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# DEMOCRATS AT DOJ: WHY PARTISAN USE OF THE VOTING RIGHTS ACT MIGHT NOT BE SO BAD AFTER ALL

Ellen D. Katz\*

## INTRODUCTION

In notable ways, the ongoing dispute over redistricting in Texas offers a mirror image to one of the major redistricting battles of the last decade, only with Democratic and Republican roles reversed. In both *Texas v. United States* and *Georgia v. Ashcroft*, a state attorney general (AG) decided he would not ask the United States Department of Justice (DOJ) to approve new redistricting plans enacted in his state. In both cases, the state AGs were well aware that the Voting Rights Act (VRA) required them to obtain federal approval, known as preclearance, before changing any aspect of their state's election laws and procedures, and both knew that the new redistricting plans were indisputably the type of changes that needed federal approval. Both, moreover, believed (and would later argue) that the plans satisfied the statutory standard for approval, namely, that they had neither the purpose nor the effect of denying or abridging the right to vote based on race or language minority status.<sup>1</sup> Still, both Texas Attorney General Greg Abbott and Georgia Attorney General Thurbert E. Baker wanted to avoid the Department of Justice at all costs.

Both AG Abbott and AG Baker wanted to steer clear of the DOJ because they suspected the Justice Department would not look kindly on the partisan redistricting plans adopted in their states. In both the Texas and Georgia cases, the plans at issue had been designed to award a disproportionate number of legislative seats to either Republican or Democratic candidates at a time when the DOJ was under the partisan control of the opposing party. Added to that,

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1. See 42 U.S.C. § 1973c (2006).

both plans had generated criticism disputing the AGs' belief that the plans complied with the VRA.<sup>2</sup>

Both AG Abbott and AG Baker accordingly decided they would seek preclearance in federal district court in Washington, D.C., a long-established route to preclearance that nevertheless is rarely pursued because it has repeatedly proven more costly and far slower than the administrative process on offer at the DOJ. Both AGs were willing to undertake these costs because both were convinced, and rightly so, that the DOJ would not be impressed with the states' redistricting efforts.<sup>3</sup> As it happened, both the Bush and Obama administrations objected to the plans at issue, arguing that they violated the VRA by offering inadequate representation to each state's minority populations.<sup>4</sup>

There is fair debate as to whether the Bush administration's more expansive reading of the VRA in *Georgia* would have better protected Georgia's African American voters than did the narrower one pressed by the state's Democratic leadership and ultimately endorsed by the Supreme Court.<sup>5</sup> What is beyond dispute, however, is that the Republican DOJ's stance in the case mapped onto the strategic interests of the Republican Party. Equally certain, a Democratic DOJ would have promptly approved the Georgia plan,

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2. See Complaint for Declaratory Judgment Pursuant to Section 5 of the Voting Rights Act of 1965 and Request for Three-Judge Court at 1, *Texas v. United States*, No. 1:11-cv-01303 (RMC-TBG-BAH) (D.D.C. July 19, 2011), available at <http://legaltimes.typepad.com/files/texas-complaint.pdf>. In the present round of redistricting, AG Abbott was not alone in mistrusting DOJ review. See Justin Levitt, *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, <http://redistricting.ils.edu/who-preclean.php> (last visited Feb. 16, 2011) (reporting that Michigan, like Texas, sought preclearance exclusively in federal court, while Alabama, Georgia, Louisiana, North Carolina, South Carolina, and Virginia sought both judicial and administrative preclearance).

3. See *Georgia v. Ashcroft*, 539 U.S. 461, 471 (2003); see also Charles S. Bullock III & Ronald K. Gaddie, *What If the Courts Have to Handle Section 5 Reviews—Lots of Them?*, S. POL. REP. (Mar. 9, 2011), [http://www.southernpoliticalreport.com/storylink\\_39\\_1869.aspx](http://www.southernpoliticalreport.com/storylink_39_1869.aspx) ("Georgia's Democratic leadership feared that the Justice Department would not approve the gerrymanders.").

4. Hindsight now shows AG Abbott erred, at least with regard to the plan for the state senate, which the DOJ apparently would have precleared. See Answer/Memorandum at 5, *Texas v. United States*, No. 1:11-cv-01303 (RMC-TBG-BAH) (D.D.C. Sept. 19, 2011). The DOJ raised no objection to the state Senate plan, though several civil rights groups did. See Ryan J. Reilly, *DOJ: Rick Perry's Texas Congressional Redistricting Map Violates Voting Rights Act*, TALKING POINTS MEMO (Sept. 19, 2011, 4:57 PM), [http://tpmmuckraker.talkingpointsmemo.com/2011/09/justice\\_department\\_signals\\_concerns\\_with\\_rick\\_perrys\\_texas\\_redistricting\\_map.php?ref=fpb](http://tpmmuckraker.talkingpointsmemo.com/2011/09/justice_department_signals_concerns_with_rick_perrys_texas_redistricting_map.php?ref=fpb).

5. Compare Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710, 1728 (2004) (arguing that Georgia's introduction of governance considerations into section 5 analysis protects minority voting power by enhancing local political coalition building), with Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 33-34 (2004) (arguing that section 5 retrogression analysis is weakened by incorporating governance considerations that are not readily observable by the DOJ or the courts, among other concerns).

which, in turn, would have benefited the Democratic Party.<sup>6</sup>

*Texas v. United States* suggests a similar dynamic. True, the case is still being litigated such that a full assessment of the various claims at issue remains premature. Still, it looks like DOJ's present stance in the case maps onto the strategic interests of the Democratic Party. It also seems likely that a Republican-controlled DOJ would have approved the Texas plan, which would have been beneficial to the Republican Party.

In other words, both *Texas* and *Georgia* show that Democrats enforce voting rights differently from Republicans. Often this means that Democrats enforce voting rights more expansively and aggressively than do Republicans, but as *Georgia* shows, not always. More consistently, Democrats enforce voting rights in ways that tend to advance Democratic interests while Republican-led enforcement tends to produce benefits for Republicans. This Article explores whether these differences should be cause for concern.

In exploring this question, let's assume that the party of the sitting President stands to benefit from VRA enforcement actions taken by the DOJ. We can remain agnostic as to whether the pursuit of partisan gain best explains any particular DOJ decision.<sup>7</sup> The argument I want to pursue is not that agency officials, be they Democrats or Republicans, necessarily seek partisan benefits when making enforcement decisions. Instead, I am interested in examining whether we should be worried about partisan use of the VRA by the DOJ, based on the supposition—as distinct from the argument—that the DOJ enforces the VRA in ways that benefit the political party of the administration

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6. See, e.g., *Georgia*, 539 U.S. at 544-48 (discussing Democratic support for unpacking majority-minority districts); Issacharoff, *supra* note 5, at 1716-17 (noting "charges of partisan misuse of the preclearance process of the VRA").

7. There is good reason to think that the Obama administration is not pursuing such gain, and not simply because U.S. Assistant Attorney General (AAG) Thomas Perez has disavowed such motivation. See Shira Toeplitz & Joshua Miller, *DOJ Redistricting Point Man: No Magic Formula*, ROLL CALL (Oct. 11, 2011), [http://www.rollcall.com/issues/57\\_39/DOJ-Redistricting-Point-Man-No-Magic-Formula-209319-1.html](http://www.rollcall.com/issues/57_39/DOJ-Redistricting-Point-Man-No-Magic-Formula-209319-1.html) (quoting AAG Perez, "One of my principal goals in coming here, not only in the voting section, but across the board, is to make sure that politics doesn't infect the decision-making process . . ."). Rather, the agency has repeatedly declined to take enforcement actions that would have devolved to the benefit of the Democratic Party. See, e.g., John Merrigan, *Georgia's Redistricting Lines Approved by Justice Department*, WSAV.COM (Dec. 23, 2011, 7:09 PM), <http://www2.wsav.com/news/2011/dec/23/3/georgias-redistricting-lines-approved-justice-depa-ar-2923682> (reporting that a Democrat-led DOJ approved redistricting plans that would create a Republican super-majority in both chambers of the state legislature); Aaron Gould Sheinin, *Justice Dep't Approves Georgia Voter Verification System*, ATLANTA J.-CONST. (Aug. 23, 2010, 11:30 AM), [http://blogs.ajc.com/georgia\\_elections\\_news/2010/08/23/justice-department-approves-georgia-voter-verification-system](http://blogs.ajc.com/georgia_elections_news/2010/08/23/justice-department-approves-georgia-voter-verification-system) (reporting that a Democrat-led DOJ approved a state plan to check voter information against drivers license and Social Security databases). But see Charlie Savage, *Justice Dep't Cites Race in Halting Law over Voter ID*, N.Y. TIMES, Dec. 23, 2011, available at [http://www.nytimes.com/2011/12/24/us/justice-department-rejects-voter-id-law-in-south-carolina.html?\\_r=1](http://www.nytimes.com/2011/12/24/us/justice-department-rejects-voter-id-law-in-south-carolina.html?_r=1) (reporting that a Democratic DOJ blocked a rule requiring photo identification to vote).

in power.

Imagine, then, that Assistant Attorney General Thomas Perez characterized the Justice Department's stance in *Texas* as an effort to block a vigorous Republican gerrymander and announced that the agency was using the VRA as a convenient legal hook to accomplish this purpose.<sup>8</sup> What if this statement accurately described the reality of the DOJ's purpose in the *Texas* case? Would such partisan use of the VRA prevent the statute from operating as we think it should?

I would like to explore here the possibility that it would not. In so doing, we will have to part company with various commentators who have long viewed partisan use of the VRA as distasteful and destructive.<sup>9</sup> But note, the idea is not simply that partisan use of the VRA by the DOJ in cases like *Texas* is benign. Rather, the argument I want to pursue here is that partisan use of the VRA in cases like *Texas* may facilitate the regime's operation in productive ways.

To be clear, in referencing cases "like *Texas*," I mean those in which the legal arguments made to support the DOJ's ostensible partisan agenda are subject to a full airing in federal court. Thus, *Georgia* is a similar case, as are the ongoing disputes about voter identification in South Carolina and Texas.<sup>10</sup> Distinguishable cases are those in which partisan motivation animates agency action that is fundamentally unreviewable, be it a grant of preclearance or a less transparent action that strategically delays such grants. These latter cases raise distinct and more troubling concerns that are beyond the scope of this Article.<sup>11</sup>

Where, however, judicial review is available, my claim is that partisan use of the VRA by the DOJ (and, indeed, other actors) is not the cause for concern it is often made out to be and instead often has beneficial consequences. The first Part of this Article explains why. It shows why core concerns about partisan use of the VRA by the DOJ are misplaced, why the practice helps elicit viable, rather than frivolous, claims, and the ways in which it is best seen as a response to, rather than the cause of, racially infused redistricting disputes.

The second Part of this Article suggests that an unduly narrow conception

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8. AAG Perez, of course, said no such thing, and in fact has disclaimed partisan motivation entirely. See Toeplitz & Miller, *supra* note 7.

9. See *infra* notes 14-15. This argument is part of a larger project that explores the various ways parties use the federal civil rights regime to extract benefits seemingly unrelated to the regime's more lofty goals. See, e.g., Ellen D. Katz, *The Role of Resistance and the Future of Anti-Discrimination Law* (unpublished manuscript) (on file with author).

10. See Associated Press, *S.C. Leaders to Talk About Fed Voter ID Law Case*, POST & COURIER (Jan. 10, 2012), <http://www.postandcourier.com/news/2012/jan/10/sc-leaders-talk-about-fed-voter-id-law-case> (reporting that the DOJ moved to block a law requiring voters to show state or federal photo identification when voting in person).

11. See, e.g., Dan Eggen, *Justice Staff Saw Texas Districting as Illegal: Voting Rights Finding on Map Pushed by DeLay Was Overruled*, WASH. POST, Dec. 2, 2005, at A1 (reporting that "political appointees" in the Justice Department overruled a unanimous recommendation of career attorneys and subjected them to a "gag" order).

of what the VRA does underlies much of the skepticism about partisan use of the statute. This Part argues that one of the VRA's most critical, albeit overlooked, functions is its provision of a forum in which to resolve competing views about minority political participation in a majoritarian system. Partisan-infused enforcement actions make use of this familiar, structured forum and highlight its operation.

### I. ON FRIVOLOUS CLAIMS AND "RACIALIZED" DISPUTES

In redistricting disputes, partisan use of the VRA typically involves casting injuries caused by partisan gerrymandering in racial terms. Some partisan moves are said to cause retrogression within the meaning of section 5 of the statute, while others are alleged to result in racial vote dilution under section 2.<sup>12</sup> Either way, partisan-infused VRA claims are routinely viewed with considerable skepticism.<sup>13</sup>

One concern is that such claims are factually unfounded or even frivolous, given that they are "manufactured" to serve goals other than the ones the VRA was ostensibly enacted to address. Because redistricting disputes are partisan at their core, the thought is that politics, rather than race, dictates the challenged districting moves, and that those unhappy with the results suffer primarily, or perhaps exclusively, as members of the losing political party and not as members of a particular racial group.<sup>14</sup> That is, they are said to suffer no

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12. If we assume partisan motivation, *Texas v. United States* is an example of the first, and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), is an example of the second. See also *Bartlett v. Strickland*, 556 U.S. 1, 14-15 (2009) (plurality opinion) (describing North Carolina's claim that section 2 of the VRA trumps a state constitutional ban on splitting counties among electoral districts).

13. See, e.g., Heather Gerken, *Coloring Inside the Lines: Will the Voting Rights Act Stop Republicans from Redistricting as They Please?*, SLATE (Nov. 10, 2010, 4:16 PM), <http://www.slate.com/id/2274411/> (calling reliance on VRA in partisan gerrymandering disputes "cynical").

14. See, e.g., Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2616-17 (2004) (arguing that "the allegation of racial injury to remedy partisan disadvantage" is "a problem that has plagued" voting rights litigation and one that "place[s] undue strain on [the VRA] by improperly forcing the Act to accommodate partisan as well as racial harms"); see also Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1733 (1993) ("That both major political parties are in fact trying to commandeer the Voting Rights Act seems evident . . . ."); Ron Levy, *Regulating Impartiality: Electoral Boundary Politics in the Administrative Arena*, 53 MCGILL L.J. 1, 52 (2008) (discussing the "rise of VRA litigation by partisans" in which "[t]ests centered on racial representation increasingly became mere points around which broader political contests focused"); Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote Dilution Standards*, 31 VT. L. REV. 39, 88 (2006) ("[T]he VRA is transparently being used for objectives different from those the law was intended to achieve . . . ."); Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1552 (2002) (describing how existing doctrine "virtually invites disappointed partisan actors to turn to the VRA and *Shaw* [v. *Reno*] as stalking horses

cognizable racial injury under the VRA.

A related worry is that recasting a political battle in racial terms is not only a factual error, but also the cause of distinct injury. More specifically, an often-cited concern is that VRA claims pressed for partisan reasons “racialize” what are fundamentally non-racial disputes. The fear is that recasting claims in this manner worsens the very racial polarization the statute was designed to reduce.<sup>15</sup>

These concerns mistake cause and effect. To be sure, redistricting is almost always a partisan affair, in which members of the dominant political party draw district lines in ways that promise to maximize their power.<sup>16</sup> And yet, such gerrymanders are invariably implemented through race-based districting moves that rely on the close connection between race and party affiliation in most jurisdictions. For example, it was not happenstance that Georgia Democrats implemented the gerrymander at issue in *Georgia v. Ashcroft* by “unpacking” Black voters from majority-minority districts;<sup>17</sup> nor was it an accident that Texas Republicans shored up a vulnerable incumbent by removing 100,000 Latino voters from a Laredo congressional district in 2003.<sup>18</sup> In these cases, the resulting claims of race-based injury under the VRA (section 5 in the first, section 2 in the second) were hardly ancillary distractions obscuring a purely

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for pursuit of judicial forms of partisan advantages denied in the legislative struggle over redistricting”). Claims alleging malapportionment under the Equal Protection Clause have long been subject to a similar critique. See *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (arguing for flexibility when evaluating the threshold for a valid malapportionment claim given the link between race and politics); ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION* 465-66 (1968) (arguing that minority plaintiffs in *Wright v. Rockefeller*, 376 U.S. 52 (1964), had partisan reasons, namely the displacement of a Republican district, for seeking to “unpack” a super-majority African-American district).

15. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 633 (2002) (discussing incentives “to racialize partisan disputes”); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 569 (2004) (arguing that the practice of “repackaging essentially partisan claims” under the VRA “can have toxic consequences for the political process as a whole”); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent