Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Voting/The Voting Rights Acts

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Shelby County, Ala. v. Holder, 679 F.3d 848 (D.C. Cir. 2012)

Shelby County, Alabama, is a covered district under Section 4(b) of the Voting Rights Act of 1965 and subsequent amendments. Voting districts are covered if they used a voting test or device as of November 1, 1964, or November 1, 1968, and less than half the eligible adult population voted in the national presidential election held in those years. Voting districts are also covered if a court finds that the district has passed voting laws that violate the Fourteenth and Fifteenth Amendments. Section 5 of the Voting Rights Amendment requires a covered district to submit for preclearance all proposed changes in voting laws to the attorney general of the United States or a three-judge federal district court in Washington, D.C. A covered district may "bail out" if a three-judge court determines that "for the previous ten years it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations."

In the wake of the Supreme Court's decision in Northwest Austin Municipal Utility District No. One v. Holder *(2009), Shelby County filed a lawsuit against Attorney General Eric Holder that claimed that the preclearance provisions of the Voting Rights Act, Sections 4(b) and 5, were beyond Congress's enforcement power under the post–Civil War Amendments, violated the Tenth Amendment, and were inconsistent with Article IV. A federal district court rejected these claims. Shelby County appealed to the Court of Appeals for the District of Columbia.*

The Court of Appeals by a 2–1 vote ruled that Section 4(b) and 5 were constitutional. Judge Tatel's majority opinion declared that Congress had sufficient evidence to determine that preclearance remained a vital means for enforcing the Fifteenth Amendment and that the coverage formula was a fair approximation of the localities most likely to discriminate against persons of color. Judge Tatel recognized that much progress has been made since 1965. Why did he nevertheless maintain that preclearance remains an important means for preventing voting discrimination against persons of color? What did he believe constituted voting discrimination against persons of color? Why did he believe the coverage formula was "congruent and proportional?" On what basis did the dissent disagree? Would Judge Williams have constitutional objections to a national preclearance requirement or a preclearance requirement with different conditions or localities? If Section 5 is unconstitutional, when did that provision become unconstitutional? If Section 5 is not unconstitutional, under what future conditions, if any, should a court declare that provision unconstitutional? What is the appropriate deference to Congress in this circumstance?

The Supreme Court in November 2012 agreed to hear an appeal from the Court of Appeals decision in Shelby County. *If you expect the justices to make a ruling based on ideology or political affiliation, then of what significance are the following?: The Voting Rights Amendments in 2006 were passed by the Senate unanimously and were signed into law by President Bush; Judge Tatel was appointed by President Clinton; Judge Griffith (who concurred) was appointed by President Bush; and Judge Williams was appointed by President Reagan. Consider the possible significance of the judicial decision to decide* Fisher v. University of Texas, Austin *(involving the constitutionality of affirmative action) in the same term. Is this part of a broad conservative challenge to liberal race policies? Might crucial justices want to split the difference, handing down a broad conservative ruling in one case but either sustaining the law or only calling for mild adjustments in the other? If so, which case might get which treatment? How does the Supreme Court's decision to hear same-sex marriage cases in the same term fit into this calculus?*

TATEL, CIRCUIT JUDGE:

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The Framers of our Constitution sought to construct a federal government powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence. They feared not state government, but centralized national government, long the hallmark of Old World monarchies. As a result, "[t]he powers delegated by the . . . Constitution to the federal government, are few and defined," while "[t]hose which are to remain in the State governments are numerous and indefinite." Close to the people, state governments would protect their liberties.

But the experience of the nascent Republic, divided by slavery, taught that states too could threaten individual liberty. So after the Civil War, the Reconstruction Amendments were added to the Constitution to limit state power. . . .

