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## Withdrawal: The Roberts Court and the Retreat from Election Law

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## Article

# Withdrawal: The Roberts Court and the Retreat from Election Law

Ellen Katz<sup>†</sup>

### INTRODUCTION

Last Term the Supreme Court handed down four decisions that upheld diverse efforts by state governments to regulate the electoral process. The Court turned back challenges to New York's method for nominating judicial candidates,<sup>1</sup> Washington's modified blanket primary system,<sup>2</sup> Indiana's voter identification requirement,<sup>3</sup> and Alabama's use of gubernatorial appointment to fill county commission vacancies in Mobile County.<sup>4</sup>

Unlike other recent election decisions,<sup>5</sup> these were not close cases. All nine Justices supported the New York holding,<sup>6</sup> while supermajorities voted in favor of the result in the others.<sup>7</sup> This consensus, moreover, emerged even as the Court voted to reverse unanimous decisions by experienced lower court judges in the Alabama,<sup>8</sup> New York,<sup>9</sup> and Washington cases.<sup>10</sup> The one af-

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1. N.Y. State Bd. of Elections v. López Torres (*López Torres III*), 128 S. Ct. 791 (2008).

2. Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184 (2008).

3. Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008).

4. Riley v. Kennedy, 128 S. Ct. 1970 (2008).

5. See, e.g., League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 408 (2006) (5-4 decision).

6. See *López Torres III*, 128 S. Ct. at 794.

7. See *Crawford*, 128 S. Ct. at 1613; *Wash. State Grange*, 128 S. Ct. at 1187; *Riley*, 128 S. Ct. at 1976.

8. See *Riley*, 128 S. Ct. at 1980.

9. See *López Torres III*, 128 S. Ct. at 797.

10. See *Wash. State Grange*, 128 S. Ct. at 1187.

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firmance came in the controversial Indiana voter ID case and even there six Justices supported the outcome.<sup>11</sup>

These four decisions suggest that a distinct approach to election law is emerging in the Roberts Court. It is an approach that seeks to avoid active federal engagement with the state-created rules regulating democratic participation; and it is one that assumes and demands an electorate that is both legally literate and diligent. This approach differs in tenor and substance from the stance the Justices have long taken in electoral disputes. It implicitly rejects the role the Court and Congress have repeatedly played in the electoral arena, and the portrait of the American voter on which federal involvement has previously been premised.

This short Article develops and defends these claims. Part I shows how the recent decisions depart from both longstanding and more recent precedent in the field. While the decisions facially overrule nothing, they narrow foundational voting decisions from the Warren and Burger Courts, and disavow the rigorous review the Rehnquist Court repeatedly employed when examining challenges to state electoral processes. The decisions suggest a Court that is eager to withdraw from engaged judicial review of state election laws and receptive to circumscribed federal oversight of state electoral processes more generally.

Part II shows how this federal withdrawal is animated by a distinct conception of the American electorate. The decisions last Term posit that voters did not need the federal assistance the plaintiffs were seeking. They all assume that voters possess a sophisticated understanding of the complex legal rules under which they act, as well as both the ability and the diligence needed to navigate those rules. Underlying decisions that reject federal challenges to electoral rules, these assumptions become permissible requirements for political participation.

The Justices know full well that a good portion of the American electorate lacks the very characteristics on which meaningful political participation now appears to depend. The recent decisions make clear that the Court is no longer eager to provide assistance when voters fall short. The expectation, implicit in these decisions, is that the void will be filled not by the States themselves, but by political parties, other nongovernmental organizations, and private individuals. A brief conclusion explores this point.

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11. See *Crawford*, 128 S. Ct. at 1613.

## I. STEPPING BACK

This Part evaluates four election law decisions from last Term. These decisions all rejected challenges to state efforts to regulate the electoral process. In each case, precedent suggested, though did not require, a more robust federal role. By letting the challenged regulations stand, all four decisions narrow prior precedent and minimize federal oversight of state electoral processes.

## A. NOMINATING JUDICIAL CANDIDATES

*New York State Board of Elections v. López Torres*, the first of the four decisions the Court handed down last Term, presented the Justices with a constitutional challenge to the influence political party leaders exert within the hybrid system New York State employs to nominate candidates to judicial office.<sup>12</sup> This system relies on decentralized state-run primaries at which party members choose delegates who then attend party-run conventions that select the party's nominee.<sup>13</sup>

Within this regime, local party leaders consistently choose the ultimate nominee. They do so by coordinating a slate of loyal delegates to run in the primary and by ensuring these slates satisfy New York's hefty primary ballot access requirements.<sup>14</sup> These requirements functionally block opposition to the party slate,<sup>15</sup> and thus the primary is routinely cancelled for lack of

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12. *López Torres III*, 128 S. Ct. 791, 797 (2008).

13. See N.Y. ELEC. LAW §§ 6-134, -136(2)(i), -136(3), -160(2) (McKinney 2007).

14. Under New York law, delegates run in each of the numerous assembly districts that comprise one of the State's twelve judicial districts. See *id.* § 6-124; *López Torres v. N.Y. State Bd. of Elections (López Torres I)*, 411 F. Supp. 2d 212, 220–21 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *rev'd*, N.Y. State Bd. of Elections v. *López Torres (López Torres III)*, 128 S. Ct. 791 (2008). To be placed on the primary ballot, candidates for delegate must circulate designating petitions within the assembly district in which they are running. *López Torres I*, 411 F. Supp. 2d at 216 n.3. State law gives them thirty-seven days to gather 500 valid signatures from party members who both reside in that assembly district and who have not already signed another such petition. §§ 6-134(3), (4), -136(2)(i), (3); *López Torres v. N.Y. State Bd. of Elections (López Torres II)*, 462 F.3d 161, 173 (2d Cir. 2006). Because these requirements routinely render many obtained signatures invalid, those seeking access to the ballot must, as a matter of practice, obtain between 1000 and 1500 signatures to ensure obtaining the required number of valid ones. See *López Torres I*, 411 F. Supp. 2d at 220–21.

15. In New York's Second Judicial District located in Brooklyn and Staten Island, for example, a challenger candidate seeking to run a full slate of delegates and alternates would need to enlist nearly 250 people to run, and secure

contest and the party slate is “deemed elected” pursuant to state law.<sup>16</sup> The delegates elected on the leadership’s slate invariably nominate the leadership’s candidates at rote conventions that last only minutes.<sup>17</sup> Noncompetitive judicial districts guarantee the nominee emerging from the majority party’s convention will become a state supreme court justice.<sup>18</sup>

Two lower federal courts thought this regime gave too much power to local party leaders. They found that the State structured the nominating system in a manner that actively and predictably gave party leaders ultimate control over the nomination.<sup>19</sup> Under it, judicial candidates like plaintiff Margarita López Torres—bona fide party members who meet the qualifications for judicial office and enjoy considerable support but are not favored in advance by the party leadership—are, in the words of the district judge, wholly unable to “clear all the hurdles necessary to elect supportive delegates,” and confront “insurmountable” obstacles in seeking to lobby the delegates who are selected.<sup>20</sup>

A unanimous Supreme Court, however, saw no constitutional defect.<sup>21</sup> Some of the Justices seemed to think New York’s regime was bad policy,<sup>22</sup> but they all agreed that the system was well within the realm of permissible structures a State might employ when regulating the electoral process.<sup>23</sup> No

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124,000 qualified signatures from the twenty-four assembly districts that comprise the Second Judicial District. *See López Torres I*, 411 F. Supp. 2d at 219. Accomplishing this would require obtaining nearly a quarter of a million signatures, based on a “conservative” estimate of the number of signatures that must be collected to ensure obtaining a sufficient number of valid ones. *See id.*

16. § 6-160(2).

17. *See López Torres I*, 411 F. Supp. 2d at 217, 223, 230.

