VOTING RIGHTS AT 50

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ABSTRACT

The fiftieth anniversary of the Voting Rights Act comes at a difficult juncture. The Supreme Court's decision in Shelby County *dismantled the core preclearance provisions of what had been the most successful civil rights law in American history. At the same time, the right to cast a ballot free of unnecessary legal encumbrances is more contested than it has been in generations. Yet, the story is more complex. The landscape of voter discrimination today bears little resemblance to the formalized Jim Crow barriers to the black franchise. Even before* Shelby County, *the Voting Rights Act struggled to keep up with the new voting challenges, which have evolved from having been exclusively Southern obstacles defined by race to now emerge as nationwide electoral modifications with at best limited evidence of direct racial motivation. The narrow geographic confines of section 5 of the Voting Rights Act were largely supplanted by other legal protections of the right to vote, well before* Shelby County.

This Article turns to other legal tools that have been invoked since 1965 to address voting claims outside the purview of section 5. The claim is that more generalized protection of the franchise can better respond to the more fact-laden challenges presented by contemporary voting rights claims. The Article draws on personal experiences with four voting cases that rely on tools ranging from section 2 of the Voting Rights Act to the Constitution to the common law in order to address claims that fall outside the domain of section 5. These cases illustrate the way in which a more general framework for voting rights protection can be used to tackle electoral schemes that were neither subject to section 5's technical scrutiny, nor were Southern, racially-specific, or even institutional in nature.

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I. INTRODUCTION

The fiftieth anniversary of the Voting Rights Act (VRA) should have been a moment of unalloyed celebration. The Act set about to empower black voters for the first time since Reconstruction and succeeded beyond all realistic hopes. Black voter registration and turnout in the U.S. today are basically the same as white rates of participation, and black elected officials occupy offices from the local to the national in a manner simply unimaginable in 1965.

Yet the anniversary of the Act comes at a difficult juncture. Most evidently, the Supreme Court, in a case from Alabama's own Shelby County, struck down the trigger mechanism for section 5 of the VRA.[1] Without doubt, section 5 of the Act, the provision that prevented re-imposition of disenfranchising devices inherited from Jim Crow, was the most successful civil rights statute in American history. To have it legally undone in a suit brought by a county from the historic battlegrounds for the franchise was a cruel twist of the knife.

Beyond the symbolic, *Shelby County* comes just as the ability to cast a ballot free of legal shenanigans is more seriously under challenge than at any time since the civil rights revolution. As discussed elsewhere,[2] voter access has become a new and unfortunate domain of partisan conflict, with the potential for renewed racial impact. For the first time in fifty years, these ballot wars arise without the protective cover of the preclearance provisions of the Voting Rights Act, at least in those formerly covered jurisdictions.

The combination of the VRA's anniversary and the current ballot struggles offers an opportunity for reflection on the many successes of the struggle for the franchise. I want to take this opportunity to look back on the history of the modern struggle for voting rights but to do so in consideration of some of the landmark cases in my personal history as a lawyer in this area of law. I have spent a significant part of the thirty years since I graduated from law school in the academic development of a field of study on the law of democracy.[3] Here, however, I want to focus more directly on some actual case experiences that helped shape my views on what has been effective and on some unexpected sources of potential protections for the still complicated right to vote.

Before turning to the particulars, however, it is worth giving a bit of context. I came to this area of law in the 1980s, well after the heyday of

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

2. *See* Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363 (2015); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013).

3. *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (4th ed. 2012).

section 5. The work of enfranchisement had largely been done—not entirely, to be sure—but the dramatic, immediate effects of section 4 and section 5 of the Act had already expanded the electoral presence of minority votes, likely beyond what would have seemed conceivable in 1965. At the same time, the law had moved on to the "second generation"[4] struggles for what *Reynolds v. Sims*—another Alabama milestone—had proclaimed as the aim of an "equally effective" right to vote.[5] The most significant legal battles, culminating in the 1982 amendment to the Voting Rights Act[6] and the Supreme Court's decision in *Thornburg v. Gingles*,[7] were not over voter access to the polls but instead over the electoral systems that over-rewarded electoral majorities and dampened the prospects of minority representatives being elected to office. Not only did the challenges to at-large elections emerge as the heart of litigation,[8] but for the first time since the passage of the VRA, the Justice Department of the 1980s conspicuously withdrew from meaningful engagement with voting rights, especially as the Republican Party began to re-emerge in the South. Voting rights litigation in this period shifted from the purview of the federal government to the increased centrality of public interest litigants and local activists.

A different time, a different legal landscape, and a different conception of how to use the law to advance protections of the right to vote. I will indulge some reflections on four cases over the years that helped crystallize my thinking on the complexity of voting rights law and the multiplicity of tools needed after the initial post-1965 period of rapid black enfranchisement in the Jim Crow South. The particular question is a perennial puzzle in legal regulation: At what level of specificity or generality is the law most effective? The case examples I provide are each premised on the use of laws of more general application than the surgically precise section 5 preclearance regime. Even before Chief Justice Roberts found the narrow geographical confines of the Act to be a source of

4. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991) (describing the "second generation" of voting rights cases as challenges to "indirect structural barriers such as at large, vote-diluting elections").

5. 377 U.S. 533, 565 (1964) ("Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.").

6. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

7. 478 U.S. 30 (1986).

8. As a result of the 1982 Amendments to section 2 of the Voting Rights Act, at-large elections in particular became a common and vulnerable form of elections for civil rights challengers to target. *See, e.g.*, Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1855 n.111 (describing the proliferation of successful challenges to election forms that diluted black voting power).

constitutional liability,[9] that same administrative precision had already signaled the need for alternative approaches by the time I engaged voting rights law in the 1980s. I turn to these four case examples not to claim outsized importance to the cases I happened to have worked on, but to open up the moment of reflection to encompass not only the successes of the 1965 vision of the Voting Rights Act, but also its limitations.

II. FOUR NOT-SO-EASY PIECES

As the Voting Rights Act aged, the gap between its primary regulatory structure and the issues of the day grew. The requirement that jurisdictions under the preclearance regime of section 5 submit to administrative oversight continued in effect, but the number of objections by the Department of Justice (DOJ) under section 5 plummeted.[10] The decline of a visible enforcement regime under section 5 raised questions about its continued relevance even as it was being renewed again in 2006.[11] By the time the Court reengaged with the constitutionality of section 5 in *Shelby County*, the majority and dissent parted ways on the question of whether there was any longer a factual predicate for coverage under the Act. For the majority, the lack of objections was an indication that the Act had run its course.[12] Meanwhile, for the dissent, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[13]

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9. *See* Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2628 (2013). ("In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. . . . Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.").

10. For instance, between January of 2000 and December of 2012, there were only seventy-three such objections, or a mean of 5.4 per year. *See Voting Rights Act: Objections and Observers*, LAW. COMMITTEE FOR C.R. UNDER L., http://lawyerscommittee.org/projects/section_5 [https://web.archive.org/web/20150507170821/http://www.lawyerscommittee.org/projects/section_5]. These objections have usually clustered around redistricting after the decennial Census. *See* Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 756 (2006) (noting that "the first years after a new Census and redistricting typically generate the greater number of DOJ objections").

11. *See* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 389 n.17 (2008) (summarizing the various criticisms raised regarding the VRA's re-authorization).

12. *Shelby Cnty.*, 133 S. Ct. at 2626 (calling it "illuminating" that "[i]n the last decade before reenactment, the Attorney General objected to a mere 0.16 percent" of proposed changes in covered jurisdictions). Compare this diminishing relevance of preclearance to the early proliferation of preclearance objections in Alabama: Between 1969 and 1980, the Department of Justice blocked seventy-one proposed changes in election procedures in this state alone. *See* Chandler Davidson, *Minority Vote Dilution: An Overview*, *in* MINORITY VOTE DILUTION 1, 11 (Chandler Davidson ed., 1984).

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

Similarly, after the early onslaught against pervasive at-large electoral systems across the country in the 1980s and early 1990s, section 2—the provision that had been significantly amended in 1982—diminished in litigation centrality as well. As with section 5, the decline in enforcement actions under section 2 was a product of success. By the 1990s, almost every significant local governmental body electing its representatives at large or from multimember districts had been challenged if there was a significant minority presence in that community.[14]

Neither of the central provisions of the VRA fit the voting battles of the twenty-first century particularly well. Each had succeeded admirably in the harm to which it was directed, either complete exclusion of black citizens in the Jim Crow South from the franchise or continued frustration of aspirations for minority representation as a result of at-large elections. In particular, section 5 is most concerned with the actual mechanics of voting, but the extraordinary administrative review of state regulations was applied only to limited parts of the country. Even when in force, section 5 would not have covered efforts to diminish voting opportunities in Ohio, Pennsylvania, or Wisconsin. Moreover, the main thrust of section 5 was the reluctance of jurisdictions to risk administrative rejection by the DOJ, something that itself waned in the latter years of the Act.