Following Reconstruction, however, "the blight of racial discrimination in voting . . . infected the electoral process in parts of our country for nearly a century." . . . The courts and Congress eventually responded. The Supreme Court struck down grandfather clauses, *Guinn v. United States* (1915), and white primaries, *Smith v. Allwright* (1944). Congress "enact[ed] civil rights legislation in 1957, 1960, and 1964, which sought to 'facilitat[e] case-by-case litigation against voting discrimination.'" But Congress soon determined that such measures were inadequate: case-by-case litigation, in addition to being expensive, was slow—slow to come to a result and slow to respond once a state switched from one discriminatory device to the next—and thus had "done little to cure the problem of voting discrimination." Determined to "rid the country of racial discrimination in voting," Congress passed the Voting Rights Act of 1965.

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Reaching beyond case-by-case litigation and applying only in certain "covered jurisdictions," section 5—the focus of this litigation—"prescribes remedies . . . which go into effect without any need for prior adjudication." Section 5 suspends "all changes in state election procedure until they [are] submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General." . . . Either way, preclearance may be granted only if the jurisdiction demonstrates that the proposed change to its voting law neither "has the purpose nor . . . the effect of denying or abridging the right to vote on account of race or color."

Prior to section 5's enactment, states could stay ahead of plaintiffs and courts "'by passing new discriminatory voting laws as soon as the old ones had been struck down.'" But section 5 "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim." It did so by placing "the burden on covered jurisdictions to show their voting changes are nondiscriminatory *before* those changes can be put into effect." Section 5 thus "pre-empted the most powerful tools of black disenfranchisement," resulting in "undeniable improvements in the protection of minority voting rights.

Section 4(b) contains a formula that, as originally enacted, applied section 5's preclearance requirements to any state or political subdivision of a state that "maintained a voting test or device as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964 presidential election." Congress chose these criteria carefully. It knew precisely which states it sought to cover and crafted the criteria to capture those jurisdictions. Unsurprisingly, then, the jurisdictions originally covered in their entirety, Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, "were those southern states with the worst historical records of racial discrimination in voting."

Because section 4(b)'s formula could be both over- and underinclusive, Congress incorporated two procedures for adjusting coverage over time. First, as it existed in 1965, section 4(a) allowed jurisdictions to earn exemption from coverage by obtaining from a three-judge district court a declaratory judgment that in the previous five years (i.e., before they became subject to the Act) they had used no test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." . . . Second, section 3(c) authorizes federal courts to require preclearance by any non-covered state or political subdivision found to have violated the Fourteenth or Fifteenth Amendments. . . .

Significantly for the issue before us, the 1982 version of the Voting Rights Act made bailout substantially more permissive. Prior to 1982, bailout was extremely limited: no jurisdiction could bail out if it had used discriminatory voting tests or practices when it first became subject to section 5, even if it had since eliminated those practices. By contrast, after 1982 the Act allowed bailout by any jurisdiction

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with a "clean" voting rights record over the previous ten years. The 1982 reauthorization also permitted a greater number of jurisdictions to seek bailout. Previously, "only covered states (such as Alabama) or separately-covered political subdivisions (such as individual North Carolina counties) were eligible to seek bailout." After 1982, political subdivisions within a covered state could bail out even if the state as a whole was ineligible.

Setting the stage for this litigation, Congress extended the Voting Rights Act for another twenty-five years in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. In doing so, it acted on the basis of a legislative record "over 15,000 pages in length, and includ[ing] statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination.". . .

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Northwest Austin Municipal Utility District No. One v. Holder (2009) sets the course for our analysis, directing us to conduct two principal inquiries. First, emphasizing that section 5 "authorizes federal intrusion into sensitive areas of state and local policymaking that imposes substantial federalism costs." . . Conditions in the South, the Court pointed out, "have unquestionably improved": racial disparities in voter registration and turnout have diminished or disappeared, and "minority candidates hold office at unprecedented levels." Of course, "[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act." But "the Act imposes current burdens," and we must determine whether those burdens are "justified by current needs."

