THE BROOKINGS INSTITUTION

VOTING RIGHTS AFTER *SHELBY COUNTY v. HOLDER*

A DISCUSSION & WEBCAST ON THE
SUPREME COURT'S VOTING RIGHTS ACT DECISION

Washington, D.C.

Monday, July 1, 2013

10:00-10:15 WELCOME AND INTRODUCTION
10:15-12:30 REFLECTIONS ON THE DECISION AND ITS LIKELY IMPACT

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P R O C E E D I N G S

MR. MANN: I'm Tom Mann of the Brookings Institution, and along with my colleague Nate Persily, I'm delighted to welcome you to this conference: the Voting Rights Act, after *Shelby County v. Holder*.

I want, first of all, to thank all of you for making this commitment of time, which is valuable to all of you to come and give us the better part of a full day of discussion. We really appreciate that. I want to indicate our thanks to the Hewlett Foundation. And Daniel Stid is here with us as one of our participants today. And I also want to thank my colleague and leader Darrell West for the support of the Governance Studies Program here.

It's less than a week since the decision came down. A lot of interesting reactions and commentary were tabled. Then came another important decision on same sex marriage, which tended to push the VRA a bit off to the side. But now, with the passage of some time, with the absorption of the writings of many of you, and others, I think it's a good time for us to come together and to look at the decision, and the likely impact, and the possible steps that might be taken in response to it.

Brookings hosted a conference on the 25th anniversary of the Voting Rights Act back in 1990. I remember it well -- Bernie Groffman and I, and Chandler Davidson worked on that. Some of you may even have a copy of *Controversies in Minority Voting* in your libraries. Nate has four copies of it, and I haven't been able to figure out why he has so many.

MR. PERSILY: Bernie Groffman gives away a lot of free books.

MR. MANN: There you go. There you go.

I want to just talk for a moment about the structure of this meeting. It is unusual. You are the presenters, the participants in the audience here at Brookings. It's a conversation amongst ourselves. But, as you know, it's being webcast live. We've had several hundred

people sign up and register for it from around the country, and we expect hundreds of additional people to tune in this morning without going through that formality.

You've seen the agenda. It's simple. The morning is really looking at the decision itself and reactions to it. I suspect some conversations about the constitutional reasoning. Doctrinal questions will emerge, as well as the likely impact in the short term about other provisions in the VRA, other than Sections 4 and 5.

And in the afternoon, we're really going to be talking about some possible consequences, and steps that might be taken -- or, in the case of Congress, perhaps not taken. But that's for our discussion.

We are -- listen, I have to admit right off, I don't tweet. But the rest of the world does, and many of you do, and so this event is being live tweeted, as well. Our hash tag is #BIVRA. So, keep that in mind. We'll get some questions or comments coming in from our audience over the course of the day.

This is almost entirely a series of discussions. That is, no prepared long statements. We have asked a couple of colleagues, in both the morning and the afternoon, to sort of check-off our discussion in a very brief way.

What we'd like you to do is put your card up in a way that Nate and I can see it when you would like to speak. But, to encourage some continuity in the discussion, if you want to speak to a point immediately made, then turn your card up and you can put your right fist or your left fist up. We will not require you to be two-fisted in your intervention, because your card will be up as well.

When you speak, please hit the speak button and look for the red light. And when you finish, turn it off. Because we will be overwhelmed, the system will be overwhelmed if all of you leave your mic on.

Nate and I have circulated a set of questions not meant in any way to limit the conversation, but to remind us of some of the issues that are on the table. You shouldn't feel constrained by those. On the other hand, it may be useful to get the conversation going.

The only other thing I'd say is I want to confirm that this webcast and this conference discussion will end about 3:45. We'll have an hour lunch break from 12:30 to 1:30. We'll then have a coffee break. Everything you say here will be recorded on the web. A transcript will appear on the website. And Nate and I, in writing up a policy report from this event, will draw heavily on what you say. So, live by what you say, folks. We're going to draw on you. You are the experts.

The only other thing I'd mention is, if you would put your silencers on your cell phone -- fine to be on the web, but it's not a good place for telephone conversations, I think.

So, to help those running the web cameras, and those on our web audience, we're going to go around the table and have everyone introduce themselves. Give us your name and your institutional affiliation. And say it slowly and clearly and forcefully so an imprint is made on the audience, and they will know, henceforth, who you are when you are speaking.

And to get us going, we're going to begin, at the request of the web team, at the far end here.

Kareem, would you kick us off? And then we'll come all the way around the table.

MR. CRAYTON: Sure. Good morning. My name is Kareem Crayton. I am a professor at the University of North Carolina at Chapel Hill Law School. And I'm pleased to be here. Thanks for inviting me.

MR. HO: Good morning. Dale Ho. I am the director of the ACLU Voting Rights Project. Thank you very much for the invitation to be here.

MR. HIRSCH: Sam Hirsch, Deputy Associate Attorney General with the U.S. Department of Justice. Thanks for having us.

MR. TOKAJI: Dan Tokaji, professor of law, The Ohio State University Moritz College of Law.

MS. THERNSTROM: Abigail Thernstrom. I wear a couple of hats. The label here says U.S. Commission on Civil Rights, and, indeed, I am the Vice-Chair. I'm also an adjunct scholar at the American Enterprise Institute (inaudible).

MR. MAGPANTAY: Glenn Magpantay. I'm director of the Democracy Program at the Asian American Legal Defense and Education Fund.

MR. BARNES: I'm Bob Barnes. I cover the Supreme Court for *The Washington Post*.

MR. STID: Daniel Stid. I'm a senior fellow with the Hewlett Foundation.

MS. KAMARCK: Elaine Kamarck, senior fellow, Brookings Institution.

MR. FOLEY: Ned Foley, also of Ohio State University's Moritz College of Law.

MR. SAENZ: Good morning. Thomas Saenz, president and general counsel of MALDEF, Mexican American Legal Defense and Education Fund.

MR. CONSOVOY: Good morning. Will Consovoy, attorney at Wiley, Rein, counsel for Shelby County.

MR. MANN: I'm Tom Mann, a senior fellow at Brookings.

MR. PERSILY: NATE Persil, a professor of law at Stanford Law School.

MS. IFILL: Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense Fund. We represented black residents of Shelby County intervening in the *Shelby County, Alabama v. Holder* case.

MR. BRADEN: I'm Mark Braden. I'm at Baker & Hostetler.

MR. CHARLES: Guy Charles. I'm at Duke Law School.

MS. GERKEN: Heather Gerken. Yale Law School.

MR. ABBOUD: I'm Khalil Abboud. I'm the Democratic Counsel to the Committee on House Administration.

MR. FORTIER: John Fortier. I direct the Democracy Project at the Bipartisan Policy Center.

MS. WEISER: Wendy Weiser. I direct the Democracy Program at the Brennan Center for Justice at NYU Law School.

MR. TAYLOR: I'm Stuart Taylor, non-resident senior fellow at Brookings, and I've written enough about the Voting Rights Act to validate the theory that a little knowledge is a dangerous thing.

MR. PILDES: Rick Pildes, professor of law, NYU School of Law.

MR. GREENBAUM: Jon Greenbaum, Lawyers' Committee for Civil Rights Under Law. And we represented defendant-intervenor Bobby Lee Harris in the Shelby County case.

MS. FERNANDES: I'm Julie Fernandes, with the Open Society Foundation, former Deputy Assistant Attorney General at the Department of Justice.

MR. ISSACHAROFF: Sam Issacharoff, NYU School of Law.

MS. DANIELS: Good morning. I'm Gilda Daniels. I'm a professor at the University of Baltimore School of Law, and former Deputy Chief in the Department of Justice Civil Rights Division, Voting Section.

MS. BORNSTEIN: I'm Lisa Bornstein, senior counsel, and amicus counsel, at the Leadership Conference on Civil and Human Rights.

MR. MANN: Well, thank you very much. I meant first to offer a toast to my colleague Nate, whose first day at the Stanford Law School is this very day. And here he is in Washington. So, thank you, Nate.

MR. PERSILY: That's right. I'm picturing palm trees in the back of the room, you know.

Thank you all for coming. This is a wonderful group of people to talk about a very important Supreme Court case. I'm going to just, mainly for the purposes of the webcast, give a five-minute summary of the Supreme Court's decision, since there are probably some people watching who are less expert than the people in the room on what the Court actually did.

So, I'm just going to start by describing Sections 4 and 5 of the Voting Rights Act, and then talk about the case itself.

Sections 4 and 5 of the Voting Rights Act were passed in 1965. They're unique provisions, in that they require jurisdictions that are covered by the statute to submit any changes with respect to voting to the Department of Justice or the D.C. Court for pre-clearance, to ensure that they didn't worsen the position of racial minorities.

The original coverage formula was based on the presence of a test or device, and voter turnout below 50 percent in the 1964, and later amended to include some other elections. The "test or device" definition was later amended to include jurisdictions with large non-English speaking populations that had ballot materials only in English. Jurisdictions that were covered under the Voting Rights Act, as I said, would have to pre-clear their State laws or local laws to the Department of Justice or the U.S. District Court for the District of Columbia. In order to get out of the pre-clearance regime, you had to show, among other things, a good voting rights record for the previous 10 years. There was also the possibility that some jurisdictions that weren't covered could be bailed in by court decree.

In 2006, the version of the Voting Rights Act which was considered in *Shelby County* was passed by Congress. It kept the same coverage formula as it existed before that. It, at the same time, overturned two other Supreme Court -- *Georgia v. Ashcroft*, and *Reno v. Bossier Parish* -- such that, when a jurisdiction submitted its laws for pre-clearance to the

Department of Justice or the U.S. District Court, it had to show that there was no discriminatory purpose, and that there was -- it did not diminish the ability of a racial group to elect its preferred candidates of choice.

So that's a very short summary of a very complicated law.

But the case itself, brought in 2010, filed by Shelby County, Alabama, which was one of the covered jurisdictions -- most of the covered jurisdictions are in the South, but not all of them -- they challenged Sections 4 and 5 of the Voting Rights Act. Unlike in an earlier case, *Northwest Austin Municipal Utility District*, this jurisdiction was not eligible for bailout because there had been a denial of pre-clearance within the previous 10 years.

The District Court and the Court of Appeals upheld the VRA, finding that the coverage formula was adequately supported by the record that Congress had developed, and the Supreme Court reversed in a five-four decision. The five-Justice majority struck down Section 4 as exceeding Congressional power to enforce the 15th Amendment. I should make clear that Section 4 is the part of the Voting Rights Act that is the coverage formula, what jurisdictions are covered, and what are not. Section 5 is the pre-clearance regime, setting for the criteria by which the covered jurisdictions need to get permission from the Federal government.

So it was struck down last week, by a five-Justice majority. They found that the coverage formula was not supported by adequate evidence in the record. They found the selective treatment of certain States by the coverage formulate to violate what they called the "equal sovereignty of States." In particular, when looking at the record, they focused on the reduction in the racial gap in registration and turnout as strong evidence that the coverage formula was outdated, and found that the current burdens of the VRA didn't match the current needs, such that Section 4 is not -- depending on the term -- it's not rationally, logically, or sufficiently related to preventing the present-day challenges to minority voting rights.

There was a concurrence by Justice Thomas, who would have struck down Section 5 as well as Section 4 -- so, not only the coverage formula, which jurisdiction -- which jurisdictions were captured by the Voting Rights Act -- but also the criteria for pre-clearance. He would have struck that down, as well.

Four justices joined in a dissent written by Justice Ginsburg. They find that the reauthorized VRA would have passed what we call "rationality review," or the standards set out in *McCulloch v. Maryland*, that this was an appropriate means toward fulfilling a constitutional end.

They, in particular, would have found that reauthorized statues are very likely to satisfy this kind of judicial review, because there's an initial record that was upheld by the Court in the initial Voting Rights Act, that there was also a temporal limitation in the Act that ensure that Congress would continually reconsider it, and that the deterrent effect of the law would naturally lead for [sic] a lessened Congressional record in a reauthorized statute than it would in the initial statute.

They viewed the 15,000-page record as sufficient to maintain coverage. That record, the elements that they point to, were the rates of pre-clearance denials by the Department of Justice, the deterrent effect of the pre-clearance regime, the insufficiency of another part of another part of the Voting Rights Act, Section 2, to accomplish the tasks, as well as academic studies that looked at the rate of Section 2 violations. And they also point to greater racial polarization in the covered as opposed to the non-covered jurisdictions.

Whereas the majority focused on turnout and registration, the dissent focused on second-generation barriers, particularly things like racial-based vote dilution. And they also considered bail-out and bail-in as important measures to ensure that the coverage formula was not rigid.

The dissent particularly criticized the majority for not thinking about whether the law could be applied in particular to Shelby County, Alabama, even if other jurisdictions might be unconstitutionally covered.

And then, finally, they disagree as to what the "equal sovereignty" doctrine means, suggesting that it's not about disparate treatment toward the States, but it's more about the admission of States into the Union.

So, just by way of conclusions, the Court strikes down Section 4 of the Voting Rights Act, leaves Section 5, pre-clearance, for another day. But, as a consequence, the covered jurisdictions no longer need to submit changes in voting to the DoJ or the District Court.

What this means going forward we'll discuss how it applies to Section 5, Section 2, other civil rights laws -- the importance of it as precedent. But that's your thumbnail sketch of what the Supreme Court did last week.

MR. MANN: Nate has set a wonderful example for all of us. That couldn't have been much more than five minutes, Nate -- a brilliant summary.

I simply wanted to welcome two of our colleagues who have arrived -- Spencer Overton, who's at the George Washington University Law School. Welcome Spencer. And Jess Bravin, who's a reporter with *The Wall Street Journal*. Delighted to have you.

Back to Nate.

MR. PERSILY: Well, I'm done. So I'll turn it over -- well, just go to my left, to Sherrilyn Ifill, who was -- as you know, the NAACP was representing some of the, the NAACP Legal Defense Fund was representing some of the intervenors in the case.

MS. IFILL: Thanks so much to you, Tom, and to Nate. Thanks so much for inviting me. I appreciate it tremendously. And, Tom, as you point out, it is less than a week since the decision. I don't actually recall, by memory, the stages of grief, but I seem to be stuck on rage. I am angry about this decision, and what I think Justice Ginsburg rightly calls the

hubris of the decision. We've been spending a lot of time talking with our clients about what it means, particularly after the evening of the decision, when various officials in jurisdictions throughout the South began to talk about their intention to implement certain voting changes that had been stopped by Section 5.

So, I'm happy for this meeting today. I think it's a great opportunity for us to convene and talk about, not only the decision and what it says, but also talk about what it means going forward.

Let me be very brief in just speaking about the decision itself, because I think Nate did a great job of laying out what it is. And you all here know and have read the decision -- but really try to lay out what I think are the questions before us, at least from my perspective, and some of the things I think -- I hope -- that we will discuss today.

One of the most distressing parts of the decision is the articulation by Chief Justice Roberts of the relationship between the Federal government and States. And if you read the opinion, there's a long discussion about the framers of the original Constitution, and their intention for the States to maintain a certain level of power in relation to the Federal government. What's missing from -- and then the opinion kind of skips to what happened in the 1960s with the passage of the Voting Rights Act.

What's missing is there's kind of a giant hole in the analysis that really goes to the effort by the framers of the Civil War amendments to re-calibrate the relationship between the Federal government and the States as it relates to minorities, and particularly minorities living in the South -- the 15th Amendment being the one that is most relevant to our discussion, which imagines that Congress will have the power to enforce the ban on voting discrimination that's articulated in the 15th Amendment. And the Chief Justice gives not very much attention to that. And I think we do have to talk about, going forward from this decision, what are we to

take from this in terms of this Court's articulation of the relationship between the Federal government and the States as it relates to voting rights.

Second is this question of the record. Because the second half of our discussion today -- do I need to use another mic, or am I --

MR. MANN: No, I think just about two inches back.

MS. IFILL: Oh, it's a really good one. Fancy mic.

So, the second thing is the record itself which, as Nate points out, was a fairly voluminous record, 15,000 pages. One of the things that's been interesting, in having conversations about the case, is how many people in the press and even in the public have said, you know, but what about this coverage formula from 1964, and 1968, that has to do with voter turnout and voter registration? And so I think the Court has successfully distracted people from the reality that the record that was developed by Congress, and that was essentially relied on to make the decision about reauthorization was a record that looked at voting discrimination between 1982 and 2006, the period between the last reauthorization.

And, given that that was the focus of what Congress looked at, and the record that they developed around Section 5 objections, Section 2 discrimination suites, enforcement actions, and so forth, the question of what is the kind of record that will support an amendment to the Voting Rights Act, I think, is something that we probably have to talk about.

And then, finally, I think this decision reflects the reality that we have -- as we all know, a Court with a view, a very strong view, about where we stand on racial discrimination in America, and certainly where we stand on race and voting in America. They are the Supreme Court, so they get to have a view and to articulate that view. I happen to think that it's fairly uninformed. But the reality is they have it.

And so, going forward in terms of talking about what this decision means as a matter of precedent, and in the second half of the day, what will happen in Congress or not, I

think we can't leave out the very clear reality that we have a majority of the Supreme Court with a very strong view -- unlikely to be shaken by reality, or even a record developed by the branch of the government that was authorized by the 15th Amendment to make the decision about how to deal with racial discrimination in voting.

And then I'll just stop there. And I'm sure we'll have much more discussion in the rest of the day.

MR. MANN: William Consovoy, you want to pick up after that?

MR. CONSOVOY: Thank you for having me today. This should be a great day.

I thought I would talk about three things, briefly: One, what the decision means, in terms of what the Court actually decided and what it didn't decide -- the rationale for the majority decision, which I don't think has been fairly, at least in the coverage I've seen so far, explained. I think it's much more modest, and decides much less than people think. And, third, a few comments about the dissent.

First, why, from my perspective, this is what I would call a modest decision by the Court. One, it did not decide the *City of Boerne* issue. The parties had litigated that issue extensively. The Court actually used the *McCulloch* standard, which was the standard that the government had asked the Court to use.

Two, it did not decide the constitutionality of Section 5, despite the urging of Justice Thomas, who invoked *Northwest Austin*, and in this case had wanted the Court to reach the issue.

Three, it did not actually decide all issues with regard to the coverage formula. It only decided the formula was not rational in theory. It did not even reach whether the formula is rational in practice.

And, fourth, by doing so, it gave Congress the opportunity to revisit.

So, with respect to the majority decision itself, I think it's important to begin with what *Katzenbach* actually says. *Katzenbach* says that the coverage formula must be rational in theory and in practice. The decision goes on to explain why the formula is irrational in theory. And I think that conclusion is inescapable for two reasons. One, it's predicated on voting data from generations ago. And, two, there's an utter mismatch between the problem Congress was trying to solve -- what it called "second-generation barriers," and the triggers for coverage, which were first-generation barriers -- "tests or devices" -- which have now been permanently banned for years.

Throughout the litigation, we contested that the Court only needed to reach the theory question, i.e., the formula on its own terms -- not with regard to the record, the record goes to whether it's rational in practice. It only needed to reach whether the formula, by its own terms, was rational in theory, which was crucial to the *Katzenbach* decision, no more needed to be decided. And the Court agreed.

And I would encourage people to look at the briefing in the case, and the decisions below, and the Supreme Court dissent. No party to this case has ever offered a theoretical defense of this formula. It explained why the court should not follow *Katzenbach* when it said it had to be rational in theory. They explained why it was rational in practice. They defended what I would call the "anti-theory" of reverse engineering. And they gave explanation for why the Court shouldn't worry about that problem. But no one has offered a defense of it as rational in theory, and I would look forward to hearing one today if there is one.

With regard to the dissent, the dissent doesn't really address the core holding of *Medarie*. If you were looking for a discussion of why the formula is rational in theory, you would have to turn to page 33 of a 37-page dissent, and the discussion lasts for all of two pages. And then it doesn't even address *Katzenbach*'s language of "rational in theory." It simply ignores it, and moves on to "rational in practice." So the dissent takes on why Section 5 is constitutional,

why they disagree with the principal of equal sovereignty -- which I don't even think was essential for the holding. It goes on to explain why it's rational in practice. And there are arguments on both sides of that. The litigants in this case know we litigated that issue extensively, about the nature of the evidence in the record, and so on and so forth. But the Court never reached those issues.

Second -- and my last two points -- there's been this discussion of Shelby County's standing to bring this suit, which I think is important to keep separate from whether the formula is rational in practice. Those are two different inquiries. The argument would be that Shelby County's voting problems are so obvious, and so pronounced, that there's no way you can even have challenge the formula. I just don't think that's sustainable.

One, it's a formula. It has to be defended as a formula. And anyone who's subject to it has a right to challenge the rationality of the formula itself. If Congress put all the names of the States into a hat and picked out 12, would the person who was picked have no standing to challenge it because a rational formula could have covered them? I don't think that's a fair charge.

Second, Shelby County has never has a Section 5 objection since 1965. It had one sub-jurisdiction in the last 10 years have one objection, to one annexation, and it had one consent decree in 1990 to an issue in at-large elections.

I would ask the people in this room whether they believe that that evidence is sufficient to deny them standing to challenge a formula that subjects them to pre-clearance until 2031.

With regard to Alabama, Alabama did not have a statewide objection for the 16 years preceding reauthorization, and its Section 2 litigation is on par with States like Illinois and New York. So, maybe they could be covered under a rational formula and maybe they couldn't. But I don't think it's plausible to say they lack standing to bring the challenge.

Last, I thought what was remarkable about the dissent was its unwillingness to live with what Justice Ginsberg and Justice Breyer agreed to in *Northwest Austin*. They effectively abandoned the decision with a footnote that says, "Agreeing that there are serious constitutional questions isn't the same as deciding them." But I found that somewhat circular.

That decision said "current burden, current needs." It said the formula had to be rational. It said there is principle of equal sovereignty. I think we could have -- I would like to have seen more from the dissent as to why they were walking away from that decision.

MR. MANN: Thomas Saenz, (inaudible).

MR. SAENZ: Having been in this situation, I think it's, six days after a decision it's sort of hard to avoid re-litigating a case. But I certainly want to focus on what the immediate effects of this decision were. Like my colleague Sherrilyn Ifill, who is stuck in one of the stages of grief, my initial reaction to *Shelby* was that our stages of celebration -- I don't know if those have been laid out by psychologists yet -- but our stages of celebration of the decision in the Arizona case eight days before was interrupted by *Shelby* coming down. The Arizona decision, of course, concluded that Arizona's voter registration documentation of citizenship requirements were preempted by the National Voter Registration Act, which was something we had worked, over many, many, many years, as well as the Lawyers' Committee, to get that ruling. And it highlights what I think are some of the critical initial effects of *Shelby County*.

From the perspective of the Latino community, two of the covered States are of particular significance in this day and age, and they are Arizona and Texas. Texas has, I think, probably consumed, in Maldev's 45 years of existence, consumed more of our energies in litigation than any other jurisdiction in the country, not only in voting but in education, in employment, in immigrants' rights, you name it. And, particularly in voting, it has consumed much time in litigation in recent years.

And the immediate effect of *Shelby* with respect to two pending changes in the State of Texas under Section 5 that had not been pre-cleared, and that were before the Supreme Court, having come out of the District Court here in Washington -- one dealing with redistricting, the other dealing with a voter ID provision that had been enacted in 2012 but blocked from taking effect. Obviously, both of those cases are now making their way, very slowly, back to the District Court, where they will be dismissed.

But there has already been action taken, under Section 2, in one preceding this case, and one filed almost immediate after with respect to those two provisions. A Section 2 case was filed against the voter ID provision. Obviously, that's a much more difficult means of challenging what would, we believe, quite seriously have depressed and deterred voter participation in Texas had it taken effect when it was enacted.

With respect to redistricting, despite the immediate pronouncements from the Attorney General about both of these changes in Texas, a day or two after the *Shelby* decision was handed down, Governor Perry signed a new redistricting map, one that looks dramatically different from the initial map adopted by the legislature that was not pre-cleared, and that was pending before the court. That map, in part, came about because there was already pending Section 2 litigation about the redistricting map that had been adopted and not pre-cleared under Section 5.

Texas is obviously the largest jurisdiction that was covered by Section 5 until this decision. It has a number of sub-jurisdictions. We are constantly, constantly trying to keep apprised of the changes that may be being put in place in those sub-jurisdictions, and that's certainly one of the significant concerns coming out of *Shelby*'s aftermath.

Arizona is another State of great concern to the Latino community. And I should say why I think, in this day and age, these are of particular concern. These are both States with significant and growing Latino populations, including significant growth in the voter-eligible

population in both cases. In both cases, those numbers are growing to an extent that they begin to threaten very well entrenched political interests because, by and large, with the growth of the Latino vote, it has not been a vote in support of the continued policies that have prevailed in those two States. And this is the kind of situation where I think efforts to suppress the vote, efforts to deter participation, are particularly likely, and particularly dangerous -- where you have large jurisdictions with growing minority populations. And those growing minority populations and their participation present some threat to well, well established and entrenched political interests. That's where we ought to be particularly concerned about what might occur in the realm of deterring voter participation.

And *Shelby*'s removal of Section 5 as a built-in protection against that very likely political phenomenon is a matter of great, great concern, and one that I think is worthy of significant attention, and why I'm pleased that we're having this conversation today.

MR. MANN: Well, people should start putting up their table tents. But we'll consider with Mark Braden.

And I should say, webcast viewers can send questions and comments to our Twitter hash tag.

MR. BRADEN: While I'm not going to re-litigate the case, I will try to talk about looking forward, as to what I think the impact will be. And I guess I'm going to be the minority opinion on this -- and the answer is: not much. It's not going to have much impact, going forward, on who gets to vote, or election administration, or how the districts look.

For the last 30 years -- not based upon a statistical analysis of the number of pre-clearance -- but the real impact of Section 5 of the Voting Rights Act is in the area of redistricting. All the other impacts in the last 30 years are on the margins. Section 5 is about drawing representational districts. That's it. The first thing to remember -- with the exception of Texas, Texas is exceptional in every way -- with the exception of Texas, and unless something

strange happens in Arizona on the litigation, we're not going to see any new lines drawn -- or, at least, very few new lines drawn -- between now and eight years from now. And eight years from now is long way away. My crystal ball isn't real clear about what's going to be going on then.

But I would suggest to you that if you actually look at how lines are drawn nationwide, the difference between how lines are drawn in un-covered jurisdictions, and how lines are drawn in covered jurisdictions, it just isn't very much. I represent both of them. How do you draw district lines? It's no big secret -- you sit, and you look at the map, and you draw the minority districts first. It doesn't matter whether it's a covered jurisdiction or a jurisdiction that simply has to deal with Section 2. The line-drawing process is the same.

I would suggest to you, looking at Ohio versus South Carolina, the actual construction of the districts isn't much different. How you look at it from a line-drawing, pencil-to-paper -- that shows you that I'm a very old person, the notion that somebody would put a pencil on a piece of paper to draw a plan, of course that's not how it happens -- isn't very much.

So the likely impact of this isn't much, going forward.

And I would also suggest to you that the little piece that you might say, oh, voter ID -- well, of course, "voter ID" has a lot of different meanings, some of which I think are indisputably, nobody has a problem with, some of which people do have problems with.

My view -- which, of course, makes it very unhappy on both sides of the aisle on this, is that no matter how you look at voter ID's, except in some extreme cases, has little or no impact actually on who votes. You might come up with a statistical analysis where you can figure out some way where it might vote, and cloistered nuns might have a problem voting on occasion, but an actual effect on the election process, except in some extreme cases, the answer to that is no. And, in extreme cases, we have Section 2 that would deal with those.

MR. PERSILY: Jon Greenbaum, I see your table tent, then Dale Ho.

Please turn on your mic.

MR. GREENBAUM: Thanks, Nate. And I want to thank Brookings for putting this event together. So much to respond to, and I'm going to try to be brief.

I disagree with Mark's view about Section 5, that not having Section 5 in place is going to have modest effects. Certainly, redistricting has been a place where Section 5 has been used a lot. But a majority of the objections are, in fact, not redistricting objections. We did see the examples, in fact, from last year, of the four major declaratory judgment actions, where the District Court -- not the Department of Justice, but the District Court -- found that voting changes were either enacted with a discriminatory purpose, or had a retrogressive effect. And three of those four cases did not involve redistricting. You had the Texas ID case, where the court found that Texas has -- which has probably the most restrictive photo ID of them all, in terms of the types of ID, short list that they accept -- and the fact that some of the places to get ID might be hundreds of miles away from where people actually live, in some cases.

You had South Carolina's ID, which ultimately got pre-cleared, but only after South Carolina essentially created an exception for people who didn't have ID that swallowed up the rule. As long as somebody gave an honest reason as to why they didn't get an ID, they could vote without it.

And the third was Florida's early voting. Florida has reduced the number of hours of early voting, and in the five counties covered by Florida, the court found that this had a retrogressive effect, because we've seen in Florida, as we've seen in a lot of other places, that African-Americans disproportionately take advantage of voter ID [sic].

I want to also briefly respond to a point that Will made in his presentation. This decision, to my mind, is the opposite of a modest decision. When you're talking about an area in which Congress -- when you're talking about trying to prohibit discrimination on race in voting, there are two constitutional amendments that cover that -- the 14th and 15th Amendments. And the Court, on previous occasions, has talked about how great Congress' power is in this

instance. Congress did a serious job of looking to see the degree to which discrimination still existed in covered areas when it reauthorized the Act, and that should have been more than sufficient, given Congress' ability to operate in this sphere.

And I also think, you know, related to that, the Court is very murky, in terms of trying to define what the constitutional standard is. You won't see, anywhere in the opinion, where the Court says the theory is irrational -- or the coverage formula is irrational in theory. You won't see any place where the Court says it's irrational in fact, either.

And if you look at where the Court is talking about the coverage formula, it kind of, in some places, talks about theory, in some places talks about fact, but only in a way that's selected to the decision that it wanted to reach.

MR. MANN: If people get called out, I should say we probably should have the right to respond. If you want to respond, feel free. And then we'll get --

MR. CONSOVOY: Yes, I'll keep it short. I think the Court was clear. It went through the two reasons why it was irrational in theory. I won't go to the pages of it, but I guess we just disagree. It said you can't base it on voting data, you know, trigger to tests or devices that have been banned for 30 years. And you can't use election results from the 1960s and '70s.

Again, under that theory, they could have picked it out of a hat. If you're going to say that you don't have to worry about theory, that as long as it's good on the ground, you're fine, then spin a wheel, pick States, and then if you get the right ones, it's good to go.

I think *McCulloch* at least requires minimum rationality on the method of how you're going to choose the States. And I think that's all the Court said.

MR. PERSILY: Dale.

MR. HO: Thanks, Nate. I should have added when I introduced myself, Dale Ho, with the ACLU, that the ACLU also represented parties in the *Shelby County*, the Alabama State Conference of the NAACP, and individual black voters in Alabama.

MR. PERSILY: Speak a little louder, Dale.

MR. HO: Oh, sure. Sorry.

I want to respond first to something that Mark said. I agree with Mark that redistricting is the central place where Section 5 has had its impact over the last few decades. But I disagree that Section 5's impact in other respects is not something that's extremely significant. I think, just to pick one example, I think a Section 5 objection in the late 2000s in Alaska, where polling places were shut down in Native Alaskan villages, and voters would have had to have traveled 20 to 70 miles in order to reach a polling place, if not for a DoJ objection. I think voters would disagree with Mark that that's not a significant burden on their right to vote.

And even if that doesn't have an effect on election outcomes -- it may or it may not -- I don't think that's the standard by which we judge fair voting practices. Our individual clients, their interests, their ability to participate in our democratic process is a value that I think we all have a lot of concern for, regardless of whether or not that's actually going to change who wins on election day.

The other thing that I want to say briefly is that -- one thing, I just wanted to respond to something that Will said about the opinion being a modest one. I don't think that it is. I agree with Jon on that point. And I think in one particular way it's a very immodest opinion, in its attitude toward stare decisis and precedent -- particularly in two respects: one, with respect to the equal sovereignty doctrine, which appears really to be made up out of whole cloth in *Northwest Austin*. It really had nothing to do with the treatment of the States after they had been admitted into the Union. And then Aquilla Mars' work, I think, demonstrates pretty conclusively that even with respect to the terms of admission, States have been historically

treated quite differently. So it's not really a significant check on Congressional power. It hasn't been treated as one in the past -- only until now.

And I think the second way that the decision is immodest, and ignores precedent, is the complete absence, really, of the *City of Boerne* decision from the Court's opinion, or any discussion of it. I think *City of Boerne*, when it came out, folks in the civil rights community were kind of, you know, concerned about this opinion. It seemed to ratchet up the standard for when Congress can exercise its powers under the 14th, and potentially the 15th Amendment as well.

But what *City of Boerne*, I think, taught us was that if you want to have a valid exercise of Congressional power, you need to have a record of constitutional violations that can support that exercise of power.

Well, that's what Congress sought to do in 2006. And the Court, I think, doesn't mention *City of Boerne* because it didn't want to engage with that record, because if it did, it would have two choices. It would either, one, acknowledge ongoing, you know, tremendous amounts of violations in the covered jurisdictions over the past -- during the 25-year period from 1982 to 2007, or the Court would have had to have taken issue with Congress' conclusions, which would really cut against the traditional deference that is accorded legislative fact-finding.

So, instead of actually engaging the record or acknowledging it, the Court simply bypasses it. And instead of applying what we now regard as the standard for valid Congressional legislation, is there a practical, demonstrated need for this legislation based on a record of violations. So the Court requires, now, Congress to sort of deduce an abstract, a priori rational link between the remedial legislation as written, and the goals of the statute. That's never been required in the past. If you'd applied that standard in the past -- the 1982 reauthorization, which was two decades, almost, after 1965, and far removed from the data of the 1964 election -- it would also have been unconstitutional. But that's never what the Court has required.

In 1982, the Court didn't look -- or Congress didn't look at conditions in covered versus non-covered jurisdictions. It looked at is there a continuing need for this remedy in the covered jurisdictions? Are there still violations in those places 17 years after the fact? And Congress concluded that it was, and the Court sustained that in the *Lopez* decision.

So what we have here is a very, very radical departure from the Court's prior jurisprudence. And I think we should be concerned, not just about voting rights, but also what this means for the way that we construct civil rights remedies and defend them in the future.

MR. PERSILY: Mark, you got called out. I don't know whether -- and Will, also, if you want to respond.

MR. BRADEN: I didn't feel like it was much of a call out, and I'm not going to defend it.

MR. PERSILY: Okay.

MR. BRADEN: I defended the Supreme Court. I'll just say that no one, really, I think, can dispute the underlying fact that the meat of the impact of Section 5 for the last 30 years has been redistricting. And so let's just move that off the table, so what we're talking about here, I guess, is getting rid of Section 5, effectively getting -- of course, I know we didn't, when we get rid of Section 4.

What we're talking about there is what do we think about voter ID? What do we think about removing polling places?

If you -- I have the strange view that the whole dispute over voter ID is so much ado about nothing. But, assuming I'm wrong, which most of the people here will assume that I'm wrong about that -- if it really is a problem, Section 2 will take care of that, if you can actually make a case that it's a problem.

MR. PERSILY: Will, you wanted --

MR. CONSOVOY: Yes, just two quick responses.

With respect to precedent and stare decisis, I think it's more the dissent that has questions -- answers to give there -- at least Justice Ginsburg and Justice Breyer, having joined *Northwest Austin*, all this opinion does it apply it. People may have problems with that opinion, but there was no dissent in that case. It was joined by the eight justices on the Court, who joined the Chief's opinion, with only Justice Thomas disagreeing, and only to go farther.

So I think if there's a departure from precedent here, it's the dissent, both with respect to *Northwest Austin*, and *Katzenbach*'s requirement that the formula would be rational in theory. However, it doesn't necessarily have to use a formula -- although at oral argument, Justice Kennedy, I think, did express concern about a list of States, because then a formula has national application, although it has local effects, right? So, the formula could apply anywhere, so it is national in that respect. So that's why I think she favored, at least in my judgment, the formula. But once Congress chooses a formula, then it must be rational.

And then, on *City of Boerne*, I guess I'm somewhat surprised to hear that as a concern, given that the litigants in the case, from the beginning, their thesis was *City of Boerne* has no application to this case. That was the briefing we saw throughout, that in voting rights, because it's the intersection of both race and voting, that you get a more deferential standard than *City of Boerne*. And the Court didn't reach the issue. So, I don't see why there would be a disagreement with the Court on that.

MR. PERSILY: Sherrilyn? Press your button.

MS. IFILL: Let me just respond to two things that I think are important for our framing, going forward in the conversation, because I don't think -- even though I just am now tempted to -- I don't think I'll re-litigate the case.

I think there are two things. One is about being honest with ourselves about what this decision means going forward. And the second really is to come back to Mark's point about what's going to be the effect of it.

You know, there are four things I keep in my head from *South Carolina v. Katzenbach*, where the Supreme Court talked about the formula that was used by Congress, and why it was rational -- right? So, it said four things. One, they said voting suits have been onerous to prepare, protracted, and, where successful, have often been followed by a shift in discriminatory devices, defiance, or evasion of court orders. One.

Two, Congress, whose power to enforce the 15th Amendment has been repeatedly upheld in the past is free to use whatever means are appropriate to carry out the objects of the Constitution.

Three, Congress had reliable evidence of voting discrimination in a great majority of the areas covered by Section 4(b).

And, finally, the Court said that the focus on certain geographic jurisdictions -- I quote -- "is rational, even though it excludes certain areas where there is voting discrimination by other means."

I don't think anybody things that those four statements in *South Carolina v. Katzenbach*, post *Shelby* can survive as an articulation that would support a formula that Congress would develop. The ground has shifted. The Court has taken a more aggressive stance vis-a-vis Congress. And we have to face that going forward.

Secondly, if there is one thing I would want to leave us here with today, and that I hope will frame our conversation, is to stand very much in friendly opposition to Mark's comment about redistricting, which I think Dale joined quite well. Because that very often distracts us from the reality of what Section 5 actually did do. It's not only that it's going to be about polling place changes, and it's going to be about voter ID, but the purpose of Section 5, in the legislative history, goes to that first point I made, which was: Congress' attempt to get ahead of what would come in the future.

The problem is, if we sit here and talk about what we're dealing with today, in 2013, we'll miss the whole point. So, let's suppose next year Shelby County, Alabama, or let's say the State of Alabama, or any other State, decides they want to switch from electing to appointing their judges. That's a switch. We won't actually have the results of those elections. But to suggest that how judicial officers exercise their authority, and who gets to select who sits on the bench will not have minute control over the lives of millions of people -- and, certainly, over the lives of African-Americans in these jurisdictions -- is to kid yourself.

So we have to remember that Section 5, Congress said they were enacting it to get at what they called any of the -- quote -- "ingenious methods that might be used by jurisdictions in the future." It was forward looking.

And so we cannot satisfy ourselves by going through the list of our 2012 voter ID and early voting issues, and tell ourselves that those are going to be the only matters that people like our clients will have to deal with.

And the part that gives me some concern is that our inclination, because of who we are, and where we sit, in Washington, D.C., and New York, and other places, is that we do focus on redistricting, because we think a lot about national politics. But I can tell you that the lives of my clients are largely controlled at the local level, by school boards, and town councils, and county commissions, and water districts, and utility districts.

When I first came to the Legal Defense Fund 25 years ago, I had a case challenging justice of the peace elections. And I remember I thought justices of the peace just married people. I couldn't imagine who cares who's the justice of the peace. It turns out they do a lot more.

