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

1:30-3:45 POSSIBLE RESPONSES TO THE DECISION

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A F T E R N O O N P R O C E E D I N G S

MR. PERSILY: In some ways it was a trailer for the movie that follows after lunch, since somebody wanted to talk about what's next as opposed to what just happened. So, as before, we'll just start with a few people who were going to weigh in. Since Abby Thernstrom has not weighed in yet, I thought I'd ask her to start us off in prospects for reform.

MS. THERNSTROM: Sorry, hold on a minute, let me get rid of this food. Right, I haven't weighed in. Silence is not usually my style, but anyway it was this morning.

Some of you may know I wrote my first book on minority voting rights 25 years ago. So, I'm in the category of a crazy, obsessed lady who latches onto one topic and can't seem to let it go. And some of you will think, and I agree, enough already. I hope maybe this conference, maybe something subsequent to this conference will be my swan song on this issue. And for the entire 25 years, as most of you will know, I've been a heretic on this subject, believing that the costs of the usual remedy for electoral discrimination; namely, the creation of as many majority, minority districts as possible, safe-block districts, sure to elect Black or Hispanic candidates, that the costs have been very high. And while there have been benefits, I agree that there have been benefits, and that point was missed in my first book and continued to be subsequently missed. I agreed for instance, with the decision in Allen in '69, but nevertheless, I have been opposed to all the racial sorting, not only with respect to voting rights, but other race-related issues as well. All the divvying up, as Justice Roberts has put it. And again, that is not because I don't recognize and agree to which the Voting Rights Act transformed the South, marked the death knell of the Jim Crow regime. I recognize it. I appreciate it. I celebrate it. And I celebrate, but I also celebrate Shelby for reasons I spelled out in my *Wall Street Journal* piece. Justice O'Connor and Ashcroft said the Court has never determined the meaning of effective exercise of the electoral franchise. Basic definition of questions have never been fully addressed, and going forward it seems to me those big definitional questions have to be talked about, and I'm hoping perhaps we can talk about them a

little bit this afternoon.

Racial progress, the question of racial progress was absolutely central to Shelby, but how do we know racial progress when we see it? There's no consensus on that question. One of the points that I often make and is a bit controversial -- well, nothing I ever say on this subject is not controversial -- is that demographic change is really changing the enforcement of the Voting Rights Act. It is not possible to keep on the course it has been on by insisting as a remedy for electoral discrimination all these race-based districts -- the creation of all these safe, Black, and Hispanic districts.

In 1965 the South, as everyone knows, was a land of Black and White. Today, that land has been swept away, replaced by much more diverse, multi-racial, multi-ethnic society. And in time, in enforcing the law, as the Department of Justice came to insist on race-conscious single member districts that served to protect black candidates from white competition because that's what those districts did, those single-member districts are going to get harder and harder to draw.

The nation has been demographically transformed since more than 30 million immigrants have entered the country. And with this influx of Hispanic and Asians, particularly, it was expected that residential clustering would continue -- the residential clustering which was so essential to drawing these safe minority districts. But that has not been the case. Since 1975 the language minorities have not only grown spectacularly, their members have burst out of their initial geographically concentrated residential areas, and have dispersed across the land. Therefore, increasingly sharing urban space -- these new minority groups with blacks, whites, and with each other. Again, as a result creating majority, minority districts will cease to be a straightforward task as it has been.

Justice Souter once defined vote-dilution as the distribution of politically cohesive minority voters to districts in ways that would reduce their potential strength. Minority voters by this definition are already diluting themselves. And I'm going to stop here, because the bottom

line here is, it is essential it seems to me, in talking about the future to recognize the changing demographic landscape and to talk about the reality that Courts will face in the future and that Congress has to think about when it goes forward, as I expect it will, in trying to piece together some sort of revised Voting Rights Act. Those are my very few short remarks.

MR. PERSILY: Spencer, do you want to join in?

MR. OVERTON: Certainly, you know I would agree that demographic changes are important, but I think that they're important in terms of supporting and updating of the act. I think about Nueces County, Texas, where in 2011 Latinos were 56 percent of the population in that county, and the county commissioners basically engaged in a racial gerrymander to ensure that Latinos wouldn't control three of the five seats. And so I agree that demographic changes are important, but I think this increased commitment to voting rights is what naturally follows.

Generally, I think it's a mistake to look to the past and be confined to the past, but I think preclearance is a really novel and important tool that we should learn from as opposed to vilifying it. And I think it's important to think about what we lost. We lost a tool that was comprehensive, as opposed to the case by case piece, it was comprehensive. All changes were reviewed. As you all know, it blocked problematic activity or changes before they were actually implemented and harmed voters. It was a lot less expensive, at least the submission, than litigation. There was a certain amount of disclosure to the government of information and some deterrents flowed from that. Politicians all knew that their changes would be reviewed and presumably acted accordingly, many did.

And then it also dealt with some of these hurdles to voting. We think about Jingles and litigation and the redistricting context, as Dan has talked about, you know, preclearance, I know that most of the objections were redistricting as opposed to hurdles, but it dealt with hurdles.

So, some initial thoughts I have in terms of how we might go forward would be updating preclearance so it's based on recent objections, as well as possible new violations

expanding bail in, so it's not just intent, but also it affects updating litigation. So, streamlining the preliminary injunction. John mentioned the fact of how difficult it is to get a preliminary injunction to prevent unfair rules before they harm voters, putting more of a burden on states and localities in litigation to show that their changes are fair in terms of burden of proof production. Litigation is expensive, and often jurisdictions are in the best position to establish, to provide information, as opposed to fishing expeditions, you know, extensive discovery, hiring of experts, et cetera. A lot of voters, especially on the local level, can't afford that. And then also updating litigation so that we have a more effective vote-denial tool as Dan has talked about, as opposed to being so focused in the litigation context on redistricting.

Then finally, I'm an advocate of us thinking about disclosure. To a certain extent, preclearance was disclosure. Everything was disclosed in covered areas to federal officials. And I'm talking about disclosing the effects of a voting change on racial and language minorities. So, not just general disclosure of impact on turnout, but effects on racial and language minorities. I think disclosure is comprehensive in a way that litigation is not. It can deter some bad acts in terms of sunlight deterring bad acts. It allows groups and government to see trends, to concentrate litigation resources and other resources.

We've got disclosure in other areas like securities, anti-trust, environmental impact statements. Criminal justice impact statements are in law in Connecticut, Iowa, Oregon, just passed it. Campaign finance -- we also use disclosure. And a note here, disclosure's not everything. I definitely believe we need to do some things with updating preclearance and litigation and, you know, disclosure's not everything. Thanks.

MR. PERSILY: Heather.

MS. GERKEN: So, in thinking about where to go forward, I think we have three kinds of problems we need to solve. And I'm going to propose one solution.

So, we have a constitutional problem. The current Section 5 is deemed by the Court too burdensome, and it doesn't allow you to select some jurisdictions over others without

adequate evidence.

We have a right's problem that is in the absence of Section 5. We have concern about not vindicating people's rights, both because you can't do it quickly enough. Sherrilyn actually made this list. The costs of Section 2 litigation are extremely heavy. You're going to miss important stuff because there isn't enough money to go around. And I'll just say to remind us that the states bear cost too. It's very costly to go through litigation if you're a state, incredibly costly. And you don't have the kind of room to maneuver that you do in the Section 5 process. In the Section 5 process you're working with experts who know you, who know your jurisdiction, who know your community, and can find ways to work things out.

In a Court you don't have those kinds of options, right? Courts don't give you those kinds of tools. So there are real reasons, both Kareem and Allan Katz have written about Section 5 as a tool of governance. There are real reasons to value Section 5, even from the perspective of the states.

And then we have an administrative problem. And the core administrative problem is how do you sort the wheat from the chaff? There are too many things that are changed every year for elections. We can't cover everything. And so the question is, how do we figure out what to target and what not to target.

So, we could do a couple things. One was we could change the coverage formula to hit certain jurisdictions. I have a lot of trouble figuring out what the politically and constitutionally acceptable strategy for doing that is. So, what I can think of as constitutional, doesn't strike me as particularly likely politically, and vice versa.

And we could do it by activity which is Wendy just suggested to me. Although again, I just have trouble seeing the Republicans and Democrats, at least these Republicans and these Democrats sitting down and mapping out what they think are suspect election administrative activities and which aren't. So again, the constitutional and the political seem to be intentioned with one another.

Now we could ask Congress to do what it often does, which is kick the can and give its own power to the administrative states, and give the executive branch more power. So, Congress could kick the can. One way, quite clever way, proposed by Travis Krumm, which is to use a bail in process by which the Justice Department would be able to pull states into coverage. That might work. You could kick the can by just deferring this all to an administrative agency. Although again, I have trouble seeing the Republican Party agree to let the OJ make this decision.

So, I think we have to think about it differently. And so I would propose what I call an opt-in approach to the Voting Rights Act. And it would have three pieces to it.

So, first it would cover everyone. It would be nationwide coverage. It would apply just the way Section 2 does to every state. So, you avoid having to have the political fight about who's an evil racist and who isn't, and to be fair. I'm from New England. There are a lot of places in New England that probably should be paid attention to. I think we all have a list of jurisdictions that were not covered under Section 5 that really ought to have been.

The second piece of it is transparency. So, the idea would be to require states and localities to disclose reasonably in advance what they're going to do with their election's process. Now that I think 10 or 15 years ago would have been a complete non-starter. But the world looks really different in election administration. It's actually catching up, technology. And especially if the federal government were to provide a means of doing this, provide the structure for doing this, that would enable the feds to make sure that the information we need would get disclosed. You can create a fairly big computer database to make sure that states and localities gave you advance notice, which is what they ought to do anyway. And it's a good governance tool, so it's a neutral tool. It's not something that's going to raise the Supreme Court's ire.

And then the third part would be with simple opt-in process. So, we wouldn't be opting in by jurisdiction. We wouldn't be opting in by practice. We'd be opting in when someone thinks there's a problem. And they would do so, civil rights groups, community groups;

representatives in those areas could simply file a one-page complaint. Simple administrative process, very easy, which simply says to the Department of Justice, or if you want to create an election's court, to an election's court, please take a look at this. So, if you sort of imagine it as a way, like something like the EEOC review, it's not a giant lawsuit. It allows us to go through the Department of Justice which is filled with experts who are going to know when they get that complaint whether it's likely to be wheat or chaff. It's in some ways the way Section 5 works now. So, right now it's just the Justice Department that makes the first phone call. It sees a list of things that it worries about and it starts calling the community to find out if there's a reason. Now the calls would go the other way.

But it puts it in an expert's hands and in the hands of an administrative agency that can deal with these things expeditiously and a cost-free way. So, I think that solves the constitutional problem. I don't think there's any problem with nationwide coverage. There is no problem with transparency. There is no constitutional problem with an administrative process that takes the place of litigation. So, there's no constitutional problem with it at all.

I think it solves the right's problem. That is, it gives us what we need which is a cheaper, more efficient tool for dealing with the small stuff. I'm with the group that thinks redistricting, at least at the state level, will get fought out by the parties. They're big boys, they've got lots of money. The civil rights groups have enough money to invest there, but they don't have it for the smaller stuff. And I don't mean just local redistricting, although that's clearly a problem. But I mean those tiny little things that get done all the time like moving polling places or shutting down polling places or canceling Sunday voting. Those tiny little things that wear away the right to vote. It's cheaper and more expeditious, and it puts it in the hands of experts.

Again, I worry about Section 2 because most Courts don't know anything about this stuff. And part of the game of litigation is just educating the Court. Getting them up to speed on this. But if you had either an election's court or the Department of Justice doing it, they know this stuff. They don't need to be up to speed. They just need to know the right facts

and can move through very quickly.