Second, the Act, through section 4(b)'s coverage formula, "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." And while equal sovereignty "'does not bar . . . remedies for *local* evils,'" the Court warned that section 4(b)'s coverage formula may "fail [ ] to account for current political conditions"—that is, "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance." These concerns, the Court explained, "are underscored by the argument" that section 5 may require covered jurisdictions to adopt race-conscious measures that, if adopted by non-covered jurisdictions, could violate section 2 of the Act or the Fourteenth Amendment. To be sure, such "[d]istinctions can be justified in some cases." *Id.* But given section 5's serious federalism costs, *Northwest Austin* requires that we ask whether section 4(b)'s "disparate geographic coverage is sufficiently related to the problem that it targets."

. . . . We read *Northwest Austin* as sending a powerful signal that congruence and proportionality is the appropriate standard of review. In any event, if section 5 survives the arguably more rigorous "congruent and proportional" standard, it would also survive "rationality" review.

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. . . [T]he Court made clear that the record compiled by Congress must contain evidence of state "conduct transgressing the Fourteenth Amendment's substantive provisions" and that invasions of state interests based on "abstract generalities" or "supposition and conjecture" , cannot be sustained. Once satisfied that Congress has identified a pattern of constitutional violations, however, the Court has deferred to Congress's judgment, even in the face of a rather sparse legislative record. . . .

We read this case law with two important qualifications. First, we deal here with racial discrimination in voting, one of the gravest evils that Congress can seek to redress. . . . Second, although the federalism costs imposed by the statute at issue in *Hibbs* (abrogating sovereign immunity to allow suits against states for money damages) [is] no doubt substantial, the federalism costs imposed by section 5 are a great deal more significant. . . . [S]ection 5 sweeps broadly, requiring preclearance of every voting change no matter how minor. Section 5 also places the burden on covered jurisdictions to demonstrate to the Attorney General or a three-judge district court here in Washington that the proposed law is not discriminatory. Given these significant burdens, in order to determine whether section 5 remains congruent and proportional we are obligated to undertake a review of the record more searching than the Supreme Court's review in *Hibbs*.

Although our examination of the record will be probing, we remain bound by fundamental principles of judicial restraint. Time and time again the Supreme Court has emphasized that Congress's laws are entitled to a "presumption of validity." As the Court has explained, when Congress acts

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pursuant to its enforcement authority under the Reconstruction Amendments, its judgments about "what legislation is needed . . . are entitled to much deference.". . .

Guided by these principles, we begin with *Northwest Austin*'s first question: Are the current burdens imposed by section 5 "justified by current needs"? The Supreme Court raised this question because, as it emphasized and as Shelby County argues, the conditions which led to the passage of the Voting Rights Act "have unquestionably improved[,] . . . no doubt due in significant part to the Voting Rights Act itself." . . . Racial disparities in voter registration and turnout have "narrowed considerably" in covered jurisdictions and are now largely comparable to disparities nationwide. Increased minority voting, in turn, has "resulted in significant increases in the number of African–Americans serving in elected offices." . . .

But Congress found that this progress did not tell the whole story. It documented "continued registration and turnout disparities" in both Virginia and South Carolina. . . . Also, although the number of African Americans holding elected office had increased significantly, they continued to face barriers to election for statewide positions. Congress found that not one African American had yet been elected to statewide office in Mississippi, Louisiana, or South Carolina. In other covered states, "'often it is only after blacks have been first appointed to a vacancy that they are able to win statewide office as incumbents.'"

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Shelby County argues that section 5 can be sustained only on the basis of current evidence of "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment." . . . We disagree. . . . Although the Court did describe the situation in 1965 as one of "unremitting and ingenious defiance of the Constitution," nothing in *South Carolina v. Katzenbach* (1966) suggests that such gamesmanship was necessary to the Court's judgment that section 5 was constitutional. Rather, the critical factor was that "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." . . . [W]hat is needed to make section 5 congruent and proportional is a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate. Given this, the question before us is not whether the legislative record reflects the kind of "ingenious defiance" that existed prior to 1965, but whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate. . . .