A. The Pervasiveness of Obstacles to Voting

Mississippi opened the post-Reconstruction era of formal disenfranchisement of black citizens through the hydra-headed provisions of its 1890 constitutional reform, beginning the so-called Redemption of white rule in the postwar South.[15] Many of the more notorious disenfranchising devices, such as literacy tests and grandfather clauses, were the prime focus of the Voting Rights Act and were relegated to the dust bin of history by the combined operations of sections 4 and 5 of the Act. Yet, in *Mississippi State Chapter, Operation PUSH v. Allain*,[16] there remained the last extant provision of the post-Reconstruction Black Codes, requiring what was known as dual registration—the obligation to register to

14. Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 921–22 (2008) (discussing the abandonment of at-large and multimember district electoral systems after widespread litigation and threats of litigation after 1982).

15. The 1890 Mississippi Constitution's disenfranchising provisions included a poll tax, MISS. CONST. art XII, §§ 241, 243 (1890), and a literacy test, *id.* § 244. In the words of the Jackson *Daily Clarion* from 1892, "The political possibilities, if not inevitabilities, in States with large negro votes, was the apprehension out of which the new Constitution was produced." James Stone, *A Note on Voter Registration Under the Mississippi Understanding Clause, 1892*, 38 J. OF SOUTHERN HIST. 293, 293 (1972).

16. 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom.* Miss. State Chapter, Operation PUSH, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991).

vote in person both in the county seat and before the local municipal registrar.[17] Though facially neutral in the fashion of many of the disenfranchising constitutional provisions, dual registration uniquely burdened the poorer, relatively immobile black population for whom a trip to register at the county level—sometimes involving fifteen miles of travel one-way in rural areas of the state—was itself a significant barrier, even almost a century after the Code was enacted. That burden was all the greater for agricultural laborers who still worked in a largely field-hand economy and were subject to vigilance by white overseers. Add in the historical resonance of the county courthouse as the traditional site of antebellum slave markets and postbellum lynchings, presented to the court through historian Steven Hahn,[18] and a secondary mechanism of suppressing black voting emerged even when the first tier of more obvious barriers, such as literacy tests, was removed.

Perhaps because of the lower salience of dual registration as a bar to enfranchisement, the Department of Justice had failed to object when the latest iteration of this requirement[19] had been presented for preclearance in 1984.[20] This left the challenge in *PUSH* outside the most important statutory remedy under the VRA. At the same time, a constitutional Equal Protection claim would require proof of discriminatory purpose,[21] not just during the initial adoption in the nineteenth century but in the more complicated setting of a subsequent, largely rational twentieth century administrative overhaul of the antiquated Mississippi election code. To further complicate the case, Mississippi had responded to the advent of federal oversight under the VRA by not purging voter registration rolls even when voters had moved or died, presumably on the theory that doing nothing would avoid any federal reporting obligations. The result was that discriminatory purpose could not readily be inferred from the totality of the

17. *Id.* at 1251. These dual registration laws were originally codified at Mississippi Code of 1892, ch. 93 §§ 3028, 3029 (1892) (providing for separate voter registration for municipal elections).

18. Steven Hahn, *Historical Circumstances and Purposes Involved in the Adoption of Dual Registration and the Abolition of Satellite Registration by the State of Mississippi*, June 1986, 29, *cited in* JOHN DITTMER, LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI 452 n.2 (1994).

19. MISS. CODE ANN. § 23-15-223 (Spec. Pamph. 1986) (recodifying as an "election code" all statutes related to registration and voting, including the dual registration requirement). The amended statute purported to streamline voter registration for municipalities with populations of 500 or more by vesting in the municipal registrar the power to perform county voter registration. *PUSH*, 674 F. Supp. at 1249. But dual registration persisted for a variety of reasons, including rules allotting broad discretionary power to county clerks who decided when, if it all, to perform "satellite registration" in communities located far from the county seat. *Id.* at 1250.

20. *PUSH*, 674 F. Supp. at 1249.

21. *See* Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

circumstances,[22] as there were counties in Mississippi that showed voter registration numbers equal to more than 100 percent of the living population and "official" voter registration rates that would be the envy of any other state.[23] Further, the Census survey estimate reported extraordinary levels of black voter registration, even exceeding white levels in the state.[24]

Section 5 of the VRA served as a rifle, aiming a precise volley at the most notorious voter exclusion practices in the heart of the Jim Crow South. Where the target is more elusive, however, a broader-gauged shotgun, to pursue the hunting imagery, may prove superior. Even without the targeted administrative protections of section 5, it was possible to challenge the dual registration system under more generalized protections of a different section of the Act. The broad language of section 2 of the Act, as amended in 1982, barred any abridgement of minority voting rights without being tied to the preclearance regime or even to any geographic limitation.[25] Further, section 2 was an independent, private right of action that was not foreclosed by the failure of the DOJ to object to a practice

22. *See Washington*, 426 U.S. at 242 (stating that discriminatory purpose "may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another").

23. *See PUSH*, 674 F. Supp. at 1253 (noting that official 1984 census survey results indicated 85.6% of Mississippi's black voting age population reporting that they were registered to vote).

24. *Id.* (indicating a black registration rate than was 4.2% higher than the white registration rate). Proof of an inhibitive effect on black voter registration demanded that the plaintiffs refute the November 1984 Current Population Survey conducted by the U.S. Bureau of the Census, which falsely indicated that despite electoral hurdles, black voter registration had actually exceeded white voter registration in the most recent election. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P20-397, CURRENT POPULATION REPORTS: VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1984 (ADVANCE REPORT) 8 (1985). At trial this was rebutted by a regression analysis comparing compliance rates from jury summonses that demonstrated that between 1981 and 1985 the registration rate for whites was approximately 25 percentage points above that of blacks. *PUSH*, 674 F. Supp. at 1254. The statistical models are explained at length in Allan J. Lichtman & Samuel Issacharoff, *Black/White Voter Registration Disparities in Mississippi: Legal and Methodological Issues in Challenging Bureau of Census Data*, 7 J.L. & POL. 525 (1991).

25. The expanded section 2 included the following addition:

> (b) A violation of subsection (a) of this section is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b) (1982) (first emphasis added).

under section 5, even in a jurisdiction subject to preclearance, such as Mississippi.[26]

As the legislative history of section 2 makes clear, and as further developed in the next section, section 2 also had a distinct legislative purpose. This should come as no surprise, as legislation is invariably the product of the perceived need to address a particular societal ill.[27] In the case of an amended section 2, this was the moment that at-large elections loomed as the largest obstacle to realizing an "[e]ra of [d]escriptive [r]epresentation."[28] Despite being addressed as a problem quite distinct from dual registration requirements in rural Mississippi, section 2 had two major advantages over section 5 for these purposes. First and foremost, section 2 empowered private litigants to act independently of DOJ regulators, allowing both a fertile, additional source of creative lawyering to enter the mix and ensuring independence from political oversight that might compromise any process of exclusive administrative review. Second, because section 2 did not have a precise target in either literacy tests or geography, it was written in broad language that allowed the judiciary to play a key role in giving the Act its common law contours.[29] Thus, for example, the key opinion interpreting section 2, *Thornburg v. Gingles*,[30] fundamentally recast the evidentiary requirements for proof of a section 2 challenge to the core statutory concern over at-large voting—only four years after Congress passed a much less tractable statutory scheme.[31]

Ultimately, as presented at trial, the heart of the case was evidentiary, not legal. The key issue was rebutting the presumptive authority of the census survey data that indicated, based on a limited sample of the population, that black registration rates were not suppressed in Mississippi. While the continuing effects of disenfranchisement were self-evidently obvious, proving it was another matter. Fortunately, working for me at the time was an incredibly enterprising paralegal named Barry Fisher, who

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26. *PUSH*, 674 F. Supp. at 1261 (discussing Thornburg v. Gingles, 478 U.S. 30 (1986), in explaining that because section 5 preclearance is both procedurally and substantively different from a section 2 claim, preclearance does not preclude private action against the DOJ-approved statute).

27. This classic canon of statutory interpretation instructs the judiciary "to make such construction as shall suppress the mischief, and advance the remedy." Heydon's Case (1584) 76 Eng. Rep. 637, 638. As Blackstone interpreted this rule, the best mode of discerning statutory purpose is "by considering the reason and spirit of it . . . [f]or when this reason ceases, the law itself ought likewise to cease with it." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 61 (emphasis omitted).

28. Pitts, *supra* note 14, at 904.

29. The 1982 amendments allowed plaintiffs to prevail by showing that the challenged election law "had the effect of denying a protected minority an equal chance to participate in the electoral process." *Thornburg*, 478 U.S. at 44 n.8.

30. 478 U.S. 30 (1986).