And finally, it really does enable you to sort the wheat from the chaff. So, you only target things that matter to people, that someone has recognized that matters, and you allow again another group that's filled with experts to figure out what to go after and what not to.

So, I think that's the right way to think about it, although I think there are lots of other possibilities as well. But it seems to me that no matter what we do, we have to think of those three problems: constitutional problem, the vindicating rights problem, and then the administrative/regulatory problem that's embedded in thinking about the next Section 5.

MR. PERSILY: Rick Pildes.

MR. PILDES: So, I have two sort of general thoughts to offer about future directions for reform. They're somewhat consistent with what has been said up until now, and some tension with some of the other things that have been said up until now.

The first general point is that I am concerned about an obvious temptation, I think, that will exist to rush too quickly to save Section 5 in response to the Supreme Court's decision. To get the discussion going down a path that's highly reactive to the Court itself, and try to figure out a way to update the formula so that it will get through the eye of the needle at the Court next time around. And I'm concerned about the temptation to do that because I understand the historic and symbolic and very real world meaning and significance of Section 5. And I understand the desire to save Section 5.

But my concern is whether this is the most effective way to think about protecting the right to vote going forward. I do agree with the practical concerns or benefits of Section 5 that have been raised about informality, speed, those are genuine. But I also think we need to keep in mind some of the inherent limitations of the Section 4 and 5 approach, some of which have been mentioned.

One limitation, which Heather alluded to, is that it does require figuring how to identify in advance the jurisdictions that are going to be subject to this special and unique

preclearance regime. And I think that's increasingly more difficult going forward for reasons other people have discussed, in part because the problems or the efforts to restrict access to the ballot box that emerge these day, typically emerge in response to partisan political dynamics, where competition is closest, as Tom actually mentioned, where political power may turn over, where the stakes are high in elections, and that varies from election to election cycle. It varies depending on the type of race involved, whether it's the presidential, senate, house, state, local kinds of races. And I think it's going to make it very hard to come up with a regime that will capture Ohio and Pennsylvania in this election; Wisconsin, New Mexico, and New Hampshire in the next election, so I think that's one inherent limitation of the structure that exists and just tweaking it.

Second is, because it's tied to selecting out and blocking those laws that have racially discriminatory purposes or effects, it does put a lot of burden on being able to establish that that's the consequence or the purpose of a particular electoral law. And I think the Supreme Court's going to get tighter on pure effects based race tests going forward. And that's another thing, I think, to keep in mind if we're trying to think forward about a sustainable alternative to Section 4 and 5.

And the third is that this model is limited to changes in voting practices. And a lot of the barriers to participation we have today are not the result of recent changes, they're things like the voter registration system, existing laws of various sorts, and this model won't capture those kinds of problems.

So, the alternative, which is also consistent with some of the discussion so far, is to think outside the framework of Section 4 and 5. And the basic alternative is to think in terms of statutes like The Help American Vote Act, The National Voter Registration Act, or the more recent forms that national legislation, to protect the right to vote, have taken since 1965, or since the various reauthorizations of Section 5. And that's to think in terms of nationwide, uniform protections for the right to vote through a federal statute. I think the effort to pursue a

constitutional amendment is completely misguided and quixotic about this, because if you can get the national legislation, it's going to be easier to get than a constitutional amendment and the legislation will give you, I think, more teeth than you can write into a constitutional amendment.

But voter identification laws with excessive documentation requirements, if those are a problem, they're a problem for the elderly, for students, as well as people who are poor, people who may overlap to some extent with minority groups. But, you know, a pure race based or anti-discrimination model won't pick those up fully.

So that's the first thought. By the way, when the Obama administration successfully challenged or defeated, let's say Will and his allies in litigation over Ohio's early voting system, and got early voting opened up the weekend before the election, it was not based on race-based legal theories or sources of law. It was based on the 14th amendment protections for the right to vote as such. Cases like Burdick, Crawford and the like. So that's the first thought is let's not go too quickly down the path of thinking within the framework of preserving Section 5. And many people have already recognized the need to do that.

Second thought is, if we do stay within Section 4 and Section 5, that model, I'm very attracted to what I think of as a fairly powerful and relatively discreet amendment to the Voting Rights Act, which is to amend Section 3, the pocket trigger or the bail-in. Heather referred to this. A student of hers, Travis Krumm, wrote the best academic study of Section 3 that's out there that I'm aware of. That's a judicial preclearance regime that's already in existence and not touched by the Court's decision in Shelby County. And with that provision the statute says that if a court makes findings of certain kinds of voting rights violations, as part of the remedy the Courts can order that jurisdiction to preclear its changes going forward for a particular period of time that the Court chooses. And it's been successfully used to put a number of jurisdictions under coverage through this mechanism.

Now part of what I think is very attractive about this as an alternative focus,

rather than fixing the formula in Section 4, is it certainly addresses the constitutional problems, because it makes coverage tied to findings of violations, recent violations, actual findings of violations, number one.

Number two, I would think as a matter of politics, and I'm no expert on the political process in Congress, but I think there is enough suspicion of the Department of Justice among the Republicans that you're going to have to get support from in Congress to get legislation through, that a preclearance regime that appeals to the experts in the Justice Department, as Heather keeps referring to them, is not going to resonate very powerfully with the part of the political coalition you need to pick up to make this happen. But you have an existing institution. You don't have to create some new electoral Court, which I also think is not a very likely thing in Congress. You have the existing Federal Courts.

A second thing that's very attractive about this to me, is that there's much more inherent flexibility in the preclearance regime through the Courts than in the prior regime with the OJ. Because the Courts can order an area to submit its changes for a defined period of time, typically ten years. And if there are no further violations, then the Court takes the jurisdiction out of preclearance.

In addition, the Court can order only the changes to be submitted that have been the basis for discriminatory actions in the past. So, if redistricting is the problem, Courts have ordered redistricting plans to be precleared by the Courts. If their access to the ballot box, Courts can order those kinds of changes to be precleared, but not necessarily everything.

And what I like about this also, it's very targeted. It doesn't require coming up with a new formula. It just requires amending Section 3 in a couple of ways. Substantively, right now the statute only applies if there are findings of intentional discrimination under the Constitution. I'd like to see it amended to include violations of the Voting Right Acts itself, and violations of the Constitution with respect to the right to vote, whether they're a product of intentional discrimination or not.

And there are some procedural things that might be done to make Section 3 work a little bit better. But I hope we don't stay within a conversation that's too narrowly focused on saving the formula. But if we do, I'd like more emphasis on Section 3 going forward.

MR. PERSILY: John Fortier.

MR. FORTIER: Thank you, Nate, and I think Nate had me here because of a thought long in advance that something happening to the Voting Rights Act or Section 5 would spur a debate maybe about broader things, other things, about election administration. And I guess I was a little skeptical of that view at the time, and I guess I'm still skeptical, but I thought it would be worthwhile thinking through, you know, what might be possible. And I find myself somewhat removed with what Heather said, and although I wonder if the group might think that Heather's suggestions are pretty modest and not enough.

You know, first I guess I'm skeptical that we're going to have a big debate about election administration issues on a national level. I'm intrigued by Rick's bringing up the Hava Debate, which Hava had all sorts of problems, but it was a big national bi-partisan debate. It had some give and take between both sides.

You know, my sense of these issues is that Republicans, and maybe others in Congress, would like a simple debate. Something quickly passed through, and so, if we're opening up a lot of cans of worms, I'm not sure that that's the type of debate that's going to get us anywhere positive.

You know, you do see GOP potential support. You see (inaudible) Brenner who was instrumental last time. You see Eric Cantor saying some nice things a few days ago. I'm not sure how seriously to take this Congress as an institution that's not working very well broadly.

But I do think that picking up on some of what Heather had said, and some of what Sam Issacharoff has suggested, that if you did imagine a broader, more universal set of disclosures or even some goals or targets that you would have to meet. The idea that states

and localities would have to go through a kind of disclosure like they would in Section 5, so at least we know about changes that are going on. I know Sam suggesting that there be some justification by officials as well. And I think that's potentially interesting.

One issue I think that was in the Court's mind, and is in Republican's minds, and is in, you know, the covered jurisdiction's minds, is that on at least the very simple measures they've already met targets, that they've already gotten rid of a voting test, that they've already met high standards of high registration. So I'm not sure that these targets or goals to meet would be necessarily very ambitious. But it might keep, you know, states aiming for at least a certain level of good government in the election business. It might keep people from backsliding, cause there again to be information out there for people to use in a variety of ways.

So, I guess the big thing I would say is that how you have a debate, or how you see it happening is the hardest thing to figure out. And done in a certain way, I think Republicans would be interested in having this debate in Congress. But, and maybe Rick's point about the kind of quick reaction to wanting to put a big formula regime in quickly is probably not likely to get where we need to get. But it has to be something maybe thought out, relatively simple, relatively universal, and, you know, I'd like to do a lot of other things on election administration. I think there's some possibilities out there on voter registration modernization which would balance both sides, would balance integrity and access issues. I guess I think that's probably done better on a state level, but in terms of the information level and trying to figure out where the states and jurisdictions are on some of these other voting measures; I think that would be a good part of the solution.

MR. PERSILY: Khalil, then John and then Sam and Kareem.

MR. ABBOUD: Well, I'm glad we're finally getting into my area here. I have to first start by saying, you know, I'm Democratic counsel to the Committee on House Administration, so not only do I work for the minority, but I don't even work for the committee with jurisdiction, which the judiciary, so -- Anything I say is not meant to imply any official

statement from either the Judiciary Committee or the Democratic Caucus or anything else. (Laughter)

MR. PERSILY: I feel your pain.

MR. ABBOUD: I wanted to just read, you know, and not attribute, two press releases that had come out once the Shelby decision came down. The first one is the Voting Rights Act is vital to America's commitment to never again permit racial prejudices in the electoral process. Section 5 of the act was a bi-partisan effort to rectify past injustices and ensure minorities' abilities to participate in elections, but the threat of discrimination still exists. I am disappointed by the Court's ruling, but my colleagues and I will work in a bi-partisan fashion to update Section 4, from which Section 5 can be properly implemented to protect voting rights, especially for minorities.

This is going to take time, and will require members from both sides of the aisle, but partisan politics aside, it will ensure American's most sacred right is protected.

And the second press statement was, my experience with John Louis Anselmo was a profound experience that demonstrated the fortitude it took to advance civil rights and ensure equal protection for all. I'm hopeful Congress will put politics aside as we did on that trip and find a reasonable path forward that ensures that the sacred obligation of voting in this country remains protected.

Now the first quote was from Jim Sesenbrenner, who was judiciary chairman at the time of the 2006 reauthorization. And the second quote was from Eric Cantor, current majority leader.

From my position in Congress this is encouraging. This is more noise than we've heard around voting rights than we have since 2010, since the new majority came in. I think it was Rick who suggested, you know, rather than looking at Section 4 and Section 5, we do something similar to Hava or Motor Voter or prospective things like updating the registration modernization and things like that.

We've heard more so far in the weeks since the Shelby decision about the coming together and fixing Section 4 and Section 5 than we have in two-and-a-half years, about things like VRM and updating Hava or any of the other election protections and expanding the franchise laws. So, I feel personally more confident that something can be done about the decision rather than finding an alternative fix that doesn't really address what the Court had laid out in Shelby. So, that's all I wanted to say.

MR. SAENZ: Thank you. I wanted to make one clarification and give two framing comments and then ask for a slight clarification. And the clarification is this, I really appreciated those who believed that the LDF's of the world have the resources to challenge every state redistricting that might be a problem, but it's not true. I mean the simple fact is that my organization can probably pursue one statewide redistricting case at a time. So, we made a choice that Texas was more important for example, than California where we believe that there was at least one problem at the congressional level, and at least two at the legislative level. But the cost of pursuing two statewide cases at the same time was simply too high.