So, I think we have to be very careful in our conversation today that we don't go towards the macro that we tend to look at when we think about politics and political participation, and we keep in mind how power is exerted over the lives of most people who live in this country,

and certainly over the lives of most African-Americans who live in this country, which is still principally located in the South.

MR. PERSILY: Julie Fernandez, Dan Tokaji, Heather Gerken, and then Guy Charles.

MS. FERNANDES: Thanks, Nate -- though I feel like I just have to "amen" you, right now, Sherrilyn, because -- I "amen" you, because some of things that I wanted to sort of just underscore are exactly that -- this sort of Washington, D.C., beltway version of what happens on the ground in communities of color across the country, at the school board, water district, county commission level, where even if it's redistricting, it's not the kind of redistricting where the political parties are fighting each other about who's going to -- you know, how they can use race for their political gerrymanders. It's not that. It's the stuff that's nonpartisan at the local level that may be redistricting, it may be county commission redistricting, but may be polling place changes which shouldn't be pooh-poohed as somehow insignificant when you're talking about a community trying to exercise the franchise.

And I do want to -- I think that Tom Saenz is so right, that we should be looking forward, not re-litigating this, but I have a couple of things, even not as a litigator myself.

The first is, I thought -- I was really struck at the equal sovereignty notion that was all over this opinion. And I kept reading it and reading it, thinking "Where does this come from?" And then I finally looked at the cites -- 1845, 1869, pre 15th Amendment, the first one, of course, pre-Civil War, the second one, pre-15th Amendment, and then 1911 -- certainly the height of the protection of racial minorities in American of the Federal government vis-a-vis the States, 1911. Obviously not.

So, it's sort of the foundation, the legal foundation for this notion that has now taken away the ability of Congress to protect minority votes is based largely on pre-15th Amendment, pre-Civil War conception of the relationship between Congress and the States --

and Congress and the voters. Because this really isn't about Congress vis-a-vis the States, as much as it is Congress' ability to protect voters from State and local discrimination.

So, I also want to underscore what Dale Ho said that the Court seems to have missed the point about the formula. And Sherrilyn had the point. The Court missed the point. It isn't an old formula, it is a formulation that was determined some time ago to determine where the worst actors were, and then a process for allowing them to demonstrate that they weren't bad actors anymore. It's actually just a remedy. It's not a formula being reapplied. And I think that the majority of the Court knows that, but they try and pretend like they don't. It isn't application today of a formula, it is whether or not the remedy has worked.

And one think about *NAMUDNO*, there were eight votes for the outcome, not eight votes for Justice Roberts, Chief Justice Roberts' dicta. And I think this kind of flim flam, to make it seem as if the eight who voted to allow the Northwest Austin District to bail out, and then avoid the constitutional question means they all signed on to his dicta is just disingenuous.

And I think the thing we can take away from some of this -- and, I'm sorry, I didn't mean it to be ad hominem, but I just mean that really is -- though it is -- I'll smile more --

MR. PERSILY: "Flim flam" in the nicest sense of "flim flam."

MS. FERNANDES: In the nicest way -- disingenuous in a nice way, yeah.

But I think that what I'm really taking away from this, in thinking about our path forward, is one, that the Court is seeing itself as a super legislature more than ever. This is policy choices they're making -- they don't like this, they didn't like it, they didn't like it, they weren't going to uphold it. And we can have our dance about all the legal stuff, but they just didn't like it, and so they decided they weren't going to vote for it -- five of them said that -- felt uncomfortable. And whether or not we think we're okay with that as they're job, the nine unelected trumping the policy choices, under the 15th Amendment, of the 435, and is that okay with us? And the contempt the Court shows for Congress, the contempt that they have for

Congress' ability to do fact-finding on an issue that is squarely within their constitutional prerogative.

I think that's something we have to think about going forward, and working with Congress to either help solve or not, but at least in their relationship to their ability to fulfill their constitutional duty to protect minority voters and minority folks -- and all of us -- in our liberty. What can Congress do if they have to always worry about different choices being made by nine unelected people in our system?

That's it.

MR. PERSILY: Do you want to respond?

MR. CONSOVOY: Yes, just quickly, I think we're probably reaching diminishing returns on re-litigating the case, so I would just let people read *Katzenbach*. It says "rational in theory." I think we're hearing today the same discontent with that that we heard throughout the litigation -- "but it's rational in practice." That's the response to why is it rational in theory? The answer is, because it's rational in practice. There's just not a response happening.

On *Northwest Austin*, they could have concurred in the judgment. They didn't. They joined the opinion in full. The normal order is, when you join an opinion in full, you join all of it. I don't know why *Northwest Austin* is being treated differently. People who didn't like what Justice Thomas said could have responded to his concurrence in that opinion, where he says the statue should be struck down right then. No one responded. I wonder if people would give the same benefit of the doubt to the majority if they tried to disassociate themselves with an opinion that they joined in full without any explanation as to why. I just don't think that's a fair reading of the opinion. That's why we have "concurring in the judgment," when you don't want to join.

And it's not dicta. It was necessarily to read the bail-out provision the way the Court did. I found myself wondering, when I read the dissent, if this was such an easy question,

why did they join such an unusual reading of the bail-out provision in *Northwest Austin*? That was only because of the serious constitutional questions that they joined that. I think that warrants an explanation.

MR. PERSILY: Dan Tokaji.

MR. TOKAJI: Thanks. There are two different conversations that we're having here, that I think are important to separate. One is the impact of this decision on constitutional law. The other is the impact of the decision on the real world.

With respect to the impact on constitutional law, I actually tend to agree with Will, that this is a fairly modest decision. There is some novelty in the application of this equal sovereignty principle to these circumstances, but look at the language that the Court uses -- rationality, logical relationship, relevance. One might disagree, as I do, with the application of this standard, or these standards, to the facts of this case, but I think supporters of the Voting Rights Act should be grateful that the Court didn't go further, and at least purports to apply the *McCulloch* test here.

In terms of the impact on the real world, this is, to my mind, at least, the far more important conversation for present purposes. And here, I think the impact is significant -- maybe not as earth-shattering as some of the immediate commentary might tend to indicate, but significant, in two respects.

First, with respect to local jurisdictions -- as has already been mentioned -- where otherwise not many people are going to pay attention, and it's going to be awfully expensive, and it's probably not going to happen that litigation will be brought.

The other is with respect to burdens on participation -- not just voter identification, but also things like early and absentee voting, and registration practices. And it's simply not the case that Section 2 will be an adequate substitute, in my view. This is largely because of the burden where, you know, with many of these practices, the empirics are going to

be unclear. It's not going to be certain at the time that these practices are adopted what impact they will have.

What was significant about Section 5 is that it placed the burden on the State or local jurisdiction to obtain pre-clearance.

Now, having said that -- and I don't want to leap too far forward into what will be our afternoon conversation -- but I do think it is important for us to think not only about race-conscious remedies, but race-neutral remedies, about burdens on the vote that affect everyone. I'm not saying don't think about race-conscious remedies, but I think it is important for us not merely to focus on the race discrimination model, and to think also about the possibility of pursuing new remedies that might look at burdens on voting regardless of which voters are affected.

MR. PERSILY: Who do I have next? Heather, I think.

MS. GERKEN: (Inaudible). I usually agree with Dan on almost everything, so much so that we were actually mistaken for husband and wife at the last conference I was in. So, rather than calling out Will, I'll call out Dan.

On this question about whether this was a modest or an "immodest," as Dale called it, opinion, I think it was an immodest opinion, with much to be immodest about.

So, it's true that it used the language of "rational basis," and you're right, maybe that was a "gimme." But anyone who teaches Con law, for those of you who aren't law professors, "rational basis review" is unbelievably generous. So when I teach it to my students, I say, "Imagine you're a law clerk. And you are sitting in the back of the room trying to make up some reason for the crazy thing that Congress just did. You make up a reason." It's that generous. It's not even sort of looking at a record. Rational basis review has always been exceedingly generous -- to the point that we make up reasons for things that we know were

passed for a different reason. That's what rational basis review was, and that's what it used to be, something like that -- the precedent.

And the Court has moved that precedent so far from where it is. So maybe that the language is the same, but the meaning of those terms, I think, is different.

The second thing I'll say about the opinion that I think is a change in precedent, and that is really going to matter if there's going to be a new VRA, is about this question of theory versus practice versus second generation. And I think the way to understand the coverage formula was it meant to describe what Tom was describing, which is the conditions in which discrimination is likely to happen. That was the theory of the coverage formula, and that explains the practice that we saw subsequently.

And the distinction that we're drawing, and the Court mysteriously drew -- between first- and second-generation cases, was a little silly, in my view. So it is true that all of the things that Congress was looking at at that moment involved first-generation barriers. And for those of you who aren't, again, in the field, first-generation barriers are the ones about access to the ballot that prevent you from casting a vote. Second-generation barriers are the ones that occur when everyone can cast a vote, but we've drawn district lines to ensure that you still don't have any power -- those are called "vote dilution" claims.

And this distinction between first- and second-generation barriers is really beside the point in this question. Because there was no reason to have second-generation barriers at the point that Congress passed the VRA, because nobody was voting. It wasn't until people started voting that they thought, aha, we have yet another means of discrimination. And, here, Sherrilyn's story is exactly right. Congress was telling a story about a set of jurisdictions that would use any means possible, and changing the means continually, and preventing the litigants from keeping up, in order to discriminate

So that's what the coverage formula was designed to do. It was designed to capture a set of jurisdictions where there were large populations, at that point, mostly of African-Americans, and that have engaged in repeated discrimination, over and over, trying to elude what the courts and the civil rights litigators were trying to do.

So that's what the coverage formula is about. And, of course, second generation cases should be included in the ambit of that evidence, because that's precisely the story, the theory, that Congress had about discrimination.

So this sort of brings me, I think, to the question that Dan ended with -- and I'll agree with him -- about where we go from here. The dilemma of figuring out what States to cover going forward under this new approach that the Court has introduced is that it's very hard to explain exactly what the conditions are in which discrimination is likely to happen. So, Tom did as good as good a job as anyone I've heard do it.

So, one is, you need a large enough population for it to matter. So, you need a population that's big enough to be a threat to the status quo if it starts to vote in a consistent and coherent way.

And, two, you need to have the politics to be such that you're likely to see targeting. So, groups that don't vote together, for example, aren't likely to be targeted, because they're just like people whose name ends with the letter "G" or the letter "S" -- you know, no one discriminates against us for that reason. But the moment that groups start to coalesce and vote together, the moment that people start to vote as a group, is when we see the conditions of discrimination. And, as Dan pointed out, the trouble is, a lot of times, those conditions are as much about politics as race.

So, voter ID laws get passed, and they get passed for a lot of different reasons. But the biggest one, I think, is politics. It's about -- and it does end up having an effect on groups that are voting together, and they vote together for historic reasons that have a ton to do

with discrimination. But nonetheless, at the end of the day, it's about keeping one group in and one group out, based largely on politics. And that's a hard thing to describe if you're doing a coverage formula.

Which, I think, leads us to wonder -- I think, in the next session -- whether or not that means we're going to have to do something different, something along the lines of nationwide coverage, where everyone is brought within the ambit, and we figure out something that's less burdensome than Section 5, or if we go into what my former student Travis Crum describes as a -- it's a one-by-one system, it's called using the pocket-trigger, that is, bringing in jurisdictions that are particularly likely to discriminate, one by one, within the formula

But I think the dilemma of figuring out a formula under the current Court's approach is that it's very hard to describe the conditions in which discrimination is likely to happen in a way that the Court is going to accept.

MR. PERSILY: Guy.

MR. CHARLES: Yes, and my comments follow directly, I think, from that. It takes us back a step back, but also a step further, which is I think part of the problem is that the Court is skeptical that the current regulatory framework is useful -- all right? So that makes it very difficult now, going forward, to use any elements of that framework.

So when we talk about Section 2 litigation, I also worry that we're going to put burdens on Section 2 that's going to take us back to the very same Supreme Court that is very deeply skeptical that the problem of race discrimination -- meaning the problem of State action, intentionally and pervasively discriminating against people of color -- the Court is skeptical that that actually is the problem of today.

So, dealing with that reality -- so, to push the point that you made further, Sherrilyn -- which is I don't think -- it's not simply that the Court is skeptical about the Congress.

I mean, that's also right. But the Court is deeply skeptical that the problem of race discrimination really is about the States pervasively discriminating against folks of color.

If you depart from that premise, then I think -- then thinking about, well, should we try to reiterate, or reapply a coverage formula that we once lost, I think is a mistake. It is also worrisome to think about the burdens that we're now going to put on Section 2 litigation, because you're likely to see the shift from 4 and 5, now to Section 2, with the same constitutional structures raised.

So, part of the argument about, you know, what is the rational basis level, what does the jurisprudence mean, what does *NAMUDNO* mean? Well, all of that, I think, is framed by the fact that you have a Court whose departing premise is very different from,, obviously, what it was in the past.

And I think dealing with that reality may help us think about, going forward, it may help us think about how to deal with the race-politics connection, and how to deal with race neutrality as a possible justification.

But I think to try to replicate what we once had, going forward, I think is a significant mistake -- at least with this current majority on the Court.

MR. PERSILY: Kareem.

MR. CRAYTON: Thanks. I guess, keeping with the tradition of disagreeing with the last person speaking, I want to probably mix up a couple of points where I may agree and disagree with some of the things that Guy and others have mentioned.

MR. PERSILY: Could you talk a little louder?

MR. CRAYTON: Sure. I will.

I want to start by saying something, as I compete with the siren, about my own view of what just happened on the Court. And I didn't think I'd ever be in the position of saying I missed Chief Justice Rehnquist, but I do.

Having seen this opinion, it's pretty clear to me that this brand of small-C conservatives have basically decided to violate most of the rules of big-C Conservatism. And I think it's, you know, most clear in the use of empirics. I just want -- I have to offer this one example, because it seems to come up in the media, and certainly it came up in the hearings, about the Chief Justice's musing about the fact that the State of Massachusetts has a higher rate, according to him, of African-American political participation -- or, excuse me, a worse rate of African-American participation compared to Mississippi. And it goes to Heather's point. And he couldn't quite understand, then, why is there this formula that does bring in Mississippi, but doesn't bring in Massachusetts.

And, you know, again, anybody who looks at the world on the ground -- and I'm glad the theme has come up -- is, the big difference is that Massachusetts has elected not one, but two, African-American statewide candidates by the way of two different political parties. And it goes to this very point about a small group being able to coalesce with a lot of other groups. And, in my view, that's one metric of places that deserve pre-clearance, versus those that have not. By the way, Mississippi has had a grand total of zero since the Reconstruction. There's an important difference -- at least one element of the effectiveness of political participation.

But put that to the side. I want to get to a broader point about, sort of, the way going forward. Because I do think I am going to differ with some people in the room, but I accept the general premise about Section 5 having to go to questions to assure that new plans that are adopted, or new changes that are adopted in whatever area we're talking about related to voting, is about preventing discrimination.

But I actually think there's something affirmative that Section 5 does, and I don't that it's come through so far in the comments. But it informs my particular view that we may differ about later, and that is -- and I've written about this -- that Section 5 is about encouraging

a way of ensuring procedural fairness: that is, to get States and jurisdictions that are covered to think about and talk about the potential effects that a change will have on minority communities.

And that, in some ways, is the most, in my view, central part of what was lost during that period of time that someone spoke about earlier -- I forget who -- who sort of, where we conveniently forget the history that ended in 1965, but that followed the period after the Reconstruction ended. There was a long period of time where people were denied access to the ballot, but, more than that, where policies were adopted that didn't take these considerations into account.

And so, for that reason, I'm particularly concerned about a policy answer that says -- not only disagree with it, but there are connections between, certainly, issues regarding race, and broader questions outside of the South that have to do with access to the ballot that a number of people have.

But I think what might get lost, if we pursue that too closely, the idea of -- I believe the comment was something like if we merely think about race. The "merely thinking about race" represents a significant part of the country where, by the, most people of color live. And I don't want -- I would encourage us not to lose this effort to have procedural attention to the way in which States make policy. Because I think, by the way, what happened in the 48 hours after *Shelby County* indicates that a lot of these jurisdictions haven't gotten the message.

And I hope, when we think about a policy measure going forward, that doesn't get lost.

Thanks.

MR. PERSILY: We've gotten our first Twitter question from Brendon. It's like "A reader asks..."

No, I'll direct it to Will, "Why do you think the majority omitted *Boerne*? Do you think to get a consensus majority?" he asks.

What are your thoughts on that?

MR. CONSOVOY: I would say I'd give you two thoughts on that. One is, I just don't think it was necessary. I think the Court felt comfortable that *Katzenbach*, on its own terms, and *Northwest Austin*, on its own terms, were sufficient to resolve the case. And I also thought that the *Boerne* standard was much more of an easier doctrinal fit with the Section 5 inquiry than it ever was with the Section 4 inquiry -- whereas "rational in theory and practice," I don't know how you translate that into *Boerne* language. It's much easier with Section 5 itself.

And, second, Justice Scalia has suggested some dissatisfaction with *Boerne*, and so maybe consensus was part of it, although that's just guesswork on my part.

MR. PERSILY: Tom, do you want to jump in?

MR. SAENZ: I'm trying to frame my thought here, but I first want to say thank you to Heather for hearing what I was saying.

I think that I want to go back to what Heather said and what Sherrilyn said, which is really, whenever you come up with a pre-clearance coverage formula, it's about predicting the future. It's not about trying to prevent what's happened in the past. If you're only interested in preventing what happened in the past, you just bar the devices that have been used so far.

But it's about predicting who or what decision-makers are most likely to engage in the next generation of device to restrict voting. And then the question is whether history is a rational theory to predict.

And I don't really think anybody in this room would disagree that, in fact, history is a rational theory of predicting what's going to happen in the future. Indeed, as we discussed this morning, nearly every person who's spoken, whether they're predicting what the Supreme Court is going to do or, like Mark, predicting what decision-makers are going to do in the future, they looked to historical experience. History is the primary theory that we use, as people, to predict the future.

It is not the only theory. What I was suggesting, I think, is that psychology, and basically looking at something other than the political culture in a particular geography, but looking at specific political circumstances could also be predictive. But they're rational theories that are useable in setting up a coverage formula.

But that's what we're about doing. We're about trying to predict where and who is most likely to come up with the next way of restricting participation.

And I just want to emphasize something, or comment on something that Heather said, which is I think this is particularly troubling, still, where the political imperatives, the political influences coincide with race, which is still very true in huge portions of this country. It is true that they also sometimes coincide with things like income, poverty. And I think that that has to be a matter of concern, to take into account, as you come up with a predictive theory about where this is most likely to occur -- again, in the future.

And I wanted to end, somewhat contradictorily, saying where sometimes history is not always a perfect predictor, and that's by disagreeing slightly with something that Mark said. And I know that you said that Texas was an exception, but I think you were talking about whether there was likely to be redistricting in the next eight years. But Texas is also an exception because the way you described doing redistricting is not the way the State of Texas has done redistricting in 2001, 2003, 20011 -- at all.

MR. BRADEN: They're an exception to rationality. So --

MR. SAENZ: But my concern there is, if you have one example like the State of Texas, and without Section 5 they get away with it -- now, I can virtually guarantee they'll have Section 2 litigation, because we'll be the ones to bring it. But it's extraordinary expensive. It's extraordinary time-consuming. If the State of Texas gets away with it at some point, or a sub-jurisdiction in the State of Texas sees the example set at the legislative level, and gets away with it in redistricting a county board, or a city council, or a school board, my concern is that

history under Section 5 will no longer be predictive of what happens in the future because, precisely because, we've changed something very significant about history. And that's what *Shelby* did.

And that's where this endeavor of predicting what will happen in the future, we have to be very careful, that it has been that kind of a dramatic change, like the one wrought by *Shelby*, it's perilous to then predict solely based on history. And I think we have to be very careful about taking into account history, yes, but looking at other factors, as well, including demography, including the political situation on the ground, as it were -- as you look at creating a predictive formula for a pre-clearance regime.

MR. PERSILY: Bob?

MR. BARNES: I was just going to try to find a way to agree with both Julie and Will at the same time. And that is to talk a little bit about the Court's decision four years ago, which, yes, everyone did join that decision. Everyone knew what it said at the time. It was not a secret. And I don't think that the four liberals were sort of hoodwinked or tricked into going along with that.

So it's a little confusing to me as to why they would do that then. Justice Ginsburg is not shy about calling on Congress to take care of a problem when she sees it. Chief Justice Roberts did it in that case.

And so if the seeds for *Shelby* were planted four years ago, as a number of us have written, why was not more done by the liberals to combat it?

MR. PERSILY: Someone want to speak right on that point? Or -- no?

I'll speak on that point. I don't think that's so exceptional, that justices join in with majority opinions that they wouldn't write themselves, especially in significant cases. And so if you think that while -- they may have disagreed with the opinion in *NAMUDNO*, but wanted to

leave the big questions for another day, and this was the way to do it to avoid disagreement. And we could rattle off several other cases, where that happened.

MS. IFILL: Including the recent affirmative action case, and Justice Thomas and Justice Scalia, in agreeing, at least, in the outcome.

MR. PERSILY: Right. And *Bush v. Palm Beach Canvassing Board*, which was a unanimous decision -- right? -- that later we realized some of the people who joined it didn't agree with it. And, you know, there's all kinds of other cases, recent and historic, like that.

I maybe have lost track, but I think Gilda is up. Yes.

MS. DANIELS: Thank you. I want to talk about what Tom mentioned, and that is the importance of history, and how the Court ignores history in its opinion.

Since we're talking about Texas, we can look at Texas to see that it has not just historically had, you know, white primaries, but in the last year had two court decisions where courts said that they intentionally discriminated, not only in redistricting, but also in voter ID cases.

And I think in this impact, when we have -- so, when we're looking at history, I think we also know that we've seen this before. We've seen, before, when the Court has removed protective measures from minority voters, and what the impact has certainly been. Certainly, we can go all the way to Reconstruction, and civil rights cases, and the Hayes Amendment, and see that once those protections are removed, what happens.

And I think that we can see the potential for a drastic thrashing of the democratic process. And the fact that the Court admits that voting discrimination continues to exist, and admits that there certainly is a record of voter discrimination, not only in Shelby County but in these covered jurisdictions, it's very troubling that they are ignoring the impact of what Section 5 does and certainly can do.

And when I hear people say that -- and as the Court says -- well, you still have Section 2, it disturbs me. And that is because Section 2 is not Section 5 -- right? Section 5 provides notice, and it is a deterrent. It's preemptive. And it's certainly protective. And Section 2 is very expensive, very time-consuming, and there are different burdens. They are completely different burdens. You can have a voting practice or procedure that could be retrogressive, but not discriminatory under -- it could be retrogressive under Section 5, but not discriminatory under Section 2.

So I think when we talk about, oh, the fact that we have Section 2, Section 2 is not enough. Because many of these practices and procedures that occur, they're not just -- particularly, discriminatory practices and procedures -- are not just redistrictings. That's, unfortunately -- I'm trying to kindly say -- that's a misinformed myth. That Section 5's primary impact is on redistricting is an untruth. It certainly -- the small parishes, cities, the school boards, annexations, as well as candidate qualifications and other voting rights practices are what Section 5 really gets to the heart of. And that is what is lost.

And when we talk about *Katzenbach*, one of the things that *Katzenbach* talked about was the fact that you needed Section 5 to address the piecemeal litigation that the Department of Justice and the Attorney General had to undergo to try to address these smaller changes. Because the statewide are things that we can all see, right? But it is these smaller changes that is the concern. And when we're talking about Section 2 addressing those concerns -- we've seen that Section 2 has not been very effective, particularly in voter ID and felon disenfranchisement. And the Court has said that statistical differences are no use to them -- right? So that you can have a voting practice, like voter ID or felon disenfranchisement, that disproportionately or disparately impacts a minority group, and the court will find that that does not violate Section 2 of the Voting Rights Act. So you can have discriminatory practices that still do not violate Section 2.

So, certainly, hopefully, when we speak this afternoon we can certainly take about what kinds of things are needed in order to continue to have a method of addressing the kinds of practices and procedures that do impact, certainly, by a swath of minority voters across the country, as well as in the previously covered Section 5 jurisdictions.

MR. PERSILY: Wendy.

MS. WEISER: Thank you. I'm actually going back to point some, to talk a little bit about what Tom and Heather were talking about in providing an eloquent description of what the theory underlying the coverage formula. And I actually wanted to address something that Will had started with, which is the difference between the Court not upholding the formula in theory, even though it might uphold it in practice, it didn't address the practice.

What I was really struck by in the decision was the radically different nature of the conversation that the Court was having and that Congress was having. And that in the 24 pages in which the Court struck down Section 4 and effectively neutered Section 5, it didn't at all engage any of the 15,000 pages of Congressional record. What Congress thought it was doing, and thought it was justifying wasn't at all relevant, in the Court's view, to the Court, other than what was formally in the coverage formula.

It wasn't interested that Congress decided these were the States that needed to be covered for all these reasons in the 15,000 pages of record. What the Court cared about was that the formula itself formally referenced 1972, '68, '64 data, and that yielded the outcome of these States that Congress wanted. But the facts of what was actually going on, and what Congress was trying to do, were not relevant to the decision.

And part of why that was striking to me was just the sheer magnitude of what the Court had done in striking down what was the crown jewel of the civil rights movement, what has such huge historic and ongoing significance to this country, and to our voting process. And,

doing so without engaging that massive conversation that the rest of the country and Congress was engaged in seemed to me to be a real extraordinary act.

And so more than the formal, basic grounds for the decision, that was partly what struck me as the most significant aspect of what the Court did or did not do.

And I agree somewhat with Dan that, formally, the decision, you know, probably doesn't have sweeping precedential impact. It probably doesn't threaten a whole lot of other statutes. I think it is formally written as very narrow. I think it can be -- it certainly applied it in a way that was more sweeping than previously, and could be thought to change what rational basis looks like. But I think it can be very easily cabined, given the unusual and fairly unique nature of the statute.

But the huge step of the Court actually overturning this really kind of critical, core part of our law, and of what Congress did, in itself is a precedent that gives me huge concern.

MR. PERSILY: Will.

MR. CONSOVOY: Just to pick up on the conversation about the practical impact of the decision, there's been a debate about whether it's redistricting, or local changes, or ballot access issues.