31. This transformation of section 2 to focus primarily on the issue of polarized voting patterns rather than a loose "totality of the circumstances" test is described in Issacharoff, *supra* note 8.

would later go on to Harvard Law School and a clerkship for Judge Myron Thompson in Alabama. Fisher spent enough time poking around the voter registration records that he became a regular at the federal courthouse in the Northern District of Mississippi. In the course of his investigation, he became friendly with the clerks at the courthouse who in turn were intrigued by his examination of the records. At one point, Fisher inquired how exactly they used the voter information to send out jury summonses. In response, the clerks complained that outgoing summonses, randomly compiled from voter registration rolls, were being routinely returned as undeliverable by the post office. Further, it turned out that the court processes required that all such undeliverable returns be logged so that the court at least could keep accurate records for future jury summonses. This in turn meant there was a record of the validity of the registration rolls, with specific names and county of residence. These clerks may not have realized, as we soon did, that the mailings were undeliverable not due to a misspelled address or zip code, but because the recipient—drawn from the registration records—did not exist or had been dead for years. And because the records were kept on a county-by-county basis, the rate of improper registration could be compared to the racial composition of the counties. Add in Alan Lichtman, a quantitative historian, and we were able to generate a complicated statistical model based on a regression examination of voter registration data to summon prospective jurors compared to the black and white composition of different parts of northern Mississippi. The resulting regression model allowed an approximation of the real levels of black and white voter registration based on the rate of summonses returned as undeliverable because of no known recipient at the address.

With that critical evidentiary hurdle overcome, the rest of the case fell into place. Individual black citizens from rural Quitman County described the obstacles presented by rural residents trying to register. And the import for rural Mississippi blacks of having to register a second time in the white part of town was not lost on a wise federal judge, well-versed in the reality of Mississippi only slowly emerging into the Civil Rights Era. Section 2 of the VRA was not a perfect fit for the case, but it was supple enough and expansive enough to provide a broad legal platform to confront enduring wrongs.

B. Spreading the Horizons

A symposium on the Voting Rights Act at the University of Alabama reinforces the clear geographic focus of the Act. The great movement that delivered the VRA can claim its Ground Zero in the marches and the suffering of Selma, Montgomery, and Birmingham, and no site more fully captures the geography of voting rights than the Edmund Pettus Bridge.

The events of Alabama effectively brought the Act into being and gave it a sense of time and place. Even the Supreme Court's deferential review of the extraordinary features of section 5 of the Act were bound up with the recognition that the Act properly targeted those sections of the country that stood out as outliers in the willful mistreatment of aspiring black voters.[32] There was no separation between the force of the Act and its tailoring to the primacy of what in other domains would be referred to as, "[l]ocation, location, location."[33]

Once removed from the immediate scourge of Jim Crow, the VRA encountered issues that transcended its initial geographic focus. What has emerged as the second generation of voting claims[34] took up the effectiveness of the black franchise once black citizens were able to register and cast a ballot. The main target of these cases was at-large and multimember elections, each a mechanism that accentuated the voting power of the majority at the expense of the minority. As implemented in the South during the Redemption period following the defeat of Reconstruction[35] as well as in the North during the era of Progressive reforms,[36] at-large elections allowed a cohesive 60% majority to cast its

32. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) (discussing how the Voting Rights Act originally targeted only "certain parts of our country" where "an insidious and pervasive evil" had manifested).

33. The phrase "[l]ocation, location, location" has been attributed to British real estate tycoon Lord Harold Samuel. Sophie Brodie, *It's Location, Location, Location for Land Secs*, TELEGRAPH (Nov. 14, 2007, 7:20 AM), http://www.telegraph.co.uk/finance/2819464/Its-location-location-location-for-Land-Secs.html. But a *New York Times* etymological inquiry revealed that Lord Samuel was only fourteen when the phrase appeared in a 1926 edition of the *Chicago Tribune*, leaving the original source of this quip unknown. William Safire, *Location, Location, Location*, N.Y. TIMES MAG., June 26, 2009, at MM14.

34. *See* Guinier, *supra* note 4, at 1093. *See generally* Issacharoff, *supra* note 8, at 1838–45 (discussing the evolution of voting rights litigation and its second generation of minority vote dilution challenges); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1724 n.83 (1993) (describing a generational evolution of voting from participation to aggregation to governance).

35. *See* BERNARD GROFMAN, CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 24 (Chandler Davidson ed., abr. ed.1992) (detailing the "disenfranchisement by indirection" that newly formed at-large elections created for black voters during Reconstruction in the South); J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 37 (1999) (illustrating the mechanics of minority vote dilution as the legal response of a fearful white citizenry during the Progressive Era); J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, *in* MINORITY VOTE DILUTION, *supra* note 12, at 27, 32–33 (explaining the introduction of at-large election systems in the South, which in some cases retrogressively replaced post-Civil War institutions that were "designed to guarantee minority representation" (internal quotation marks omitted)).

36. *See* Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence*, *in* MINORITY VOTE DILUTION, *supra* note 12, at 65, 67, 70 (exploring the ineffectiveness of black political participation as a result of at-large elections that appeared in Northern cities, such as Boston, Detroit, and New York, during the Progressive era); *see also* Davidson, *supra* note 12, at 11 ("Although the Progressive movement is still portrayed in many civics textbooks as motivated by high-minded 'good government'

votes for, e.g., all five city commissioners, rather than confine its voting power to single districts, where it might prevail in only three of five contests. This second generation of voting rights suits came into full flower after the Supreme Court decision in *City of Mobile v. Bolden*,[37] its repudiation in the 1982 amendments to the VRA,[38] and the landmark decision in *Thornburg v. Gingles*.[39] This was also the period in which I most actively litigated voting rights cases, and to one of these I now turn.

In large part, the facts of the case I address were typical of the period, but in some symbolic sense the setting was significant—perhaps not by Alabama standards, but significant nonetheless. The lawsuit followed years of political frustration for a well-organized black community with impressive leadership, which found itself fighting for political representation in a city where one of the major race riots in American history had occurred in 1908;[40] this conflagration made its historic mark by precipitating the founding meeting of the NAACP.[41] These historic markers may deceivingly evoke images of a Southern civil rights battleground. Yet in fact, the lead plaintiff was a black member of the Sangamon County Board of Springfield, Illinois,[42] outside the geographic skeleton of Jim Crow.

As it happens, one of the early benchmark cases of amended section 2 of the Act took place in a jurisdiction not covered by section 5 of the VRA, and the targeted voting statute was not a traditional inhibitor of access to the polls. Instead, the class of black voters brought an action against the City of Springfield alleging that its at-large election system, which expressly prohibited the division of the city into wards, served to dilute the voting power of the blacks such that it was virtually impossible for them to

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reformers, many of the changes in election rules were aimed at diminishing the clout of the working classes and ethnic and political minorities, and they usually had that effect.").

37. 446 U.S. 55 (1980).

38. *See* S. REP. NO. 97-417, at 67 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 245 ("With this clarification, Section 2 explicitly codifies a standard different from the interpretation of the former language of Section 2 contained in the Supreme Court's *Mobile* plurality opinion . . . .").

39. 478 U.S. 30 (1986).

40. For two days a white mob lynched, seriously injured, and destroyed the property of black citizens, driving over 2,000 from the city. Eight citizens, including an eighty-four year old man, were killed. *See* LANGSTON HUGHES, FIGHT FOR FREEDOM: THE STORY OF THE NAACP 20 (1962); 1 CHARLES FLINT KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE 9 (1967).

41. In response to the Springfield riots and the lynching epidemic that had claimed over 1,000 black lives in the decade preceding the riots, a group of prominent Americans signed a call for a conference in New York. From this conference emerged a National Negro Committee, which the following year was renamed the National Association for the Advanced of Colored People. *See* HUGHES, *supra* note 40, at 20–23.

42. *See* McNeil v. City of Springfield, Ill., 658 F. Supp. 1015, 1032 (C.D. Ill. 1987). As a later consequence of our success in the lawsuit, Frank McNeil was able to become elected as one of the first black members of the Springfield City Council. Sangamon Cnty. Historical Soc'y, *Timeline*, SANGAMONLINK, http://sangamoncountyhistory.org/wp/?page_id=3521 (last visited Oct. 19, 2015).

elect a black representative.[43] In a city that was 10.8% black, no black candidate had been elected to the Springfield City Council since the 1911 adoption of the at-large system.[44] The obstacles for blacks in Springfield and the violent history that preceded them were especially paradoxical given the city's claim to Abraham Lincoln's heritage.[45] As Langston Hughes observed, the violence in Springfield had surfaced "less than two miles from the Great Emancipator's grave."[46] Even in Lincoln's city, far from the land of Jim Crow, racial discrimination had impeded black voting power in subtler ways than had the poll taxes of Virginia[47] or the dual registration of Mississippi.[48]

The ensuing five-week trial allowed a test of the legal terrain after *Gingles.* To our benefit, *Gingles* had reduced the essence of a section 2 claim under the 1982 amendments to the VRA to a showing that "a certain electoral . . . structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[49] After the 1982 amendments had laid out an assortment of factors that could lend support to a plaintiff's challenge of voting laws,[50] *Gingles* simplified the rubric and the challenge

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43. *McNeil*, 658 F. Supp. at 1020.

