most for electoral participation.”⁹¹

While election laws are just part of the story, they do affect turnout. As another meta-study of turnout found, “the institutional procedures governing the course of the elections strongly affect turnout.”⁹² In particular, the ease of registration procedures, compulsory voting, and proportional representation have all been tied to increased turnout.⁹³ This isn’t to deny that other factors unrelated to election administration can exert an equal or greater influence on participation. Those factors include the competitiveness of particular races, the type of political system in place, and of course individual motivations. Still, there is considerable evidence that election administration rules affect participation. Even if barriers to registration and voting aren’t the main reason for lower turnout rates among some groups, making the voting process easier—especially by easing the rules for registration—can have a positive impact on both the total number of voters turning out and disparities in turnout for some groups.

When it comes to election administration, voter registration is the practice most firmly established to affect turnout. In fact, discouraging some groups of voters from participating was part of the original motivation for adopting voter registration in the first place. Massachusetts was the first state to require voter registration in 1801, though most other states did not adopt this requirement until after the Civil War.⁹⁴ Registration rules were touted as a means to curb fraud—which was indeed a problem in some places—but they were often designed to depress participation among certain groups, including African Americans, immigrants, and laborers.⁹⁵ As Alex Keyssar puts it in his indispensable history of the right to vote, “it can be said with certainty that registration laws reduced fraudulent voting and that they kept large numbers (probably millions) of eligible voters from the

⁸⁹ Kaat Smets & Carolien van Ham, *The Embarrassment of Riches? A Meta-Analysis of Individual-Level Research on Voter Turnout*, 32 ELECTION STUD. 344, 345 (2013).

⁹⁰ *Id.* at 348–50.

⁹¹ *Id.* at 356. See also Benny Geys, *Explaining Voter Turnout: A Review of the Aggregate-Level Research*, 25 ELECTION STUD. 637, 653 (2006) (“Browsing the (aggregate-level) empirical literature on voter turnout would most likely lead to the conclusion that little agreement has been reached about what explains this phenomenon.”).

⁹² Geys, *supra* note 91, at 653.

⁹³ See *id.* See also Joshua Harder & Jon A. Krosnick, *Why Do People Vote? A Psychological Analysis of the Causes of Voter Turnout*, 64 J. SOC. ISSUES 525, 528–30 (2008) (reviewing literature showing that easier registration tends to increase turnout).

⁹⁴ For more on this history, see ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 151–59 (2000). See also Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 456–61 (2008); McDonald, *supra* note 78, at 95.

⁹⁵ See Tokaji, *supra* note 94, at 458–59.

polls.”⁹⁶ From its beginnings, then, voter registration has served a dual purpose: to discourage fraud *and* to make participation more difficult.⁹⁷

There is considerable evidence that registration liberalization, especially allowing voters to register and vote at the same time, increases turnout.⁹⁸ Same-day registration lowers the barriers to participation by combining two steps, registration and voting. It thus allows one-stop shopping for would-be (or might-be) voters.⁹⁹ Twelve states and the District of Columbia currently allow some form of same-day registration, either on election day, before election day, or both.¹⁰⁰ Election-day registration (or EDR), in which the voter may actually register and then vote on election day, is especially useful when it comes to including those with a late-developing interest in an election.¹⁰¹ While estimates on the precise increase in turnout vary, it is generally thought to increase turnout somewhere between three and ten percentage points.¹⁰²

Traditionally, Democrats have generally supported same-day registration and Republicans have opposed it. This is surely due to the conventional wisdom that lowering registration barriers tends disproportionately to in-

⁹⁶ KEYSSAR, *supra* note 94, at 158.

⁹⁷ *See id.* at 156–58.

⁹⁸ *See* Elizabeth Rigby & Melanie J. Springer, *Does Electoral Reform Increase (or Decrease) Political Equality?* 64 POL. RES. Q. 420, 427–29 (2011) (finding that election-day registration tended to increase equality of participation between rich and poor voters); Roger Larocca & John S. Klemanski, *U.S. State Election Reform and Turnout in Presidential Elections*, 11 ST. POL. & POL'Y Q. 76, 90, 93–94 (2011); Craig Leonard Briens & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 161, 170, 176–77 (2001) (finding a seven percent increase with election-day registration, on average); Craig Leonard Briens & Bernard Grofman, *When Registration Barriers Fall, Who Votes? An Empirical Test of a Rational Choice Model*, 99 PUB. CHOICE 161, 161 (1999) (finding elimination of costs associated with voter registration results in greater turnout among those with medium income and education); Benjamin Highton, *Easy Registration and Voter Turnout*, 59 J. POL. 565, 568 (1997) (finding turnout approximately ten percent higher in states with EDR or no registration); Glenn E. Mitchell & Christopher Wlezien, *The Impact of Legal Constraints on Voter Registration, Turnout, and the Composition of the American Electorate*, 17 POL. BEHAV. 179, 195–96 (1995) (finding that liberalized registration rules increased turnout); Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections From 1960 to 1992: A Research Note*, 22 AM. POL. RES. 74, 80, 84 (1994) (finding turnout increases in states that adopted same-day registration in mid-1970s, even as turnout in other states declined).

⁹⁹ *See* McDonald, *supra* note 78, at 96.

¹⁰⁰ *Same-Day Voter Registration*, NAT'L. CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/same-day-registration.aspx> (last updated Nov. 14, 2013). This includes the ten states plus D.C. that allow election-day registration (i.e., voting on election day): Connecticut, Colorado, Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming. It also includes two states (Ohio and North Carolina) that allow simultaneous registration and voting during a period before election day, but not on it. One of those two states is North Carolina, which recently adopted a law getting rid of same-day registration during the early voting period. Not included are two states (California and Maryland) that have enacted some form of same-day registration but have not yet implemented it.

¹⁰¹ *See* James G. Gimpel et al., *Election-Year Stimuli and the Timing of Voter Registration*, 13 PARTY POL. 351, 364 (2007).