So, I want to caution against deciding that we can easily remove state redistricting from the far more efficient Section 5 process and not lose something. And I want to specifically describe what I think we would lose. There are entities with interest in the statewide redistricting that do have resources. And frankly, that's the political parties. And we've seen in this last round of redistricting, covert partisan interests on both sides. Attempts to use the Voting Rights Act, Section 2 on statewide redistricting, or at least talk about it. And in at least two cases that I'm aware of, actually pursue it.

The problem with that in my view is that that's not really Voting Rights Act litigation. That's partisan litigation brought under the guise of the Voting Rights Act. And I think we all lose if that's what we sort of end of with in terms of the challenges to the statewide redistricting. But if I look to the next redistricting process for my organization, I've got to assume there's going to be problems in Texas, perhaps California, Arizona, Nevada, and there's

absolutely no way that I could pursue Section 2 litigation on all of those jurisdictions at once. I could pursue it sequentially, but that means pursuing one or more of those cases later in the decade, and Sherrilyn already described what the problem is with that. You end up with folks with power of incumbency, if you get a remedy later in the decade.

But my two framing comments are this. I think first of all -- and I don't think anybody's done it -- but it's a danger. We ought not assume that it's an either/or proposition here. I think a lot of good ideas have been generated, will be generated and the best sausage will include elements of multiple ideas, not just a single approach to responding to Shelby County. So, I think we should view all of the ideas that are generated as potentially complimentary and not exclusive of one another.

And the second framing comment is this, I think that we lost three things after Shelby. One has been discussed which is notice and disclosure. Obviously, a very serious concern, particularly with regard to the sub-jurisdictions and the many, many different sub-jurisdictions in a state like Texas, for example.

Second, and this has been discussed a good amount, we lost the shifting of the burden of proof to the entity with the data and evidence available most readily to it in having to demonstrate compliance with Section 5's restrictions.

But the third is this, and that is it sort of doesn't get discussed, but it is preclearance. It is pre-implementation, nothing can be implemented until it has been reviewed, and vetted and approved. And we all know how important that is when election changes are contemplated and implemented within days or weeks of an election. And if you don't get that automatic injunction, if you will, in place you cannot wind back the clock after the election has occurred. So, I think we don't discuss it as much, but that's got to be on the table as well.

And it's with respect to that I ask a question about, Heather, your idea, because I think it's intriguing, but I'm not clear if I understood how the opt-in would work from the standpoint of implementation. If it's an opt-in that's directed by third parties as you've

discussed, I'm not certain how constitutionally that could then bar implementation until there is some sort of review. So, maybe I didn't fully understand the idea that you laid out.

MS. GERKEN: Yeah, so I think that this is back to your point about there being lots of ways to do it. One way that you could do it, is you could say that jurisdictions need to put something up on the federal database in a certain period of time in advance of an election. And I will say, most election administrators actually do need to make those decisions well in advance because everything is advanced planning. So, there are some changes that get made at the very last second, but there aren't that many. And so, to put them up and say that there's a one-month waiting period or a pick the right time, and to give an opportunity for people to challenge it. And if they challenge it, presumably you could do one of two things, right? You could say it goes forward, that the burden of proof remains with the plaintiff. Or you could say that the state has to stay until the Department of Justice has the time to investigate it. You could have the Justice Department make that decision, just like a request for information. We need more information before this is going to go forward.

All of those things could happen and, again, you could get some of what you get from preclearance. I think you wouldn't get all of it. You wouldn't get the blanket prohibition on everything, but for the things that are most troubling you could build in a requirement that stuff not go into place until it's gotten an adjudication from DOJ within a certain period of time.

MR. GREENBAUM: Thanks. Tom just asked one of the questions of Heather that I was going to ask of her, and I have one more question for her, and a couple questions and comments for Rick.

What happens if the jurisdiction fails to disclose?

MS. GERKEN: I think if the jurisdiction fails to disclose then you can do a variety of things, but one of them is you can tell them it can't go into place if it hasn't been put up on the web. That seems to me a pretty straightforward good governance piece.

MR. GREENBAUM: So, arguably it actually has the potential of being broader

than the way Section 5 works now.

MS. GERKEN: Yes, except for, if I could just say, the burden that the Court was talking about -- the state sovereignty burden -- wasn't a burden about transparency. I mean we get from all the other courts opinions, particularly Citizen's United. The Court believes in transparency. It's a pretty neural thing, and especially this is going back to Sam Issacharoff's astute comment about the Arizona case. If you say for federal elections you have to disclose things, that actually covers a lot, except for the state and local redistricting. But for almost every election administration practice voter ID and so on, that all is going to be applied to federal elections as well as state and local ones.

So, if you use that power to mandate transparency -- because every citizen deserves a right to know what's going to happen in the election's process, I don't think that's a problem.

MR. GREENBAUM: So, you do that for federal elections?

MS. GERKEN: So, the burden isn't the disclosure. I don't think the Supreme Court -- I mean I get that one of the most important things about Section 5 was the disclosure provision, but that is not what the Court was thinking about. The Court was thinking about the idea of states in receivership, and some states rather than others.

And so I don't think there's a constitutional problem with a transparency mandate. Even though it might actually be broader in application in that one respect.

MR. GREENBAUM: And then with Rick, I think I understood you to say that you would use 14th amendment fundamental right to vote as your constitutional justification.

MR. PILDES: What do you mean, for the preclearance regime under Section 3?

MR. GREENBAUM: No, not under Section 3, but you were mentioning something else.

MR. PILDES: Oh yes, right. So, I think there are two sources of federal authority that have been underdeveloped. One which now a number of people are talking about, the

election's clause. And I'm one of the people who's of the view -- I don't want to preempt Sam, because I know he's going to say this, but I certainly am one of the people who's of the view that the Arizona case is one of the strongest, maybe the strongest statement in the Court's history of congressional power under the election's clause to regulate all aspects of federal elections, with the exception of voter qualifications. And I want to remind people that Justice Kennedy wrote a separate opinion to say, "Wait a minute, you're going too far in overriding the power of states in this area." And the Court blew through that concurrence and affirmed what I think of as a very robust power under the election's clause for federal elections, number one.

And number two, since 1965 we've had the development of the fundamental right to vote jurisprudence under the 14th amendment, which gives Congress the power to legislate to protect the right to vote. And the old models of congressional power were based on the civil rights framework partly because it wasn't clear how much power Congress had outside the area of racial discrimination to regulate the voting process.

But once you start having cases on, you know, poll taxes, durational residency requirements, differential interests, you know, where cities were trying to keep people who didn't have kids in the schools or didn't own property from voting, once you have *Bush v. Gore* which is a broad statement about the right to vote, the need for non-arbitrary regulations in that area, many of these are not tied to race. And so I think Congress has power both under the election's clause and for all elections under the fundamental right's provision of the 14th amendment through the enforcement power that can be used for national legislation that protects the right to vote as such, indirectly.

MR. GREENBAUM: So, first of all, Tom, Dale, and I, and our colleagues are happy to hear you characterize the Arizona case as a big win. I'm sure they feel the same way that the day after the decision came out; we were disappointed in some of the commentary of the case, where it almost sounded like we had lost the case.

MR. PILDES: Can I just interject as a little joke here? You know, it's fascinating

to me that the things that get drama and get a lot of coverage, are the sky is falling kinds of reactions to Supreme Court decisions. And I was really a little taken aback by a lot of that commentary myself. I didn't say much about it, but I thought it was a really strong affirmation of federal power.

MR. GREEBAUM: That's good to hear. On the fundamental right to vote, lawyers spent a good deal of time on that, successfully suing Ohio after the 2004 elections on a fundamental right-to-vote theory, unsuccessfully, in voter ID cases in Georgia, and in Arizona. How would you deal with the Court's recent decision in Crawford on the fundamental right-to-vote theory in terms of using that as a justification for congressional authority to act?

MR. PILDES: Well, a couple things I guess. Remember that the state constitutional right-to-vote provisions are well-developed in a number of states. And Courts have been fairly aggressive in elaborating those provisions. So, we need to keep in mind that state Courts found constitutional bases in Pennsylvania --

MR. GREENBAUM: Was that a congressional legislation?

MR. PILDES: -- in Missouri, Wisconsin, right, but that's not the only source of potential protection. In terms of congressional legislation, I think that, you know, Congress would have to have a rational basis, and it would have to be a congruent and proportional act under the Section 5 power to be protecting the right to vote against unnecessary, unduly restrictive barriers to participation that aren't justified on the basis of any appropriate evidence or information.

So, I'm not saying that that power could be used to block a law that the Supreme Court has directly set as constitutional, but the Indiana law was, you know, a law on its face, it had a certain set of documentary requirements. These laws vary a lot from place to place, and I think there would be congressional power under either of these two sources of authority to get at unnecessary, unjustified restrictions that don't meet kind of an intensive, judicial scrutiny sort of requirement that could be embodied in federal legislation.

MR. ISSACHAROFF: Let me join in on three different points. The first is it makes a difference what kind of legislation you pass in terms of what the constitutional burden is. It makes a difference what kind of legislation you pass in terms of the constitutional burden upon the proponents so that one of the reasons to focus on the difference between the Arizona case and Shelby County is that one comes up under the election's clause, and one comes up under the racial remediation arguments, or provisions of the 14th and 15th amendments. And I agree with Heather, with Rick that this is a very different standard we're talking about, and one that gives Congress a lot more latitude if it purports to be regulating federal elections as opposed to remediating problems of racial discrimination where the standards just much higher.

Now, if Congress acts, what can it act as to? Well, let's look at the facts of the Arizona case. The facts of the Arizona case were an attempt to ratchet up voter identification requirements for the excess of the franchise. In the last ten years, the major battles at the big national level, and I grant you that that's been my primary focus, but the big battles have been over voter identification and the times and places that you can access the ballot. That is clearly within the election's clause power that Congress has. That's a place where Congress can act with tremendous latitude even beyond the rational relations test identified in Shelby County.

Second point, one of the ways in which Section 5 of the whole preclearance requirement shows its age is that it's a rather outdated form of regulation. It is an attempt to define ahead of time what are the problematic areas or the likely problems in the effectuation of federal rights, and to define not only what those are ahead of time, but what will be done about it ahead of time?

Since the 1960's regulatory theory has moved a great deal forward, and regulatory theory tends to be more in line with theories of responsive regulation, that is that you allow the regulatory environment to evolve. So, if you look at the problems that we faced in the 2012 election, and granted I was working for President Obama, so my focus was on the presidential election, but it was rather striking that most of the issues that we had to go to court

over did not involve jurisdictions covered by Section 5 because those were not battleground states so nobody was really at the forefront of trying to suppress voter participation or encourage voter participation in those states whether you take the Democratic or Republican view of what the problem was. And it had to do with things that were not part of the preclearance regime at all. And so, even in the few states where there was a Section 5 overlap in part, places like Florida, that was just not part of the game. And in fact, if you look back over the last 30 years, and this point has been made, you find that Section 5 has not been hitting on the wedge issues in voting litigation for the past 30 years. Now some of it is that it took a lot of things off the table. Some of it is that the jurisdictions that might have been malefactors were discouraged or deterred, but there is a certain kind of mismatch.

And let me make the final point about what you can get through a disclosure regime. The Department of Treasury just put out a series of regulations called Smart Disclosure. And the theory of Smart Disclosure is that you use a disclosure regime in order to make ex-post enforcement easier, not just put out information out into the world, but give it in the form that it is useful to you. So, what would be useful if you were litigating a case where you thought there was improper manipulation of the right to vote? Well the hardest thing to establish with collective bodies is why are you doing this, right? We litigated on behalf of the Obama campaign over the Ohio regulations on the eve of the elections. Every time we went into Court the argument changed, and every time we found ourselves litigating a different set of issues. Now, Will probably wasn't involved at that point yet. He might have advised his client, ultimately that's not a good idea to keep changing your story every time you go into Court, but, you know, that's a litigation question.