Second, Shelby County urges us to disregard much of the evidence Congress considered because it involves "vote dilution, going to the weight of the vote once cast, not access to the ballot." . . . It is true that neither the Supreme Court nor this court has ever held that intentional vote dilution violates the Fifteenth Amendment. But the Fourteenth Amendment prohibits vote dilution intended "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." Although the Court's previous decisions upholding section 5 focused on Congress's power to enforce the Fifteenth Amendment, the same "congruent and proportional" standard, refined by the inquiries set forth in *Northwest Austin,* appears to apply "irrespective of whether Section 5 is considered [Fifteenth Amendment] enforcement legislation, [Fourteenth Amendment] enforcement legislation, or a kind of hybrid legislation enacted pursuant to both amendments." . . .

. . . . Specifically, Congress found that while "first generation barriers"—flagrant attempts to deny access to the polls that were pervasive at the time of *Katzenbach*—have diminished, "second generation barriers" such as vote dilution have been "constructed to prevent minority voters from fully participating in the electoral process." Although such methods may be "more subtle than the visible methods used in 1965," Congress concluded that their "effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice."

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The record contains numerous "examples of modern instances" of racial discrimination in voting, *City of Boerne*, 521 U.S. at 530, 117 S.Ct. 2157. Just a few recent examples:

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- Kilmichael, Mississippi's abrupt 2001 decision to cancel an election when "an unprecedented number" of African Americans ran for office;
- Webster County, Georgia's 1998 proposal to reduce the black population in three of the education board's five single-member districts after the school district elected a majority black school board for the first time;

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- Washington Parish, Louisiana's 1993 attempt to reduce the impact of a majority-African American district by "immediately creat[ing] a new at-large seat to ensure that no white incumbent would lose his seat:"
- Waller County, Texas's 2004 attempt to reduce early voting at polling places near a historically black university and its threats to prosecute students for "illegal voting," after two black students announced their intent to run for office.

The legislative record also contains examples of overt hostility to black voting power by those who control the electoral process. In Mississippi, for instance, state legislators opposed an early 1990s redistricting plan that would have increased the number of black majority districts, referring to the plan publicly as the "black plan" and privately as the "nigger plan," . . . .

First, Congress documented hundreds of instances in which the Attorney General, acting pursuant to section 5, objected to proposed voting changes that he found would have a discriminatory purpose or effect. Significantly, Congress found that the absolute number of objections has not declined since the 1982 reauthorization.

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The second category of evidence relied on by Congress, successful section 2 litigation, reinforces the pattern of discrimination revealed by objections and MIRs. The record shows that between 1982 and 2005, minority plaintiffs obtained favorable outcomes in some 653 section 2 suits filed in covered jurisdictions, providing relief from discriminatory voting practices in at least 825 counties. . . . Considering the evidence required to prevail in a section 2 case and accounting for the obligation of Article III courts to avoid reaching constitutional questions unless necessary, we think Congress quite reasonably concluded that successful section 2 suits provide powerful evidence of unconstitutional discrimination. In addition, as with Attorney General objections, we cannot ignore the sheer number of successful section 2 cases—653 over 23 years, averaging more than 28 each year. . . .

Third, Congress relied on evidence of "the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions." . . . As Congress saw it, this continued need for federal observers in covered jurisdictions is indicative of discrimination and "demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as harassment and intimidation inside polling locations."

Shelby County insists that the Attorney General's decision to dispatch federal observers "indicates only that . . . there might be conduct with the effect of disenfranchising minority citizens, which might or might not be purposeful discrimination." As the district court explained, however, "observers are not assigned to a particular polling location based on sheer speculation; they are only dispatched if 'there is a *reasonable* belief that minority citizens are at risk of being disenfranchised.'" . . .