18. *See id.* at 217 (“In most places, the nominees of a single party (either Democratic or Republican) win all or virtually all of the time.”); *see also López Torres II*, 462 F.3d at 178 (“Empirical evidence showed that because one-party rule is the norm in most judicial districts, the general election is little more than ceremony.”). The supreme courts of the State of New York are the state’s trial-level courts.

19. *See López Torres II*, 462 F.3d at 181; *López Torres I*, 411 F. Supp. 2d at 231, 233. I agreed. *See* Brief of Amici Curiae Law Professors at 2, N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791 (2008) (No. 06-766).

20. *López Torres I*, 411 F. Supp. 2d at 216–17.

21. N.Y. State Bd. of Elections v. López Torres (*López Torres III*), 128 S. Ct. 791 (2008).

22. *Id.* at 801 (Stevens, J., concurring).

23. *See id.* at 800–01 (majority opinion).

precedent squarely blocked this holding, but several decisions emerged narrowed as a consequence.

Most notably, *López Torres* examined New York's regime solely as state statutes describe it, and disregarded how it operates in practice. The Court never disagreed with the lower courts' finding that New York's system is functionally impenetrable to challenger candidates and their supporters.<sup>24</sup> What mattered to the Justices, however, was that the process was and remains *legally* accessible.<sup>25</sup> As Justice Scalia pointed out, "[n]o New York law" compels the election of the leadership's slate; no law directs those elected to vote the leadership's preference; and no state law prohibits challenger candidates from attending the convention or from lobbying the delegates.<sup>26</sup>

All this is true, to be sure. That the Court would, however, explicitly and unanimously deem formal, legal accessibility sufficient to validate New York's regime is something new. The Justices have repeatedly claimed to have engaged in precisely the type of analysis *López Torres* disavowed; that is, the Court has said it focuses not only the "requirements themselves" but also on "on the manner in which political actors function under those requirements."<sup>27</sup> *Bullock v. Carter* accordingly emphasized that a candidate filing fee must be examined "in a realistic light" that includes "the extent and nature of the[] impact on voters."<sup>28</sup> Chief Justice Burger explained that, under the challenged regime, "potential office seekers . . . are in *every practical sense* precluded from seeking the nomination of their chosen party."<sup>29</sup> Rather than focusing exclusively on legal impediments, *Bullock* examined the system's "real and appreciable impact," stressing that to do otherwise would to be "ignore reality" about the system's effect in practice.<sup>30</sup>

*Bullock* was not an outlier on this point. Back in *United States v. Classic*, the Court emphasized "the practical opera-

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24. *See id.* at 800 (finding "one-party entrenchment" not a valid basis for judicial interference).

25. *See id.* at 799.

26. *Id.*

27. *Id.*; cf. Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 321–22 (2007) (arguing that "the Court's rhetoric . . . seems to invite all-things-considered, empirically oriented burden inquiries," but that in practice, "the Court often reverts to formalism").

28. 405 U.S. 134, 143 (1972).

29. *Id.* (emphasis added).

30. *Id.* at 144.

tion” of a primary election in controlling outcomes, even as it observed the absence of any “effective legal prohibition” on voter rejection of the primary choice in the general election.<sup>31</sup> *Lubin v. Panish* emphasized the need to examine “[t]he realities of the electoral process,”<sup>32</sup> and *American Party of Texas v. White* rejected access that is “merely theoretical.”<sup>33</sup> And as recently as *Clingman v. Beaver*, Justice O’Connor called for a “realistic assessment of regulatory burdens on associational rights” and an “examination of the cumulative effects of the State’s overall scheme.”<sup>34</sup>

*López Torres*, by contrast, steadfastly refused to examine the system’s cumulative effects and came close to embracing what Justice Stevens’s dissent in *Clingman* described as “empty formalism.”<sup>35</sup> No state law prevented a challenger candidate like López Torres from attending the convention or lobbying delegates,<sup>36</sup> but the Court knew full well that in “every practical sense” she would be unable to do so.<sup>37</sup> So too, the Court willingly “ignore[d] reality” and deemed “entirely reasonable” New York’s requirement that a single candidate for delegate obtain 500 signatures before gaining access to the primary ballot.<sup>38</sup> The legal obstacles to a successful standalone candidacy as a convention delegate were certainly less onerous than those involved with securing the election of a coordinated slate, but, in “every practical sense” pursuing such a standalone candidacy is pointless, given the absence of debate and discussion at that state-mandated convention.<sup>39</sup>

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31. 313 U.S. 299, 313, 319 (1941).

32. 415 U.S. 709, 719 n.5 (1974).

33. 415 U.S. 767, 783 (1974) (citing *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)).

34. 544 U.S. 581, 599 (2005) (O’Connor, J., concurring).

35. See *id.* at 610 (Stevens, J., dissenting in part) (emphasizing that the assessment “should focus on the realities of the situation, not on empty formalism”); cf. Christopher S. Elmendorf, N.Y. State Bd. of Elections v. Torres: *Is the Right to Vote a Constitutional Constraint on Partisan Nominating Conventions?*, 6 ELECTION L.J. 399, 409 (2007) (predicting that the Court would not give “unqualified approval” to the “neither formalistic nor abstract” approach followed by the lower courts in *Lopez Torres*).

36. See N.Y. State Bd. of Elections v. López Torres (*López Torres III*), 128 S. Ct. 791, 799 (2008) (“[N]o state law prohibits an unsupported candidate from attending the convention and seeking to persuade the delegates to support her.”).

37. Cf. *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

38. See *López Torres III*, 128 S. Ct. at 799.

39. See López Torres v. N.Y. State Bd. of Elections (*López Torres I*), 411 F. Supp. 2d 212, 217, 223, 230 (E.D.N.Y. 2006), *aff’d*, 462 F.3d 161 (2d Cir. 2006),

In *López Torres*, the Justices were nevertheless satisfied to limit their gaze to formal legal access, and to ignore the burdens that arise in practice. In so doing, *López Torres* was not an aberration. In the decisions that followed, the Court retained this rigid focus on legal rather than practical impediments to participation.

#### B. MODIFYING THE BLANKET PRIMARY

The Court's next decision, *Washington State Grange v. Washington State Republican Party*,<sup>40</sup> was the most unexpected of the four. Reversing two lower courts, the decision upheld as constitutional the Washington state law known as the People's Choice Initiative (Initiative 872 or I-872).<sup>41</sup> Court watchers widely anticipated an affirmance.<sup>42</sup>

For decades, the State of Washington relied on the blanket primary to select party nominees for elective office.<sup>43</sup> Under this system, the names of all the candidates from all parties appeared on a single ballot, and voters choose among them, selecting, for instance, among the Democratic candidates for governor, and among the Republicans for senator.<sup>44</sup> The candidate with the highest votes by party for each office advanced to the general election, as the respective party's nominee.<sup>45</sup> In 2003, a federal court struck down Washington's system, finding it "materially indistinguishable" from the blanket primary the Supreme Court invalidated three years earlier in *California Democratic Party v. Jones*.<sup>46</sup> There, the Justices held that California's blanket primary impermissibly burdened the associational freedom of political parties because "it forced them to allow nonmembers to participate in selecting the parties' nominees."<sup>47</sup>

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*rev'd*, N.Y. State Bd. of Elections v. López Torres (*López Torres III*), 128 S. Ct. 791 (2008).

40. Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184 (2008).

41. *Id.* at 1189–90.

42. See, e.g., In Shocker, Supreme Court on 7-2 Vote Upholds Washington State Primary, <http://electionlawblog.org/archives/010463.html> (Mar. 18, 2008, 07:25 PST).

43. Wash. State Grange, 128 S. Ct. at 1187.

44. *Id.* at 1188.

45. *Id.* at 1188–90.