44. *Id.*

45. HUGHES, *supra* note 40, at 20. *See generally* ROBERTA SENECHAL DE LA ROCHE, IN LINCOLN'S SHADOW: THE 1908 RACE RIOT IN SPRINGFIELD, ILLINOIS (2008) (detailing the 1908 race riots that began a few blocks from Abraham Lincoln's family home).

46. HUGHES, *supra* note 40, at 20–21.

47. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (finding that Virginia's poll tax was unconstitutional as inconsistent with the Equal Protection Clause).

48. *See* Miss. State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom.* Miss. State Chapter, Operation PUSH, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991).

49. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

50. The Senate Report accompanying the amended section 2 listed these factors as follows:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. Whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

S. REP. NO. 97-417, at 28–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07 (footnotes omitted). Additional factors that could have "probative value as part of plaintiffs' evidence" were "whether there is a significant lack of responsiveness on the part of elected officials to the particularized

narrowed to a question of whether a probative level of racially polarized voting existed.[51] For example, the Senate Report included the open-ended inquiry into the responsiveness of local government officials as one of the evidentiary factors in a voting rights suit. The inclusion of non-responsiveness was based on some early cases that had mentioned in passing the disregard that white elected officials displayed toward minority neighborhoods that were not part of their political coalition.[52] But, when reduced to a multi-factored statutory test, the case law provided little guidance as to what level of treatment was sufficient to be non-responsive. Is non-responsiveness established by different gauges of sewer lines in the black and white sections of town, and does a voting rights trial require counting every sewer cap in the whole city? Do you have to count how many hydrants there are in the black part of town, the white part of town, and then compare them? How often does the band for the football team in the white part of town get new uniforms compared to the band for the football team in the black part of town? *Gingles* seemingly bypassed this inquiry, but the first trial to test the new legal standard was *McNeil.*

Because *McNeil* was the first vote dilution challenge after *Gingles*, the key issue at trial was the evidentiary standard for establishing the three-factor *Gingles* test that largely reduced a voting rights trial to the actual voting practices of the majority and minority communities. According to Justice Brennan's plurality opinion, demonstrating racially polarized voting required: that the minority community is sufficiently large and confined to constitute a majority in a single-member district; that this community is politically cohesive; and that a "legally significant white bloc" of voters will usually defeat the minority's preferred candidate.[53] In particular, the cryptic phrase, "legally significant white bloc voting," had no antecedent case elaboration.[54] Thus, in a geographic setting outside the Deep South, *McNeil* pioneered the statistically-driven vote dilution claim, in which the

needs of the members of the minority group" and "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.*

51. *See* Issacharoff, *supra* note 8, at 1851 (analyzing the effect of *Gingles* in bringing the racially polarized voting inquiry to the "undisputed and unchallenged center of the Voting Rights Act"); *see also* James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 64 (1982) (arguing that since the Voting Rights Amendments of 1982, the Court had still left unresolved the evidentiary question "under what circumstances at-large schemes actually have the adverse racial impact that has only been presumed to exist in the cases to date").

52. *See, e.g.*, White v. Regester, 412 U.S. 755, 767 (1973) (approving the district court's finding that one county's white-dominated organization which had "effective control" of the Democratic Party candidate slating "did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community").

53. *Gingles*, 478 U.S. at 49–51.

54. *Id.* at 54.

various factors from the 1982 amendments fell to secondary status.[55] The use of ecological regression analyses and verifiable drawings of hypothetical electoral wards, for instance, demonstrated that it was possible to win a vote dilution case around a statistically-based conception of legally significant polarized voting. These had been present in other cases, including in the record in *Gingles* itself, but *McNeil* became a reference point for how to litigate under the VRA in a post-*Gingles* world.[56]

This case also revealed new horizons for the VRA outside its initial geographic region. The history of the VRA before 1982 was directed at the manifest problems of 1965, predominantly in the South.[57] The histories of these Southern jurisdictions with racial discrimination weighed heavily on pronouncements against their voting laws, as in *PUSH*. In *PUSH*, that history was so readily evident that the district court could take judicial notice of the fact of discrimination under the 1891 Mississippi Constitution. By contrast, no such history of formal barriers against black voting existed in the City of Springfield. Under section 2, however, there was no requirement that there had ever been formal barriers to black voting as a condition of a successful voting rights claim.[58] Though the original VRA had been extremely effective at combating "first generation" voting rights cases centered on voting access, only the expanded version could address problems centered on voting power.[59] Springfield, Illinois, with essentially unencumbered access to the polls for black citizens, was not the prototypical target of the original VRA.

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55. The district court found that although the issue of responsiveness was the "strongest part" of the defendants' case, the *Gingles* Court had decided that this was a "peripheral and not a determinative issue in a vote dilution case." McNeil v. City of Springfield, Ill., 658 F. Supp. 1015, 1032 (C.D. Ill. 1987). At trial McNeil was pressed on cross-examination as to whether increased city contracts and employment were not the real aim of the lawsuit; as I recall a quarter century later, he memorably answered, "If there is pork to go around, then our folks should get some too."

56. In the years following *McNeil*, the routine nature of this showing made proof of a legally significant polarized voting system surprising only when it was absent. *See* Issacharoff, *supra* note 8, at 1855 n.111.

57. Of the seven states that became "covered jurisdictions" in their entirety under the original formula in section 4, Alaska was the only one not located in the South. Civil Rights Div., U.S. Dep't of Justice, *Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/vot/misc/sec_4.php#formula (last updated Aug. 8, 2015).

58. *Compare* Miss. State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1250–51 (N.D. Miss. 1987), *aff'd sub nom.* 932 F.2d 400 (5th Cir. 1991) (stating that "[t]he court takes judicial notice" of the factual finding that "Mississippi has a long history of de jure and de facto race discrimination," including notice of the "purpose of racial discrimination" for which legislation related to dual registration was enacted), *with McNeil*, 658 F. Supp. at 1023, 1032 (noting that despite some history of racial discrimination, the plaintiffs made a relatively weak showing that the City of Springfield was not responsive to the black community's needs).

59. *See* Guinier, *supra* note 4, at 1093–94 (distinguishing the "first generation" of voting rights litigation, which confronted direct impediments to electoral participation, from "second generation" cases, which dealt with vote dilution and the possibility of a "meaningful vote").

Even the 1982 Congress in amending section 2 had not clearly targeted locations outside the South. In fact, proponents of the amendments sought to deflect challenges in the legislative debates by offering assurances that the bill would not apply to jurisdictions around the country that had at-large elections but no de jure history of formal barriers to voting.[60] Nonetheless, the law as enacted was generalizable, and *McNeil* showed just how far it could reach.

C. The Reemergence of Constitutional Litigation

The sharpened partisan divide of recent vintage has changed the dynamics of current political campaigns. The older view was that elections were waged over the median voter, and that the parties would naturally gravitate toward the center as Election Day approaches. Of late, however, that time-honored view has ceded to elections that consist at least as much in battles over turnout. At least since 2004, Democrats fare better in high turnout elections that draw in episodic voters, and Republicans prevail in elections controlled by the smaller core of regular voters. The 2012 election was conducted following this basic calculus: if turnout for the election mirrored the record-setting levels of 2008, President Obama would be re-elected, and if it mirrored the comparatively measly turnout of 2010, the victor would have been President Romney.[61] Add to the mix the combustible claims by Democrats that Republicans were engaged in vote suppression, and the Republican claims that Democrats were fostering voter fraud. The result was that voter turnout itself became a partisan issue and access to the franchise returned to a central role in voting rights claims for the first time in at least a generation.

Only there was a difference. The crucible for the 2012 election was Ohio, as it had been in 2004 and 2008, and the ballot wars were fought outside the reach of section 5 of the VRA, even before *Shelby County*. Under Republican Secretary of State Kenneth Blackwell, Ohio was an early entrant in the new round of electoral gymnastics, well exemplified by the Secretary's 2004 directive that voter registration forms that were not

60. S. REP. NO. 97-417, at 35 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 213 ("[T]he amendment to Section 2 is careful, sound, and necessary, and will not result in wholesale invalidation of electoral structures."). In Pittsburgh, Pennsylvania, one of the cities which the wary Subcommittee warned would be vulnerable to "extensive judicial restructuring" were the section 2 amendments to pass, I served as counsel for the Metropolitan Pittsburgh Crusade for Voters, where the plaintiffs successfully argued that at-large elections violated section 2 in its diluting of black voting strength. *Id.* at 156, *as reprinted in* 1982 U.S.C.C.A.N. 177, 329; Metro. Pittsburgh Crusade for Voters v. City of Pittsburgh, Pa., 727 F. Supp. 969, 970 (W.D. Pa. 1989), *aff'd in part, rev'd in part*, 964 F.2d 244 (3d Cir. 1992).

61. For a discussion of the correlation between turnout and partisan success in the 2008 election, and its predictive power for 2012, see Issacharoff, *Ballot Bedlam*, *supra* note 2, at 1366–67, 1367 n.8.

"printed on white, uncoated paper of not less than 80 lb. text weight" would be rejected.[62] Blackwell had ultimately backed down, but this inventive style of electoral reform endured. By 2012, the signature reform was limiting early voting the weekend before the election, a method of casting the ballot unprotected by any fundamental constitutional right to early voting as such.

At the time, I was a senior legal advisor to the Obama campaign, and the withdrawal of early voting could jeopardize fruitful avenues for Democratic voting, particularly among minority voters. But the challenge had to be anticipatory in terms of the partisan motivation and the likely partisan effect. While minority voters were more at risk from the cancellation of "souls to polls" voting by black congregants on the Sunday before election, this was not the sort of structural challenge easily fitted within section 2 of the VRA—nor was there evidence of a clear racially disparate effect of changes that had not yet gone into effect.[63] A disparate impact theory would have required measurable effects, and from a pre-election standpoint, would have to rely on anticipatory arguments about how voters were likely to be affected by the changes. The ready rejoinder would have been that, in response to Ohio's reform, affected citizens would vote by a different method or at a different time. Other constitutional theories, perhaps framed under the First Amendment,[64] did not map well onto the real problem of partisan manipulation of voter access rules.

Without a basis in the racial impact-based analysis under the VRA, the question was whether there was a legal principle available that was neither geographically confined, as with section 5, nor triggered by racially disparate effects, as with section 2. Moreover, Ohio's reform was a poor subject for a comparative challenge, juxtaposing the system in question with more equitable regimes in other states. The court in *PUSH* could note that dual registration was unique to Mississippi and could only be explained as a legacy of the overall effort at disenfranchisement a century earlier.[65] The problem in Ohio was not comparative but contextual. Despite

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62. *See* J. Kenneth Blackwell, Ohio Sec'y of State, Directive 2004-31, at 1 (Sept. 7, 2004). For a detailed retelling of Ohio's electoral reform efforts in 2004 and subsequent litigation, see Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1220–40 (2005).

63. Obama for Am. v. Husted, 697 F.3d 423, 426–27 (6th Cir. 2012), *stay denied*, 133 S. Ct. 497 (2012) (citing studies from Ohio counties on early voter turnout demographics).

64. *See generally* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2483–87 (2003) (discussing "First Amendment Equal Protection" jurisprudence as applied to the "one person, one vote" rule).

65. *See* Miss. State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1252 (N.D. Miss. 1987) ("In 1984, Mississippi was apparently the only state which maintained statutes explicitly requiring dual registration state-wide and prohibiting county registrars from removing the registration books from their offices to conduct registration." (footnote omitted)), *aff'd sub nom.* Miss. State Chapter, Operation PUSH, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991).

the last-minute restrictions on weekend voting, Ohio still offered more early voting opportunities than many states.[66] The problem was not so much the absolute availability of voting opportunities but the manipulation of those opportunities in the run up to a presidential election.

Consequently, *Obama for America v. Husted*[67] needed to move up one more level in terms of general as opposed to specific protections. Without the confined geographical mooring of section 5 and without the race-based protections of the VRA overall, the question became one of framing a generalized constitutional limitation on the ability of state officials to manipulate the voting process for partisan aims. The claim unsteadily bridged a substantive due process approach to the fundamental right to the franchise with a peculiarly discrete equal protection claim. The equal protection argument was prompted by Ohio's reservation of early voting for some but not all voters. In seeking to avoid an adverse impact on military voters, Ohio had backed into keeping state early voting offices open for certain military and overseas voters who happened to be in-state. At the same time, the state sought to deny access to other qualified voters even though there were open state offices whose purpose was to receive early ballots from qualified voters.[68] The idea of having a voting office open but not allowing a subset of voters to use it was as novel as it was bizarre.

Ohio's attempt to distinguish overseas and military voters from in-state voters may not have fallen along the traditional lines of discriminatory categorization for an equal protection claim, but it added a sense of a status-based discrimination in access to the ballot.[69] The combination of selective access to some groups and the overall diminution of electoral access fueled the claim that this was impermissible state behavior, even if the legal form of the claim was not well anticipated in the law. The aim of the lawsuit was to force Ohio into the position of having to justify its odd ballot restriction even in the absence of an affirmative obligation to make early voting available to anyone at all.

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66. *See Election 2012: Early and Absentee Voting, By State*, NPR, http://apps.npr.org/early-voting-2012/ (last updated Sept. 25, 2012) (showing Ohio as one of thirty-five states that gave voters the opportunity to vote ahead of the November 6, 2012 election); *see also* Samuel Issacharoff & Richard H. Pildes, *Epilogue:* Bush v. Gore *and the Constitutional Right to Vote*, *in* ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER *BUSH V. GORE* 212, 216 (R. Michael Alvarez & Bernard Grofman eds., 2014) ("In Ohio, even following the restrictions imposed for 2012, EV [early voting] was still widely available . . . .").

67. 697 F.3d 423 (6th Cir. 2012).

68. Even before Secretary of State Husted construed H.B. 224 to apply unequally, the Ohio General Assembly clumsily enacted two contradictory deadlines for early voting and failed to correct the error once it realized its mistake. *Id.* at 427 (discussing the haphazard legislative changes to early voting in 2012).

69. *See* Issacharoff & Pildes, *supra* note 66, at 217 (describing Ohio's voter classifications for weekend voting).

Here again, location made a difference. Because of the repeated efforts at ballot manipulation in Ohio, the Sixth Circuit had started to develop a jurisprudence based on *Crawford v. Marion County Election Board*,[70] together with its precursors in *Burdick v. Takushi* and *Anderson v. Celebrezze*,[71] that posited that some unspecified levels of adverse impact on voting access would trigger some obligation of explanation upon the state. This was not conventional equal protection requiring a comparison in the treatment of two otherwise similarly situated parties. It was more in the nature of what Rick Pildes has termed an expressive harm, a sense that apparent state disregard for its citizens required justification based on the perceived disregard.[72] Further, in *Crawford*, the Court had already intimated that a voting restriction whose only plausible justification was partisanship would be struck down.[73] Finally, the simple fact that no state had ever allowed some citizens into an open polling place while denying the same access to other registered voters seemed tailor-made for demanding some measure of justification from Ohio.[74]

Somewhat paradoxically, however, the strongest support for a generalized constitutional protection of the franchise came from an unlikely source for the Obama campaign: *Bush v. Gore*.[75] The Sixth Circuit had already employed *Bush* in 2011 for the constitutional requirement under equal protection that a state ensure "the nonarbitrary treatment of voters."[76] Whatever its origins, *Bush* had thus laid out an expanded equal protection doctrine, stating that the right to vote protects "more than the initial allocation of the franchise. *Equal protection applies as well to the manner of its exercise*."[77] There was always the potential in *Bush v. Gore* that, despite the Court's discomfort with being thrust into the heart of the

70. 553 U.S. 181 (2008).

71. Burdick v. Takushi, 504 U.S. 428, 434 (1992); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). For the Sixth Circuit case law, see, for example, Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 238 (6th Cir. 2011) (applying the *Anderson–Burdick* standard to an equal protection challenge to provisional ballot counting). The *Anderson–Burdick* standard considers the range in between the rational basis scrutiny required for non-burdensome classifications and the strict scrutiny required for severely burdensome classifications.

72. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993) ("An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.").

73. *Crawford*, 553 U.S. at 203 ("If [partisan] considerations had provided the only justification for a photo identification requirement, we may also assume that [such a law] would suffer the same fate as the poll tax at issue in *Harper*.").

74. *See* Issacharoff & Pildes, *supra* note 66, at 215 (noting Ohio's unique policy of selective access to early voting).

75. 531 U.S. 98 (2000).

76. *Hunter*, 635 F.3d at 236 (quoting *Bush*, 531 U.S. at 105) (internal quotation marks omitted).

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

political storm,[78] the recognition of a constitutional interest in proper democratic procedures was the critical step in expanding ballot protections—a position I had taken as soon as the Court spoke in 2000.[79] At its core, *Bush* stood for the simple proposition that the state was required to treat voters equally and to make access meaningful, a theory which the District Court approved and a unanimous Sixth Circuit affirmed. The Supreme Court soon thereafter denied a request for injunctive relief, allowing expansive voter access on Election Day. The decision that had solidified the election of a president against whom candidate Obama railed had ultimately, and ironically, catalyzed this candidate's victory. Vindicating voting rights in Ohio in 2012 required moving up a substantial level of general protections beyond both geographic boundaries and even the critical concept of antidiscrimination law.

D. A Return to the Common Law?

The current controversies over voter identification and other mechanisms that may frustrate voter access to the ballots reveal a core difficulty in the use of inherited civil rights models of discrimination. In most cases, the impetus behind voter restrictions today is largely partisan, and these restrictions' overlapping impact on racial and ethnic minorities reflects both the likely partisan alignment of those communities and the distinct vulnerability of those groups to willful disruptions of the ability to cast a ballot. The question is whether particularized efforts at exclusion, that to varying extents exploit minority vulnerability, are best redressed through discrete legal remedies aimed at the vulnerability of these groups as minority voters, or whether broader gauged legal protections can be harnessed more effectively.

Consider *Vargas v. Calabrese*,[80] a case that involved no structural barriers to the franchise, but instead was a thuggish attempt to steal an election, perhaps befitting its setting in New Jersey. The backdrop of the case is simple enough to belie its conceptual difficulty. An incumbent mayor of Jersey City, Gerald McCann, nearly lost the next mayoral election outright in the first round to a challenger. Under local New Jersey law, a mayor had to be elected by majority vote, and the first round had proved

78. *See id.* at 111 ("None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere.").

79. *See* Samuel Issacharoff, Opinion, *The Court in the Crossfire*, N.Y. TIMES (Dec. 14, 2000), http://www.nytimes.com/2000/12/14/opinion/14ISSA.html ("[B]y claiming a role in this case, the Supreme Court may have given us an advancement in voting rights doctrine. It has asserted a new constitutional requirement: to avoid disparate and unfair treatment of voters.").

80. 634 F. Supp. 910 (D.N.J. 1986), *aff'd sub nom.* Vargas v. Hudson Cnty. Bd. of Elections, 949 F.2d 665 (3d Cir. 1991).

almost fatal to McCann. McCann had little minority support in the first round, no doubt reflecting his relative inattention to minority concerns, such as rising rent costs.[81] At risk of losing, McCann turned to the instrumentalities of his office, as well as an array of extralegal measures, to target the voters most likely to back his opponent. As with all strategies focusing on the low-lying gains to be had, McCann needed quick rules of thumb to get out the vote in his areas and suppress the vote in areas deemed hostile to him. In electoral shorthand, that meant suppressing minority votes.

A number of actions taken without formal, institutional decision-making ensued: off-duty armed policemen with jackets that read "Warrant Squad" appeared at polling stations in wards with large numbers of minority voters; letters falsely informing would-be voters that they would be prosecuted for voting if their names did not appear on their apartment leases arrived to homes in public housing projects; racially-coded lists of prospective voters the McCann campaign intended to challenge were compiled; and other scare tactics emerged to threaten these voters.[82] In certain cases, the line between threats and overt malevolent action was blurry: the elevator cables of two high-rise public housing buildings were slashed on Election Day, preventing some voters from leaving their residences to cast ballots.[83] In all, an imaginative mélange of state instrumentalities and extralegal resources were assembled to try to tip the election. Remarkably, McCann still lost the election, but the question persisted whether this sort of on-the-spot election misbehavior was subject to legal redress.

Certainly voter intimidation and the exclusion of lawfully registered minority voters was not new, nor an invention of Jersey City. The oftentimes-violent suppression of minority voting rights had been a hallmark of the assertion of Jim Crow in the Redemption-era South. At the same time, the central concerns of voting rights law poorly fit the events of Jersey City. Elevator cable slashing in New Jersey stood well outside the geographic confines of section 5, and the impromptu lines of assault did not look like Southern poll taxes and other legally enshrined obstacles. Nor would section 2 quite fit the harm as here again there was no structural feature that could be challenged, as with at-large elections. Even an equal

81. In response to a local priest inquiring what he would do to address rent concerns for low-income minority communities, McCann responded to the clergyman, "When you stop sin, Father, I'll solve all the problems of Jersey City." Joseph F. Sullivan, *McCann and Cucci Campaign in Jersey City's Mayoral Race*, N.Y. TIMES (June 7, 1985), http://www.nytimes.com/1985/06/07/nyregion/mccann-and-cucci-campaign-in-jersey-city-s-mayoral-race.html.

82. *See Vargas*, 634 F. Supp. at 914–15.

83. *Id.* at 914. Remarkably, community organizers were able to recruit weight lifters from a nearby gym to assist voters getting to the polls despite non-functional elevators.

protection claim was problematic as Jersey City neighborhoods were not so tightly racially demarcated as to give an exclusively minority cast to the targeted populations.

While the wrong in Jersey City seemed obvious, what to do about it was less so. The primary lawyers in the case, Juan Cartagena of the Puerto Rican Legal Defense Fund and myself, were institutional civil rights lawyers, accustomed to thinking in terms of injunctive actions to alter institutional practices. Shortly before we filed suit, however, the Supreme Court handed down a decision that altered our approach. In *Memphis Community School District v. Stachura*,[84] the Supreme Court rejected a damages award in a First Amendment case that was premised on a jury charge that asked the jurors to, in effect, value the importance of freedom of speech as an abstract constitutional right. The Court, building on its earlier decision in *Carey v. Piphus*,[85] delineated the boundaries between an abstract claim for the value of legal rights and the nature of a constitutional tort, even if the damages were difficult to determine with certainty.[86] In striking down an award for the abstract value of a right standing alone, the Supreme Court in *Stachura* contrasted the longstanding use of presumed actual damages from abstract damages claims. There are many examples of the use of presumed actual damages to facilitate the enforcement of rights, such as the statutory damages amounts in copyright.[87] In such cases, a fixed sum is presumed as an approximation of a right whose specific violation is nonetheless difficult to quantify. Of most significance for *Vargas* was a footnote in *Stachura* that cited back to centuries of damages awards for tortious interference with the franchise as an example of presumed actual damages.[88]

In fact, the availability of tort damages had some authority in early twentieth century voting cases, including cases that denied claims for

84. 477 U.S. 299, 312–13 (1986).

85. 435 U.S. 247 (1978).

86. *Carey*, 435 U.S. at 266 n.23, itself relied on classic statements of tort liability for this, such as DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.8, at 191–93 (1973); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 20–22 (1935); RESTATEMENT (FIRST) OF TORTS § 907 (AM. LAW INST. 1939).

87. Modern U.S. copyright law stems from the Copyright Act of 1909, which, among other reforms to the prior "per-sheet penalty" regime, included a nonpenal statutory damages framework to provide compensation when proof of actual damages was difficult to demonstrate. Copyright Act of 1909, § 25, 35 Stat. 1075, 1081–82 (damage recovery provision).

88. *Stachura*, 477 U.S. at 311 n.14. *Stachura* specifically invokes *Ashley v. White*, (1703) 92 Eng. Rep. 126, 136–37; 2 Ld. Raym. 938, 954, 956 ("Supposing then that the plaintiff had a right of voting, and so it appears on the record, and the defendant has excluded him from it . . . it is an injury to the plaintiff. . . . If publick [sic] officers will infringe mens [sic] rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences."). *See generally* Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 79–90 (1992).

equitable injunctive remedies.[89] Perhaps even more significant, the early voting cases, including the White Primary Cases,[90] had to confront a jurisdictional requirement of an amount in controversy for the assertion of federal subject matter jurisdiction. While today an amount in controversy is required only for diversity jurisdiction, at the time there was a separate amount in controversy requirement of $2,000 for federal question jurisdiction.[91] The presumed actual damage amounts were therefore necessary not only to establish the voting rights claim but also as a jurisdictional predicate for suit.[92]

Without clear footing in contemporary voting rights law, *Vargas* proceeded with a throwback claim to constitutional common law damages added for good measure to the injunctive claims that framed the lawsuit. In law, as in life, it is often better to be lucky than good. In *Vargas*, the luck took the form of a certain measure of happenstance: We discovered that the McCann campaign had purchased a rider on its headquarters' insurance policy to cover civil rights violations, which effectively underwrote our suit for damages. For an add-on of $75, the McCann campaign's general liability policy insured against political claims, specifically including civil rights complaints. The combination of this general theory of a constitutional tort and a compelling factual record allowed the plaintiff class of minority voters to recover over $5 million on a theory of common law damages all but forgotten in the modern era. To the best of my knowledge, this may well have been the first (and perhaps the only) time money was distributed legally in conjunction with a New Jersey election.

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89. For example, in *Giles v. Harris*, 189 U.S. 475, 485 (1903), Justice Oliver Wendell Holmes left open the possibility of a suit for money damages while denying relief for unconstitutional exclusion of black voters. For discussions of *Giles*, see Richard H. Pildes, *Keeping Legal History Meaningful*, 19 CONST. COMMENT. 645 (2002) (giving account of the failures of the Court to engage massive black disenfranchisement at an early stage of the institutionalization of Jim Crow). Still, Justice Holmes relegated a damages suit to jury trial, in which such suits would be highly unlikely to succeed in the South. *See* MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT 12 (2007) (exploring the unlikelihood of successful damages claims in front of white juries in the South).

90. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 652–68 (1998) (discussing the White Primary Cases).

91. As discussed in Healy v. Ratta, 292 U.S. 263, 270 n.2 (1934), the original required amount of $500 was increased to $2,000, exclusive of interest and costs, by Act of March 3, 1887, 24 Stat. 552. *See, e.g.*, *Giles*, 189 U.S. at 499 ("The act of Congress limits this jurisdiction to cases where the matter in dispute exceeds $2,000.").

92. The background for private damages caused by political action was a series of Supreme Court and lower federal court cases involving white plaintiffs who had been deprived of their right to vote and had sued under federal question jurisdiction. *See* Wiley v. Sinkler, 179 U.S. 58, 64 (1900) (stating that a deprivation of a man's political rights may be alleged to entitle him to monetary damages); Wayne v. Venable, 260 F. 64, 65 (8th Cir. 1919) (allowing a plaintiff to recover $2,000 in damages from election officials for denying right to vote in a federal election).

Vargas left a strong impression on me as a young lawyer. Even without a theory with much contemporary backing, without the ability of public prosecutors to prove conspiracy by turning certain officials against one another, and without a simple prospective injunctive remedy, a simple truth became evident: Making individuals pay ex post for misconduct can make them think twice ex ante. If this sounds familiar, it should. It is the regulatory theory at the heart of tort law. On a theoretical level, this meant reconsidering the exclusive attention given to the injunctive force of civil rights statutes—the VRA included—and instead contemplating a more general, even traditional, form of accountability. *Vargas* would not be this particular defendant's final encounter with the justice system, nor even his final election.[93] But as a broader theory of deterrence, *Vargas* points to an underutilized ability of the law to instill fear in would-be manipulators of the electoral system.

III. THE RIGHT TOOL FOR THE RIGHT JOB

To everything there is a season. The four cases presented show the need for different tools to address different voting rights problems at differing levels of legal generality. On the fiftieth anniversary of the Voting Right Act, the immediate suggestion is that the concentrated focus of the initial Act was the source of its transformative power but proved also to be a limitation. The combination of sections 4 and 5 of the Act broke down the barriers to the black franchise precisely because they were designed surgically to address the forms of Jim Crow exclusion in their Jim Crow setting. Applied to barriers that did not trigger preclearance scrutiny, as in *PUSH*, or did not fall within the geography of section 5, as with *McNeil*, or did not trigger a race-specific restriction on the franchise, as with *Husted*, or were not the product of a formalized institutional barrier, as with *Vargas*, section 5 was not the tool of choice. It turned out that a broader set of legal responses were necessary. Legal effectiveness requires a means/end fit with the scale of the problem, the scope of the threat that it poses, the most effective remedy to the problem, and the moral force of this response.

From 1965 to the present, the scale has changed dramatically. At its simplest, the suspension and preclearance regime of sections 4 and 5 of the Act was targeting a Southern problem. From failed federal efforts to

93. After losing the mayoral election, Gerald McCann retook the office four years later, but was removed in 1992 after criminal conviction in a savings-and-loan scam, earning him two years in federal prison. Evan Serpick, *That Felon Inspecting Trash? He Used to Be Mayor*, N.Y. TIMES (Oct. 7, 2011, http://www.nytimes.com/2011/10/09/nyregion/in-jersey-city-ex-mayor-gerald-mccann-keeps-an-eye-on-trash.html?_r=0.

combat impediments to the vote in the 1870s,[94] to the institutionalized white reaction of the Redemption constitutions at the turn of the century,[95] the formalized prohibition on black voting was geographically confined. The trigger formula for VRA coverage, together with suspension and federal oversight, served as a brilliant legislative gambit for dealing with a particular form of exclusion from the franchise.[96]

The landscape of disenfranchisement has been transformed, with problems expanding beyond the boundaries of the Deep South. The Supreme Court recognized only half of this reality in *Shelby County*, finding that a coverage formula reliant on 1964 presidential election ballot statistics and limited predominantly to one region was outdated.[97] Yet it did not acknowledge this reality's crucial, latter half: A limited formula is somewhat inappropriate precisely *because* disenfranchisement has surfaced

94. Soon after the Fifteenth Amendment was ratified in 1870, Congress passed the Enforcement Act and then amended it the following year. *See* Enforcement Act of 1871, ch. 99, 16 Stat. 433. The amended act created "supervisors of election[s]" whose presence would be required "at all times and places when the names of registered voters may be marked for challenge" as well as other monitoring checks. *Id.* at 434. But the enforcement of this federal effort died with the end of Reconstruction. *See* South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966) (describing how as the "fervor for racial equality waned, enforcement of the [federal supervisor] laws became spotty and ineffective").

95. The Southern constitutional conventions of the early 1890s and early 1900s sought to drive black citizens out of the political process through a series of overlapping prohibitions on the franchise, beginning with the Mississippi constitution of 1890 and its invocation, *inter alia*, of felon disenfranchisement as a method of preventing blacks from voting during its 1890 convention. *See* MISS. CONST. art. XII (1890), *in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (William F. Swindler ed., 1973). *See generally* William Alexander Mabry, *Disenfranchisement of the Negro in Mississippi*, 4 J. SOUTHERN HIST. 318 (1938) (discussing the Mississippi convention); Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581 (2004). The president of Alabama's 1901 convention, which established a literacy test for voting, openly called for the establishment of white supremacy "within the limits imposed by the Federal Constitution." John B. Knox, President, Address to the Constitutional Convention (May 21, 1901), *in* JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 8, 9 (1901). *See generally* R. Volney Riser, *Disfranchisement, the U.S. Constitution, and the Federal Courts: Alabama's 1901 Constitutional Convention Debates the Grandfather Clause*, 48 AM. J. LEGAL HIST. 237 (2006). The Constitutional Convention of the State of Louisiana in 1898 was similarly open about its intentions, with its president pledging "to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana." E.B. Kruttschnitt, President, Address to the Constitutional Convention (May 12, 1898), *in* OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 379, 381 (1898). The South Carolina Constitutional Convention of 1895 began with an address denouncing the existing constitution from 1868, which was a "stain upon the reputation of South Carolina" because "negroes" had drafted it, among other reasons. Robert Aldrich, Delegate-elect from Barnwell, Address to the Constitutional Convention (Sept. 10, 1895), *in* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 1, 2 (1895). *See generally* W. Lewis Burke, *Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina After the Civil War*, 57 S.C. L. REV. 859, 873 (2006).

96. For a detailed analysis of the effect of the VRA on the eight southern states covered by the act's special provisions, see QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (Chandler Davidson & Bernard Grofman eds., 1994).

97. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2013) ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

across the country, no longer predominantly along the lines of race but centrally as a result of partisan efforts to sculpt the electorate.[98] Whether in Ohio, Wisconsin, Pennsylvania, Virginia, Texas, or North Carolina, concerted efforts at disenfranchisement have emerged under state governments that are uniformly under Republican control.[99] Regardless of the exact form of voter restrictions, as I have argued elsewhere, the single effective predictor for the adoption of franchise limitations is not the racial makeup of the state, or the history of Jim Crow, but unified Republican control of the state electoral rules. It is of course unfortunate that a sharpened partisan divide has come to plague the process of voting itself. But this is the sad reality.

If there are new challenges to the effective exercise of the franchise, does it make sense to fall back on a tool devised to address the specifics of Jim Crow in the 1960s? With partisan elements complicating the once-obvious motivation of racial exclusion, a blend of cases has materialized: a quasi-dual registration requirement in Kansas without appreciable racial motivation,[100] a photo-identification voter law in Wisconsin with more subtle racial overlays,[101] and an even more stringent photo-identification law in Texas with some elements of outright racial motivation.[102] Faced with this mix, we must consider whether the specific should now give way to the general. Despite Justice Ginsburg's pluvial warning in her *Shelby County* dissent,[103] an expanded, generalizable framework for equal protection or a broader common law approach might prove more effective at preserving voting rights in today's environment.

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98. *See generally* Issacharoff, *Ballot Bedlam*, *supra* note 2, at 1371–74; Issacharoff, *Beyond the Discrimination Model on Voting*, *supra* note 2, at 103.

99. *See* Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1110 (2014) (showing that eighteen of the twenty-two states to have approved new voting law regulations since 2010 had Republican governors and Republican-controlled legislatures); Issacharoff, *Ballot Bedlam*, *supra* note 2, at 1372 (describing how efforts to regulate ballot access since 2010 were strongly correlated with Republican control of the election-administration process).