But one of the things that you require is somebody with authority like Sarbanes-Oxley. Somebody's got to put their name on the bottom of the document under perjury and say this is why we did it. Now, all of a sudden it's a lot easier to go into Court and say, not just this was done badly, but this was pretextual because now pretext can be a sign of something that

triggers illegality.

What else would you want to know? Well, give us the equivalent of an environmental impact statement. Give us a voter impact statement. Will this make it harder to implement? Will this have an effect on predictable communities? Again, always signed by somebody at the bottom of the form subject to the laws against perjury. People are leery about putting themselves -- remember, secretaries-of-state want to become senators, and in turn every secretary-of-state in America is going to be president one day. They do not want to put the name --

MR. PILDES: And many have become. Is there one who's made it?

MR. ISSACHAROFF: No, but they're the one. They're the one, Rick. And so you can use this kind of a regulatory regime to pick up most of what we were trying to pick up under Section 5 in years past, and in fact, to pick up what is our concern now in the modern era, I think in a more effective way. And because it doesn't differentiate among geographical units, and because it's not tied to racial remediation, that triggers either *Boerne* or some other kind of 14th and 15th amendment constrictions. It can be more effective, and that's, I think, the way you can start thinking beyond, okay, go fix Section 4 which was the Robert's invitation at the end of Shelby County.

MR. PERSILY: Table tents are up, and I want to make sure -- raise your hand if you want to speak on this point.

MS. IFILL: I only want to say, I really like the idea of the voter impact statement, Sam. I only wanted to just point out that actually -- because I feel like I have to -- that actually Section 5 has been getting at some of the key voting problems of the day. And the case in point are the two voter ID cases in Texas and South Carolina which were Section 5 enforcement actions, and the South Carolina case, you know, precisely what you're describing, the jurisdiction had to kind of keep re-creating what the need was during the course of that litigation. And I think, you know, when the Shelby case was decided last week, and that evening, that

afternoon actually, the attorney general of Texas tweeted first and then announced that they would be imposing their voter ID law. You know, the question, and I didn't see much in the media about this. You know, you said the question is why, like what is it? So, what is it about a concealed gun permit that's better than a student ID? You know, I do think that there does have to be a space where officials have to be compelled to justify. I mean talk about your rational basis. You know, you have be compelled to justify, and beyond the words voter fraud, the distinctions that they're making in these laws. But I just wanted to stand up for the fact that actually Section 5 has effectively flushed a great deal of this out. It certainly did in the 2012 litigation.

MR. ISSACHAROFF: I don't disagree with that. I just think that the disclosure regime is imperfect because it's designed for a certain kind of administrative review by the Department of Justice, and it can be tweaked to a far better function if it is designed to encourage or facilitate affirmative litigation on a different basis.

MR. PERSILY: Elaine, you said you wanted to jump in on this.

MS. KAMARCK: Yeah, just on one point that seems we've been going around ever since Heather put a very sensible beginning option on the table -- and here's what it brought up to me -- there are two models in my mind for the kinds of governmental entities that could perhaps be operating here. A bad one and a good one. And you're going to be surprised at the good one.

But the bad model is the Federal Elections Commission. Political parties and candidates have learned throughout the decades that it really doesn't matter what they say. It doesn't matter what you do. You do what you do to win, and by and large the Federal Elections Commission come in when it's too late, nobody cares. It doesn't even affect your re-elect chances. It's just a big nothing, and it hasn't, in fact, helped sort of the cause very much. So lesson number one is avoid that model.

Lesson number two you're going to think is an odd thing to bring up in this

instance, but the Fizer Court. As much as we may not like what the Fizer Court does or whatever. The fact is that it is required to make very, very quick, and very timely decisions which stand. And so it seems to me that if you think about that aspect of the Fizer Court as a sort of model for how you would play out this. What? No, they're not transparent for obvious reasons. But all I'm talking about here is the timeliness aspect. We do have a model in the government for an entity that is required to act in an extraordinarily timely way.

And the big problem with elections is that, as we've seen with campaign finance laws, and as I suspect we'd see with a lot of voter registration issues and voter suppression issues, the problem is in the eye of the beholder. And the eye of the beholder is either a winner or a loser. And if you think you can litigate these after the fact, well you're absolutely wrong.

So, figuring out some governmental mechanism to deal with this in an effective way prior to elections, I think is actually the key here, and maybe one of the most difficult things to do.

MR. PERSILY: Kareem, and then I guess Julie, both on these points, yeah.

MR. CRAYTON: Thank you. A couple of points, I guess the comments that Jess issued, I do want to register my sympathy for, and large agreement with. I believe there ought to be a more modern approach to regulation in general. And I would add to the goods that were just expressed. One of innovation and learning.

I think we all have a critique of the existing Section 5 system. If we had our druthers, we'd want it to be better. And let me just sort of add mine to the mix and say, I think if you are a state or a local jurisdiction, one annoyance you have, I think you should have, is not always clear what is going to comply with what the Justice Department wants.

And in many cases, what jurisdictions do, certainly when I advise them is look, find the last thing that the Justice Department said was okay, and do something like that. But what that doesn't allow -- because it's a small (inaudible) conservative approach -- but what it doesn't allow is innovation. It doesn't encourage decision making that embodies the inputs of

everybody who has an interest, including minority groups. And I think that's lamentable, but that's one of the problems of a widespread national, or let's say regional-wide remedy.

Now I say there are benefits on the other side of that, that make me nonetheless put my little quibble with the Section 5 system as it existed before Shelby, to the side. But I would say if we are thinking about new regulatory regimes, we should be thinking about ways of encouraging jurisdictions to think -- I think Heather mentioned the idea of cooperatively or collaboratively with groups so that you get buy-in.

But having said that, I do want to actually give what I haven't yet heard, which is a defense of some form of the existing system. And I guess this is a point of my being a prisoner of the moment, so lock me up. But I do want to make the argument.

Let me put to the side the possibility that the Court just will not be satisfied with anything that Congress does. But I want to return to the question, I think that Rick brought up earlier, about whether or not the problem is that there's something in what Congress found, but did not explicitly say that the Court was bothered by, or whether it's just substantively nothing at all that has to do with Section 5 as it currently exists is going to make them happy.

I want to at least say if it's the first version of that problem, there is plenty of evidence that would distinguish the states that were initially laid out in Section 4, at least almost all of them in some revised regime. So let me just at least offer the evidence, because I don't feel like it's been discussed, at least explicitly, yet.

Some question was made about turnout and participation. You know the funny thing about state elections -- and this is the conversation connected in part to national remedies -- federal elections don't occur at the same time that all state elections do. In fact, Alabama and New Jersey are two states where state elections occur at a time different from a national election.

If you look at these so called off election races, whether those elections or mid-term races, African-American, Latino participation is actually lower than White participation.

You get a much different framework that is, if you look at elections where you're not dealing with the presidential race as Justice Roberts focused on, than if you're looking at basically off-cycle races.

Now, again, that may just complicate the picture a bit, but if you look at that measure alone, you get many, if not all, of the Section 5 states.

Let me mention two other factors. If you look at racially polarized voting, the level of polarized voting if we file it with the Court, it relies in part on stuff that Nate and Steven worked out in their piece. It distinguishes the Section 5 jurisdictions as compared to the rest of the country. So, again, on that measure, if the question is how do these places compare to the rest of the country, they are not performing as well on factors that have to do with race.

And the last element of this, I think, is about the prevalence of these racially restrictive voting devices. And I suspect if you added in the extra mix that I referenced earlier, the election of preferred candidates of choice of the minority community in statewide elections, you'd pretty much hit what you have currently on the list of Section 4 violators.

Now, that's all current since 2002. You can arrive at the same answer if that's where you want to go. Now, again, I leave open the possibility that the Court may take a hard and fast view that no version of this works. But I don't want to let it get lost here that the existing record on facts since 2002 don't distinguish Section 5 states from other places. And I have yet to hear anybody make the argument to the contrary.

One last point, and I guess I just want to tee it up. You know, it's a point about the connection between partisanship and race, and of course, there is a connection, but that seems to be attributable to a broader problem. I know there are disagreements in the room about this question but, you know, we have a Supreme Court that doesn't want to see the 14th amendment as banning some partisan level of gerrymander. If that's the case, it seems to me we have to push this existing tool to get at these sorts of problems because the people who bear the burden of it, for a variety of reasons, are people of color.

So, unless I'm willing to hear a consensus on the topic of some version of the 14th amendment addressing that problem, which as a (inaudible) doesn't seem to be a concern of the Court and Justice Kennedy seems confused about it, I'm kind of left with looking at these tools. So, I leave it open to anybody else who'd like to react.

MR. PERSILY: Julie, did you want to jump in?

MS. FERNANDES: Nate, I just wanted to say that I think there is something else going on that I just wanted to kind of name for the discussion. Because we're talking a lot about what would be okay by the Court. I think a lot of the ideas folks have talked about are really interesting, and ones that a lot of us have thought about, notice and disclosure, and 3C, and administrative regimes.

And I think it's all really -- and some of the ideas are new, and I'm happy to hear a lot of it -- but we do have to think about that old Congress as well. And I think that the instinct to kind of look toward -- look, what the Court said to Congress, I think this is kind of okay, you kind of got it wrong, there's a mismatch in the formula. And I think what Congress is hearing perhaps, is that there's a voting discrimination regime out there, and now there's a hole in it, and I have to fill the hole for voting discrimination, which is different from a democracy hole.

And I think the more that I think, I'm concerned that the more the reforms we talk about are driven toward sort of a general democracy problem, and away from the problem of racial discrimination in voting, the more it looks like partisan and Democrats, and Congress is not doing it.

So I think -- and I'm not saying this is a ruse here. I'm saying for real we should be focused on filling the gap that the Court has left us around racial discrimination in voting. And not to say that I don't think the other stuff is super important. That's the hole we've got, and that's the hole I think we should be fixing, while at the same time we think about our general democracy problem.

MR. PERSILY: Will, then Dale.

MR. CONSOVOY: I just wanted to respond to a certain number of different points briefly. On the what was the problem with the law, I really think it just failed at the first step. There's a lot of issues about whether there's a good record here to distinguish the covered from non-covered. That the really, you know, honest good fight we had throughout the litigation, the Courts just didn't get to it. You have to start with a formula that actually makes sense. If Congress can find one -- and there would be litigation I'm sure all over again about the rest of the case, whether there is a record that distinguishes the jurisdictions, and whether Section 5 remains an appropriate means of enforcing the 14th and 15th amendment.

But I just don't think the Court actually got that far. It's really just that first thing. The formula actually has to make sense.

Second, on whether you can distinguish still on the racially polarized voting, so I have the Katt study with me. According to the Katt study, there were 105 instances of racially polarized voting since 1982, 52 were in covered jurisdictions, 48 were non-covered jurisdictions.

So, at least according to this Katt study that was in the record, that's where racially polarized voting stands in the United States.

One thing I want to talk about which was retrogression. Is that the right standard going forward? What does that mean? As Abby said, the Court has never defined what effective exercise of the franchise means, which under rides retrogression. I wanted to bring up two examples that I'm familiar with, and I'm sure there's many others.

The Kinston, North Carolina case which was our companion case in Shelby County, which ended up getting dismissed has moved in the D.C. circuit. There you had a majority/minority community in North Carolina decide to switch from partisan to non-partisan elections. And it drew an objection from the Department of Justice as retrogressive on the theory that the minority community needed the partisan affiliation in order to effectively exercise the franchise.