46. Democratic Party of Wash. State v. Reed, 343 F.3d 1198, 1203 (9th Cir. 2003).

47. Wash. State Grange, 128 S. Ct. at 1188.

In 2004, voters in Washington State responded by adopting I-872, which provides that all candidates for a “partisan office” appear together on the primary ballot, with the two candidates receiving the most votes overall advancing to the general election.<sup>48</sup> This new, modified blanket primary resembles the non-partisan primary that *California Democratic Party* described as a permissible alternative to the blanket primary.<sup>49</sup> Washington’s system, however, added the wrinkle that it allows candidates to list their party “preference” on both the primary and general election ballots.<sup>50</sup>

*Washington State Grange* addressed whether this wrinkle invalidated I-872.<sup>51</sup> Two lower courts thought it did, noting that the party-preference designation suggested the party had either endorsed or nominated a candidate when it had done neither.<sup>52</sup> Observers widely agreed that *California Democratic Party* controlled, and mandated the invalidation of I-872.<sup>53</sup> Oral argument in the Supreme Court suggested an affirmance would be quickly forthcoming.<sup>54</sup>

The Justices nevertheless voted 7-2 to reverse.<sup>55</sup> Justice Thomas’s lead opinion emphasized that the I-872 primary did not “by its terms” or “on its face” select party nominees, and that the law made no reference to the top-two candidates “as nominees of any party, nor does it treat them as such.”<sup>56</sup> Pointing out that the challenge before the Court was a facial one,

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48. *Id.* at 1189.

49. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 598 n.8 (2000).

50. *Wash. State Grange*, 128 S. Ct. at 1189.

51. *See id.* at 1192–93.

52. *See* *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 922 (W.D. Wash. 2005), *aff’d*, 460 F.3d 1108, 1125 (9th Cir. 2006), *rev’d*, *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008).

53. *See, e.g.*, Joseph M. Birkenstock, *Did I-872 Take Washington State’s Voters on an Unconstitutional Detour?: Partisanship in Primaries in Washington v. Washington State Republican Party*, 6 ELECTION L.J. 394, 398 (2007) (questioning whether I-872 offered “a different route to the same destination intended by the blanket primary,” namely, taking parties “out of the business” of nominating candidates for office); Posting of Robert F. Bauer to American Constitution Society for Law and Policy Blog, <http://www.acsblog.org/guest-bloggers-guest-blogger-does-washington-states-modified-blanket-primary-system-violate-the-right-of-association.html> (Oct. 1, 2007, 9:00 PST) (noting that the State of Washington faced “serious obstacles in the path toward a Supreme Court victory”).

54. *See* *Washington State Likely to Lose Top-Two Primary Case*, <http://electionlawblog.org/archives/009403.html> (Oct. 1, 2007, 11:34 PST).

55. *Wash. State Grange*, 128 S. Ct. at 1187.

56. *Id.* at 1192.

Justice Thomas rejected as “sheer speculation” the idea that voters would view the top-two candidates as party nominees, and found “simply no basis to presume that a well-informed electorate” would misunderstand the system.<sup>57</sup> Washington, moreover, had yet to implement this regime, and careful ballot design might well preclude the confusion plaintiffs argued would arise.<sup>58</sup>

The decision notably suggested that the system might in due course be challenged if implementation proved problematic.<sup>59</sup> While the Court has long distinguished facial from as-applied challenges, invocation of the distinction in this context was unusual.<sup>60</sup> As Justice Scalia’s dissent pointed out,<sup>61</sup> numerous decisions have examined restrictions on political participation and expressive association without requiring specific evidence about the scope of the burden imposed.<sup>62</sup> *Washington State Grange* nevertheless demanded such evidence and appeared to be inviting the legal challenges that would present it.<sup>63</sup>

The invitation is novel, but the innovation in practice promises to be limited. *Washington State Grange* looks like it is inviting a fact-intensive, time-consuming inquiry to assess how voters understand the top-two primary in practice.<sup>64</sup> Few such inquiries, however, are likely to materialize. The Court in *Washington State Grange* did not explain how voter confusion might be assessed, but provided detailed recommendations of things the State might do to minimize such confusion.<sup>65</sup> Wash-

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57. *Id.* at 1193.

58. *See id.* at 1194.

59. *See, e.g.*, Rick Hasen, *About Face: The Roberts Court Sets the Stage for Shrinking Voting Rights, Putting Poor and Minority Voters Especially in Danger*, FINDLAW, Mar. 26, 2008, [http://writ.lp.findlaw.com/commentary/20080326\\_hasen.html](http://writ.lp.findlaw.com/commentary/20080326_hasen.html).

60. Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy? The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court’s Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1658–72 (2009) (discussing the Court’s use of as-applied challenges in the election law context).

61. *Wash. State Grange*, 128 S. Ct. at 1201 (Scalia, J., dissenting).

62. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 577 (1995); *Burdick v. Takushi*, 504 U.S. 428, 438 (1992); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966).

63. *See Wash. State Grange*, 128 S. Ct. at 1193.

64. *See id.*

65. *Wash. State Grange*, 128 S. Ct. at 1194; *id.* at 1197 (Roberts, C.J., concurring).

ington State might ultimately choose to disregard this advice, and for instance, place the simple “D” or “R” next to the candidate’s name in the manner the Chief Justice’s concurrence suggested would be problematic.<sup>66</sup> Assuming, however, the State maintains a more compliant stance,<sup>67</sup> a federal court is likely to reject in short order an as-applied challenge to the regime. Litigation assessing survey data on voter perceptions remains possible; more likely, a court will look exclusively at the State’s effort and deem it sufficient.

Supporting this speculation is the Court’s refusal to mandate the very thing that would most directly dispel voter confusion, namely, allowing the party to disavow a candidate on the ballot itself. Justice Scalia thought this refusal rendered irrelevant all questions about implementation, insisting that under “no set of circumstances” did the Washington regime *not* severely burden political parties.<sup>68</sup> Seven Justices disagreed with him, and thereby implicitly accepted that political parties are not impermissibly burdened by a primary structure designed to discourage what Justice Scalia called “bright-colors partisanship.”<sup>69</sup> *Washington State Grange* posits that the State may rely on the top-two primary to advance this goal, and that doing so causes political parties no cognizable injury absent voter confusion. This proposition necessarily circumscribes the scope of the as-applied challenge the decision invites to marginal issues, and ensures the impact of such challenges will be negligible. Justice Scalia aptly described the task faced by plaintiffs seeking to displace the regime once implemented as “perhaps-impossible.”<sup>70</sup>

Rather than inviting a new, unpredictable foray into the political thicket, *Washington State Grange* is better understood as promoting an “exit strategy” from the aggressive review that characterizes decisions like *California Democratic Party*.<sup>71</sup>

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66. *Id.* at 1197 (Roberts, C.J., concurring).

67. See WASH. SEC’Y OF STATE, ANNOUNCING WASHINGTON STATE’S NEW TOP 2 PRIMARY (2008), available at <http://wei.secstate.wa.gov/osos/en/Documents/VP%20Top%20%20Primary%202008.pdf> (explaining the top-two primary with a sample ballot indicating which specific party a candidate “prefers”).

68. *Wash. State Grange*, 128 S. Ct. at 1200 (Scalia, J., dissenting).

69. *Id.* at 1202; see also Bauer, *supra* note 53 (offering views on what the top-two primary seeks to accomplish).

70. See *Wash. State Grange*, 128 S. Ct. at 1201 (Scalia J., dissenting).

71. Cf. Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667 *passim* (2002) (discussing various views of such exit strategies).

With reasoning that strongly suggested Washington's top-two primary should be invalid,<sup>72</sup> *California Democratic Party* displaced a practice long used<sup>73</sup> on the basis of a vigorous, and arguably undertheorized conception of party autonomy.<sup>74</sup> *Washington State Grange* treats *California Democratic Party* as settled precedent,<sup>75</sup> but nevertheless narrows the decision by letting stand (for now, at least) a practice that advances the very same goal through a different, but hardly unrelated mechanism.