100. *See* Kansas Secure and Fair Elections (SAFE) Act, ch. 56, 2011 Kan. Sess. Laws 795. For a discussion and critique of Kansas's proof-of-citizenship registration law, see Chelsea A. Priest, Note, *Dual Registration Voting Systems: Safer and Fairer?*, 67 STAN. L. REV. ONLINE 101, 105 (2015).

101. *See* 2011 Wisconsin Act 23, 2011 Wis. Sess. Laws 103 (codified in scattered sections of WIS. STAT. §§ 5.02–343.50). Some commentators argue that the racial motivation at play in the enactment of Wisconsin's photo-ID law is more than subtle. *E.g.*, Christopher Watts, *Road to the Poll: How the Wisconsin Voter ID Law of 2011 Is Disenfranchising Its Poor, Minority, and Elderly Citizens*, 3 COLUM. J. RACE & L. 119, 146 (2013).

102. *See* Act of May 27, 2011, ch. 123, 2011 Tex. Gen. Laws 619; Texas v. Holder, 888 F. Supp. 2d 113, 144 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013) (describing the Texas photo-ID law as "the most stringent in the country.").

103. *See* Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").

This generalizable approach involves thinking creatively and unromantically about remedies. A useful analog may be the stubborn problem of housing discrimination, something that continues to require the attention of the Supreme Court to determine the role of disparate impact theories of liability.[104] In the initial phases of the Civil Rights Era, suits were brought in to challenge segregation in public housing and other residential communities, primarily using testers to establish unlawful steering practices; this provided evidence for the courts to issue massive desegregation orders across the country, evoking comparisons of a *Brown v. Board of Education*[105] moment for the housing arena. But the enthusiasm was short-lived. Housing segregation was a remarkably stubborn fixture to dislodge, and injunctions had little effect at catalyzing integration, as repeatedly demonstrated in places like Yonkers.[106] By contrast, a more availing alternative effort was to abandon injunctions in favor of private damage remedies against the owners or managers of housing projects or larger apartment complexes.[107] This, in contrast to the classic injunction method, was extremely effective—individual vulnerability had altered the equation.[108]

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104. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities. Project, Inc., 135 S. Ct. 2507, 2525 (2015) (finding that disparate-impact claims are cognizable under the Fair Housing Act).

105. 347 U.S. 483 (1954).

106. Despite a federal district court judge ruling against the City of Yonkers in 1985 for engaging in a pattern of housing discrimination against poor black and Hispanic residents, it was not until 2007, after decades of exorbitantly expensive intransigence on the part of the City, that the parties reached a settlement. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1289 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987). *See* Fernanda Santos, *After 27 Years, Yonkers Housing Desegregation Ends Quietly in Manhattan Court*, N.Y. TIMES (May 2, 2007), http://www.nytimes.com/2007/05/02/nyregion/02yonkers.html?_r=0 (detailing the tortured history of the Yonkers housing litigation). *See generally* Jennifer Hochschild & Michael N. Danielson, *Can We Desegregate Public Schools and Subsidized Housing? Lessons From the Sorry History of Yonkers, New York*, *in* CHANGING URBAN EDUCATION 23 (Clarence N. Stone ed., 1998) (exploring the failure of injunctive relief in Yonkers). The City had refused to implement the judge's original housing order and only yielded when its contempt of court fines, which threatened to bankrupt the city, were upheld on appeal. *See* United States v. City of Yonkers, 856 F.2d 444, 448–51 (2d Cir. 1988), *rev'd sub nom.* Spallone v. United States, 493 U.S. 265 (1990). *See* Jonathan L. Entin, *Learning from Yonkers: On Race, Class, Housing, and Courts*, 44 HOW. L.J. 375, 380 (2001) (reviewing LISA BELKIN, SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION (1999)) (describing the City of Yonkers' elaborate measures to refuse the desegregation orders). During this injunctive battle, the Supreme Court found that the district court judge had abused his discretion in holding four Yonkers city council members in contempt for voting against legislation that would implement a consent decree the City had approved, which limited courts' ability to sanction legislative conduct. *Spallone*, 493 U.S. at 267. For a contemporary retelling of the Yonkers housing crisis, see *Show Me a Hero* (HBO television broadcast Aug. 16–Aug. 30, 2015).

107. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982) ("A tester who has been the object of a misrepresentation made unlawful under § 804(d) [of the Fair Housing Act of 1968] has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions.").

108. *See* Fay S. Joyce, *Fair-Housing Law Making Inroads*, N.Y. TIMES (Sept. 1, 1985), http://www.nytimes.com/1985/09/01/realestate/fair-housing-law-making-inroads.html (detailing legal

Renewed attention to monetary damages may prompt greater private attorney interest in voting rights claims, by analogy to the section of the private bar that routinely handles employment discrimination or police misconduct claims. The motive may not seem the most ennobling, but unleashing the resources of the private bar against reprehensible action may provide a punctual, incentivized form of regulation. No doubt there will be resentment of attorneys seeking compensation, just as there were complaints that the fee award in *McNeil* would siphon funds from the public school library of Springfield. Ultimately, however, such blame must fall on the political decision to defend the indefensible rather than on the lawyers vindicating the rights of their clients. It is not that private damages remedies under the common law or statutory protections such as § 1983 are a complete substitute for well-crafted injunctions. Rather, harnessing the entrepreneurial energy of the private bar combined with the attention-grabbing prospect of private liability is a proven way to refresh and invigorate aging statutory regimes.[109]

Damages remedies also allow for a multiplicity of actors, not only government and the large public interest organizations. Pressed a bit further, one of the underappreciated features of section 5 of the VRA was that it put exclusive enforcement power in the hands of the Department of Justice, and indeed did not allow even a private cause of action to challenge DOJ nonfeasance when no objection to local practices was forthcoming.[110] As the statute aged, an increasing portion of the objections tendered by the DOJ concerned redistricting after the decennial Census.[111] Distinctively, redistricting involves the allocation of political power, creating concerns that DOJ decisions whether to intercede had taken on a partisan hue.[112]

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challenges to housing discrimination which had cost the real-estate industry almost $2 million in legal awards and negotiated settlements in the metropolitan New York area alone).

109. In the context of federal labor laws, a parallel argument suggests that the absence of a damages regime and the isolation of labor law from private enforcement contributed to the atrophying of legal protections for workers. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1551–58 (2002) (highlighting the benefits of a "tortification" of employment law).

110. *See* Morris v. Gressette, 432 U.S. 491, 507 (1977) (finding that the Attorney General's decision not to challenge a South Carolina election law under section 5 of the Voting Rights Act was unreviewable, preventing plaintiffs from attempting to enjoin enforcement of the law).

111. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 112 (4th ed. Supp. 2015) (showing that in recent decades, the DOJ blocked redistricting efforts nearly fourteen times as often as changes to ballot access); Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 HOW. L.J. 717, 733 (2006) ("[A] clear distinction can be made between changes to redistricting plans, which have generated the most controversy, and all other voting changes, which the DOJ rarely denies preclearance.").

112. Such decisions to deny preclearance have come in non-traditional forms: I represented the State of Texas in litigation over a Republican DOJ's preclearance denial of Texas's reapportionment plan that would have bolstered minority voting constituencies. *See* Issacharoff, *Beyond the Discrimination Model on Voting*, *supra* note 2, at 99; *see, e.g.*, Nathaniel Persily, *Drawing Lines in*

CONCLUSION

It is unlikely that any of the current voting rights battles can invoke the tremendous moral authority of the confrontation over the Edmund Pettus Bridge[113] or the imagery of President Lyndon B. Johnson proclaiming that "[W]e [S]hall [O]vercome" in his special address to Congress.[114] As the Supreme Court recognized in *South Carolina v. Katzenbach*, the extraordinary remedies of the VRA corresponded to the tenor of the times.[115]

The current partisan-infused voting controversies in Texas, North Carolina, Ohio, and Wisconsin not only appear different from the more geographically-confined and racially-directed voting denials of the Civil Rights Era, they are in fact different. Different times demand different measures. The legacy of the Voting Rights Act is not served by transforming the Act into an icon. The 1965 Act was the single greatest democratizing tool since the Nineteenth Amendment. Its legacy should be enshrined in the continued vitality of effective protections of the right to vote.

Shifting Sands: The DOJ, the VRA, and the 2011 Redistricting Process, 23 STAN. L. & POL'Y REV. 345, 347 (2012) (describing the "political minefield" of the preclearance process during the redistricting controversies of 2011).

113. *See Overview of the Selma to Montgomery March*, NAT'L PARK SERV., http://www.nps.gov/semo/learn/historyculture/index.htm (last visited Oct. 6, 2015) (describing the attacks on civil rights protestors at the Edmund Pettus Bridge).

114. President Lyndon B. Johnson, Special Message to Congress: The American Promise (Mar. 15, 1965), http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise/ ("Equality depends not on the force of arms or tear gas but upon the *force of moral right*; not on recourse to violence but on respect for law and order." (emphasis added)).

115. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding the Voting Rights Act in order to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century").