Fourth, Congress found evidence of continued discrimination in two types of preclearance-related lawsuits. Examining the first of these—actions brought to enforce section 5's preclearance requirement—Congress noted that "many defiant covered jurisdictions and State and local officials continue to enact and enforce changes to voting procedures without the Federal Government's knowledge. . . . In addition to section 5 enforcement suits, Congress found evidence of continued discrimination in "the number of requests for declaratory judgments [for preclearance] denied by the United States District Court for the District of Columbia." The number of unsuccessful judicial preclearance actions appears to have remained roughly constant since 1966: twenty-five requests were denied or withdrawn between 1982 and 2004, compared to seventeen between 1966 and 1982. . . .

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Finally, and bolstering its conclusion that section 5 remains necessary, Congress "f[ound] that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." . . . As Congress explained, "'[o]nce officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result.'"

This brings us, then, to Congress's ultimate conclusion. After considering the entire record, including

- 626 Attorney General objections that blocked discriminatory voting changes;
- 653 successful section 2 cases;
- over 800 proposed voting changes withdrawn or modified in response to MIRs;
- tens of thousands of observers sent to covered jurisdictions;
- 105 successful section 5 enforcement actions;
- 25 unsuccessful judicial preclearance actions;
- and section 5's strong deterrent effect, i.e., "the number of voting changes that have never gone forward as a result of Section 5."

Congress found that serious and widespread intentional discrimination persisted in covered jurisdictions and that "case-by-case enforcement alone . . . would leave minority citizens with [an] inadequate remedy." . . . Given all of this, and given the magnitude and persistence of discrimination in covered jurisdictions, Congress concluded that case-by-case litigation—slow, costly, and lacking section 5's prophylactic effect—"would be ineffective to protect the rights of minority voters."

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. . . . After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference.

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The most concrete evidence comparing covered and non-covered jurisdictions in the legislative record comes from a study of section 2 cases published on Westlaw or Lexis between 1982 and 2004. *Impact and Effectiveness* 964–1124 (report by Ellen Katz et al.). Known as the Katz study, it reached two key findings suggesting that racial discrimination in voting remains "concentrated in the jurisdictions singled out for preclearance." First, the study found that of the 114 published decisions resulting in outcomes favorable to minority plaintiffs, 64 originated in covered jurisdictions, while only 50 originated in non-covered jurisdictions. Thus, although covered jurisdictions account for less than 25 percent of the country's population, they accounted for 56 percent of successful section 2 litigation since 1982. When the Katz data is adjusted to reflect these population differences (based on the Census Bureau's 2004 population estimates, the most recent data then available to Congress), the rate of successful section 2 cases in covered jurisdictions (.94 per million residents) is nearly four times the rate in non-covered jurisdictions. . . .

Second, the study found higher success rates in covered jurisdictions than in non-covered jurisdictions. Specifically, 40.5 percent of published section 2 decisions in covered jurisdictions resulted in favorable outcomes for plaintiffs, compared to only 30 percent in non-covered jurisdictions.

The difference between covered and non-covered jurisdictions becomes even more pronounced when unpublished section 2 decisions—primarily court-approved settlements—are taken into account. As the Katz study noted, published section 2 lawsuits "represent only a portion of the section 2 claims filed or decided since 1982" since many claims were settled or otherwise resolved without a published opinion. According to data compiled by the National Commission on the Voting Rights Act and Justice Department historian Peyton McCrary, there have been at least 686 unpublished successful section 2 cases since 1982, amounting to a total of some 800 published and unpublished cases with favorable outcomes for minority voters. Of these, approximately 81 percent were filed in covered jurisdictions. When this data is broken down state-by-state, separately identifying covered and non-covered portions

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of partially covered states, the concentration of successful section 2 cases in the covered jurisdictions is striking. Of the eight states with the highest number of successful published and unpublished section 2 cases per million residents—Alabama, Mississippi, Arkansas, Texas, South Carolina, Georgia, and the covered portions of South Dakota and North Carolina—all but one are covered. . . .