¹⁰² *See* Jacob R. Neiheisel & Barry C. Burden, *The Impact of Election Day Registration on Voter Turnout and Election Outcomes*, 20 AM. POL. RES. 634, 638 (2012); Highton, *supra* note 98, at 568.

crease participation among Democratic-leaning groups of voters. Yet regardless of partisan effects, both parties should support reforms that broaden the electorate to include groups with historically low participation rates. Recent research, moreover, casts doubt on the prevalent assumption that registration liberalization will benefit Democrats more than Republicans. In fact, one recent study of Wisconsin—which has had same-day voter registration since the 1970s—found that adoption of this reform actually helped Republicans more than Democrats.¹⁰³ In addition, same-day registration helps bring in younger voters as well as recent movers.¹⁰⁴ Another recent study finds that it helps reduce income disparities in turnout by bringing in more voters of limited means.¹⁰⁵

While same-day registration is the gold standard, other means of facilitating registration can also have a positive impact on turnout. Federal law prohibits registration deadlines for more than thirty days before presidential elections, and many states have adopted a thirty-day registration deadline for other elections. But moving registration deadlines closer to election day tends to increase turnout.¹⁰⁶ Another reform that helps some voters participate is portable voter registration, which allows voters who move within a state to transfer their registration on election day.¹⁰⁷ This reform tends to help increase participation among recent movers, a group that generally has low turnout rates.¹⁰⁸ There is also some evidence that voter registration programs combined with “civic literacy” help increase participation among college students.¹⁰⁹

For the most part, state law governs the process of voter registration, though there is a limited federal overlay. The National Voter Registration Act of 1993 (NVRA) requires states to make registration available at certain government agencies, including motor vehicle offices.¹¹⁰ Almost one-quarter of people now register to vote at motor vehicle offices, which is higher

¹⁰³ See Neiheisel & Burden, *supra* note 102, at 636; see also Mitchell & Wlezien, *supra* note 98, at 195–96 (finding neither major party likely to benefit from easier registration).

¹⁰⁴ See R. MICHAEL ALVAREZ & JONATHAN NAGLER, DEMOS, ELECTION DAY VOTER REGISTRATION IN IOWA 3 (2007), available at <http://www.demos.org/sites/default/files/publications/updatedIOWA.pdf> (estimating that turnout of those eighteen to twenty-five in Iowa would increase by 10.7% with EDR); Stephen Knack & James White, *Election-Day Registration and Turnout Inequality*, 22 POL. BEHAV. 29, 34–41 (2000) (noting increase among younger voters and recent movers with EDR). But see Briens & Grofman (2001), *supra* note 98, at 173 (finding that EDR increased turnout, but only resulted in modest changes in composition of voting electorate).

¹⁰⁵ See Rigby & Springer, *supra* note 98, at 424, 432.

¹⁰⁶ See Greg Vonnahme, *Registration Deadlines and Turnout in Context*, 34 POL. BEHAV. 765, 776 (2012).

¹⁰⁷ See Michael P. McDonald, *Portable Voter Registration*, 30 POL. BEHAV. 491, 491–92 (2008).

¹⁰⁸ See *id.* at 492.

¹⁰⁹ See Cynthia J. Bogard et al., *Information They Can Trust: Increasing Youth Voter Turnout at the University*, 41 PS: POL. SCI. & POL. 541, 541 (2008). But see Richard G. Niemi & Michael J. Hanmer, *Voter Turnout Among College Students: New Data and a Rethinking of Traditional Theories*, 91 SOC. SCI. Q. 301, 312–13 (2010) (finding registration not much of a barrier for college students).

¹¹⁰ 42 U.S.C. §§ 1973gg-3, 1973gg-5.

than any other means of registration.¹¹¹ The NVRA's reforms helped increase the number of registered voters,¹¹² but its impact on turnout was more debatable. Early research found that it did not increase turnout,¹¹³ though it probably helped slow the decline in turnout due to other factors.¹¹⁴ There are, however, some more recent studies suggesting that the NVRA helped "equalize" the electorate, modestly reducing disparities in participation based on income, age, and residential stability.¹¹⁵ The Help America Vote Act of 2002 (HAVA) did not expand the means of registering, but required each state to have a statewide voter registration database replacing the local lists that prevailed before then.¹¹⁶

In addition to registration liberalization, convenience voting is sometimes suggested as a means by which to increase participation. This category of reforms includes the expansion of mail-in absentee ballots and in-person early voting. Many states have liberalized their absentee and early-voting laws over the years, with a majority of states now allowing "no excuse" absentee or early voting—which may be used by voters, regardless of whether they have a reason for not going to the polls on election day.¹¹⁷

Research on the turnout effects of convenience voting, however, yields much more mixed results than that on registration liberalization. There is some evidence that expanded absentee and early voting increases turnout.¹¹⁸ Several studies have found that all-mail elections (sometimes called "vote-by-mail") increase turnout, at least in low-profile elections.¹¹⁹ But other

¹¹¹ *Method of Registration by Selected Characteristics: November 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (follow hyperlink to download XLS for Table 12) (last revised May 8, 2013).

¹¹² Tokaji, *supra* note 94, at 469.

¹¹³ See Robert D. Brown & Justin Wedeking, *People Who Have Their Tickets but Do Not Use Them: "Motor Voter," Registration, and Turnout Revisited*, 34 AM. POL. RES. 479, 488 (2006); Michael D. Martinez & David Hill, *Did Motor Voter Work?*, 27 AM. POL. Q. 296, 297 (1999).

¹¹⁴ See Stephen Knack, *Drivers Wanted: Motor Voter and the Election of 1996*, 32 PS. POL. SCI. & POL. 237, 241 (1999).

¹¹⁵ See Rigby & Springer, *supra* note 98, at 427–29; Cynthia Rugeley & Robert A. Jackson, *Getting on the Rolls: Analyzing the Effects of Lowered Barriers on Voter Registration*, 9 ST. POL. & POL'Y Q. 56, 71 (2009).

¹¹⁶ 42 U.S.C. § 15483(a).

¹¹⁷ See Daniel P. Tokaji & Ruth Colker, *Absentee Voting for People with Disabilities*, 38 McGEORGE L. REV. 1015, 1021 (2007).

¹¹⁸ See Larocca & Klemanski, *supra* note 98, at 95 (finding that no-excuse voting increased probability of voting); JAN E. LEIGHLEY & JONATHAN NAGLER, *THE EFFECTS OF NON-PRECINCT VOTING REFORMS ON TURNOUT, 1972–2008* (2009), available at http://www.pewtrusts.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/MVW/Leighley_Nagler.pdf; Paul Gronke & Daniel Krantz Toffey, *The Psychological and Institutional Determinants of Early Voting*, 64 J. SOC. ISSUES 503, 521 (2008) (finding option to vote early had a significant impact during midterm elections but not presidential elections).