Secondly, in the case I litigated for Florida, early voting, one of the issues in

Florida had scaled back from its early voting. That was challenged through preclearance litigation. One of the arguments we saw in the case was that by lowering early voting, you would lead to longer lines which would be evenly distributed in theory among various districts. But the minority community was less willing or able to stand in line than other voters, and that's what led to retrogression. Those are the kinds of arguments you're going to be seeing if you stay with retrogression as the governing standard.

And then I would lastly talk about -- one thing that I haven't heard any mention of which is innovation. It's true that Section 5 is very effective at stopping bad practices. Any prior restraint is always going to be the most effective way to stop bad practices. I remember when we were doing our briefing in Shelby County, thinking about the ADA. The ADA is a fine statute. But how much more effective would a statute be if every local building in the country had to submit their architectural plan to DOJ for preclearance. We'd have no ADA violations, but the cost would be significant.

Innovation is a good thing. Oregon has done some innovative things with voting. Ohio, as I've been reminded repeatedly today, expanded early voting dramatically. But then the recession hit and budget cuts came. I'm not speaking about Ohio, I'm speaking generally. Would a state be as willing to try new innovative things if they know that they have very little discretion to pull them back if they turned out to be not as effective as they wanted, more expensive than they wanted. It's just a question that a local government would have, any responsible local government would have to at least ask itself before moving onto something that's sort of innovative and new. Are you willing to live with it long term?

MR. PERSILY: Dale, then Heather.

MR. HO: I want to echo and maybe amplify some of the points that Julie was making just a bit earlier. I think one of the unspoken -- or maybe it's been spoken about a little bit -- but one of the questions that underlies a lot of the comments that people have been making today, is how much of this problem that we're confronted with right now is about race?

And how much of it is just about democracy sort of generally. And I think you can break that question down into maybe two different components. How much of the harm that we're dealing with is about race? Is this something that we see people being discriminated against on the basis of race, or is it just the sort of political issue that's mainly a partisan issue, that sometime configured around racial lines. And then, you know, there's this question about the remedy. Do we just sort of need some sort of universal ballot access statutes to sort of a HAVA or a motor voter on steroids that would sort of solve all of these problems?

Well I want to interrogate both of those to formulations of the problems and the remedy that we're dealing with, because I think a lot of this is about race and the hole that's being left, as Julie put it by the demise of Section 5 is about race.

So, let me address the remedy portion first. Now I think Tom pointed out that -- first of all, this really shouldn't be an either/or question as far as improving election administration or having strong remedies against racial discrimination in voting. But just look at the data and the numbers again. Most of, as Mark pointed out at the beginning this morning, most of what Section 5 did had to do with redistricting. So, it didn't have to do with ballot access questions, and sort of wedge issues that Sam was talking about. And most of this happened at the local level, 85 percent of objections at the sub-state level. So, we're talking about things like redistricting, like annexations, that make it impossible for minority communities to exercise effective political power. And HAVA and motor voter and all the election administration reforms in the world can't stop that. And you're right, these aren't the big wedge issues, but that's precisely, Sam, why we need something, maybe not exactly Section 5, but something that's race based that does deal with problems at the local level, because the parties are going to take care of the big wedge issues that affect turnout in battleground states. They're not going to affect an annexation in Alabama or a re-redistricting in Georgia, the kinds of things that we've seen in the past and may see again.

With respect to the harms that we're seeing, even with respect to the voter

suppression issues, I think it's absolutely true, as I think Rick pointed out, that voter ID laws, those types of voter ID laws, the onerous ones that we're particularly concerned about do affect broader groups of people than just people of color -- disabled, elderly voters, young voters. So yes, this is an issue that affects other people as well.

But I think there's sometimes an assumption that some people have. I'm not attributing it to anyone in particular here, but it's the notion that targeting minority communities because of their partisan preference, or how they might vote is somehow something that's not as bad or isn't bad at all in comparison to efforts that target those communities based on sheer sort of racial animus.

I think Judge Kozinski, of all people actually, has an opinion where he sort of talks about this point. But intentional discrimination is intentional discrimination regardless of whether or not it's motivated by animus. So, if you try to lock out certain types of people from moving into your community, because you're worried they're going to bring down property values, that's no different, that has no different affect on those people than if you're trying to keep them out just because you don't like them.

So, I think that for the folks in minority communities and the people that we try to represent -- and it doesn't matter why you don't want them to vote -- but the fact that you're trying to intentionally prevent them from voting has the same affect on them. So, it doesn't matter if it's just because you're worried about how they're going to vote. After all, disenfranchising African Americans in the civil rights era -- part of the reason for that was because people were afraid precisely about how they were going to vote in elections. So, I don't think we can make this sort of distinction between partisan bases for targeting minority communities versus ones that are motivated purely by animus.

MR. PERSILY: Sherrilyn, you wanted to -- you're about to leave so you wanted to jump in one last time.

MS. IFILL: And please forgive me for having to leave early, so I just wanted to

make this final intervention and say thanks very much for that commentary, Dale, because I couldn't agree more that the focus has always been, and this is where trying to figure out what would satisfy this Court is difficult because the issue of voting discrimination has never been one in which it was about minorities exercising their vote at the polls, period.

It was what people thought would be the result of the exercise of that vote that was actually problematic. So, I think Dale's point is really important.

Here's what I don't want to get lost. And I actually thought Julie was going to say this, but she said something different that was actually quite interesting about Congress and what they might be prepared to do, and the hole that is to be filled. I really think if you read Chief Justice Robert's opinion, and you were at the oral argument, as I was, it's impossible not to see that there's a key part of this that's about southern stigma.

So, you know, there's no way Chief Justice Roberts is going to compare voter registration between Mississippi and Oklahoma. Oklahoma's not covered by Section 5. It's going to be Massachusetts because this is about this question of whether the South should continue to be punished. I started out the conversation this morning talking about that leap that Justice Roberts took, from talking about the original frame-up of the Constitution and how they calibrated the relationship between the federal government and the states, and then they jumped to 1965, like something really big didn't happen in between, which actually did stigmatize the South and appropriately so.

And at that time, the founders of the Civil War amendments recalibrated that relationship. And that's the part -- the expression of that -- I think is what is deeply troubling to some members of the Court. And even Justice Kennedy at oral argument talked about, you know, southern states being in this kind of trustee relationship to the federal government. There is a kind of effort to restore the honor, dare I say, of the South. It sounds archaic, but I see that in the opinion.

And so I think it's important for us to remember when we're talking about how to

build a better mouse trap, one that doesn't account for that reality among this Court, is unlikely to pass muster with this Court, and I think it's best for us to be kind of honest about that at the outset. And that's why I think the question (inaudible) raised earlier about, you know, if we believe that this Court's kind of unlikely to buy this whole idea of principally southern states because I don't think New York City feels stigmatized by the fact that three of their boroughs are covered by Section 5. They're just covered. And I don't think the jurisdictions in California that were covered by Section 5 felt stigmatized, and I don't think New Hampshire felt stigmatized.

So, I think we have to deal with the reality that, in addition to what is race, the underlying cover of that race conversation is about south, north, and the stigma of southern states having to engage in this practice vis-a-vis the federal government. So, we should just be careful as we develop these ideas that we think about the fact that this is deeply troubling to at least five members of this Court.

Thanks so much. Thanks to Tom and Nate for having me today. This has been terrific.

MR. MANN: Heather.

MS. GERKEN: Yeah, I just wanted to follow up again in response to Tom about the resource question and the (inaudible)friendly amendment to Sam because Sam is exactly right that regulation has changed a lot over time. The opt-in proposal that I was talking about, I should just say, is exactly what's being used in a lot of areas where they have the same problem we have here, which is that there are too few resources, there are too many targets, jurisdictions, to worry about.

In most cases, it's private companies that we're worried about. I mean, you're trying to figure out both small and big problems, and in that world you have an imperfect solution, so it's not as good as a top-down strong-arm government regulation in terms of its coverage.

But in that world what typically is done to regulate is called responsive regulation

or tripartite regulation, but is to get the regulated entity, that is the states, under formers and government to work in this way using transparency and disclosure and so on to create this sort of dynamic piece over time.

And in response to Will's concern about innovation, the nice thing about this kind of regulatory scheme is it allows for learning over time, so one of the things you do is you start to have red flags, both of bad and good targets of regulation, so bad and good jurisdictions, which means that over time you could still do what you need to do. But also bad and good practices; again, that learning process happens over time. It's dynamic. Nothing gets set in stone.

And my friendly amendment to Sam is just to say that Sam's right that Section 5 formally doesn't look like that, right? Because it sets these jurisdictions down and says these jurisdictions and these jurisdictions only, but internal to those jurisdictions, it's pretty much how the thing ran.

So, DOJ, over time, worked with community groups and transparency and a learning process and red flags and figuring

out which were the better and worst jurisdictions and better and worst practices. This is what was happening internally for the last few decades, so it was working on the ground. It's been working in other industries. We wouldn't have as good a system on that because the calls would have to go the other way than they do now but, nonetheless, is there.

The last thing I should just say is we are having our Marshall McLuhan moment because Rick and I have been talking all day about a paper written by Travis Crum on the pocket trigger. So, Travis is, for all of you interested, over there and has just come into the room.

MR. MANN: So, does that make this Annie Hall if this is the Marshall McLuhan? I've lost track. I think Wendy and then, yeah. Well, then, I have to think.

MS. WEISER: I just have two questions. One for Rick and for Sam, and it does

relate to the point of whether or not we're addressing race decimation in voting or just more broadly, protecting the right to vote. For Rick, it sounded to me like you were saying, and I just want to clarify that you think the Congress's power to protect the fundamental rights to vote under Section 2 of the 14th Amendment is stronger than Congress's power to protect against race discrimination under that same section than under the 15h Amendment which sounds -- I mean, especially against race discrimination in the exercise of the fundamental right to vote? And I wanted to clarify if that's really what you were trying to articulate, so that's my first question. And I have one for Sam.

MR. PILDES: Okay, so I was trying to make a couple of points. I think that, for me, one of the big questions is what is going to be the most effective way of protecting the right to vote going forward? And one of the major questions I meant to raise is whether a model that stays within the targeted race discrimination kind of approach of Section 4 and 5, even if it could get reenacted, is the most effective way to protect the right to vote.

I also do think that this court certainly has been saying for many, many years that it's going to police the boundaries of race-conscious public policy, not conventional anti-discrimination law, but there are lots of disputes about exactly what the boundary between anti-discrimination law and disparate impact and effects-based tests actually is. And so, a model that also is very dependent on a disproportionate racial-impact standard is obviously going to face tougher sledding in the Supreme Court. So, it's about effectiveness, as well as how broad the Constitutional powers are.

MS. WEISER: So, I think if I understand correctly, it the skepticism of Congressional regulation in the area of racially conscious Congressional regulation regardless of the strength of the Congressional powers.

MR. PILDES: Well, again, I don't want to lose the -- look, this goes back to what Julie was saying, and I was going to respond to this and to link it to 2006. Part of what I was trying to say about 2006 is I thought there was a tremendous amount of, I would call it

intellectual conservatism, which was let's re-authorize what we've had for the last 25 years. Let's not push for various kinds of changes, and I'm worried -- I mean, I don't reject the view, but I want to be cautious about the conservatism that says now there's this hole. Congress thinks there's this hole. This hole is race decimation. Let's fill this hole.

I think that we need to be thinking about what the most effective way to respond is going to be, and I think Congress takes its cues from lots of sources on this. I think it's absolutely predicable. The immediate reaction will be there's a hole. That's the hole. Let's fix that hole. But I would like to see sort of real reflection about what the most effective way, both Constitutionally and as a matter of policy, actually is to fix that hole.

MS. FERNANDES: If I could just say I think that we don't disagree on this, Rick. That I think what we should be looking for is the most effective way we can address the problem, and to be effective in addressing the problem we have to pass a statute. And I think that part of what the conversation needs to be is how to be appropriately responsive to what the Court has said, what members of Congress believe their charge is because their perception, I agree, can be influenced on sort of what their job is. Once they've gotten to that, then we're working within that framework, and I am very concerned about -- and we've seen some of this in the coverage already from some members of Congress -- that I'm very concerned with the perception that those of us who are trying to respond to the Court will, in fact, be doing it in a way that is over-reach toward trying to reach all of these sort of hotly-contested national issues around Republicans and Democrats. And if we're in that world, we should just go work on another issue because we're not getting something done. So, that's what I think.

MR. PERSILY: Wendy had another question for Sam.

MS. WEISER: My question for Sam was just about the scope of your proposal. I think that disclosure is clearly critical and now something that is absent and lost as a result of the Court's decision in the covered jurisdictions. I want to clarify whether you were talking about disclosure of changes only that affect federal elections and how you propose addressing them;

the discriminatory conduct at the local level in a regulatory way? And then also, what the standard -- you mentioned if it's pre-textual, there might be a basis to sue. What would be the substantive basis to sue under your proposal? What's the substantive standard that would be upheld or promoted by Congress?

MR. HIRSCH: Well, two things. First of all, almost all state elections are run in conformity with federal election practices, even when there's a gulf between the timing on them so that I lived in Texas, and in the time -- 10 years I lived in Texas -- I don't recall any jurisdiction trying to come up with different rules for the conduct of a state election off-cycle than they did every two years when there's a federal election. And there was no shortage of off-cycle elections in Texas. They were all the time. I mean, in Austin we had, I think, six or eight elections a year by the time you had all these small runoffs and things of that sort. So, the reason I focus on the federal elections is because that's where the federal power is clear under the Elections Clause, and you would basically sweep up the terrain of election administration because election administrators for the reasons have a set are quite conservative. They don't like change. They want to know what the rules are, and they're not going to go running multiple levels of election administration.

The reason that pretext is important is that there are multiple legal sources at this point of the right to vote. Some of them are in the 14th and 15th Amendments by extension of racial issues. Some of them are statutory under the Voting Rights Act. Some of them are statutory under a whole series of other acts including, as we discovered in the last election, military voting and all these sorts of things, and some of them -- and this is one of the great innovations of the last 6 years of litigation. Mostly, or heavily in Ohio, some of it is directly under the Constitutional protection of the right to vote against arbitrary and capricious state action. And that's where, particularly the 6th Circuit, was highly innovative in the use of the Equal Protection Clause and the use of *Bush vs. Gore* and the use of a number of sources of federal authority. So, pinning down state conduct in a way that's transparent as to why they're doing it,

having someone with authority to speak for the state, have to represent why it was done goes a long way toward lowering the litigation burden in challenging and challenging that conduct. So, that's the reason for that proposal.

MR. PERSILY: Kareem, right on this point very quickly. I want to get some people who haven't been talking.

MR. CRAYTON: I'll just be very quick to say I actually think, in truth, if we take the route of the Elections Clause, I think states are likely to do a great deal of innovating to utilize every off-cycle election that they can.

Let me just offer you one example that is slightly on point, but gives you a precursor, I think, of what's to come. North Carolina is in the midst of litigation over its redistricting process, and one of the elements of the claim is that the state has gone through, by the Republicans, and divided precincts any number of ways; we argue racially motivated, but it's done it at every different level in a different way.

So, for example, if you're in a precinct, you could be in Precinct A divided on the west side of the line for Congressional elections, but on the east side of the line for local elections. If you're willing to do that on different levels and in different ways in the same election, it does not seem to me a strong suggestion to believe that for elections that are at a different time than the federal election that you're willing to apply different rules if you're all of a sudden shown that the federal government has the authority to regulate how you manage federal elections. I think that motivation for doing things differently is power, and people are willing to use it whenever possible.

MR. PERSILY: Let me get Daniel Stid in since he hasn't spoken before.

MR. STID: Sure. I just want an observation and a question (inaudible) on some things that Heather said. When you were describing your model, I was thinking an analog in my mind was the Office for Civil Rights in the Department of Education in terms of the universal coverage. They are now working -- the Department's putting up a lot of data about just

outcomes experienced by different protected groups. And just the opt-in clause, so if you go to their department, you have a single sheet you can fill out in 15, 20 minutes that captures that. And I think the notion of allowing for more of a collaborative regulatory regime where they have your colleague letters and providing technical assistance. So, it just strikes me that it's a different model, but I think that they -- that struck me as an analog there.

This is a question for Tom and John from a Congressional standpoint, and maybe, Mark, you could speak to this too. If you were to begin with a starting point that it was universal, so you're moving away from the covered states, and the Congressional quest was to devise a formula that would stand up to the expectations set down by the court, Would that enable a new coalition to emerge? I don't know if it's a bipartisan coalition, but a different mix of -- if you had a new starting point in terms of which jurisdiction's up front that this would be applying to, would it create new possibilities there?

MR. MANN: There will come a time when new coalitions emerge. It's not clear that it would develop here. One of the problems is that members of Congress tend to be risk averse on these matters, and a national focus for such plans then put many, many more states and Congressional districts into the potential target causing possible problems for members who presently have no difficulty with the whole pre-clearance regime because it doesn't apply to them.

So, at this point the only place we're seeing any coalitions moving across parties is when the political incentive is just so powerful, and that's the dozen or so Republicans in the Senate who were thinking very much about their party's prospects in national elections and therefore trying to work on the immigration issue. That it's limited, but it's the only encouraging sign now on the horizon.

MR. STID: What I was thinking about here is that you were talking about the jurisdictions, that the rates of violations in these covered jurisdictions, and so I'm just wondering if the revised formula would actually have far fewer jurisdictions being caught up in it; if there

was a way of devising a formula that was still catching the real miscreants, but far few of them which would -- I just don't know. I'm just wonder if there's --

MR. PERSILY: If you use Section 2 as the basis for the coverage, then it will be much fewer to replace it because -- but then the types of jurisdictions they pursued under Section 2, there's all kinds of factors that then lead into that, both resource and whether they were covered by Section 5, et cetera. But there are an infinite number of potential triggers if Congress were to go into that vein, and also whether the extent of racial diversity in jurisdiction itself might be a trigger. Right? Or whether it would be some other kind of criteria based on election performance. But did you want to jump in?

MR. CONSOVOY: I would just say if you look at the different metrics that were discussed during this litigation, Section 2 suits filed, racially polarized voting, constitutional violations, there's been a number of proposals offered. As I look at the data, it's hard to see a formula that doesn't at least bring in some new jurisdictions.

MR. PERSILY: Oh, yeah, let me just say since my -- the study with Stephen, it's also Charles Stewart, that even racial polarization certainly wasn't as if all the most racially polarized jurisdictions were covered and all the jurisdictions that weren't polarized were not covered. Right? It was never -- it didn't coincide like that, and so if you were going to look at racial polarization, there would be interesting Constitutional questions whether that would be sufficient; that for some reason, no one paid attention to that part of the article, but maybe some did. (Laughter) But that racial polarization wouldn't capture the same group of jurisdictions either. And then you have to think at what level of generalities; states, counties, localities, et cetera. Why don't we stay on this side of the table since I think I haven't been calling on -- why don't we just go Glenn and then Abby.

MR. MAGPANTAY: Two things I just want is, one is this issue of same election, whether it's a federal election or state election, and then, secondly, this issue of what's a win when you actually do litigation.

So, the first is on the same elections, one of the things that we're beginning to see is even though Congress's power is much stronger now when they exercise it under the Elections Clause, states are beginning to figure out ways to have different rules and regulations for non-federal elections. So, you see New York where they now will have new voting systems just for a state election, and a local election with the old lever machines that are not ADA accessible, that do not provide the HAVA protections, but it's not a federal election. So, we can do our old voting system in this upcoming election, and that's not subject to pre-clearance, and it's not subject to HAVA, and then next year we'll go back to our optical scan system.

I think we're seeing that also in Virginia where there are new identification requirements for this upcoming election because it's a state election, so fewer forms of identification in this election, but next year you can have more forms of identification.

So, even though I think as a general matter, most states have the same system for federal or state elections, we're beginning to see states flow back and forth. And we saw this when we first enacted the NBRA that once, I think it was Louisiana, had two voter registration systems; one for state elections and one for federal elections. And so, Congress does have the power to regulate under the Elections Clause what will states so contrive and develop so they can get out of those federal requirements.

The second aspect is some of the discussion that's happened before around a win under Section 2 or some other provision of the Voting Rights Act then becomes a basis for coverage, and while that makes sense because those are the worst acting jurisdictions, then there's a finding of discrimination, the problem is that many times you don't get a finding of discrimination.

Many times you get a settlement, and how do we even know that a settlement is in the plaintiff's favor or defendant's favor? Is that redistricting cases always go to trial and you get a win, but two or three cases, two (inaudible) cases, other cases under the Act that are non-redistricting cases, you could have the plaintiffs claiming victory, and you have a successful

lawsuit, and you've gotten some of remedy, but it is not one that is accompanied with judicial findings. It is not one that is accompanied with even a settlement.

We were the consent decree now. Jurisdictions are much more resistant to consent decrees. They're doing alternative memorandums of agreement and MOUs, which what are the persuasive value there? So, I think it's those contexts in which as we try to develop a trigger, a formula for coverage, we would like to think about.

I did have one question I want to ask Will. And so, just to put you on the spot immediately, if the court had asked you what a formula would be that would be good and would satisfy your concerns, what would that be? If you could design a Constitution (inaudible) because I think we agree that race discrimination in the United States still exists. Right? That there are still bad actors, and that those bad actors and those bad instances still need to be reined in. I hope we can all agree on that. How do we figure out a way to curtail that through a formula that is rational, both in theory and in practice? What is the theory (inaudible) we've got the practice?

MR. CONSOVOY: I'm probably going to disappoint you here.

MR. MAGPANTAY: Oh, sorry. (inaudible00:20:58) think (inaudible).

MR. CONSOVOY: Continuing my trend for the day. Our position was even if -- and if our client's position remains, even if on this record you could have sustained the formula, you still could not have sustained Section 5. We brought a facial challenge to Section 5. No one contested that discrimination remains in the country, but whether pre-clearance remains an appropriate remedy, we contested and we still do, but I would say a starting point for figuring out a rational formula would be actually looking at the non-coverage states. We scoured the record, and as Rick mentioned, there just was no comprehensive study of non-covered jurisdictions. The stats we found were from a few reports, but we just don't know what's going on in those jurisdictions, and you can't do a comparison until you have an overall assessment of what the entire nation looks like. So, I would say for Congress to start, it would be to have a

comprehensive study of what's going on throughout the country, at least as a basis for starting to compare cover vs. non-cover.

MR. PERSILY: Abby.

MS. THERNSTROM: I was very glad, quite a while back, that Julie brought up the questions of what Congress will accept, and I just heard Tom say members of Congress are very risk averse. But I'll put the point more strongly, Tom. I would say Republicans are terrified of any issue that involves race, and you can point back to 2006 and say, well, look at that vote, and look at that role that Sensenbrenner & Company played, but 2013 isn't 2006, and it seems to me that the *Shelby* decision has given some legitimacy, a lot of legitimacy, to now members of Congress questioning whether the conventional wisdom in the civil rights community is correct and raising questions they have not been willing to raise before.

And I also wanted to reiterate a point that I made earlier that you can't move forward, it seems to me, on a bipartisan basis unless some basic definitional questions are discussed, and I named a few of them before but I would add, for instance, can only minority legislators represent the interests of minority voters? If so, the safe black districts that the Justice Department has made mandatory as a part of the enforcement of Section 5, are they essential? Do they continue to be essential? Do we have to find a way of creating those safe black districts with Section 5 having to be revised in order to do so? And more broadly, does political equality demand group rights through representation? There are a host of huge normative questions which, it seems to me, are insufficiently discussed or not discussed in 2006, and need to be discussed if we're going to move forward.