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Critically, moreover, and as noted above, in determining whether section 5 is "sufficiently related to the problem that it targets," we look not just at the section 4(b) formula, but at the statute as a whole, including its provisions for bail-in and bailout. Bail-in allows jurisdictions not captured by section 4's coverage formula, but which nonetheless discriminate in voting, to be subjected to section 5 preclearance. Thus, two non-covered states with high numbers of successful published and unpublished section 2 cases—Arkansas and New Mexico—were subjected to partial preclearance under the bail-in provision. . . . Bailout plays an even more important role in ensuring that section 5 covers only those jurisdictions with the worst records of racial discrimination in voting. . . . As of May 9, 2012, having demonstrated that they no longer discriminate in voting, 136 jurisdictions and sub-jurisdictions had bailed out, including 30 counties, 79 towns and cities, 21 school boards, and 6 utility or sanitary districts. . . .

The importance of this significantly liberalized bailout mechanism cannot be overstated. Underlying the debate over the continued need for section 5 is a judgment about when covered jurisdictions—many with very bad historic records of racial discrimination in voting—have changed enough so that case-by-case section 2 litigation is adequate to protect the right to vote. Bailout embodies Congress's judgment on this question: jurisdictions originally covered because of their histories of discrimination can escape section 5 preclearance by demonstrating a clean record on voting rights for ten years in a row. . . . Shelby County complains that bailout helps only "at the margins" and the dissent emphasizes that only about 1 percent of covered jurisdictions and subjurisdictions have applied for bailout. But absent evidence that there are "clean" jurisdictions that would like to bail out but cannot meet the standards, the low bailout rate tells us nothing about the effectiveness of the bailout provision. As the dissent concedes, since 1982 no bailout application has been denied.

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. . . . [A]lthough the section 4(b) formula relies on old data, the legislative record shows that it, together with the statute's provisions for bail-in and bailout—hardly "tack[ed] on," *id.* at 901 (internal quotation marks omitted), but rather an integral part of the coverage mechanism—continues to single out the jurisdictions in which discrimination is concentrated. Given this, and given the fundamental principle that we may not "strik[e] down an Act of Congress except upon a clear showing of unconstitutionality," we see no principled basis for setting aside the district court's conclusion that section 5 is "sufficiently related to the problem that it targets," *Nw. Austin*.

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We turn, finally, to the dissent's argument that section 5 "requires a jurisdiction not only to engage in some level of race-conscious decisionmaking, but also on occasion to sacrifice principles aimed at depoliticizing redistricting." . . . Shelby County neither challenges the constitutionality of the 2006 amendments or even argues that they increase section 5's burdens, nor does it argue that section 5 requires covered jurisdictions to undertake impermissible considerations of race. These issues, in other words, are entirely unbriefed, and as we have repeatedly made clear, "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." Where, as here, "counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, important questions of far-reaching significance are involved." *Id.* (internal quotation marks omitted).

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In *Northwest Austin,* the Supreme Court signaled that the extraordinary federalism costs imposed by section 5 raise substantial constitutional concerns. . . . But Congress drew reasonable conclusions from the extensive evidence it gathered and acted pursuant to the Fourteenth and Fifteenth Amendments, which entrust Congress with ensuring that the right to vote—surely among the most important

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guarantees of political liberty in the Constitution—is not abridged on account of race. In this context, we owe much deference to the considered judgment of the People's elected representatives. We affirm.

WILLIAMS, Senior Circuit Judge, dissenting:

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Section 4(b) of the act states two criteria by which jurisdictions are chosen for [preclearance]: whether a jurisdiction had (1) a "test or device" restricting the opportunity to register or vote and (2) a voter registration or turnout rate below 50%. But § 4(b) specifies that the elections for which these two criteria are measured must be ones that took place *several decades* ago. The freshest, most recent data relate to conditions in November 1972—34 years before Congress extended the act for another 25 years (and thus 59 years before the extension's scheduled expiration). . . .