In this sense, *Washington State Grange* curiously resembles *Easley v. Cromartie*,<sup>76</sup> the 2001 Rehnquist Court decision that effectively brought to a close the racial redistricting disputes about which the Justices obsessed in the 1990s. *Cromartie* declined to apply strict scrutiny to an oddly shaped district in which African Americans comprised 47 percent of the district's population.<sup>77</sup> After reviewing the record's most minute details, the Court concluded that partisanship best explained the district lines, and therefore that race had not predominated in the districting process.<sup>78</sup> Commentators reacted to *Cromartie* with skepticism,<sup>79</sup> and some predicted that the Court's fact-intensive approach would usher in even more intense federal court involvement in racial redistricting disputes.<sup>80</sup>

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72. See *supra* text accompanying notes 46, 49.

73. The practice was not, however, long used in California. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570 (2000) (describing the relatively recent adoption of the blanket primary by California voters).

74. See, e.g., Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 282–98 (2001); see also *Wash. State Grange*, 128 S. Ct. at 1188.

75. See *Wash. State Grange*, 128 S. Ct. at 1192.

76. 532 U.S. 234, 237 (2001).

77. See *id.* at 240, 258.

78. See *id.* at 243–44.

79. See, e.g., John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 496 (2002) (describing the Court's "predominant purpose" test as "indeterminate to the point of incoherence"); Karlan, *supra* note 71, at 677 ("[*Cromartie*] cannot be explained in any sort of principled terms that provide guidance for future cases.").

80. See, e.g., Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1593 (2002) (reading *Cromartie* as evidence that because the Court "seems to have committed itself to conducting serious factual review, and that *Shaw* cases will remain a stalking horse for various partisan interests, the deluge of cases is likely to continue").

And yet, the deluge of racial gerrymandering challenges anticipated after the post-2000 round of redistricting never materialized.<sup>81</sup> While *Cromartie* analyzed the record in excruciating detail, the decision also provided significant guidance to States working on redistricting plans, instructing them, in effect, to tone down racial references, use race less bluntly, and rely on party affiliation to the extent possible when drawing district lines.<sup>82</sup> By and large, States heeded the advice, with the tight connection between race and political affiliation enabling informed line drawers to immunize most districting plans from constitutional challenges.<sup>83</sup>

*Washington State Grange* promises to function similarly. The decision reads like a “dodge,”<sup>84</sup> inviting what appears to be an expansive, time consuming project that will burden the federal courts. But the decision provides advice much like that offered less expressly in *Cromartie*. If heeded, this advice promises to limit, rather than encourage, federal court involvement in future disputes.

The Court, no doubt, intends as much. Following on the heels of *López Torres*, the decision continues the Court’s reluctance to mire itself in the minutiae of state election law. To be sure, *López Torres* let stand a regime that greatly empowered party organizations, while *Washington State Grange* preserved a state regime that actively sought to undermine those same entities. Uniting the two, however, is the Court’s commitment to stay out of it.

### C. REQUIRING VOTER IDENTIFICATION

By far the most prominent of the election disputes before the Court last Term, *Crawford v. Marion County Election Board*<sup>85</sup> synthesized key elements of the Court’s approach in the two previous cases. *Crawford* continued the Court’s rigid focus on legal restrictions over practical effects, making clear that *López Torres* was not an aberration on this point.<sup>86</sup> *Craw-*

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81. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 67 n.172 (2004).

82. See *Easley v. Cromartie*, 532 U.S. 234, 257–58 (2001).

83. See Pildes, *supra* note 81, at 67–68.

84. Bob Bauer, *Political Parties in the Soup, at the Supreme Court*, MORE SOFT MONEY HARD LAW, Mar. 19, 2008, [http://moresoftmoneyhardlaw.com/updates/the\\_supreme\\_court.html?Archive=1&AID=1221](http://moresoftmoneyhardlaw.com/updates/the_supreme_court.html?Archive=1&AID=1221).

85. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

86. *Id.* at 1622–23.

*ford*, moreover, followed *Washington State Grange* both by distinguishing facial from as-applied challenges, and by suggesting the latter will encompass few, if any, successful claims.<sup>87</sup>

*Crawford* affirmed the validity of the Indiana voter identification requirement<sup>88</sup> many observers deemed to be the most severe of the ID requirements states have enacted in recent years.<sup>89</sup> Joined by Chief Justice Roberts and Justice Kennedy, Justice Stevens's lead opinion held that the State's interest in things like preventing voter fraud and protecting voter confidence justified the burdens the requirement imposed.<sup>90</sup> The opinion noted the plaintiffs' allegation that "a small number of voters . . . may experience a special burden under the statute," but found no basis in the record to quantify either the burden's magnitude or the portion of it that is "fully justified."<sup>91</sup> The record as it stood, Justice Stevens wrote, did not support the allegation that the statute imposed "excessively burdensome requirements," emphasizing that "[a] facial challenge must fail where the statute has a 'plainly legitimate sweep.'"<sup>92</sup>

Justice Scalia, joined by Justices Alito and Thomas, agreed that Indiana's law was valid, but thought the inquiry should be a categorical one in which the "peculiar circumstances of individual voters" were legally irrelevant.<sup>93</sup> According to Justice Scalia, Indiana's voter ID requirement imposed a single burden on all voters, namely to present photo identification in order to vote in person.<sup>94</sup> The reality that some voters will be able to comply more easily than others simply reflects "the different *impacts* of the single burden" uniformly imposed, and not multiple burdens that warrant particularized judicial scrutiny.<sup>95</sup> Justice Scalia nevertheless concurred in the judgment because

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87. *Id.*

88. *Id.* at 1624.

89. See It Could Have Been Worse, [http://moritzlaw.osu.edu/blogs/tokaji/2008\\_04\\_01\\_equalvote\\_archive.html](http://moritzlaw.osu.edu/blogs/tokaji/2008_04_01_equalvote_archive.html) (Apr. 29, 2008, 06:53 EST) (referring to Indiana's law as "probably the strictest and most exclusionary voter ID law in the country").

90. *Crawford*, 128 S. Ct. at 1617–21.

91. *Id.* at 1622.

92. *Id.* at 1623 (quoting *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008)).

93. *Id.* at 1624–25 (Scalia, J., concurring).

94. See *id.* at 1625.

95. See *id.*

he deemed the single burden at issue imposed by the state law to be “minimal and justified.”<sup>96</sup>

Justice Souter, in a dissenting opinion joined by Justice Ginsburg, catalogued the various difficulties voters lacking conventional forms of ID would confront in seeking to comply with the statute, and argued that these difficulties gave rise to “an unreasonable and irrelevant burden.”<sup>97</sup> Justice Breyer also dissented, emphasizing why he thought the Indiana regulation, as distinct from voter ID generally, imposed peculiar and disproportionate burden on voters lacking conventional forms of identification.<sup>98</sup>

With four separate opinions, no majority opinion, and indisputably heated rhetoric among the Justices who wrote, *Crawford* would seemingly provide unlikely support for the claim that a new consensus to election law is emerging in the Roberts Court.<sup>99</sup> And yet, substantial consensus there was, at least among the six Justices who voted to affirm.<sup>100</sup>

First, none of these Justices thought the strict standard from *Harper v. Virginia Board of Elections* controlled.<sup>101</sup> *Harper* applied rigorous review to strike down Virginia’s \$1.50 poll tax, deeming it an invidious and unjustified voter qualification.<sup>102</sup> Justice Douglas’s majority opinion struck down the poll tax law on its face and was indifferent to the fact that many voters presumably could comply with the requirement without difficulty.<sup>103</sup> Justice Stevens’s opinion in *Crawford* cited *Harper*,<sup>104</sup> but never really explained why Indiana’s identification requirement is not functionally like a poll tax. Justice Scalia cited *Harper* in a manner that suggested an intent to limit the decision to its facts.<sup>105</sup>

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96. *Id.* at 1624.

97. *Id.* at 1643 (Souter, J., dissenting).

98. *Id.* at 1643–45 (Breyer, J., dissenting).

99. See *It Could Have Been Worse*, *supra* note 89 (describing the Court’s decision as splintered and stating that “*Crawford* accentuates the lack of coherence in the Court’s jurisprudence when it comes to election law”).