¹¹⁹ See, e.g., Paul Gronke et al., *Early Voting and Turnout*, 40 PS. POL. SCI. & POL. 639 (2007) (vote-by-mail, but not other convenience voting reforms, positively affects turnout); Michael J. Hanmer & Michael W. Traugott, *The Impact of Voting by Mail on Voter Behavior*, 32 AM. POL. RES. 375 (2004) (vote-by-mail increases mobilization, especially for Republicans); Jeffrey A. Karp & Susan A. Banducci, *Going Postal: How All-Mail Elections Influence Turnout*, 22 POL. BEHAV. 223 (2000) (vote-by-mail produces higher turnout, especially in low stimulus elections, such as local elections); Thad Kousser & Megan Mullin, *Does Voting by*

studies find that these changes have no effect¹²⁰ or even (counter-intuitively) a negative effect¹²¹ on turnout. In addition, some studies purport to find that convenience voting increases turnout among those already most likely to vote, thus having the “perverse effect” of exacerbating the existing discrepancy between the voting electorate and the citizenry as a whole.¹²²

In summary, the turnout effects of convenience voting are uncertain and disputed. There is no doubt that more and more voters are casting their ballots before election day using absentee and early voting. Many of these voters are among the groups less likely to participate. For example, one recent study found that minority and younger voters are much more likely to use in-person early voting, especially on weekends.¹²³ What is less clear is whether early voting increases participation among these voters, rather than simply changing the day on which they vote.¹²⁴

Mail Increase Participation? Using Matching to Analyze a Natural Experiment, 15 POL. ANALYSIS 428, 442 (2007) (vote-by-mail increases participation in local but not statewide elections); Priscilla L. Southwell, *Analysis of the Turnout Effects of Vote by Mail Elections, 1980–2007*, 46 SOC. SCI. J. 211 (2009) (vote-by-mail format elevates turnout in low-stimulus special elections and primary elections, but has no significant impact on presidential and congressional elections); Priscilla L. Southwell, *Letting the Counties Decide: Voter Turnout and the All-Mail Option in the State of Washington*, 39 POL. & POL'Y 979 (2011) (vote-by-mail results in modest increase in voter turnout); Priscilla L. Southwell & Justin I. Burchett, *The Effect of All-Mail Elections on Voter Turnout*, 28 AM. POL. Q. 72 (2000) (voter turnout higher in all-mail elections).

¹²⁰ See, e.g., Joseph D. Giammo & Brian J. Brox, *Reducing the Costs of Participation: Are States Getting a Return on Early Voting?*, 63 POL. RES. Q. 295 (2010) (various forms of convenience voting do not increase turnout in the long term); Jeffrey A. Karp & Susan A. Banducci, *Absentee Voting, Mobilization, and Participation*, 29 AM. POL. RES. 183 (2001) (liberalized absentee voting rules do not appear to increase overall voter turnout).

¹²¹ See, e.g., Larocca & Klemanski, *supra* note 98, at 96 (finding that in-person early voting reduced turnout); Elizabeth Bergman & Phillip A. Yates, *Changing Election Methods: How Does Mandated Vote-By-Mail Affect Individual Registrants?*, 10 ELECTION L.J. 115, 121–22 (2011) (finding that vote-by-mail decreased probability of individual registrants voting by 13.2%).

¹²² See Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RES. 471 (2005); see also Adam J. Berinsky et al., *Who Votes By Mail? A Dynamic Model of the Individual-Level Consequences of Voting-By-Mail Systems*, 65 PUB. OPINION Q. 178 (2001) (vote-by-mail increased turnout by mobilizing older voters, those who are well-educated, and those with substantial amounts of campaign interest); Grant W. Neeley & Lilliard E. Richardson, Jr., *Who Is Early Voting? An Individual Level Examination*, 38 SOC. SCI. J. 381 (2001) (expanded convenience voting does not mobilize low income voters, minorities, senior citizens, and voters with little interest in political process and no strong partisan attachments); Gronke & Toffey, *supra* note 119, at 520 (“early voters are older, better educated, are more likely to declare a partisan affiliation on the voter registration form, and tend to be exposed to party mobilization efforts”); Karp & Banducci, *supra* note 120 (vote-by-mail mobilizes those already predisposed to vote, particularly those of higher socioeconomic status); McDonald, *supra* note 78, at 101 (early voters are more likely to be older than other voters); Rigby & Springer, *supra* note 98, at 429 (convenience voting reforms exacerbated income inequality). But see LEIGHLEY & NAGLER, *supra* note 118, at 2 (absentee voting had greater positive effect on turnout by older voters, but effects of absentee and early voting did not vary across income or education).

¹²³ Herron & Smith, *supra* note 53, at 331.

¹²⁴ As one study puts it: “The overwhelming majority of voters choosing to vote using no-excuse early voting and no-fault absentee voting are doing so as alternatives to other methods of voting” LEIGHLEY & NAGLER, *supra* note 118, at 2. That study nevertheless finds that

The ambiguous results of research on convenience voting might seem peculiar, given the Obama campaign's well-publicized outreach aimed at persuading its supporters to vote early, and its fight against restrictions on early voting¹²⁵ in the 2012 election campaign. Perhaps the Obama team knew something that most social scientists have missed. It is certainly possible that expanded convenience voting, when combined with a campaign's aggressive mobilization efforts, will increase turnout.¹²⁶ It is also possible that these efforts will help reduce the turnout disparities affecting certain demographic groups. The available evidence, however, provides mixed support at best for these propositions. The positive impact of registration liberalization, especially same-day registration, is much more clear than that of convenience voting.

V. WHAT SHOULD BE DONE: FEDERAL REGISTRATION AND IDENTIFICATION REFORM

Three key points from Parts II and III are worth reviewing before turning to possible solutions. First, there is a disjunction between perception and reality when it comes to what VRA preclearance was actually doing. Contrary to popular belief, it was not often used to stop vote denial; rather, it was mostly used to curb vote dilution. Second, there is reason to be worried about disparities in registration and participation. The black-white gap has closed, and that is something to celebrate. But Latinos, Asian Americans, people of low income and limited education, young people, recent movers, and some people with disabilities continue to vote at substantially lower rates than their fellow citizens. Third, liberalization of voter registration has the best track record of improving participation by eligible citizens. The gold standard is same-day registration. While not a panacea, these reforms have a greater potential to increase turnout—especially among some of those least likely to participate—than expanded convenience voting.

The Court's decision in *Shelby County* provides an opportunity to adopt a voting rights act for the twenty-first century, built on the ideal of universal inclusion of all eligible citizens.¹²⁷ The most promising means by which to pursue this ideal is by expanding opportunities for voter registration. Such legislation offers the greatest promise of improving voter turnout, especially among demographic groups that continue to register and vote at lower rates. The great challenge to enactment of such a bill is the stultifying political

absentee and early voting both had a positive impact on turnout of approximately three percent when other factors are controlled for. *Id.* at 2.

¹²⁵ See *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012).

¹²⁶ There is some evidence of this. See J. Eric Oliver, *The Effects of Eligibility Restrictions and Party Activity on Absentee Voting and Overall Turnout*, 40 AM. J. OF POL. SCI. 498 (1996) (finding liberalized absentee voting increased turnout only when combined with party mobilization efforts).

¹²⁷ See Pildes, *supra* note 22, at 757 (urging national voting rights model analogous to NVRA and HAVA, rather than race-specific remedies).

polarization, in Congress and among the public.¹²⁸ If history is any guide, Republicans are likely to oppose any election administration bill focused exclusively on registration liberalization—despite the empirical research showing that they may well benefit from this type of reform. A sweetener is therefore necessary. I propose a Grand Election Bargain that would expand voter registration opportunities, while also implementing a limited voter-identification requirement in federal elections. Section A outlines the options open to Congress after *Shelby County*. Sections B and C propose federal legislation that would liberalize voter registration and implement uniform voter identification respectively. Section D explains why such federal legislation would be constitutional.

A. *Post-Shelby County Options*

Reform of voter registration and identification is just one of the options open to Congress after *Shelby County*. Since the decision came down, there have been many worthy suggestions for protecting the right to vote.¹²⁹ The leading ideas include: (1) rewriting the coverage formula so that it harmonizes with “current needs”;¹³⁰ (2) strengthening the results test of Section 2, which prohibits racially discriminatory voting practices, particularly with respect to claims of vote denial by racial minorities;¹³¹ (3) amending Section 3 of the VRA, the “pocket trigger,” to make it easier to subject new states and localities to get coverage under its preclearance requirement;¹³² (4) adopting a disclosure requirement, under which jurisdictions changing their election rules would have to provide a “voter impact statement” documenting the purposes and likely effects of the new rules;¹³³ and (5) creating a private, blue-ribbon panel that would assess new election rules, like DOJ did before

¹²⁸ See Cohen, *supra* note 14.

¹²⁹ For a summary of a discussion of possible reforms immediately after *Shelby County* was decided, see NATHANIEL PERSILY & THOMAS MANN, BROOKINGS INST., *Shelby County v. Holder and the Future of the Voting Rights Act* (2013), available at http://www.brookings.edu/~media/research/files/papers/2013/08/09%20shelby%20v%20holder%20policy%20mann/persily_mann_shelby%20county%20v%20holder%20policy%20brief_v9.pdf.

¹³⁰ See Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CAL L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262954.

¹³¹ For discussion of a proposed standard under Section 2 for vote denial claims, see Tokaji, *supra* note 9, at 723–26. Although this article suggests a test that courts could use for claims under the current version of Section 2, such a test could also be adopted through legislation. See also Kathleen M. Stoughton, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292 (2013) (arguing that Section 2 might successfully be used to challenge voter-ID laws).

¹³² See Editorial, *The Future of Voting Rights*, N.Y. TIMES, June 30, 2013, at SR10. The leading academic treatment of Section 3 is Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 992 (2010).

¹³³ See Spencer Overton, *How to Update the Voting Rights Act*, HUFFINGTON POST (June 25, 2013, 12:52 PM), http://www.huffingtonpost.com/spencer-overton/how-to-update-the-voting_b_3497350.html; Bruce Cain & Daniel Tokaji, *Stopping the New Vote Denial*, AMERICAN PROSPECT (June 23, 2009), <http://prospect.org/article/stopping-new-vote-denial>.

Shelby County.¹³⁴ My point here is not to argue against these proposals, some of which I support. Rather, it is to explain why voter registration reform offers the most promising means to prevent vote denial and expand the electorate.

Of these possible responses to *Shelby County*, the most obvious is to amend the coverage formula. Whatever the utility of a new coverage formula when it comes to vote dilution, it is not an effective approach to vote denial for four reasons. The first is political feasibility. Members of Congress from formerly covered jurisdictions are likely to resist a new coverage formula subjecting them to the same preclearance regime from which they just escaped. Most members from previously uncovered jurisdictions are also likely to resist the stigmatization and burdens that come with coverage. It is difficult to imagine, for example, that many members of Congress from Ohio or the previously uncovered counties in Florida—places that would be prime candidates for inclusion in a revamped preclearance regime—would accede to coverage willingly.

Second, a revised coverage formula would raise serious constitutional questions, at least for the current Supreme Court. One might try to base coverage on recent registration and participation statistics, as I have done above. The problem is that these statistics do not necessarily signal constitutional violations, which the Court will likely view as necessary to justify Congress's use of its Fourteenth- or Fifteenth-Amendment enforcement powers.¹³⁵ The same problem exists with a formula based on racial polarization.¹³⁶ But racially polarized voter attitudes, even if they translate into voting behavior, do not amount to a constitutional violation, certainly not in the eyes of the current Supreme Court.

Third, a revamped coverage formula cannot reasonably expect to capture those places at greatest risk of vote denial in the future. That is most obviously true of a coverage formula based on racial polarization. Whatever the utility of such a formula is when it comes to vote dilution, it cannot effectively deal with problems of vote denial. Experience suggests that impediments to voting occur both in places without much racial polarization (like Ohio) and those with it (like Alabama).¹³⁷ These changes, moreover, are more likely to be driven by partisanship than racial animus. Even a formula based on past violations of the Constitution or VRA cannot reasonably seek to keep pace with future vote denial laws. In the dozen or so years since *Bush v. Gore*, we have seen “voting wars” (to borrow Rick Hasen’s phrase)¹³⁸ throughout the country, though they tend to attract the greatest

¹³⁴ Edward B. Foley, *If Congress Won't Act, the Nonprofit Community Can*, 12 ELECTION L.J. 343, 343 (2013).

¹³⁵ I have discussed these constitutional issues at greater length elsewhere. See Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349 (2007); see also Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 183–95 (2005).

¹³⁶ See Elmendorf & Spencer, *supra* note 130.

¹³⁷ See Pildes, *supra* note 22, at 748–49.

¹³⁸ HASEN, *supra* note 35.

attention in swing states during presidential years. It is hard enough to predict where barriers to participation will emerge tomorrow, much less five, ten, or twenty-five years down the road. The loci of vote denial are sure to change in the years to come, in a way that no static formula can realistically anticipate.

Fourth, a renewed coverage formula can be expected to have only a modest effect on vote denial, even in covered jurisdictions, unless the standards and procedures for preclearance are also revamped. I have already discussed the preclearance regime's limited impact on participation in Part I. Part of the problem lies in the exclusively race-based test for measuring compliance, focused on retrogressive effect and discriminatory purpose. Although I support race-based remedies for voting practices that have a disparate impact on racial minorities,¹³⁹ the problems in our current system of election administration go well beyond race. The system also leaves out other demographic groups—including those defined by income, educational attainment, age, disability, and residential mobility—with low registration and voting rates. More fundamentally, contemporary vote denial is more likely to be motivated by a desire to gain partisan advantage, rather than to suppress minority participation for its own sake.¹⁴⁰ It is sometimes difficult to distinguish racial vote suppression from partisan vote suppression, particularly in some formerly covered jurisdictions where race strongly correlates with partisan affiliation.¹⁴¹ But a race-based standard for preclearance will not necessarily capture those practices which tend to exclude other groups of voters, such as young people, poor people, or people with disabilities. A different approach is needed.

Similar problems and limitations exist with the other possible responses to *Shelby County* identified above. Amendments to strengthen Section 2 may help in stopping practices that have a demonstrable negative effect on racial minorities in comparison to others. But even for practices like voter ID, a racially disparate impact is hard to prove.¹⁴² Moreover, even with solid evidence of racial disparities, a race-based model cannot expect to address barriers to registration and participation faced by other groups.¹⁴³

¹³⁹ See generally Tokaji, *supra* note 9.

¹⁴⁰ See Pildes, *supra* note 22, at 751.

¹⁴¹ For a discussion of the difficulty inherent in disentangling racial and partisan motivations, see Hasen, *supra* note 36, at 4.

¹⁴² The effects of voter ID and other barriers to voting, racial and otherwise, are fiercely disputed. Compare Levitt, *supra* note 11, at 107 (arguing that racial minorities are less likely to have ID, and therefore more likely to be negatively affected) with Hans A. von Spakovsky, *Protecting the Integrity of the Electoral Process*, 11 ELECTION L.J. 90, 92 (2012) (asserting that voter ID does not reduce minority turnout). For discussion of the empirical challenges, see generally Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L.J. 85 (2009). See also Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 657–63 (2007) (discussing limitations of empirical research on voter ID).

¹⁴³ See Issacharoff, *supra* note 4, at 100 (recommending that Congress move beyond the anti-discrimination model); Pildes, *supra* note 2, at 318 (suggesting an approach that “protects the right to vote robustly regardless of where those barriers might emerge and which voters are wrongly denied access”); Bruce Cain, *Moving Past Section 5: More Fingers or a New Dike?*,

Expanding the “pocket trigger” for coverage under Section 3 is also worth considering. Under this section of the VRA, jurisdictions may be subjected to preclearance, based on past constitutional violations. There are, however, some serious limitations and potential drawbacks with Section 3 expansion. The major challenge is that, under Section 3, covered jurisdictions are currently subject to the same race-based standard that formerly applied to jurisdictions covered under Section 4(b). This is of limited efficacy to the demographic groups with the lowest rates of registration and participation today. To improve Section 3, this race-based standard might be supplemented with one that looks to burdens on voting rather than racial intent or impact. But crafting such a standard poses an enormous challenge. In particular, it will be difficult to develop a non-race-based standard that can effectively deal with unnecessary burdens on participation, without vesting considerable discretion in DOJ. As experience with Section 5 preclearance demonstrates, such discretion is an invitation to partisan manipulation.¹⁴⁴

Disclosure requirements and blue-ribbon panels likewise deserve attention, but can only accomplish so much. These reforms may help discourage the adoption of unnecessary burdens on voting, but would not lead to systemic reforms needed to broaden the electorate.

B. Voter Registration Reform

If we are serious about lowering barriers to voting for all eligible citizens, we should start with voter registration. The United States is at the far end of the spectrum, in imposing responsibility on individual citizens to register, rather than taking responsibility for ensuring that all eligible citizens are registered.¹⁴⁵ In Canada, by contrast, a federal agency (Elections Canada) is responsible for assembling a registration list from a range of sources, including citizenship applications, provincial voter lists, tax returns, and driver’s licenses.¹⁴⁶

The U.S. registration system is an unfortunate by-product of the hyperdecentralization that plagues election administration here—and, in particular, the lack of an independent federal agency that is competent to perform a function comparable to that performed by Elections Canada. In the United States, there was no federal agency charged with overseeing election administration until HAVA established the U.S. Election Assistance Commission (EAC). The EAC has been plagued by problems since its incep-

12 ELECTION L.J. 338, 340 (2013) (suggesting an approach that focuses on “national procedural equality”).

¹⁴⁴ See Tokaji, *supra* note 61, at 798–819 (describing accusations and evidence of partisan manipulation of preclearance process).

¹⁴⁵ See Daniel P. Tokaji, *Voter Registration and Institutional Reform*, 3 HARV. L. & POL’Y REV. (ONLINE) 14–15 (Jan. 22, 2009), http://web.archive.org/web/20120625050732/http://www.hlpronline.com/Tokaji_HLPR_012209.pdf.

¹⁴⁶ Frank Emmert et al., *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 16 (2007).

tion.¹⁴⁷ It is currently without any sitting commissioners. Federalization of voter registration, with an independent federal agency responsible for registering all eligible voters, is a worthy ideal. It is not, however, a realistic possibility in the foreseeable future.

Given the impracticability of federalizing registration, responsibility for maintaining our lists can be expected to remain in state hands for the foreseeable future. It is nevertheless possible to standardize the registration process, in a way that will at once include new voters and stop states from adopting practices that impede registration. I propose a package of registration reforms that would require the following for federal elections:

- *Affirmative Registration.* Federal and state government offices would assume greater responsibility for registering voters. Designated government agencies would be required to register eligible citizens and electronically transmit information to election authorities, while giving them the opportunity to opt out.¹⁴⁸ A model already exists with respect to state motor vehicle agencies, public assistance agencies, and agencies that serve people with disabilities under NVRA, which are required to offer citizens the opportunity to register. This system could be extended to such entities as state universities, secondary schools, corrections authorities (including probation and parole), unemployment agencies, the U.S. Bureau of Citizenship and Immigration Services (for naturalized citizens), Social Security Administration, Department of Veterans Affairs, and Department of Defense. Targeted registration efforts by agencies that serve language minorities, as well as long-term-care facilities, would help reach groups currently underrepresented in the electorate.¹⁴⁹ The health exchanges created by the Affordable Care Act provide another potential site for voter registration.¹⁵⁰
- *Online Registration and Updating.* New voters should be able to register online, while established voters should be able to check and correct their registration information and to find their polling location. The system would provide means for parties and candidates to verify whether a voter is registered, given the important role they play both in registering voters and in promoting turnout. Notice should be provided to new registrants, voters who have changed their addresses or names, and voters whose

¹⁴⁷ Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 125 (2009).

¹⁴⁸ For discussion of automated registration, see Joseph Shure, *Automating Voter Registration*, 36 POL'Y STUD. J. 679 (2008), and Mark Ritchie, *The Future of Voter Registration*, in VOTING IN AMERICA 123, 126–27 (2008).

¹⁴⁹ For a recent study of the benefits of outreach in helping people in nursing homes and assisted-living facilities exercise their right to vote, see Richard J. Bonnie et al., *Voting by Senior Citizens in Long-Term Care Facilities*, 12 ELECTION L.J. 293 (2013).

¹⁵⁰ Some advocates argue that these exchanges are already required to offer voter registration under the NVRA, because they provide “public assistance.” Faith Barksdale & Eunice Hyon Min Rho, *Why Today Is a Big Day for Voting Rights*, ACLU BLOG OF RIGHTS (Oct. 1, 2013, 4:20 PM), <https://www.aclu.org/blog/voting-rights/why-today-big-day-voting-rights>.

names are to be removed from the list on the grounds of ineligibility or duplication.

- *Same-Day Registration.* The most important ingredient of any reform package is to allow voters to register and vote simultaneously, on election day and during in-person early voting. Established voters should also be permitted to update their information at the polling place or early voting site. As set forth above, same-day registration has a strong track record—more so than any other election administration reform—of expanding participation. The main argument against same-day registration is that it will increase voter fraud, but the evidence shows otherwise.¹⁵¹ A study of states with same-day registration found only ten cases of voting fraud between 1999 and 2005. It concluded that “the collective evidence suggests there has been very little voter fraud in EDR states over the past several election cycles.”¹⁵²

Although this set of reforms stops short of providing uniformity of registration rules across states, it would provide a baseline level of consistency for federal elections that is currently lacking. The idea would be to include as many eligible citizens as possible before election day, while providing a backstop for those who are not registered before then. Same-day registration also has the advantage of allowing for errors to be corrected, for those voters who tried to register before election day, but whose names were left off the rolls due to an error by election officials or private persons engaged in voter registration. This package of reforms has the best prospect of increasing participation among eligible voters. It would also preempt attempts to restrict registration, like those embodied in North Carolina’s recent elimination of same-day registration.

C. *Uniform Voter Identification*

Republicans are unlikely to support voter registration liberalization without getting something in return. The most obvious candidate is voter identification, which has prompted contentious debates across the country over the past decade. HAVA included a limited ID requirement, applicable to first-time voters who registered by mail. The statute did not require these voters to present photo ID, instead allowing them to vote with some form of documentary identification, such as a utility bill, bank statement, or government document with the voter’s name and current address.¹⁵³ A number of states have gone further, with some enacting laws requiring voters to present

¹⁵¹ LORRAINE MINNITE, DEMOS, ELECTION DAY REGISTRATION: A STUDY OF VOTER FRAUD ALLEGATIONS AND FINDINGS ON VOTER ROLL SECURITY 2–4 (2007), available at http://www.demos.org/sites/default/files/publications/edr_fraud.pdf.

¹⁵² *Id.*

¹⁵³ See *The Rules on Registering to Vote*, MILWAUKEE J. SENTINEL, Feb. 15, 2004, at Z6.

government-issued photo ID.¹⁵⁴ Georgia, Indiana, and Missouri were the first to enact such laws. Missouri's law was struck down on state constitutional grounds, but the U.S. Supreme Court upheld Indiana's photo-ID law against a facial constitutional challenge in *Crawford v. Marion County Election Board*.¹⁵⁵ Since then, nine more states have adopted strict photo-ID requirements.¹⁵⁶ Eight other states have less strict photo-ID laws, which give voters without the required ID a way to cast valid ballots, typically by signing an affidavit verifying their eligibility.¹⁵⁷ Still others require non-photo ID of all voters.¹⁵⁸

Photo-ID laws have been the primary focal point of the access-versus-integrity debate, with Republicans arguing that they are needed to prevent fraud and Democrats arguing that they will suppress the vote, particularly among racial minorities, poor people, young people, and other groups with relatively low rates of participation. The evidence that voter ID laws are an effective means by which to prevent voting fraud is practically nonexistent. The only subcategory of voting fraud that such a law could hope to prevent is in-person voter impersonation fraud, but it is extremely uncommon for voters to go to the polls pretending to be someone they are not.¹⁵⁹ Even in the *Crawford* litigation, the supporters of photo ID were unable to document even a single incident of voter impersonation fraud in the state that the law would have prevented. Nor do voter-ID laws appear to give voters greater confidence that elections are being conducted fairly.¹⁶⁰ The best argument for voter ID is the “broken windows” theory suggested by Brad Smith. He posits that requiring ID serves as a visible demonstration of the state's commitment to stamping out fraud, which “may prevent fraud from growing,” just as cleaning up graffiti may discourage street crime.¹⁶¹ There is, however, no empirical support for the proposition that voter ID actually reduces the perception, let alone the reality, of voter fraud.¹⁶²

What are the costs of voter ID, in terms of its negative impact on voter turnout? Estimates of the percentage of people without photo ID vary—and the answer depends in part on how strict the law is (for example, whether public university IDs are acceptable). A study by the Brennan Center for Justice, widely cited by voter-ID opponents, estimates that approximately

¹⁵⁴ For a list of state identification requirements, see *Voter ID: State Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Dec. 23, 2013).

¹⁵⁵ 553 U.S. 181, 188–89 (2008).

¹⁵⁶ See *Voter ID: State Requirements*, *supra* note 154.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See generally LORRAINE MINNITE, *THE MYTH OF VOTER FRAUD* (2010). This is the most extensive study of voter fraud to date. Professor Minnite finds very little evidence of in-person voter fraud.

¹⁶⁰ Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1759 (2008).

¹⁶¹ Bradley A. Smith, *Broken Windows and Voting Rights*, 156 U. PENN. L. REV. PENNUMBRA 242, 244 (2008).

¹⁶² See Ansolabehere & Persily, *supra* note 160.

eleven percent of eligible citizens lack photo ID.¹⁶³ While some studies have found that an even higher percentage lack photo ID,¹⁶⁴ supporters of strict ID requirements claim that the number is significantly lower.¹⁶⁵

Determining the impact of ID laws on turnout has proved to be difficult—and almost as contentious as the political debate.¹⁶⁶ Some studies have found that strict voter-ID laws have a negative impact on turnout.¹⁶⁷ Others have found no impact,¹⁶⁸ a modest negative impact,¹⁶⁹ or (quite surprisingly) a positive impact¹⁷⁰ on turnout. The best explanation for these differing conclusions is offered by Robert S. Erikson and Lorraine C. Minnite, who conclude that the complexity of the problem and “likely marginal effect of photo ID rules makes statistical outcomes quite sensitive to research designs.”¹⁷¹ Reviewing studies touted by both sides, they conclude that it is wise to be wary of claims by both sides. While there may be some effects, “the data are not up to the task of making a compelling statistical argument.”¹⁷²

The jury is still out, then, on the impact that photo-ID laws have on turnout. The effect may not be as great as some opponents fear—and some supporters probably hope—at least where there is an affidavit exception. It is clear, however, that some groups of voters are less likely to have ID. That

¹⁶³ BRENNAN CENTER FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION* 1, 3 (2006), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

¹⁶⁴ Matt A Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence From Indiana*, 42 PS: POL. SCI. & POL. 111, 113 (2009) (finding that 16.1% of eligible citizens in Indiana lacked photo ID).

¹⁶⁵ ROBERT PASTOR ET AL., AM. UNIV. CTR. FOR DEMOCRACY & ELECTION MGMT., *Voter IDs Are Not the Problem: A Survey of Three States* 1, 37 (2007), available at <http://www.american.edu/spa/cdem/upload/csae080109.pdf> (reporting results of phone survey which found that about 1% of registered voters lacked ID).

¹⁶⁶ See generally Tokaji *supra* note 9.

¹⁶⁷ See Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL’Y REV. 185 (2009); R. Michael Alvarez et al., *The Effect of Voter Identification Laws on Turnout* (Cal. Inst. of Tech. Soc. Sci. Working Paper No. 1267R, 2008), available at <http://dx.doi.org/10.2139/ssrn.1084598>; Marjorie Randon Hershey, *What We Know About Voter-ID Laws, Registration, and Turnout*, 42 PS: POL. SCI. & POL. 87, 88 (2009).

¹⁶⁸ See Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 NYU ANN. SURV. AM. L. 613 (2007); Jason D. Mycoff et al., *The Empirical Effect of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. & POL. 1 (2009).

¹⁶⁹ Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through An Examination of Provisional Balloting*, 24 J. L. & POL. 475, 488 (finding 371 provisional ballots not counted in Indiana’s 2008 primary due to lack of photo ID); Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana’s 2008 General Election*, 25 J. L. & POL. 329, 348 (2009) (finding that about 900 people cast ballots that were not counted due to lack of photo ID in Indiana’s 2008 general election).

¹⁷⁰ Larocca & Klemanski, *supra* note 98, at 90, 94.

¹⁷¹ Erikson & Minnite, *supra* note 142, at 85.

¹⁷² *Id.* at 98.

includes poor voters, as well as racial minorities.¹⁷³ Thus, to the extent that voter-ID laws do affect turnout, they are likely to depress it among groups already less likely to vote. In addition, there is evidence that voter-ID laws are *applied* in a discriminatory manner, with minorities more likely to be asked to show ID.¹⁷⁴ But the magnitude of the impact is difficult to assess from published studies to date.

As the above discussion suggests, I do not believe that supporters of voter ID—and particularly government-issued photo ID—have made a persuasive case that it is necessary. The rarity of in-person voter impersonation suggests that, at least for many ID proponents, fraud is nothing more than a pretext to impose new barriers on voting. One of the worst examples is the strict photo-ID law that North Carolina enacted into law, just over a month after the *Shelby County* decision. We are likely to see similar efforts to enact strict ID laws in other states with Republican-dominated legislatures, including formerly covered states as well as those that were not covered by Section 5. That is especially true given the evidence of strong public support for voter ID.¹⁷⁵ While public support for ID does not make such laws good policy, it does suggest that more states—especially ones with Republican-dominated legislatures—are likely to enact strict laws in the future. The multiplicity of voter ID laws in the states threatens to cause confusion for voters, especially those who move across state lines.

In these circumstances, Congress should consider a compromise package that pairs registration liberalization with a uniform voter-ID requirement. This requirement should be made applicable nationwide in federal elections, and would preempt state laws—including those imposing higher requirements, as well as those imposing lower requirements. Congress might use as a model the modified version of South Carolina's voter-ID law, which was ultimately precleared after being softened significantly. In particular, the state's photo-ID requirement was understood—and authoritatively interpreted by state authorities—to have an affidavit exception. This exception, which South Carolina has in common with several other states, should be sufficient to ensure that few voters are kept from voting or having their votes counted. Such a compromise would have the beneficial effect of set-

¹⁷³ See Barreto et al., *supra* note 164, at 113 (finding that minority, low-income, less educated, and the youngest and oldest people in Indiana were less likely to have required ID); M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statutes*, 36 AM. POL. RES. 555, 556–63 (2008) (African Americans, Hispanics, and the elderly less likely to have photo ID); PASTOR ET AL., *supra* note 165, at 18 (finding blacks over three times as likely as whites to lack ID).

¹⁷⁴ Rachael V. Cobb et al., *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Boston in 2008*, 7 Q. J. POL. SCI. 1, 3 (2012) (finding “strong evidence that Hispanic and black voters were asked for IDs at higher rates than similarly situated white voters”); see also Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1 (2009).

¹⁷⁵ See, e.g., *Fear of Voter Suppression High, Fear of Voter Fraud Higher*, WASH. POST (Aug. 13, 2012), http://www.washingtonpost.com/politics/polling/fear-voter-suppression-high-fear-voter/2012/08/13/13590fa8-e419-11e1-89f7-76e23a982d06_page.html (finding that almost three-quarters of Americans support a photo-ID requirement).

ting this debate, while preempting more restrictive laws like those adopted by North Carolina and Texas.

To be clear, I do not support enactment of a photo-ID law as a standalone measure, because I don't believe that it's necessary or justified as a means by which to prevent fraud. But if Democrats' acceptance of voter ID is the price that must be paid for Republican agreement to registration liberalization—including same-day registration in federal elections—then the deal is worth making.¹⁷⁶ Any harms are likely to be modest, while the benefits will be substantial. Those benefits include the preemption of the strictest photo-ID laws, like those that have been adopted in Texas and North Carolina, and are likely to take effect without congressional action.

D. Constitutional Authority

The proposal I recommend—liberalized voter registration and a uniform ID requirement for federal elections—lies squarely within Congress's power under the Elections Clause,¹⁷⁷ as recently clarified in *Arizona v. Inter Tribal Council of Arizona*.¹⁷⁸ That case concerned language in the NVRA, requiring that states “accept and use” a uniform federal registration form, developed by the EAC. The federal form comes with state-specific instructions, which, in the case of Arizona, do not require proof of citizenship. Justice Scalia's opinion for a 7–2 majority held that the NVRA's “accept and use” requirement preempted an Arizona law requiring that registration forms be rejected unless accompanied by proof of citizenship.

The most significant portion of the Court's ruling in *Arizona v. Inter Tribal* is the discussion of Congress's power to preempt state laws under the Elections Clause. This clause allows states to regulate the “Times, Places, and Manner” of conducting congressional elections as an initial matter, but allows Congress to “make or alter those rules.”¹⁷⁹ According to the Court, Congress' power to regulate congressional elections is “comprehensive,”¹⁸⁰ and includes the authority to preempt contrary state laws. At the same time, the Court suggested that there are limits on that power. The Court proceeded to discuss Article I, Section 2 and the Seventeenth Amendment, which make the qualifications for voting in congressional elections the same as those for voting in state legislative elections. These provisions effectively give states the power to determine the qualifications that a voter must have to vote in congressional elections (e.g., U.S. citizenship, residency in the district, or age). According to the Court, it would raise serious constitutional questions

¹⁷⁶ For a somewhat different proposal that would combine registration and identification reforms in an effort to reach bipartisan compromise, see Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937 (2005).

¹⁷⁷ U.S. CONST. art. I, § 4.

¹⁷⁸ See 133 S. Ct. 2247 (2013).

¹⁷⁹ U.S. CONST. art. I, § 4.

¹⁸⁰ 133 S. Ct. at 2253.

for Congress to prevent states from obtaining information “necessary” to enforce their qualifications.¹⁸¹ But the NVRA raised no such concern, because it provided a means by which Arizona could seek the information it sought to require.¹⁸²

The decision in *Arizona v. Inter Tribal* clarifies that Congress has broad authority to make rules governing federal elections, preempting contrary state laws. That includes the power to impose voter registration duties on states in federal elections, as the NVRA did—and as the proposal outlined above would do. The Elections Clause also gives Congress the power to set rules regarding voter identification in federal elections, preempting contrary state laws. The uniform voter ID law proposed above falls squarely within Congress’s power to regulate the time, place, and manner of elections. It would not prevent states from obtaining any information “necessary” to enforce its qualifications. In this regard, it is important to distinguish a qualification for voting (like citizenship or age), from the means by which a voter proves that he or she satisfies that qualification. Identification is not, properly speaking, a qualification for voting; it is instead a means by which voters prove that they meet the qualifications for voting. With that in mind, a state would be hard-pressed to argue that a more onerous ID requirement than the one proposed here is *necessary* to establish their qualifications. That is especially true given that there are so few documented instances of people going to polls attempting to impersonate a registered voter.

Of course, the Elections Clause only gives Congress the power to regulate *federal* election procedures.¹⁸³ It does not confer the power to regulate the procedures for state and local elections. Thus, if Congress acted only under its Elections Clause power, then states would be free to apply different (and less voter-friendly) requirements in non-federal elections. Whether they would actually do so, however, is questionable. After enactment of the NVRA, two states tried to prevent the statute’s registration rules from applying to non-federal elections by establishing dual registration lists for federal and state elections, but ultimately abandoned this procedure.¹⁸⁴ States might similarly try to apply different registration and identification rules for non-federal elections, if the proposal suggested above were adopted, but such an effort is likely to prove cumbersome and confusing for voters, poll workers, and election officials alike.

To the extent there are worries about more states adopting more restrictive rules for non-federal elections, Congress could also use financial incen-

¹⁸¹ *Id.* at 2258–59.

¹⁸² *Id.* at 2259–60. For further discussion of Congress’s power under the Elections Clause, see generally Issacharoff, *supra* note 4.

¹⁸³ More specifically, it gives Congress power to regulate congressional elections. But since elections for U.S. president almost always accompany congressional elections (the exception being some presidential primaries), the power to regulate the administration of congressional elections is functionally coextensive with the power to regulate federal elections generally.

¹⁸⁴ DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* 332 (5th ed. 2012).

tives to encourage states to apply the same registration rules in all elections. It could offer new federal funds to the states, to be used for election administration improvements, if they apply federal registration and identification rules in all elections. This would fall within Congress's Spending Clause power, as understood by the Court in *National Federation of Independent Business v. Sebelius*.¹⁸⁵ It would have the added benefit of providing badly needed federal money to states for election administration improvements, now that HAVA funds have dried up. As was the case before HAVA, Congress has left state and local jurisdictions holding the bag. They pay for the conduct of elections—including federal elections—without help from the federal government. Federal funding could not only persuade states to accept federal registration and identification rules, but also improve the conduct of election administration generally.¹⁸⁶ In sum, the Grand Election Bargain proposed here is constitutional, and Congress has at its disposal the means by which to ensure that it is effective not only for federal elections, but also for state and local elections.

VI. CONCLUSION

For many voting rights advocates—and I am one of them—the decision in *Shelby County* was a sad milestone. But like most crises, the decision offers an opportunity that should not be wasted. Realizing this opportunity requires that we acknowledge the limitations of the now-defunct preclearance regime in stopping vote denial. It will also require us to take a good, hard look at the data showing that, despite the enormous progress that has been made on voting rights in the past half-century, there is much more work to be done. Even before the decision, too many Americans were left out of the democratic process. This might be tolerable if non-participants were representative of the citizenry, but they are not. The citizens who are less likely to vote are disproportionately Latino, Asian American, poor, less educated, disabled, and transient. These circumstances call for new legislation to protect the right to vote. A Grand Election Bargain could unite Democrats and Republicans behind a compromise package, combining the changes that each side cares about most. Legislation that liberalizes voter registration while imposing a uniform ID requirement provides the best hope

¹⁸⁵ See 132 S. Ct. 2566, 2603–07 (2012) (Spending Clause permits Congress to attach conditions to new federal funds, but not to penalize states by taking away existing funding).

¹⁸⁶ For a previous suggestion that the federal government provide money for election administration as an inducement, see Thad Hall & Dan Tokaji, *Money for Data: Funding the Oldest Unfunded Mandate*, EQUAL VOTE BLOG (June 5, 2007, 3:06 PM), http://moritzlaw.osu.edu/blogs/tokaji/2007_06_01_equalvote_archive.html. State and local election authorities are now in great need of federal money, especially for voting technology maintenance and improvements. With HAVA money gone, many jurisdictions could use financial help to make sure their voting systems are up to date. See Matthew M. Damschroder, *Of Money, Machines, and Management: Election Administration From an Administrator's Perspective*, 12 ELECTION L.J. 195 (2013).

for such a compromise. It would fall squarely within Congress's Elections Clause power, if applied to federal elections, and could be combined with federal funding to incentivize the application of federal registration and identification standards to state and local elections as well. While common ground is hard to find in an age of intense partisan polarization, both sides have a stake in broadening our democracy to include as many eligible citizens as possible.