Of course sometimes a skilled dart-thrower can hit the bull's eye throwing a dart backwards over his shoulder. As I will try to show below, Congress hasn't proven so adept. Whether the criteria are viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of § 5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?), they seem to me defective. They are not, in my view, "congruent and proportional," as required by controlling Supreme Court precedent. My colleagues find they are. I dissent.

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. . . . Preclearance now has an exclusive focus—whether the plan diminishes the ability of minorities (always assumed to be a monolith) to "elect their preferred candidates of choice," irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration—and thus less of the political isolation that concentration spawns. The amended § 5 thus not only mandates race-conscious decisionmaking, but a particular brand of it. In doing so, the new § 5 aggravates both the federal-state tension with which *Northwest Austin Municipal Utility District No. One v. Holder* (2009) was concerned and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination.

Another 2006 amendment makes the § 5 burden even heavier. . . . By inserting discriminatory purpose into § 5, and requiring covered jurisdictions affirmatively to prove its absence, Congress appears to have, at worst, restored "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting" and at best, "exacerbate[d] the substantial federalism costs that the preclearance procedure already exacts."

The majority correctly notes that Shelby did not argue that either of these amendments is unconstitutional. Neither do I. Appellant does argue however that § 4(b) is unconstitutional, that is, that § 4(b) is not a congruent and proportional response to the problem currently posed by voting discrimination. To answer that question one must necessarily first assess the severity of the consequences of coverage under § 4(b) (i.e., subjection to § 5 as it exists today).

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There appears to be no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout. Quite the opposite. To the extent that any correlation exists, it appears to be negative—condemnation under § 4(b) is a marker of higher black registration and turnout. Most of the worst offenders—states where in 2004 whites turned out or were registered in significantly higher proportion than African-Americans—are not covered. These include, for example, the three worst—Massachusetts, Washington, and Colorado. And in Alabama and Mississippi, often thought of as two of the worst offenders, African-Americans turned out in greater proportion than whites.

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. . . . Covered jurisdictions have *far more* black officeholders as a proportion of the black population than do uncovered ones. Of the ten states with the highest proportion of black elected officials relative to population, eight are covered states, with the top five all being fully covered states (Virginia, Louisiana, South Carolina, Mississippi, and Alabama). Nor can the poor scores achieved by some uncovered states be chalked up to small black populations. Illinois, Missouri, Delaware and Michigan,

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where African-Americans comprise at least 10% of the citizen voting-age population (CVAP), all fall to the left (i.e., on the worse side) of every one of the states fully covered by § 4(b). While the relatively high number of black officeholders in covered states might be taken as a testament to § 5's *past* success, no one could credibly argue that the numbers are proof of the coverage scheme's continued rationality.

In upholding § 5, the district court acknowledged that the number of black elected officials had increased but found the nature of the positions insufficient, pointing particularly to the nationwide disparity between the black proportion of the population (11.9%) and the number of black officials elected to *statewide* office (5%). . . . But if on that account one thinks there has been a shortfall in the covered states, it might be caused in part by the Justice Department's policy of maximizing majority-minority districts, with the concomitant risks of "isolating minority voters from the rest of the State" and "narrowing [their] political influence to only a fraction of political districts." If African-American candidates primarily face solidly African-American constituencies, and thus develop political personas pitched overwhelmingly to the Democratic side of the aisle, it would hardly be surprising that they might face special obstacles seeking statewide office (assuming, of course, racially-polarized voting, as § 5 does).

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[O]bservers are being sent to covered states more often than to uncovered ones. Six of the "worst" eight states are covered ones. But a number of factors undermine any serious inference. First, the National Commission report explains that it has captured "each occasion when federal observers are detailed to a jurisdiction *covered by Section 5 or Section 203*." The apparent implication is that the Commission didn't purport to collect data for jurisdictions not covered by either of those sections; if so, the data are useless for comparative purposes. . . . The same Department that administers § 5 preclearance also decides where to send observers, so it is unsurprising that the covered states, which are already in the Department's sights, would also receive the most observers. . . .

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[Studies of lawsuits suggest] a more narrowly tailored coverage formula—capturing only Mississippi, Alabama, and Louisiana, and possibly the covered portions of South Dakota and North Carolina—might be defensible. But beyond these, the covered jurisdictions appear indistinguishable from their uncovered peers. The five worst uncovered jurisdictions, including at least two quite populous states (Illinois and Arkansas), have worse records than eight of the covered jurisdictions: the six covered states appearing to the right, plus two fully covered states—Arizona and Alaska—which do not appear on the chart at all because there has been not one successful § 2 suit in those states in the whole 24-year period. Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered (five if we add back in the covered portion of South Dakota). A formula with an error rate of 50% or more does not seem "congruent and proportional."

To bolster these numbers, the majority relies on an account of purportedly successful, but unreported § 2 cases, numbers that it rightly notes one should "approach . . . with caution." Indeed, beyond the serious concerns about these data already elucidated by the majority (e.g., completely different groups gathered the data regarding covered and uncovered jurisdictions), we also have almost no information for how particular cases [are identified] as "successful" or not. All we know is that he required "some evidence" that the case was "resolved" under § 2 and "some reference" to settlement. . . .

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As to the imputed deterrence, it is plainly unquantifiable. If we assume that it has played a role, how much should we inflate the covered states' figures to account for it, and which covered states? Given much weight, the supposed deterrent effect would justify continued VRA renewals out to the crack of doom. . . .

To recap, of the four metrics for which comparative data exist, one (voter registration and turnout) suggests that the coverage formula completely lacks any rational connection to current levels of voter discrimination, another (black elected officials), at best does nothing to combat that suspicion, and, at worst, confirms it, and two final metrics (federal observers and § 2 suits) indicate that the formula, though not completely perverse, is a remarkably bad fit with Congress's concerns. Given the drastic remedy imposed on covered jurisdictions by § 5, as described above, I do not believe that such equivocal evidence can sustain the scheme.

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Nor is the coverage formula materially helped by the VRA's bailout provision. . . . A covered jurisdiction can now obtain bailout if, and only if, it can demonstrate that, during the preceding *ten* years, it has (simplifying slightly): (1) effectively engaged in no voting discrimination (proven by the absence of any judicial finding of discrimination or even a Justice Department "objection" (unless judicially overturned)); (2) faithfully complied with § 5 preclearance; (3) "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process"; and (4) engaged in "constructive efforts to eliminate intimidation and harassment of persons exercising rights protected" under the act and "in other constructive efforts, such as the expanded opportunity for convenient registration." Perhaps because of these opaque standards, actual bailouts have been rare; only 136 of the more than 12,000 covered political subdivisions (i.e., about 1%) have applied for bailout (all successfully).

All of this suggests that bailout may be only the most modest palliative to § 5's burdens. One scholar hypothesizes that bailout may "exist [ ] more as a fictitious way out of coverage than [as] an authentic way of shoring up the constitutionality of the coverage formula." . . .

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A current political dispute—state adoptions of voter identification requirements—highlights the oddity of § 4(b). In 2005, the state of Indiana enacted a law requiring its citizens to present a government-issued photo identification before voting. Against a variety of legal challenges, the Supreme Court upheld the law. In 2011, Texas and South Carolina both passed similar laws. But because of those states' inclusion under § 4(b), they had to look to Justice Department attorneys in Washington to seek further approval. In the end, the Department blocked both laws.

Why should voter ID laws from South Carolina and Texas be judged by different criteria (at a minimum, a different burden of persuasion, which is often critical in cases involving competing predictions of effect) from those governing Indiana? Indiana ranks "worse" than South Carolina and Texas in registration and voting rates, as well as in black elected officials. As to federal observers, Indiana appears clearly "better"—it received *none*. As to successful § 2 suits South Carolina and Texas are "worse" than Indiana, but all three are below the top ten offenders, which include five uncovered states. This distinction in evaluating the different states' policies is rational?

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