100. *Crawford*, 128 S. Ct. at 1613, 1624.

101. See, e.g., *id.* at 1615–16, 1624.

102. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666, 670 (1966).

103. See *Hasen*, *supra* note 59.

104. *Crawford*, 128 S. Ct. at 1615–16.

105. *Id.* at 1626 n.\* (Scalia, J., concurring) (“[W]e have never held that legislatures must calibrate *all* election laws, even those totally unrelated to money, for their impacts on poor voters.”); see also *It Could Have Been Worse*, *supra* note 89.

As important, all six Justices voting to affirm in *Crawford* appeared to agree that Indiana could permissibly make voting more difficult for a select class of voters. Justice Scalia said so emphatically,<sup>106</sup> but Justice Stevens accepted the idea as well, albeit less explicitly.<sup>107</sup> Following *Washington State Grange*, Justice Stevens's opinion in *Crawford* left open the prospect of an as-applied challenge, while intimating that almost all of the conduct the plaintiffs challenged was permissible.<sup>108</sup> Indeed, *Crawford*, more forcefully than *Washington State Grange*, suggested that few, if any, as-applied challenges will succeed.<sup>109</sup>

Justice Stevens identified several classes of voters for whom the ID requirement imposed "a somewhat heavier burden" and made voting more difficult: the elderly, the homeless, those for whom "economic or other personal limitations" interfere with acquisition of a birth certificate or other documents needed to obtain state-issued identification, and voters who refused to be photographed for religious reasons.<sup>110</sup> The opinion, however, found the record insufficient to allow the Court to "quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."<sup>111</sup>

This statement indicates some openness to the possibility that better evidence might establish a severe and unjustified burden, at least for some discrete groups of voters. But the opinion also repeatedly suggests that such a burden would arise only if voters found themselves wholly unable to vote.<sup>112</sup> At several junctures, Justice Stevens emphasized that the admittedly "heavier" burden some voters confront was also a surmountable one, both because the law provided varied ways for voters to comply, and because, in practice, the limited evidence collected showed that some informed and diligent voters were in fact able to comply.<sup>113</sup>

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106. See *Crawford*, 128 S. Ct. at 1625.

107. *Id.* at 1621–24 (plurality opinion).

108. *Id.*

109. *Id.* at 1622–24.

110. *Id.* at 1621.

111. *Id.* at 1622.

112. *Id.* at 1613–14, 1620–23.

113. *Id.* at 1621–22.

The record in *Crawford* was indisputably thin.<sup>114</sup> But it was nevertheless sufficient to reinforce what the Indiana law did on its face: namely, it made voting more difficult for a discrete class of voters. The law required additional effort from some, and the effort required was far from inconsequential. The issue of whether Indiana may lawfully do so was debatable before *Crawford*, but not afterward, given Justice Stevens's apparent comfort with the idea. So long as voters lacking conventional ID do not claim "a personal inability to vote," they apparently have no cause for complaint, and an unwillingness to take the inconvenient steps the law requires does not amount to an "inability" to vote.<sup>115</sup>

By suggesting (and perhaps holding) that voters dissuaded but not wholly precluded from voting suffer no cognizable injury, the plurality opinion seems to reject the core injury the plaintiffs alleged in the lawsuit. As Professor Dan Tokaji explained, the alleged injury was not that the burdens imposed by the ID requirement were wholly insurmountable.<sup>116</sup> Some voters will, of course, "go through the hoops" to obtain the ID, but others will not "wait in a line at the BMV to get photo ID, only to wait in another in order to vote."<sup>117</sup>

Those last voters will not vote in Indiana. *Crawford* finds no constitutional defect with a system that has this effect,<sup>118</sup> and was designed with awareness of it,<sup>119</sup> and arguably specifically to produce it. In this sense, *Crawford* follows *López Torres*, in that both decisions focus rigidly on legal rather than practical impediments to participation.<sup>120</sup> Because Indiana's law did not wholly preclude anyone from voting, but instead imposed steps to be taken by voters lacking the requisite ID,<sup>121</sup> a sufficiently informed and diligent voter lacking conventional ID should still be able to vote. That the law indisputably

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114. See Linda Greenhouse, *Supreme Court Memo: At Supreme Court, 5-to-4 Rulings Fade, but Why?*, N.Y. TIMES, May 23, 2008, at A1 (calling the record "nonexistent").

115. *Crawford*, 128 S. Ct. at 1621–22.

116. It Could Have Been Worse, *supra* note 89.

117. *Id.*

118. *Crawford*, 128 S. Ct. at 1624.

119. See *id.* at 1623–24.

120. See *id.*; see also N.Y. State Bd. of Elections v. López Torres (*López Torres III*), 128 S. Ct. 791, 801 (2008).

121. See *Crawford*, 128 S. Ct. at 1621–23; John Fund, *Sister Act: Is Indiana Really Disfranchising Elderly Nuns?*, WSJ.COM, May 8, 2008, [http://online.wsj.com/article/SB121018485894374391.html?mod=opinion\\_journal\\_political\\_diary](http://online.wsj.com/article/SB121018485894374391.html?mod=opinion_journal_political_diary).

created obstacles that many voters simply will not overcome<sup>122</sup>—not because compliance is wholly impossible, but because it is burdensome—was of no consequence.

Diligence might arguably be a proper prerequisite to participation, at least if concerns about fraud and its perception factor into the calculus.<sup>123</sup> Justice Stevens seemed to think so, but never quite said as much. Instead, he seemed content, as was the Court in *López Torres*, to concentrate on formal legal access,<sup>124</sup> with little concern for the practical burdens that arise under the system. The approach gives States license to structure electoral processes to impose barriers to participation, subject only to the most limited constraint that they not be *legally* impossible to traverse. Reality no longer has anything to do with it.<sup>125</sup>

#### D. RESTORING EXECUTIVE APPOINTMENT

Unlike *López Torres*, *Washington State Grange*, and *Crawford*, *Riley v. Kennedy* was a purely statutory case. While the question it addressed under the Voting Rights Act (VRA) was obscure, the decision advanced an approach that complements the stance underlying the three election cases that preceded it. Like the others, *Riley* suggests a retreat from the federal regulation of state elections, although the *Riley* Court cut back not on its own role but instead narrowly construed the reach of a federal statute that it had previously interpreted expansively.<sup>126</sup>

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122. Cf. Bruce Ackerman & Jennifer Nou, *Hey, What About the 24th?*, SLATE, May 2, 2008, <http://www.slate.com/id/2190372> (noting that the Indiana law creates additional burdens of money, time, and effort that may amount to humiliation on the part of the voter).

123. See *Crawford*, 128 S. Ct. at 1617, 1618–21; *id.* at 1636 (Souter, J., dissenting) (“There is no denying the abstract importance, the compelling nature, of combating voter fraud.”).

124. *Crawford*, 128 S. Ct. at 1623–24 (plurality opinion).

125. See Vikram David Amar, *What the Supreme Court’s Recent Decision Upholding Indiana’s Voter ID Law Tells Us About the Court, Beyond the Area of Election Law*, FINDLAW, May 8, 2008, <http://writ.news.findlaw.com/amar/20080508.html> (“It doesn’t take a genius to see that relegating plaintiffs to ‘as applied’ challenges in these kinds of cases doesn’t really leave them with much.”); Hasen, *supra* note 59 (commenting pre-*Crawford* that if the Court upholds the Indiana law, “poor and minority voters will hardly have a chance”).

126. *Riley v. Kennedy*, 128 S. Ct. 1970, 1982–87 (2008).

*Riley* involved a factually complex dispute arising under the VRA.<sup>127</sup> Distilled to its most basic facts, the dispute concerned the status under the VRA of a 1985 Alabama law that required that midterm vacancies on the Mobile County Commission be filled by special election rather than gubernatorial appointment, as had been the prior practice.<sup>128</sup> In 1988, the Alabama Supreme Court struck down the 1985 law as a violation of the Alabama State Constitution, but only after a special election had already been held and the victor served approximately fourteen months on the County Commission.<sup>129</sup> *Riley* presented the question whether Alabama could resume filling midterm vacancies by executive appointment without first obtaining federal approval to do so.<sup>130</sup>

As a covered jurisdiction under the VRA,<sup>131</sup> Alabama must obtain federal approval, known as preclearance, before implementing a change to any election practice that is “in force or effect.” Filling by appointment an office previously filled by election is a type of electoral change that has been long held to require federal preclearance.<sup>132</sup> Alabama did not dispute this in *Riley*, and instead maintained that the 1985 law mandating elections to fill midterm vacancies in the Mobile County Commission had never been “in force or effect” within the meaning of the VRA.<sup>133</sup> The law was challenged as a violation of the state constitution at the first moment a challenge was possible, and while the trial court initially upheld it, the Alabama Supreme Court subsequently struck it down.<sup>134</sup> In these circumstances, the State argued, the invalidated election law should not be the baseline against which the return to gubernatorial appointment should be measured.<sup>135</sup>

A three-judge federal district court disagreed. Judge Myron H. Thompson’s brief opinion for the unanimous panel suggested the judges thought the case was straightforward.<sup>136</sup> Citing

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127. *Id.* at 1976–82.

128. *Id.* at 1978.

129. *Id.* at 1978–79.

130. *Id.* at 1976.

131. See 42 U.S.C.A. § 1973c(a) (West Supp. 2008).

132. See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544, 550–51, 569–72 (1969).

133. *Riley*, 128 S. Ct. at 1982–87.

134. *Id.* at 1978–79.

135. See *id.* at 1979–80.

136. See *Kennedy v. Riley*, 445 F. Supp. 2d 1333 (M.D. Ala. 2006), *rev’d*, *Riley v. Kennedy*, 128 S. Ct. 1970 (2008).

what the panel viewed as settled precedent, Judge Thompson found that the 1985 Act had been “put into force and effect” when a new commissioner was elected pursuant to it, and accordingly constituted the baseline practice against which executive appointment should be evaluated.<sup>137</sup>

The Supreme Court reversed in a 7-2 vote.<sup>138</sup> Justice Ginsburg’s opinion for the Court sympathized with the awkward position in which the State found itself. After the District Court’s order, the Justice Department objected to Alabama’s preclearance submission, finding that the resumption of gubernatorial appointment “appears to diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission.”<sup>139</sup> The State consequently found itself needing to fill a commission vacancy with an election that the Alabama Supreme Court had previously held would violate the state constitution.<sup>140</sup>

Justice Ginsburg’s opinion holds that the election was not required because preclearance was not necessary. Acknowledging that precedent supported the lower court’s holding, she wrote that the dispute would be “a close case” but for an “extraordinary circumstance” that “impel[s]” the conclusion that the 1985 Act was never “in force or effect.”<sup>141</sup> This case, wrote Justice Ginsburg, was different from the relevant precedent because it involved a state electoral practice that had both been challenged “at first opportunity,” and had been invalidated by the state supreme court.<sup>142</sup> In this “circumstance,” the Court found that the Act had never been “in force or effect,” and thus preclearance was not required.<sup>143</sup>

By placing dispositive weight on a “circumstance” the Court had not previously confronted, Justice Ginsburg sought to limit the holding to the odd facts *Riley* presented.<sup>144</sup> But while *Riley* offered a narrow ruling in an unusual case, aspects

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137. *Id.* at 1336 (citing *City of Lockhart v. United States*, 460 U.S. 125, 133 (1983)).

138. *Riley*, 128 S. Ct. at 1976.

139. Letter from Wan J. Kim, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Troy King, Att’y Gen., State of Ala. and John J. Park, Jr., Assistant Att’y Gen., State of Ala. 3 (Jan. 8, 2007), available at [http://www.votelaw.com/blog/blogdocs/DOJ objection letter 2007 01 08.pdf](http://www.votelaw.com/blog/blogdocs/DOJ%20objection%20letter%202007%2001%2008.pdf).

140. *See Riley*, 128 S. Ct. at 1978–80.

141. *Id.* at 1984.

142. *Id.*

143. *Id.* at 1976, 1984.

144. *See id.*

of both the majority and dissenting opinions suggest a new approach to the VRA that supplements the stance the Roberts Court took in the constitutional election decisions earlier last Term.

Most prominently, and as noted by Justice Stevens in dissent, the majority's approach failed to give Section 5 of the VRA the "broadest possible scope"<sup>145</sup> and hence was "not faithful" to precedent that has long shown the Court inclined to do just that.<sup>146</sup> The Roberts Court might well have been expected to stray from an interpretative mandate the Warren Court announced nearly four decades ago. The Court's stance in *Riley*, however, also departed from that of the Rehnquist Court on the specific statutory question presented in the case. With only one significant exception,<sup>147</sup> the Rehnquist Court repeatedly construed Section 5 broadly when confronted with the question whether a change was of the sort for which preclearance was required. In case after case, the Court expanded the types of decisions subject to preclearance and stiffened the penalties for a jurisdiction's failure to obtain it.<sup>148</sup>

Prominent among these decisions is the Rehnquist Court's 1999 decision in *Lopez v. Monterey County, California*.<sup>149</sup> Ac-

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145. *Id.* at 1987 (Stevens, J., dissenting) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

146. *Id.*

147. *See Presley v. Etowah County Comm'n*, 502 U.S. 491, 494, 504 (1992) (holding section five inapplicable to a resolution altering the powers exercised by elected county commissioners because applying section five to such changes would work "an unconstrained expansion of its coverage," given that "[i]nnumerable" local enactments unrelated to voting affect the power of elected officials).

148. *See, e.g., Lopez v. Monterey County, Cal.*, 525 U.S. 266, 280–82, 287 (1999); *Foreman v. Dallas County, Tex.*, 521 U.S. 979, 980 (1997); *Young v. Fordice*, 520 U.S. 273, 290–91 (1997); *Lopez v. Monterey County, Cal.*, 519 U.S. 9, 22–25 (1996); *Morse v. Republican Party of Va.*, 517 U.S. 186, 200–06, 210 (1996); *Clark v. Roemer*, 500 U.S. 646, 652–55, 660 (1991); *City of Pleasant Grove v. United States*, 479 U.S. 462, 471 (1987). *See generally* Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179, 1208–10 (2001) (discussing trends of the Rehnquist Court when confronted with section five issues). However, the Rehnquist Court repeatedly has construed the VRA narrowly when addressing the distinct question of whether a change in electoral practice met the necessary substantive standard for implementation. *See Georgia v. Ashcroft*, 539 U.S. 461, 477–82 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328–36 (2000); *Abrams v. Johnson*, 521 U.S. 74, 95–98 (1997); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997); Katz, *supra*, at 1209–10.

149. 525 U.S. 266 (1999).

knowledging the “substantial ‘federalism costs’”<sup>150</sup> resulting from the VRA’s “federal intrusion into sensitive areas of state and local policymaking,”<sup>151</sup> *Lopez* recognized that the Reconstruction Amendments “contemplate” this encroachment into realms “traditionally reserved to the States.”<sup>152</sup> *Lopez* affirmed as constitutionally permissible the infringement that the VRA’s Section 5 preclearance process “by its nature” effects on state sovereignty,<sup>153</sup> and applied Section 5 broadly, finding that a county’s nondiscretionary implementation of state law must be precleared.<sup>154</sup>

Nine years later, *Riley* adopted a very different stance when the Court again confronted the question of whether a challenged electoral practice must be precleared prior to implementation. Absent from Justice Ginsburg’s majority opinion is *Lopez*’s reflexive acceptance of Section 5’s “federal intrusion” into state sovereignty.<sup>155</sup> In its place is remarkable concern about the very federalism costs that the Court in *Lopez* so willingly tolerated.<sup>156</sup> Specifically, Justice Ginsburg worried that mandating preclearance in *Riley* would interfere too greatly with the power of the Alabama Supreme Court, and, by extension, with state supreme courts more generally.<sup>157</sup> Mandating preclearance, she wrote, effectively rendered the decision of the Alabama Supreme Court “inoperative,” and “would have the anomalous effect of binding Alabama to an unconstitutional practice because of a state trial court’s error.”<sup>158</sup> Such a mandate “interfere[d] with a state supreme court’s ability to determine the content of state law,” and hence gave rise to a distinct “burden.”<sup>159</sup> Justice Ginsburg stated that “the prerogative of the Alabama Supreme Court to say what Alabama law is merits respect in federal forums.”<sup>160</sup>

Justice Ginsburg, of course, had said this before. Her discussion in *Riley* closely tracked her dissent in *Bush v. Gore*, where she lambasted the Court for failing to defer to the judg-

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150. *Id.* at 282 (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

151. *Id.*

152. *Id.* (citing *City of Rome v. United States*, 446 U.S. 156, 179 (1980)).