One more remark; who is it that brought up *Kinston*? Did you? Well, I love my carbon, but of course I love my carbon, but I thought that was an awful case. I mean, the central proposition was so demeaning and patronizing to black voters; black voters can't figure out how to vote unless there's a partisan label next to candidates -- that I was happy to see that case go down. And that is an unusual view of *Kinston*, but it's mine.

MR. PERSILY: Spencer.

MR. OVERTON: I want to talk a little bit about the issue in terms of politicians' manipulating rules based on how voters look or speak, racial or language minorities, and the kind of access-for-all approach. If we just talk about it from a strategy standpoint, I think Khalil talked about it and kind of hit it on the head that there's some opportunity for some bipartisan movement on the Voting Rights Act, and that to the extent that we get into broader questions of reform, there are all these issues in terms of state's rights and partisanship and who's going to do what, and multiple Congressional committees, et cetera. Right? So, that's the practical strategy piece.

But just from a principled standpoint, I think this notion of politicians manipulating rules based on race is a real problem that we should acknowledge. I understand that people may have debates. Oh, do we need affirmative action? Is this person really working hard? Or economic opportunities or what you would do based on race, and I think Abigail just kind of framed VRA kind of in that language. I think that Justice Scalia was doing that when he was talking about this racial entitlement piece. He was thinking about it in this kind of *Shaw v. Reno*, 1980, early '90s question. Right? But I think --

MS. THERNSTROM: He was referring to racially gerrymandering districts as having become an entitlement.

MR. OVERTON: Right, yes, exactly, which I think is much more in the kind-of-quota affirmative action discussion, and I'm not saying that I'm not supportive of affirmative action, but I am saying that these are different questions.

That's a different question from whether politicians pay attention to race, and they do because it's related to voter performance. Right? And what we don't want politicians to do is manipulate rules to win elections. We want them to change their arguments if they need to respond to more people and to include more people.

And I think broad access is definitely a worthy goal. I got nothing against it. I'm

definitely on board, but I just think it's a different problem from manipulation by politicians of election rules based on race. It's kind of like a tax deduction for mortgage interest to buy a home. Oh, we want to open up home ownership to everybody. Let's go ahead and do that. That's wonderful. That's a good thing. Right? But that's a different problem than banks who are out here defrauding folks to get them into faulty home mortgages. Right?

They're two different issues and we need two different sets of laws to deal with these different problems. Giving out a tax deduction is not going to prevent a bank from defrauding someone with a faulty loan, and we just need to recognize that that exists. There's this kind of O. J. Simpson, did he do it? Or are they just talking about race and throwing this out there, and it's just some make-believe boogeyman type of thing, but it is the case that politicians in both parties pay attention to race, and to the extent they do that, we want to give them incentives to do the right thing as opposed to the wrong thing.

And finally, I really just don't want us to retreat from the 15th Amendment. I mean, maybe we need -- and I know we had the Lincoln movie on the 13th Amendment. Maybe we need a movie on the 15th Amendment. Right? I've got to believe (laughter) there was some drama and some struggle associated with that 15th Amendment, and it's not time limited. Right? It continues, and so as opposed to retreating from it I think we should really acknowledge and respect it.

MR. PERSILY: Dan.

MR. TOKAJI: So, saddened as many of us were by last week's decision, the upside which has been illuminated by the comments today, is that it may actually provide the opportunity, maybe not tomorrow, but at some point, for a law that actually works better in terms of protecting the right to vote.

And so, in terms of responses to *Shelby County*, it seems to me there are three big possibilities that have been suggested. One is revamping the coverage formula; rewriting Section 4. This, I have to say, strikes me as a non-starter, politically very difficult for the

reasons that Heather earlier identified. And even if you were to get it, I am not at all confident that it would survive Supreme Court review.

The second possibility is this disclosure/voter impact statement idea which strikes me as very promising and seems to me squarely within Congress's power under the Elections Clause as interpreted in the Arizona case at least insofar as it is applied to practices that are used in federal elections. I would suggest, germane to this discussion that we've been having about race consciousness and race-neutral remedies that that ought to include but should not be limited to information about the anticipated impact of the voting practice on different racial and ethnic groups.

The third possibility, and this is the one I'd really like to explore, is one Rick mentioned a while back, and is the subject of Travis's article that I really think warrants some further exploration, and that is amendments of Section 3, the so-called pocket trigger. Rick, you mentioned, and Travis, you say this in your piece as well, that it requires intentional discrimination, although the statute actually doesn't say that. It says a violation of the 14th --

MR. PILDES: No, no. I don't think that's right, Travis. Doesn't the statue say intentional discrimination in violation of the 14th and 15th Amendments? That's what I remember.

MR. PILDES: Oh, it does? I take that back. Okay.

MR. TOKAJI: Yeah, but it's not a completely -- what I was going to say, it's actually not a crazy reading even though that's not what the text of the statute says because if you are brought into coverage under Section 3, then the standard that's applied to you is effectively the same as under Section 5: that it not have the effect or purpose of denying or bridging the vote on account of race. And so, it would be odd to subject jurisdictions to a race-based standard when they haven't been found to have engaged in intentional race discrimination.

So, I guess I do agree that it would be helpful to clarify the statute, but then that

leaves the question -- so if jurisdictions can be brought in based not just on race discrimination but based on other violations of the right to vote, what would then be the standard for pre-clearance? It shouldn't just be that it not have the purpose or effect of denying or bridging the vote on account of race. So, I mean, I like the idea, but I just wonder, I guess, I'll direct this to you, Rick. What do you think the standard for pre-clearance should be for jurisdictions that are brought in based on something other than race discrimination?

MR. PILDES: So, that's a great question, and I hadn't thought it through in advance, but certainly what I want to say as an initial response is to link this to the kind of protection for the right to vote is such that I was talking about outside of the Section 4 model. So, I would say, as a starting point the pre-clearance would be designed to ensure that the courts would subject further changes with respect to voting practices in that jurisdiction or the type of practices that had been found in violation to the kind of scrutiny we were talking about: that they have to be necessary to serve a legitimate state purpose, may be necessary to serve legitimate and substantial state purpose, but a standard along those lines. And I think that's a great point; that if one imagines, including violations of universal laws like the National Motor Voter Act, then you would need to think about a substantive pre-clearance standard that would fit that. I think that's a good point.

MR. PERSILY: Ned, on this point, real quick.

MR. FOLEY: Yeah, seems to me that the Ohio (inaudible). Oh, I'm sorry. Seems to me that --

MR. PERSILY: Press it again.

MR. FOLEY: Sorry -- that the Sixth Circuit in the Ohio early voting case in effect used a kind of retrogression standard that it imported from Constitutional law, but that could be built into statutes. So, to answer Dan's question or to build on Dan's point, it seems to me that you could have a retrogression standard linked to Anderson-Burdett-Crawford type claims that's broader than retrogression linked to race-based claims, and that that could be made a statutory

standard not vulnerable to different Constitutional interpretation in other circuits that might disagree with the Sixth Circuit points. I think there is room for legislative innovation along the lines that Rick and Dan are talking about. I have another point, but I could save it till later.

MR. PERSILY: Okay, good. Why don't we get Guy and Mark and then Tom, Glenn, and Will.

MR. CHARLES: What we didn't tell you is that there is no later. So, I think my question will go more to Tom, but it's framed within the context of the discussion that we're having because in many ways even though some of the comments earlier, these don't have to be mutually exclusive, but it does seem that they are points of contention. So, on the one hand, we can think about a race-neutral alternative, but then some of the comments have been made that while you're not going to get that through Congress because that is not going to be viewed as being bipartisan enough. On the other hand, if you think through the race-conscious alternatives, then the question becomes whether you're going to get that through the courts, and whether anything could happen.

And then I think I at least understood Tom Mann to say it's not clear that you get anything through Congress at all, and so the question becomes what are the options that are left? And that leads me to ask not just Tom Saenz but all the LDFs in the room (inaudible) you talked about your lack of resources, and I'm wondering if you could say a little bit more about that because it seems that -- or all of the others of you could say a little more about what that means -- because it seems that the default option, or if you can't get something through Congress, or if you can get it through Congress but you can't get it through the courts, so even a modest modification of the bale-in provision might not be a great option. It seems that the default option are the civic groups as well as the organizations that litigate these issues. And if you all are going to have difficulty doing a lot of it, then from my perspective, and maybe I happen to be the most cynical one in the room, that is, I'm not expecting that much coming out of Congress. So, as innovative as some of these ideas are, it's not clear to me that we can

really expect much in the next few years, even for the modest ones.

But then if you all also are telling me, well, you know what? We can probably litigate one -- we can take care of this, but we're not going to be able to handle the flood of what's coming, then I think there are some real serious issues to start thinking about.

So, I'm wondering if those of you could say a little bit more -- you don't have to say a lot more -- but be curious to hear a little bit more about what some of the limitations are, and if there are ways that those of us who are not in your organizations can help you think through them.

MR. PERSILY: Can we get some quick responses from (inaudible)? Yes, no, that's fine, and then Mark, but since it was directed at Tom, and I see Glenn and John.

MR. SAENZ: I do have another comment, so I'm not going to give up my -- (laughter). But I would say this. The problem is that Section 2 litigation, because it's a totality of circumstances, is extraordinarily expensive from the vantage point both of out-of-pocket costs to experts and attorney time on my staff.

I would add to that that the other challenges, frankly, the number of attorneys who have experience in doing Section 2 cases has been diminishing over the years, and that, too, is a very serious issue. I, 10 or 12 years ago, had, I would say, four attorneys on staff who were very experienced in Section 2. I'm now down to about one and a half of those four because people move on to other aspects of their career, and I think that probably something similar could be said about the expert stable; that there has been some diminution in that as well.

And so, I think there's a lot of work to be done when you ask what could be done. It's not just about raising money. I'm happy to give out the online-donation mechanism to everybody that wants it, but there really is an effort that needs to be made to build up expertise in both the attorney pool and among experts if a lot more Section 2 litigation, particularly in areas other than redistricting, has to go on.

MR. PERSILY: Glenn, real quick, and John.

MR. MAGPANTAY: And I think it's the Section 2 standard of intent and also the availability of data. So, even if you have experts, so with intent, they -- legislators just -- except maybe in Indian country where, in deference to the ACLU, they just don't use racist language anymore in enacting statutes. You just don't see negro, Chinaman, dirty spick, in the legislative record. The language is very coded, so we understand how to do this work without using those triggers that evidence race discrimination, and you never get it written. And then even when it is said, it's said in a private meeting where there's no one who could attest to it or it's said in council, so it's cloaked and you can never kind of get that, so that the Section 2 standards are very difficult to meet on the (inaudible).

The second part is even if you have the expert for Asian-Americans and emerging communities where you don't have a long history of political participation, finding the data to even demonstrate RPV analysis can be challenging. Why is RPV analysis even necessary in moving a poll site in China Town? Nevertheless, you have to do that; make that showing to show if you only move the poll site and only give notice in English in China Town, and all the Chinese people don't know where to go, and it's in China Town because none of the (inaudible) are bilingual, that creates a problem. And so, it's an enormous hurdle and an enormous effort to make a very small change. So, those type of things are some of the challenges in bringing a Section 2 case even if we had the resources. It's just difficult.

MR. PERSILY: John, quickly.

MR. GREENBAUM: So, we have five lawyers who work on voting full-time with portions of other lawyers -- we have seven full-time equivalent positions that work on voting, but that includes all the work that we do on election protection, voting reform, as well as this work. We're helped significantly by the fact that we co-counsel with law firms. Last year we were involved in all four -- although the Texas redistricting case, less -- of the major declaratory judgment actions and ran the election protection program with a little bit more legal staffing than

what we have now, and we were extremely stretched. So, I mean, there's no doubt that we're going to need more lawyers to do this work.

MR. PERSILY: I think (inaudible). Mark.

MR. BRADEN: God, I'm feeling old already. I don't see any difficulty whatsoever in drawing a trigger standard that would be Constitutional. I do see a huge problem with drawing one that would be Constitutional and would, in fact, pass Congress. I think the question here is what can pass Congress. The starting point, I would suggest to you, is going back -- my own view of the world, obviously -- going back and bifurcating what we're talking about here that Section 5 deals with.

There's a big piece which is reapportionment, redistricting, and then just let me call it the election administration piece. If you fill the need to not bifurcate and have to come up with a system that would get through Congress that would deal with both those pieces, good luck. I don't see how that's going to happen, but if you were to bifurcate it, I think there's a possibility that you could. You have to deal with Abigail. You have to realize that if you don't break out redistricting, then if you break out redistricting, suddenly you've freed up a huge portion of the Republican caucus who is opposed to what they would view as racial quotas and redistricting based upon race, even though, of course, redistricting based upon race has been vital to the creation of the Republican party itself. I mean, there's no question about that throughout the '80s, '90s. People that were working with me was the minority community in the South, and that's what permitted the Republican party to become the majority party in those states at the local and legislative level.

Okay, but the whole notion of creating those majority minority districts is very difficult with most of the Republican caucus in the House of Representatives. So, if you want to break that piece off and say, okay, we're not going to have any effort to replace Section 5 is going to deal with redistricting. We'll depend upon Section 2 or something else to deal with redistricting litigation. But we're going to deal with -- what I heard in a variety of discussions

here -- things that are really important going forward. First of all, with the exception of a few odds and ends, everything in redistricting is a long way from now, 2012.

So, if you want to deal with what you perceive to be problems in the near, near term, which are election administration problems, you break those out, you've suddenly freed up a lot of Republicans who wouldn't consider this because they say this is based upon racial-based redistricting. If you take that piece out, then all we're talking about is election administration practices, whether or not they're discriminatory.

No matter what, we have different views about early voting and voter ID or whatever, but at least intellectually the caucus is going to vote rhetorically, and I would suggest intellectually, want to take the position that they're not in favor of anything that discriminates, any type of election procedure that discriminates against a minority community. Now, we're going to have lots of arguments as to what that means, but at least rhetorically they will take that position, and I believe actually take that position.

So, if you're talking about creating a system that might permit some type of pre-approval or easier access to challenging election administration pieces, that's doable. If you're doing the whole thing, that's not politically doable, period.

MR. PERSILY: Kareem, very quickly, and then I'm going to Tom and Will, and then --

MR. CRAYTON: It's a question, actually, for Mark. In general, I'm inclined against it, but I have a question, and then maybe this is also for Abigail. Suppose we had a system where we divided redistricting from this, and maybe this looks like the immigration proposal. I look at Florida and its recent approach at redistricting. I'm not a huge fan of it. California is another where the State Supreme Court reviews, part of the time it's enacted based on, right, the red flag waved by some party that seems to feel as though they were wrong, but before the plan is enacted it gets judicial review. If we were czars of the world and could have a system where we divide redistricting out, but let's say, encourage force, whatever we can do

constitutionally, states to adopt that kind of prior review system in state courts, would that be a world that you are happy to embrace?

MR. BRADEN: Well, let me just say one thing right up front. I actually think that's where we had, in 1965. I think Justice Thomas is absolutely correct, although by the time he wrote the opinion, I think it was too late to swim upstream that far. I think it's pretty clear in 1965 when the Voting Rights Act passed, nobody was thinking that it applied to redistricting. I mean, it's just if you look at historically when it passed, and you look at the language, it's absolutely no reason to believe it was applied -- that was an after-the-fact development of law. I actually think it was a good one. It certainly paid for my kids to go to school, so I'm very happy about that.

MR. PERSILY: Of course, a lot of people starting voting in 1965.

MR. BRADEN: Yeah, and I think the result was good, but most certainly the plan in '65 was not to include that. They were looking at something else. In 1965, again, you've got to go back to a world we're not familiar with. These were not big issues. Redistricting was not a big issue in '65. I mean, because this is just the beginning of the one person, one vote revolution, so it just isn't there. Sure, I have no problem, and I think from my sort of side of the aisle, that, again, I know people are very suspicious, but people from -- there's not a problem philosophically like there is on racial-based redistricting. That's a big philosophical problem. The system being fair, as a starting point, is not a philosophical problem with conservatives or Republicans or Libertarians, I don't think. So, theoretically, the answer is yeah, you could do something like that. Might work, possibly.

MR. PERSILY: Tom.

MS. THERNSTROM: In '65 the Congressional hearings in 1965 were not even discussed (inaudible)because (inaudible).

MR. PERSILY: Could you press the button.

MS. THERNSTROM: Sorry about that. And by the way, Republicans know full

well -- I mean, they've been laughing all the way to the bank -- that race-based districting helps them, but they don't want to be depicted as racially insensitive, and that has been the problem. Yes, they like the fact that the concentration of black votes whitens the surrounding district, and in the South that means those are fertile ground for Republicans, but they also worry about reinforcing the image that Republicans are racially -- that in the closet, they're all racists.

MR. PERSILY: Tom.

MR. SAENZ: Yeah, as we're coming to the aisle, I want to -- I do respect my friend, Dan. I think I heard more than three ideas generated here. (Laughter) And I also think this is only the beginning of idea generation, so with an eye to future idea generation I want to just want to make a couple of quick comments.

As I said, I think the best legislation is going to be a buffet of different approaches in response to *Shelby*. Some of them may survive. Some of them may not in the political process. Heather, I think that your suggestion is an interesting one, and I want to comment specifically because you and Sam have pointed out that the regulatory regime has really evolved significantly since 50 years ago, and that's clearly true, and I think there is lots to be mined from that development in the regulatory regime.

In fact, I was pleased to hear the Department of Education brought up in other contexts, so I suggested it go the other way; that the achievement gap in education would be seriously reduced if we had pre-clearance in education policy making in certain respects. But here I think that there is something to be learned from the Department of Education and No Child Left Behind's incorporation of data collection and data transparency, and then the data that reaches certain thresholds triggers certain policy responses. I think there's something to be learned there.

I would say specifically to counter one thing that you said, Heather. Earlier you -- I think Wendy suggested to you that there might be pre-clearance that was subject-matter based, and you rejected that politically. I think that's right with respect to certain matters. Voter

ID, for example, has become so partisan politicized you could not get anything through. It would specifically isolate that.

But for a lot of the concerns under Section 5, I think that there is a way, particularly with data available today, to put together metrics that would say, for example, a precinct consolidation, if it met certain numerical metrics, ought to be subject to pre-clearance wherever it is. Or a precinct movement, and you could look at what that meant for the voters in the district and distances from it. You could come up with mathematical metrics that thresholds, if met, would trigger pre-clearance, meaning it could not be implemented until it was fully reviewed.

So, I think that there is lots to be mined from regulatory regimes that have developed in other policy areas including education. The one caution that I would give is the political process being what it is in all of those other areas, we also have to attend to how there may be baked-in flaws that come out of the politics around regulation in that other arena before assuming that something that works in education might be borrowed and pulled over here. We'd have to look how education politics as unduly limited, for example, what has been done with the data that's available in the education arena.

But in terms of idea generation, I think that there's lots to come out of that, and I think we have to look at how data could set thresholds that could lead to the very, very, I agree, a very aggressive and high threshold of a pre-clearance review where something cannot be implemented until it's been subject to review.

MR. PERSILY: Very quickly as we approach the end, Ned.

MR. FOLEY: I love the buffet metaphor. I think that's a useful one. Two quick points. One is following up on Julian and Spencer. I guess I would urge the thought that even if you take the problem as being a hole in the discrimination regime that *Shelby County* has put forward, that in the current environment, including the Robert's court, that the best tactical means through Congress to fix that hole may be to use your words, frame it as a democracy

problem as the means to fix a discrimination-problem objective, at least as one of the buffet things to consider.

And then finally, I'm hopeful that Congress can do something in this post-*Shelby* window, and given the bipartisan effort to kind of fix some hole that now exists -- but even if Congress can't, I think the non-profit community can do some things, maybe not as good as governmental regulations, but the democracy index experience shows that the non-profit community can create shadow regulatory-type institutions that, if imperfect, nonetheless do some things. And so, if one of the primary goals is transparency, it may be possible that a respected bipartisan institution could create its own outside-of-government transparency regime as a second-best solution.

MR. PERSILY: Will.

MR. CONSOVOY: Just one comment, then two quick questions on the Elections Clause. I was surprised today by how little discussion there's been about the Department bringing Section 2 cases. It's available to the Department. They can bring cases. I know we're in a budget crunch nationally, but if the Department made it a priority they certainly have the resources well beyond people in the litigation community to do that, and it seems to me that that would be a place to start, not a place to finish.

On the Elections Clause, either Heather or Rick or Sam, two quick questions. One, do you think voter ID falls on the qualification side or on the Elections Clause, I guess time-place-manner side as Justice Thomas referred to in his Arizona concurrence? And two --

MR. ISSACHAROFF: I think Arizona answers that because the question there was what you needed to bring with you to the polls to vote. So, if they want to say you have to be 18 years old and you must be this and that to be qualified to vote, that's fine. But for the actual act of voting, which has been most of the concern in 2012, 2008, that's covered under the Elections Clause as I read the Arizona decision.

MR. PILDES: I actually have a somewhat different answer to that. I think that

there is some tension there in the opinion, but the way I would read it is having resolve is that as long as the federal government is not fundamentally thwarting the state's ability to enforce its voter qualifications, then there is power in the Elections Clause to regulate issues of identification and registration. So, there may be some outer-boundary constraint on that power. I think that's maybe where the small difference is, but I think that the federal government under the Elections Clause would really have to thwart the state's ability.

MR. PERSILY: We have to end, but Gilda, I want to give you the last word since you've had it up, but very -- give me 15 seconds.

MS. DANIELS: Fifteen seconds.

MR. PERSILY: All right, 23 seconds.

MS. DANIELS: Oh, well, thanks. Twenty-three seconds. So, well, I want to say I think we've certainly started approaching this, I think, from the wrong direction. And I think we should have looked at it from the fact that the Voting Rights Act was meant to create equal opportunities to participate in the electoral process, and that Section 5 was enormous in helping to create those opportunities. And so, it's just those opportunities and how we recapture those, and I think we have to look at the buffet and say everything's on the table; Elections Clause, 15th Amendment. I've written about voter-impact statements, and certainly I think they're useful and how we can use the election clause with voter-impact statements.

And finally, there are not enough lawyers to replace Section 5 with Section 2. There are not enough lawyers in the country to replace Section 5 with Section 2. And also we have to look at how Section 2 has -- how courts have viewed Section 2 in regards to its effectiveness as well and looking at how we may -- so they may soon apply it, and go back to intentional discrimination which is, again, a very difficult standard.

MR. PERSILY: I think ending on the note that there's not enough lawyers is always a (inaudible). (Laughter)

MR. MANN: No one else in America would believe that. Listen, I want to thank

all of you. It's been a very stimulating and informative discussion. We are going to bring the webcast to an end. We hope to produce a policy brief drawing on this conversation. We hope those of you who write public documents in the next weeks and months that are related to our discussion here will share those with us. We will stay in touch.

The webcast will be up on our Brookings website as well as a transcript of the proceedings for you to use as you wish. And the webcast now ends. Our conference is over. Thank you all very much.