So I thought what might be, I thought, useful is to look at the objection rate, because that would cover all changes or any kind that have been submitted.

So, the objection rate between 1982 and 2004 when Congress took it up again was .74 percent. That's 752 objections, over 12,000 jurisdictions, over 25 years. That's quite low. And if it's even possible, that actually misrepresents -- it's actually lower than that. In '82, the objection rate was 2.32 percent. In 2004 and 2005, it was .06 and .02 percent in those two years. And, actually, if you look at it, as the *Miller* decision in 1994, which was when the Supreme Court struck down what was called in those cases the "maximization policy," the

objection rate really dropped. So, the year before *Miller*, there were 61 objection letters issued. In the year after *Miller* there were 7 objection letters issued.

So, this is not to say that each objection isn't a real issue, I'm just saying, if you're talking about a disagreement over redistricting versus other issues, you might want to look at the sum total of how many objections there really were, as at least some measure of how big the problem is.

MR. PERSILY: Well, the table tents all flipped when you said that. (Laughter.) Let me start with Sherrilyn Ifill.

MS. IFILL: To be charitable, I'm going to (inaudible) --

MR. PERSILY: Press your button.

MS. IFILL: -- I'm going to appreciate the statement you made at the end, that not to say that one objection isn't important. Right. Because I just don't think that's actually the appropriate, you know, empirical focus.

I mean, if we think about, you know, what Congress did in 2006, there were 240 changes in the State of Alabama between 1982 and 2006 that were struck down: 46 were by objection letter, 192 were by Section 2 litigation. And, of course, when we look at the .6 number, you know, we don't include those instances where jurisdictions had actually refused to submit a change for pre-clearance, as well.

You know, the reality is that those 46 objections represent -- now, this is in Alabama, between 1982 and 2006 -- they represent real people, living in real jurisdictions, whose lives are really controlled by local officials and by the political process created by local officials. That, you know, our clients who lived in the City of Calera were really affected by the one issue of the diminution of the majority black district from 70 percent black district to a 29.5 percent black district in 2008. That's just one issue -- but they're real people.

So I just think we have to be really careful when we try and attach an empirical value to understanding, whether it's redistricting or other things, and we recognize that, particularly when we're talking about voting, that fundamental right -- and we're talking about the ability to participate in the political process, and to exercise what is your irreducible right as a citizen -- we don't get to aggregate numbers and say some are important, and some are not. They are all important.

And, as it relates to the day-to-day lives of people living on the ground, my own view, and from my experience as a voting rights lawyer, is that those small jurisdictional levels actually have a powerful impact on the lives of people living in those communities. And therefore we can't discount those objections. In fact, I would weight them.

MR. PERSILY: Rick Pildes.

MR. PILDES: Well, let me start with just one point of data. And I agree with the comment that -- my greatest concern is what's going to be happening at the local government level.

But, in terms of the symbolism of Section 4 and Section 5, and what it actually has been addressing in recent decades, the data I wanted to provide on the discussion we've been having so far is that since 2000, the Justice Department has objected 73 or 74 times. It objects 14 times to redistricting for every 1 time it objects to access to the ballot box issues -- at least in that period. More than 50 percent of these 73 objections have been to redistricting since 2000. A number of the other ones -- there have only been 2 objections to annexations, by the way since 2000. And a number of the other objections are to statewide laws, which I think will be aggressively challenged going forward. Whether those challenges will be successful under other theories, I don't know. And I'm hesitant to predict about it going forward.

But the larger point I wanted to make is that, in thinking about the Court's decision, I have always been much more focused on what Congress did in 2006, than what the

Court did in *Northwest Municipal Utility District* [sic] four years ago, or in *Shelby County*. Because in 2006 -- and I guess what I want to say here is this is an opportunity to reflect, I think, on the 2006 process, and to ask all of us who participated in that process, and who are thinking about going forward in future processes, what to learn from the 2006 process.

You know, in my view, it was fairly -- I don't know if I want to use the word "clear," but as I said to the Senate Judiciary Committee at the time, if Congress didn't update the formula, and did not have substantial evidence that it had generated to show continuing differences that were significant between the covered and non-covered areas, it was entirely foreseeable, given changes in constitutional doctrine since 1982, that we were going to get the result that we did ultimately get.

And so, to my mind, the question has always been why was it that the political process in 2006 wasn't capable of generating something that had a better prospect of surviving the obvious constitutional scrutiny it would be subjected to? And, you know, I've been working on these issues for a long time. I clerked for Justice Thurgood Marshall. I worked on both of President Obama's campaigns as a senior legal advisor. But one of the things I felt I learned from both of them was a combination of idealism and realism. And I felt in 2006 there wasn't enough of a realistic understanding of the larger constitutional context that seemed obvious to many people, I think.

And I think Congress could have been encouraged to do a lot of things in 2006 that would have made it much more likely that a majority of the Court -- maybe still a five-to-four majority -- but that a majority of the Court might have upheld a renewed version of Sections 4 and Sections 5. For example, I was deeply concerned that Congress didn't do anything to address the bail-out issue. We know that that's the way the statute was supposed to unwind itself naturally. And, if we're honest, we know that bail-out has not really been an effective mechanism. It hasn't worked, it hasn't worked for any of the counties that have significant sized

minority populations. 99 percent of the nearly 900 counties that were first included are still included if they have minority populations of more than 10 percent. Congress recognized this was a problem in 1982. They tried to fix it. Bail-out still didn't work in the wake of that.

Did it make sense for Congress to renew this for 25 years, given how difficult these issues are? Should Congress have been encouraged to take redistricting out of Section 5? I think I would tend to agree that the redistrictings are challenged very aggressively under Section 2. They don't look that different in the Northern States, the Midwestern States, the Western States with minority populations than they do in the South now, because of Section 2. Maybe Texas, you know, remains an exception, but those plans would have been challenged and struck down, I think, most likely, under section 2.

So, I think part of what happened in 2006 -- and, to me, this is the real question about how to think of this going forward -- there was an effort to simply capture as much of the ground as had been captured back in 1982, in the last process in which Congress looked into this. And by doing something that went for not just 100 percent of the status quo, but 150 percent, or whatever, by overruling *Georgia v. Ashcroft*, for example, I think the result has been getting zero percent now of the Section 4 and Section 5 regime.

And in going forward, I think trying to learn the lessons from the 2006 process, not just to focus on the Court -- I don't think it was inevitable that Justice Kennedy was going to vote against an extension. But I think that what happened in 2006 didn't convey any strong sense that the political process was capable of dealing with these very difficult issues of what's changed, what hasn't changed, how do we move forward, how do we still deal with serious problems where they exist?

And so I think we ought to be reflecting about what we can learn from that process, not just focused on the Court.

MR. PERSILY: Sam.

MR. HIRSCH: I'd like to make two points. One about the empirical foundations and one about constitutional doctrine. On the empirical point, I think that this is an unwinnable debate, and I don't think it's a particularly useful debate.

MR. PERSILY: Could you speak up a little bit there.

MR. HIRSCH: I think it's an unwinnable and not particularly useful debate. On the one hand you have a strong regulatory structure, one that looks pretty much unlike anything else that we have in any area of enforcement of policy of the states. It would be shocking if that kind of regulatory overlay does not affect behavior in some fashion, and thus to argue that there are very few objections is correct, and it's a point that I have made on many occasions. At the same time, you have to recognize that conduct may be different without the regulatory environment under which it operates. That has to be. People respond to incentives based on regulation.

At the same time, it is a non-falsifiable proposition to say that absent Section 5, you wouldn't know what would happen because, in fact, you wouldn't know what would happen. And, therefore, that is not proof; that is simply a statement that is tautologically correct. This

might have been different under a different regime, sure. So that the dissent in the majority go right past each other in claims that cannot be established on behalf of either of them.

So, the question then to my mind is, what would a record look like if you were trying to create Section 5 anew in 2006? There were thousands, tens of thousands, fifty thousand pages of evidence put before Congress, but most of that was just a catalogue laundry list of everything bad that had happened for a long time, most of it not in the immediate period. Does the Court have to defer to that? Does the Court have to accept that as a finding of Congress? I'm not sure on this point, because it didn't correspond to why this mechanism was needed in 2006/2007. Rather, it was a statement that there is incomplete overcoming of the barriers of race, which is undoubtedly the case.

And here again, you have a debate which is unwinnable between those who claim nothing has changed, and those who claim that everything has changed. And the reality, unfortunately, is in the middle, is somewhere in between, and also fortunately, because it shows that this very powerful remedial tool did have some effects.

So, what does this say about the prospects for altered mechanisms, and I know this is the discussion for this afternoon, but I want to suggest something about what the Constitutional framework looks like. And I think that there are three significant decisions that do actually; they're a puzzle. You have Fisher, and in Fisher the state of Texas puts forward what it says are reasons to have racial preferences and admissions. This is a topic I know very well. I represented the state in the Hopwood litigation. And the Court overturns that on the grounds that you can't be deferential here. It has to be a more exacting level of scrutiny. Okay, that's pretty much what we might have expected in terms of the standard use of racial considerations or any kind of activity taken that's challenged under the equal protection clause.

But contrast that with Shelby County itself, where the Court -- and I was

surprised by this -- did not go the City of Boerne route. It did not ask for congruence and proportionality which I take -- I was curious about Dale's comments -- I take that to be a much higher threshold than what the Court seemed to apply, which is this rational relations. I can't remember something being struck down under this kind of rational relations, but I can't really remember rational relations being the standard either for this kind of a test. So, it's a scaling back of what the demand is upon Congress here to have something that meets rational relation's scrutiny.

And then you have Justice Scalia's opinion in the Arizona case involving the election's clause which gives full-throated authority to Congress under the election's clause. So, you seem to have a constitutional differentiation between the powers of Congress, where it has primary regulatory authority -- the election's clause. The powers of Congress where it starts to act pursuant to the 14th and 15th amendment, which I thought had been held to the city of Boerne congruence and proportionality standard, but now seems to be held to a slightly lower standard in terms of rational relations. And then you have the level of scrutiny applied to the states which is now reinforced through Fisher as being quite high.

So, this is a constitutional subtlety that was not present before that actually gives -- seems to me to give Congress more leeway if it has a relationship between what it is doing now and a regulatory objective that can be tied to it in some systematic fashion.

MR. PERSILY: Spencer.

MR. OVERTON: Thank you. You know, I certainly want to move forward, and I look forward to this afternoon's conversation. But just in response to Rick's point here in terms of 2006, and kind of some of the criticism of the process, and I think that -- to me -- it's a little more nuance than the sense that, you know, I think you mentioned that bailout didn't work, was what you said. But, you know, as I remember looking at it, every jurisdiction that was eligible to

bailout has been successful in bailing out since 1984. I think the bailout kicked in maybe a couple of years after 1982. I think a quarter of the Virginia counties have bailed out, and I think that there may be just some jurisdictions that actually looked at preclearance as kind of a good housekeeping seal of approval that was a shield against litigation in terms of Section 2.

So I think the notion that bailout didn't work -- at least to me -- is a bit of an overstatement with regard to redistricting and the possible concept of some type of carve out there. I think you mentioned that local elections are really important and 85 percent of objections are objections to local jurisdictions, right, rather than statewide changes. And so, I think if we were to carve out redistricting somehow, there'd be a lot of localities that wouldn't have resources to bring a Section to claim in terms of redistricting, I think could be an issue.

And I just think that there's some general, political issues -- that at least to me as a law professor -- that, you know, are beyond me in terms of different positions in terms of Congress. And also I'm not sure that anything would have satisfied Justice Kennedy in terms of a change. I don't know, I didn't try to thread the needle here, and I wasn't there in terms of threading the needle. But I'm less, I think, critical of the 2006 process. Obviously, we want something that's constitutional moving forward, and I take your point there, but I'm probably less down on those who kind of led the charge in 2006.

MR. PERSILY: Did you want to respond to that now?

MR. PILDES: I can wait.

MR. PERSILY: Okay, Glenn Magpantay.

MR. MAGPANTAY: This is quite challenging because I recognize that the Court struck down Section 4 of the Voting Rights Act, but what is most disturbing to me is how they did it. And the discussion over state's rights, the flagrant disregard for the incorporation doctrine that the Court went, you know, in a very powerful way, as Julie talked about, to strike down a

tremendous piece of the Civil Right's Movement.

And I look at the Voting Rights Act, not only as a provision that eliminated race discrimination against populations who were affirmatively disenfranchised, but looked to eliminate discrimination for generations to come. So, new communities and margin minority communities, in my case Asian Americans and their protections that they had enjoyed under the Voting Rights Act are now threatened.

And then there are other provisions of the Voting Rights Act that I am very fearful of their constitutionality in light of Shelby. That obviously Section 203 and 208, the bilingual (inaudible) provisions, the assistance provisions of 208, can disable voters, bring (inaudible). If Congress says that people with disabilities can get assistance to help them read a ballot, does Congress no longer have that power? What is the way in which they argue that they have that power? The anti-coercion provisions of the Voting Rights Act, and we filed provisions in New Jersey not too long ago on anti-coercion, and are those constitutional?

You know, before we were looking for a way to argue that yes, Asian-American voters, other communities, do face current and a history of discrimination. But now that the record in 2006, you know, was unnecessary and didn't even need to be referenced, how do we argue that those provisions are still there? What is it that the Court needs to satisfy, you know, their taste for modern remedies to disenfranchise in the political process if a reasoned, historical analysis and actual instances of disenfranchisement is not good enough for this Court.

So, I am searching and looking for, you know, what is it that we need to do to protect the remaining provisions of the Voting Rights Act that are there? What do we need to preserve them?

MR. PERSILY: Ned.

MR. FOLEY: So, it's true that the Court only struck down Section 4 and not

Section 5, but I think there are some signals in the majority opinion about the Court's attitude to Section 5 that we should talk about. The Court, whether we like it or not, the majority thinks of Section 5 as constitutionally problematic. They're willing to tolerate it. They said it was justified in Katzenbach, but I think they put it in a separate constitutional status than what they see as conventional remedies. They keep citing Katzenbach for the proposition that it's an extraordinary remedy that kind of needs some special justification.

And what I take that to mean is that there can't, in the Court's mind, there cannot be a permanent preclearance regime. As a constitutional matter, preclearance has its own sunset, even if Congress didn't put a sunset in it. And that means as a constitutional matter the coverage formula or the necessity of a preclearance regime has to have some renewal. Now they don't specify as a matter of constitutional doctrine whether that's a decade, two decades, or whatever, but something like that has to happen.

And I think, you know, one of the most significant lines in the opinion is the Court's statement that if Congress had used this coverage formula as its first iteration of how to do preclearance, it wouldn't have passed the same rationality test.

And by the way, picking up on Sam's point, you know, I think they just wanted to deflect the Boerne issue. Boerne is a much tougher test of Section 5 power under the 14th amendment, or Section 2 power under the 15th amendment. And since it was a tougher test than the original Katzenbach test itself, in the earlier 1960's view of Section 5 power, the Court found that since it could strike it down under the more lenient test, they just didn't want to go to the more difficult test.

But I guess my basic point then is that if the voting right's community or as a policy matter we think that there ought to be a permanent preclearance regime, I think we have to look elsewhere. And perhaps we can look to the Arizona case. If preclearance were limited

to federal elections and not state elections. In other words, it seems to me that going forward -- I know this is this afternoon's conversation -- but if we want a preclearance regime justified under the 14th and 15th amendments, there needs to be a new coverage formula. And that might be difficult, and we can talk about how to go about doing it.

But I think it would be necessary to recognize that that would not be a permanent regime. It has its constitutional sun setting feature as long as the present five-member majority of the Court exists. If the policy recommendation is that elections need a permanent preclearance feature that doesn't have to be constantly re-justified, maybe Congress has the power under the election's clause to impose that kind of regime for federal elections exclusively.

Now as a practical matter, state elections and local elections may be swept under because it's just so difficult for states to have two different electoral systems. But I think if the goal is something like, that the way in which elections should be run is that all states, or some number of states, have to submit for prior approval, that we should look to the election's clause instead of the 14th and 15th amendment perhaps to justify that.

MR. PERSILY: Dale.

MR. HO: Just to respond to Ned's point, I agree with you that there maybe is a clear path to some kind of preclearance for federal elections, but the Spencer side of it, I think, is really crucial here, that between 1982 and 2006, 85 percent of the objections were at the state and local level, right? So we're not, I think, ultimately as concerned about -- not that we are not concerned about what happens in federal elections -- but the vast bulk of Section 5's work was done at the local level. Sorry, I think I said state and local, but it actually is at the sub-state level.

And those are the kinds of voting changes that I think are going to be very, very difficult without some sort of new mechanism in place to deal with. Section 2 we know is

expensive and difficult. People have talked about that a lot, and it's just something that is hard to use as a remedy to changes that happen at the local level. It's also harder to know about those changes that happen at the local level. One aspect of Section 5 that I think we haven't really discussed yet today, is the notice function that it served. When it comes to statewide changes, obviously it's valuable to know about those through the Section 5 process and to get all of the data, but we generally hear about that kind of stuff, right? It's covered in the news, you have presences and state legislators who are aware of those kinds of changes to voting laws, and we hear about them. It's the stuff at the local level that we don't hear about, and without a regulatory mechanism in place that requires jurisdictions, not only to notify us when those changes happen, but also to provide the basic data that enables us to begin to evaluate those changes, I think is something that we lose here that is extremely valuable that a preclearance mechanism that only applied to federal elections wouldn't necessarily capture.

MR. PERSILY: Kareem.

MR. CRAYTON: Just a couple of notes, I think at different points, including in Dale's comments, the consideration about empirics comes up, and I'm wanting also to encourage us and to remind ourselves that in addition to the wonderful contributions that lawyers make, social scientists have a great deal to say about this. And I think it's important to understand how social scientists use data.

One of my critiques of Justice Robert's opinion is that he selectively uses it, but I want to at least limit my comments now to the conversation that's going on because I think we do need to move forward.

Just to add to the conversation about how to understand activity in the last 25 or so years, one thing that hasn't come up, that did come up in the congressional record, and I think we should think about this in the ways in which Section 5 is affected behavior, is what a

colleague, Luis Fraga, has put out in addressing the way in which the Justice Department has utilized more information requests which are not entirely formal in the same way that a Section 5 objection is, but it in many cases has an effect on local behavior. And when you take that into account, actually, you get a much more full picture of the way in which Justice Department activity actually does limit decisions by local governments that might have a discriminatory effect. The number of those requests actually are quite large by comparison to just objections outright.

The other point I wanted to make about this in terms of empirics, is thinking some about that predictive point that Tom mentioned earlier. And I really do want to encourage us to look at this problem in that fashion. If we are trying to fashion a new system, whatever it looks like -- I still hold to my earlier comment that I believe that there are still distinctions that make the project begun in Section 5 states still an ongoing concern, and how we do that is an open question.

But what I want to encourage us to think very realistically about are the different variables that are associated with the propensity towards discrimination. Because I think that really is -- at least from my way of thinking -- the big question going forward. And while we're at that by the way, we might also think about the propensity with which our traditional litigation tools -- I mean one thing that Justice Kennedy talked about in the hearings was, and it's come up here, that, you know, you can utilize litigation. Well one question that is empirical and does have an answer is whether or not the Courts, as a matter of habit, have been fairly generous or less than generous in issuing a preliminary injunction on a plan. Now I know what the answer is with respect to voter ID, but I don't think anybody in this room has offered an answer. I don't think we know the answer about how the federal Courts look at the propensity towards issuing a preliminary injunction on election related questions.

And in my view, that's actually the part of the rub. And I suspect, I hope anyway, those on both sides of this issue who seem to believe that litigation at least offers some answer in the absence of a Section 5, can think creatively about ways of encouraging Section 2 if it's going to be a significant tool going forward, actually addresses some of these concerns.

MR. PERSILY: Sherrilyn.

MS. IFILL: I just wanted to intervene here to note that -- because I very much appreciate that comment that Kareem made, but also several others, and that we are beginning to develop something of a list, and I hope in the afternoon we'll be mindful of it as we think about what might be answers in the future. There are certain qualities and characteristics of Section 5 that I think Congress was quite intentional about that we don't want to lose in the sauce.

So, you know, we've already had a conversation about notice, and that's what Dale talked about. How will we find out that at the school board or the water district in Alamogordo, New Mexico, they're planning to add another seat, right? And obviously for people like me, and some of the others around this table, you know, this is an important issue for us in terms of talking with the communities that we work with around mobilization, but the reality is, it's fairly impossible to imagine being able to keep up if you imagine all of the political subdivisions and districts that there are in all of the jurisdictions that were formerly covered by Section 5.

So, whatever we want, we want something that provides some opportunity for notice. Second is cost. The reality is that Section 2 litigation, I know people think that lawyers want to file lawsuits all the time and litigate for years, but the reality is, we don't. Non-profit lawyers don't. (Laughter) So, it costs a lot of money. It takes a lot of time and manpower, and so we want something that we don't have to bear the burden of the cost of fighting discrimination in all of these tiny political subdivisions in the country.

The third thing is time, and time is also correlated with advantage. Not only do the suits take long, but even if we have the favorable disposition in the judiciary that Kareem referred to, and we win, five years down the road, you know the person who was elected in that improperly created district is now an incumbent. And even if we go back to the drawing board that person now has all of the advantages of incumbency including being a known factor, the ability to raise money, and so forth. And so there is an advantage that happens even with successful Section to litigation that we need to think about. Section 5, (inaudible) rated that because you were able to intervene before the practice went into effect.

And then the last thing is deterrence. I mean I'm always astonished at how little Section 2 litigation actually deters actors from engaging in certain kinds of conduct as it relates to voting changes. People are willing to ride this thing out, largely because Section two litigation does take long. And what we don't want is for it to become a war of attrition.

This is why, I think, this issue of Section 5 and its influence is sometimes misunderstood. I do think that Section 5 has a tremendous influence, even outside of the covered jurisdictions because there are certain practices that now are recognized as potentially having a discriminatory effect. I live in the state of Maryland for example, and, you know, voting changes happen all the time, and the language of what, you know, of Section 5, the language of the kinds of changes in voting practices that might have a discriminatory effect actually come up in the context of voting changes and jurisdictions that are not covered because people just want to know, and they want to make sure they're being fair

So there is a way in which kind of the deterrence effect of Section 5, you know, needs to be understood in its national scope and not just in its covered jurisdiction scope. And so in some ways what we say about whatever this thing becomes, if it becomes a formula or whatever we want to call it, we should recognize that it will have resonance and significance

outside of the places where it may be formally imposed.

And so I just hope, you know, in the afternoon we just kind of keep a catalog of some of those things that have arisen as interests and of qualities about Section 5 that have been powerful and important, as we develop what might be a way of thinking about where something like a Section 5 or a Section 4 might be imposed.

MR. PERSILY: Jon Greenbaum.

MR. GREENBAUM: Thanks, I think Kareem's points about empirics are a good one in terms of going forward. On the question that you posed regarding preliminary injunctions in Section 2 cases, I will tell you that they are rare. Even in cases that we've won; we've lost at the preliminary injunction phase.

With respect to what Sherrilyn was talking about, we're going to see with the upcoming Texas photo I.D. litigation, these issues of cost and time coming up. It's going to be extremely expensive, both for the state and all the parties that are litigating the case on the plaintiff's side, and it's going to take a long time to work itself out. We're going to have a practical example in front of us in terms of what a difference it makes to not have Section 5 because, of course, that was a change that first the Department of Justice and then the Federal District Court blocked under Section 5.

MR. PERSILY: Will.

MR. CONSOVOY: I just wanted to follow up on some of the discussion about costs. Of course Section 2 does have costs, but preclearance has massive costs for covered jurisdictions. It's cost billions of dollars over the last few decades for these jurisdictions to submit all changes. That should at least factor into the analysis.

If Section 5 does all these good things for the system -- and I'm no expert on certainly all the policy issues -- then maybe someone could ask the delegation from Wisconsin if

they'd like to be covered, or New York or Tennessee or Illinois or Pennsylvania or Oregon. I don't think they would be receptive to being covered. There's a stigma to being covered for the state. There are real costs for the state. And that is something that's going to be needed to be addressed if there's going to be changes to the coverage formula and new jurisdictions are going to be brought in. If that's an avenue people are going to pursue, I think it will be interesting to hear from those delegations whether they're willing to be covered.

MR. PERSILY: Kareem, you want to speak on this?

MR. CRAYTON: Well, this is one of those places where again, as a person who's trained in social science, I feel like I do need to offer a thought. In part because I actually wrote about this shortly after Nuwhitno because Justice Kennedy raised the question in the course of that conversation that I think Will just brought up, that didn't it cost billions of dollars over the course of -- I guess it was the last decade at the time he asked the question -- to comply with the voting rights scheme in Section 5. And the answer is, absolutely it did not.

And I'll tell you two reasons why that's true. I've written about it in the SCOTUS blog, just in a short column; feel free to look at that. But let me just say, as a matter of common sense, the entire election's budget of the Section 5 covered states doesn't get to a billion dollars, that is to run the election. The average cost of a Section 5 submission is around 200 bucks, as I think that was the case for Nuwhitno in the lawsuit in question. But to believe that more than a billion dollars is necessary to deal with one particular provision, when the entire election's budget of these states don't get close to a billion dollars, is stretching credulity.

Now it doesn't suggest that there aren't costs. There probably are financial costs. And there probably are some sovereignty costs. I don't want to minimize that, and those should be a part of the discussion. But one thing I don't want us to do is get a different view than what the reality suggests about the financial cost associated with dealing with this regime.

Section 2 is expensive. Section 5 does cost money, but it's not even half of what it costs to deal with a Section 2 lawsuit.

MR. PERSILY: Did you want to respond?

MR. CONSOVOY: So, I'm no expert on -- the billions was in the congressional record -- I went back and read it. And then the deputy associate general was asked in the Northwest Austin argument if that figure was correct, and I believe he agreed. So that was where I got it from, in the Northwest Austin argument.

With respect to costs, again, I represented Florida in the early voting litigation. I can tell you the costs were extensive. Section 5 costs obviously cover every change, right? There is some cost, some minimal for sure, some more. So when you're measuring the cost for Section 5 you have to look at every voting change. Obviously, not every voting change is going to be subject to Section 2. Some small fraction of that will be subject to Section 2. So you can't do an apples to apples comparison between one Section 5 change and one Section 2 litigation. It's just not a fair comparison.

MR. PERSILY: Gilda, then John, they're both on this point.

MS. DANIELS: I just wanted to address the issue of costs. It is more costly to seek preclearance in the District Court in the District of Columbia. It is not costly to seek free clearance from the attorney general of the United States. We're talking about a postage stamp, essentially. The cost is minimal. It's certainly as compared to -- if you're thinking about cost in regards to litigation in the D.C. district Court, yes, litigation is expensive, but the cost of pre-clearing, of submitting these more than 20,000 submissions doesn't reach this extraordinary cost that's been recited in the media, as well as in the cases.

MR. PERSILY: John, did you want in on this point?

MR. GREENBAUM: It's a really quick point,

MR. PERSILY: It's Lisa and then Rick.

MR. GREENBAUM: So, on the billions of dollars, let's talk about what the source of that was in the congressional record. It was from Greg Coleman who represented Northwest Austin. And it was taken from his testimony. He didn't purport to do a study on it. It was simply a sentence that it's cost, I think he said over a billion dollars in the last ten years with no support behind it.

MR. PERSILY: Lisa, and Mark did you want to jump in?

MS. BORNSTEIN: You know, a lot of the conversation this morning has been kind of previewing the conversation this afternoon. I think everyone's kind of anxious to start thinking of what do we do? And I have more of a question than an answer to that I think. Wendy mentioned that Congress and the Court worked at cross purposes or unrelated to each other, and I wonder when Congress does go back to look at how to resolve this, how should Congress view the decision? And what is it going to look at in the decision as it does its work in order to try to respond. I think, you know, the fact of the historical context and Ginsberg's discussion about the potential for backsliding is part of, I think, what has to really encourage Congress to do something to continue to protect voters, and yet the Court was very disdainful of that argument.

I think that, you know, others have mentioned that Congress developed a very extensive record, and it was completely ignored. You know, it seems like Congress did everything right. The Court even talks about, you know, their disdain for the argument about the deterrent effect of Section 5, saying that that argument basically makes Section 5 immune from scrutiny.

And so I think the Court kind of created this, you know, conundrum, and I think Congress may have to basically ignore the Court and just kind of start over. I don't really know

what this opinion does to kind of provide any path for Congress to do it in a way that is, you know, going to survive Court scrutiny.

MR. PERSILY: Rick, did you want to weigh in?

MR. PILDES: Yeah, I think I'll come back for just a moment to Spencer, and then weigh in on this issue On Congress. So I don't know how to assess the, you know, claim that Justice Kennedy would have voted to strike down anything that came out of Congress in 2006. I do worry that that kind of narrative makes it too easy to take responsibility off of us to talk and reflect about what might have been done differently in the political process to maximize the chances that Justice Kennedy, or others on the Court, might have found the renewed Section 4 and 5 acceptable.

I want to clarify one of these issues about deference to Congress and the fact finding and the 15,000 pages, because I think this is also an area where people are talking very much past each other, okay. So, there's a huge question here in this case about what the constitutional question is, or was. And that question is in theory, as Will says, or in practice, was Congress obligated or permitted to start with the existing coverage and then show that there continued to be problems in those areas and that was sufficient. Or was the question, is Congress obligated in theory or in practice to show that there are continuing significant differences between the areas that are covered and the areas that are not.

That's a big question, and people can have very different views about what the right question is. And that's a normative or constitutional debate. But the actual record that Congress built, was built on the assumption that the first question was the critical question. And so, as some people have alluded to, all of those 15,000 pages, virtually all of them, were designed to martial evidence that there continued to be incidents in the covered jurisdictions.

If the constitutional question was what the Court suggested in Nemundo it was,

and what they decided in Shelby County it was, that there was a constitutional obligation to show either that the formula was rational and contemporary circumstances or the application could be justified, there was very, very little evidence in the record that compared the covered to the non-covered jurisdictions. And that's what I said in 2006 when I looked at that record and was very surprised to see that by the time it had gone to the Senate.

So, the worries about, is the Court not being deferential to Congress' findings through empirical information and the like, are I think asking the wrong question and people are giving themselves the wrong answer.

The big question is, what was the legal question, or what should it have been? But if you were going to frame the question as the Court ended up framing it, then it's not really an issue about deference to fact finding on Congress' part because Congress didn't devote much of the record to actually comparing the covered to the non-covered areas. And that may have all sorts of implications for how concerned people are about whether the Court would be deferential or not to future voting rights reforms. Because if there's actually a factual record on the question the Court considers the critical constitutional question, I don't think that this decision actually says very much about the Court being willing to blow past empirical findings from Congress. I think there's a disagreement people have about which question should have been the critical question. That's where the issue is.

MR. PERSILY: Mark.

MR. BRADEN: Well I actually worked real hard to get the renewal in 2006, and you got what you could get, and this is what you could get. It's a little bit like doing -- you know, everybody's in favor of tax reform, until you look at the details, and every change in the tax law is money out of somebody's pockets so they're adamantly against it. Any change in the formula brings somebody in and sends somebody out. Guess what, the ones that would be brought in,

this wasn't going to happen. So, what could happen here is what happened.

Now on the record, reality to the record was a little bit like grading term papers in college. This was the test of, okay, we'll make it as long as possible so we'll throw it down the stairs, and when it gets to the bottom as the longest one, we think that's maybe, maybe the Supreme Court will look at it and say, "15,000 pages, there must be a lot there of good stuff," and bingo, it will support the constitutionality of that. I mean that's what was going on. Don't fool yourself. Anybody who thinks anything else is unfamiliar with the sausage-baking process of legislation.

So everyone at the time, not everyone, but everyone who was paying attention at the time, knew that this was going to be vulnerable to constitutional attack. My prediction to the caucus was, you know, reach in your pocket, flip the coin in the air, as to whether this will be constitutional when it comes to the Court. It's in serious doubt at the time. So that's where we're coming from on that.

Let me comment on one thing that actually goes directly to my heart, which is the cost of doing preclearance. This decision most certainly took money right out of my pockets. (Laughter). It's the cost to you. It's the cost to me that we're talking about here, and I try to charge just as much as they're willing to pay me to do preclearance. I have no notion of what the overall cost is. I'm not tied to any studies, but if you're going to represent a state, to do a statewide redistricting plan or a large municipal plan to get to preclearance, you've got the lawyer's costs, you've got the expert's costs. You're talking about hundreds of thousands of dollars, is my experience involved. And I'm not even talking about the other costs that are involved. I'm talking the cost to do the presentations.

Now, I'm not saying that's not a justifiable cost, but I'm just saying don't fool yourself that it's cost free. It's cheaper than Section 2 litigation, but not necessarily when you

get the volume. So I think the cost issues are a little more complicated than we think they are.

MR. PERSILY: Rick, did you want to respond about what was possible -- Mark's argument is that this is all that was possible then.

MR. PILDES: Well, part of my view about this was that precisely because it was going to be difficult to adjust the coverage formula, that it would have been prudent to try to adjust as many other parts of the statute as possible. That's why I come back to the bailout issue. I think this case looks very different to the Supreme Court majority, if a very substantial percentage of the jurisdictions that first were covered in 1965 or 1972 had bailed out. I think that it looks very different to the Court, if these difficult problems come up. And we understand that redoing coverage is very complex. But it gets locked into place for another 25 years.

I think that because so much of the obvious concern of the Supreme Court, whether you accept it or not, centers around issues of racial redistricting where the majority has been, you know, consistently putting limits on that process since the early 1990's.

I think the statute looks different if redistricting is taken out. And even if you started with the existing states, and weren't looking to add new states because of the complexity, I think it looks different if the coverage starts getting targeted. More to the Mississippi's and Louisiana's rather than the North Carolina's or the Virginia's.

So, I agree it was politically complicated. I think it would have taken leadership. I think no one in Congress wanted to exert that leadership. I don't think any of the major participants in the process were really helping Congress by getting out in front and endorsing, you know, some kind of modified version of the system along any of these or other lines. And I think that was the problem.

MR. PERSILY: We're coming close to the end of this session. Wendy, Guy and Heather, if you could do it real quickly.

MS. WEISER: I just wanted to respond to what Rick said before and what Lisa said. I do agree with Rick that there is a disagreement about the critical question. But I don't think that the Court actually engaged the question of whether or not there was differential treatment, or differential discrimination in the states. The decision nowhere talks about that, other than in vague reference to equal sovereignty. It doesn't talk about the record on that point. So, even if that's something that might have been animating a concern for the Court, the decision's not based on that. And even though that might be something that a future record we might be well served to keep in mind, that is not what the decision is based on.

MR. PILDES: But *NAMUDNO* does, Wendy. I just want to make sure you remember that.

MS. WEISER: That is true, but that decision is not the governing one now. And then to answer Lisa's question, for that reason the decision's actually quite narrow in terms of constraining what it is that the congressional record needs to be for a future fix or enactment. I mean it formally just says the formula has to be based on current conditions. It formally criticizes the formula for not using the record to shape a current formula. And so as a formal matter, even though we know it's animated by other things, there's very little that's criticized in the congressional record other than the formula itself wasn't an appropriate tool to be the outcome. So, I think that gives a lot of leeway.

MR. PERSILY: Guy and Heather.

MR. CHARLES: All right, I understand I need to be really short. I think this is an important point because it goes to what we're going to talk about this afternoon. So, I will be really short. If one believes that the Court was open to some modified version, then I think going forward that one can respond to that.

If, however, one believes that the Court is hostile no matter what you presented

to them, then I think you have to take a different path forward. So, I'm just going to stop there because otherwise, the wrath of Persily (laughter) will come at me, but I think this is a very important point to figure out.

MR. PERSILY: Heather, last word.

MS. GERKEN: I just want to reframe the cost question briefly. It is always as opposed to what? So, the question isn't how much Section 5 costs per piece. It's what is it going to cost when it's all done by Section 2? And you're going to have Tom and Sherrilyn and Glenn and Dale in litigation mode, all of these local jurisdictions. It's going to be a hostile process, I hope, because you guys are going to litigating. It's not going to be cooperative. It's not going to be done with bureaucrats who know what they're doing. Not repeat players that have worked with the states over a long time and built good relations both with the community and with --

DOJ is very cheap because they know what they're doing, unlike most courts. They are expert in this area, unlike most courts. They're not in litigation mode. They're in cooperation mode with these localities, and so resolving these problems through Section 5 can be cheap, as long as you don't cover too much. Just remember, litigation mode will be really costly too.

MR. PERSILY: 15 seconds.

MS. IFILL: I've got 15 seconds to say, and it won't all happen through Section 2, which if I keep my cynical self together, you know, I recognize is part of the deal, because of the notice piece. We won't know all of it, you know. It's true that there will be a higher cost because we'll have to do more Section 2, but there's also another cost. There will be a democracy cost because some of it we just won't know about.

MR. PERSILY: Tom, do you want to take us to lunch?

MR. MANN: I'm going to take you to lunch, but you're going to have to wait a minute or two. Just a couple of comments as we move from morning to afternoon. First, I want to thank Kareem for saying such nice things about political scientists. (Laughter) There are many of us here, and I really appreciate that, and I'll remember that.

For me, not versed in many of the intricacies of the law, it's been a fascinating discussion this morning. But as we move to the afternoon, THREE sort of big realities from the real world of politics sort of demand being addressed I think in the afternoon.

The first goes to a question which is the continuing importance of Section 5 to racial gerrymandering. Mark indicated that he saw relatively no difference between covered and non-covered states in the whole approach. The question is, does that hold up when it's litigated, what other legal means and state constitutions and other parts of the law are available for that?

My impression is that the sharpest critiques of the Voting Rights Act were sprung from the controversies and differences over racial gerrymandering. Abby's here, and will no doubt talk about some of that this afternoon. Stuart has written about it. So that's there, it's sort of part of the history, and so my question to Nate and the others who have really studied this, and who have been involved as masters for the court in drawing plans, are we entering a somewhat new phase of race and districting? And what was the experience coming out of this last round? It's more complicated with coalitions of racial groups, and we have the natural sorting of democratically-inclined voters, including minorities in urban areas where you have to gerrymander to avoid overwhelming minority districts.

Anyway, if we could have that in mind and get that sort of straightened out a bit in the afternoon, I think that would be helpful.

The second is the evidence -- and again I turn to a paper by Nate and Steve Van

Sullivar on the increased level of racial polarization in the South, and therefore, in particular, in the covered states. It's really quite striking the difference between white voters' inclination to vote for a black candidate in the South versus other places. And covered versus non-covered states is a reality of our politics, and so how does that play out in following up.

The final is the overwhelmingly practical effects on our politics of minorities along with low-income people and to some lesser extent young people, voting overwhelmingly democratic in elections. That can't but help have a major impact on Congress. And we all talk about Congress, but there is no Congress. There's a House and a Senate, and there are Democrats and Republicans. And maybe, Sherrilyn, since the bulk of important cases are at the local jurisdiction where there's more non-partisan politics, maybe this is less a problem. But when Congress gets into it, I think in many respects it plays out their real live considerations about winning federal elections, and in state elections necessary to draw the next set of maps for federal elections.

With those brief remarks, we are adjourned for an hour. We have a little informal luncheon buffet. You can come back and eat at the table. You can talk to friends, go out into this balmy Washington weather if you want to. In any case, we are adjourned for one hour. Thank you.