153. *Id.* at 284–85.

154. *Id.* at 282, 287.

155. *Id.* at 282.

156. *Riley v. Kennedy*, 128 S. Ct. 1970, 1985–86 (2008).

157. *Id.*

158. *Id.* at 1985.

159. *Id.* at 1986.

160. *Id.* at 1985.

ment of another state supreme court on what she understood to be question of state law.<sup>161</sup> In his concurrence, Chief Justice Rehnquist had invoked several Warren Court decisions that he argued supported a federal judicial role in the presidential dispute.<sup>162</sup> Justice Ginsburg responded by berating the Chief Justice for “bracket[ing]” the Florida Supreme Court with “state high courts of the Jim Crow South.”<sup>163</sup>

*Riley* showed Justice Ginsburg again defending a state supreme court, this time the Alabama Supreme Court. She pointed out the absence of any suggestion that the Alabama Supreme Court’s decisions “were anything other than reasonable and impartial interpretations of controlling Alabama law.”<sup>164</sup> She dismissed the dissent’s invocation of the Alabama Supreme Court’s complicity in the State’s Jim Crow past, noting that the past misdeeds of the Alabama Supreme Court would have been subject to preclearance, had the VRA existed at the time, while the Court’s decision in *Riley* was simply different, falling outside what constitutes a “change” within the meaning of the VRA.<sup>165</sup>

Justice Ginsburg’s consistency with regard to state court power would seem unremarkable, but for the fact that *Riley* was a VRA preclearance case. As the VRA’s most notorious and remarkable provision, the preclearance requirement reverses the presumption of validity that typically attaches to state and local governmental action, and mandates that jurisdictions subject to it obtain federal approval before changing any aspect of their electoral laws.<sup>166</sup> Underlying this regime is the belief that state power in the voting realm—including state judicial power—is suspect until the State can demonstrate otherwise.<sup>167</sup>

Under this regime, Justice Ginsburg’s confidence in the judgment of the state supreme court in *Riley* was misplaced—not because it was factually inaccurate, but because it was legally preempted. The premise of the VRA’s preclearance requirement is that decisions by covered jurisdictions are, by de-

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161. *Bush v. Gore*, 531 U.S. 98, 136 (2000) (Ginsburg, J., dissenting).

162. *Id.* at 114–15 (Rehnquist, C.J., concurring).

163. *Id.* at 141 (Ginsburg, J., dissenting).

164. *Riley*, 128 S. Ct. at 1986 n.12.

165. *Id.* at 1987 n.13.

166. 42 U.S.C.A. § 1973c(a) (West Supp. 2008).

167. Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 183, 183 (Ana Henderson ed., 2007).

definition, suspect. While this premise alone does not resolve whether Alabama's return to gubernatorial appointment should have been deemed a change subject to preclearance, it suggests that neither the state court's sound judgment nor its need for autonomy provide grounds to exempt the change from the strictures of preclearance.

Or at least it did. After *Riley*, all nine Justices appear unconvinced. Justice Ginsburg, speaking for herself and six others, protected Alabama's power to resume a practice that the Department of Justice refused to preclear given its potential discriminatory effect on minority voters.<sup>168</sup> Justice Stevens, joined by Justice Souter in dissent, would have retained federal review, but only reluctantly.<sup>169</sup> The dissent wonders in dicta whether "it may well be true that today . . . maintaining strict federal controls . . . [is] not as necessary or appropriate as [it once was]."<sup>170</sup> *Riley* accordingly exposes the Court's deep skepticism about the VRA and the continued federal intervention it mandates in state electoral affairs.

## II. REDEFINING THE ELECTORATE: LEGAL LITERACY AND VOTER DILIGENCE

*López Torres*, *Washington Grange*, *Crawford*, and *Riley* all limited federal involvement in state electoral disputes by making clear that voters were not entitled to the federal assistance the plaintiffs sought in each case.<sup>171</sup> Underlying all four is a distinct portrait of the American voter. Specifically, these decisions advance the idea that voters must be both legally literate and diligent.

### A. LEGAL LITERACY

Formal literacy tests have long been outlawed,<sup>172</sup> and the recent decisions hardly suggest a desire to resurrect such tests. They nevertheless both assume and require that voters engaged in the political process possess a sophisticated under-

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168. *Riley*, 128 S. Ct. at 1976, 1980, 1982, 1984.

169. *Id.* at 1987, 1993–94 (Stevens, J., dissenting).

170. *Id.* at 1987.

171. *Riley*, 128 S. Ct. at 1982, 1984 (majority opinion); *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623–24 (2008); *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1193, 1196 (2008); *N.Y. State Bd. of Elections v. López Torres (López Torres III)*, 128 S. Ct. 791, 799–801 (2008).

172. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966).

standing of the rules that govern elections. The decisions from last Term credit voters with knowing and understanding the law in considerable detail, and with grasping the significance of complex legal developments. In short, they render meaningful political participation dependent on legal literacy.

The importance of legal literacy emerges nascently in *López Torres* with the decision's replacement of "realism" review with an exclusive focus on legal rather than practical burdens.<sup>173</sup> Through this circumscribed lens, the challenged regulations are not obviously burdensome. To be sure, the district court in *López Torres* found that that the state's ballot access requirements were functionally insurmountable, the existing primary system a nullity, and the lobbying of delegates fruitless,<sup>174</sup> and the Supreme Court never disputed these findings. The Court held, however, that state law was not the cause, or more precisely, was not the direct cause, and that the burdens observed stemmed most directly from decisions by party leaders to do things like run a coordinated slate of delegates incapable of deliberation.<sup>175</sup> *López Torres* suggests that if party members are unhappy with such practices, they should change them or replace the leaders who implemented them.<sup>176</sup> Doing so, of course, requires that party members—as voters and challenger candidates—understand which parts of the nomination process are state-mandated, and which are derived from party practice in response to those mandates. *López Torres* expects party members to understand that state law is not the direct cause of the problems that exist. The suggestion is that a legally literate voter can be expected to so understand.

The concept of legal literacy emerges in more developed form in *Washington State Grange*. Emphasizing the facial nature of the challenge, Justice Thomas's majority opinion rejects as "sheer speculation" the notion that voters might be confused by a candidate's party preference and might view such a candidate as the party's approved nominee.<sup>177</sup> Justice Thomas said explicitly that "a well-informed electorate" should not be pre-

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173. *López Torres III*, 128 S. Ct. at 797–99.

174. See *López Torres v. N.Y. State Bd. of Elections (López Torres I)*, 411 F. Supp. 2d 212, 216, 248, 256 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *rev'd*, *N.Y. State Bd. of Elections v. López Torres (López Torres III)*, 128 S. Ct. 791 (2008).

175. See *López Torres III*, 128 S. Ct. at 799.

176. See *id.* at 799–80.

177. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1193 (2008).

sumed to make such an error.<sup>178</sup> This electorate would know that the party designation is a preference, not a nomination, because, in fact, that is what the law says. The law, after all, never referred to the top-two candidates “as nominees of any party, nor does it treat them as such.”<sup>179</sup> Well-informed voters are presumed to be aware of this.

No such presumption attached eight years earlier when the Court decided *California Democratic Party v. Jones*.<sup>180</sup> That decision struck down the blanket primary as intrusion on party autonomy, in part because participation by nonmembers threatened to alter the identity or qualities of the ultimate party nominee.<sup>181</sup> A well-informed electorate would presumably have understood and appreciated that the nominee who prevails in the blanket primary may well be different from the one securing the nomination when primaries are wholly closed. Such victors were legally designated party nominees, to be sure, but well-informed voters would presumably understand that nominees differ depending on the legal regime that allows for their selection. The Court in *California Democratic Party* nevertheless expressed no interest in what the electorate might know or could be expected to understand, and instead struck down the law as unduly burdensome on a facial challenge.<sup>182</sup> *Washington State Grange*, by contrast, preserved a closely related law by crediting the understanding of an informed electorate versed in legal nuance.<sup>183</sup>

*Riley v. Kennedy* likewise assumed a legally literate electorate. Justice Ginsburg’s opinion made clear that not every situation in which a state law is found to violate the state constitution would be immune from the strictures of preclearance. Instead, she emphasized that narrow and specific circumstances had rendered Section 5 inapplicable to the Alabama dispute.<sup>184</sup> Justice Ginsburg wrote that the state law that attempted to supplant gubernatorial appointment with special elections to fill midterm vacancies in the Mobile County Commission “was challenged in state court at first opportunity, the lone election was held in the shadow of that legal challenge,

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178. *Id.*

179. *Id.* at 1192.

180. 530 U.S. 567 (2000).

181. *Id.* at 581–82.

182. *Id.* at 586.

183. See *supra* note 57 and accompanying text.

184. *Riley v. Kennedy*, 128 S. Ct. 1970, 1986 (2008).

and the Act was ultimately invalidated by the Alabama Supreme Court.”<sup>185</sup>

All three conditions are apparently required to detach the preclearance obligation, but it is the second that is most interesting for present purposes. Why should the fact that the election occurred in the “shadow of [a] legal challenge”<sup>186</sup> matter? Justice Ginsburg offered no explanation, but one possibility is that this “shadow” informed voters that the new law had yet to supplant fully the prior practice. The pending legal dispute meant the ultimate status of the election law remained unsettled. Its “shadow” told voters that the election in which they were voting was a tenuous and possibly fleeting participatory experience.

In other words, the “shadow” of the legal dispute insulated minority voters from experiencing the harm the preclearance requirement guards against, namely, electoral changes that diminish opportunities for minority political participation. While a move from elections to appointment is a classic example of such a “retrogressive” change,<sup>187</sup> *Riley* posits that the ultimate invalidity of the election law caused no retrogression in Mobile.<sup>188</sup> The “shadow” hanging over the election in which minority voters participated informed them that their voting experience was provisional at best. It provided notice that the return to appointment took away nothing from their participatory opportunities.

Some voters may have grasped the significance of the lawsuit’s “shadow.” But doing so required knowledge that a lawsuit had been filed that called the election into question, that a state trial court’s dismissal of that lawsuit prior to the election did permanently establish the law’s validity, and that the pending appeal to the Alabama Supreme Court was sufficient to render the election’s status uncertain. Only the most legally literate voter could be expected to make such observations. Indeed, even the three-judge district court missed the last point.

#### B. VOTER DILIGENCE

Diligence emerges as a prerequisite to voting most explicitly in *Crawford*. Justice Stevens’s lead opinion posits that voters

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185. *Id.* at 1984.

186. *Id.*

187. *See, e.g.,* *Allen v. State Bd. of Elections*, 393 U.S. 544, 550–51 (1969).

188. *See Riley*, 128 S. Ct. at 1984.

lacking conventional forms of identification need not necessarily suffer an undue burden under the identification law because various venues exist through which a diligent voter might secure ID, or otherwise validate a provisional ballot cast without identification.<sup>189</sup>

Justice Stevens acknowledged, for instance, that Indiana's regime created "difficulty" for some elderly voters lacking birth certificates, but highlighted how one named plaintiff was able to obtain her birth certificate, had the ability to pay the birth certificate fee, and "intended" to return to the Bureau of Motor Vehicles to get her identification.<sup>190</sup> Justice Stevens also pointed out that the absence of public transportation in parts of Indiana was irrelevant because that absence indicated nothing about how frequently the poor and elderly might venture to the BMV "during a routine outing with family or friends" or on visits arranged by private civic and political groups.<sup>191</sup>

Justice Stevens also pointedly noted that any burden imposed by the ID requirement "is, of course, mitigated" by the ability of voters without qualifying ID to cast provisional ballots and have them counted, so long as the voter visited a circuit court clerk's office within ten days of the election to execute an affidavit about why they lacked the requisite identification.<sup>192</sup> Justice Stevens said that this requirement was "unlikely . . . [to] pose a constitutional problem," save perhaps for voters who refused to be photographed for religious reasons, and hence would have to make this circuit court trip for every election.<sup>193</sup>

In short, Justice Stevens seemed to recognize that Indiana's law made voting more difficult for some voters, that the effort needed to comply was facially significant, and that the requirements might dissuade some voters from voting.<sup>194</sup> So long, however, as these voters do not find themselves wholly unable to vote, the plurality opinion suggested they suffered no cognizable injury.<sup>195</sup> Diligence emerges as a functional and permissible prerequisite to voting.

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189. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1620–21 (2008).

190. *Id.* at 1621.

191. *Id.* at 1623 n.20.

192. *Id.* at 1621.

193. *Id.* at 1621 & n.19.

194. *Id.* at 1620–23.

195. *Id.* at 1621, 1623.

## CONCLUSION

Last Term's decisions suggest a systematic move by the Roberts Court to abandon active review of state electoral procedures and to curb federal regulation of such processes more generally. This suggestion, of course, may be illusory. Supreme Court decisions are easy to over-read and intentions may erroneously be attributed to Justices who never harbored such sentiments.

But insofar as a new, unified approach to election law is emerging, last Term's decisions suggest it has at least two prominent features. The approach makes meaningful political participation contingent on knowledge and skills that many voters simply lack. Legal literacy and diligence have become functional prerequisites to voting. The new approach, moreover, promises little and perhaps no federal assistance when voters fall short in what is required.

The Justices, of course, know that voters will fall short. The decisions allude to this circumstance and anticipate various actors will emerge to fill the void. The Court suggests that political parties have appropriate incentives to assist voters as they navigate the system—hence the standing granted to the Democratic Party in *Crawford*<sup>196</sup>—and to ensure that voters properly understand the legal regimes within which they act—by, for instance, making clear the significance of a candidate's party preference in Washington's top-two primary.<sup>197</sup>

The Court, however, seems to envision assistance by others as well. In *Crawford*, Justice Stevens made reference to the employees who staff homeless shelters, relatives and friends inclined to orchestrate outings to the BMV for elderly voters, and the staff of civic and political organizations.<sup>198</sup> These are the people who thus far have prevented Indiana's voter ID requirement from becoming unduly burdensome, at least in a facial challenge, and it is their anticipated assistance that will likely lead the Court to turn back any as-applied challenge that might be brought.<sup>199</sup>

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196. See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (finding that the "Democratic Party . . . has standing to assert the rights of those of its members who will be prevented from voting by the new law").

197. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1192–93 (2008).

198. *Crawford*, 128 S. Ct. at 1623 n.20.

199. See *supra* notes 190, 191 and accompanying text.

The election decisions from the 2007 Term anticipate that private individuals will play an increasingly crucial role within election law. While such assistance hardly signals the wholesale privatization of election administration, it reveals an implicit delegation of power. As the Court retreats from its longstanding role as the primary guardian of voting rights, private individuals and organizations are emerging as the most likely replacement.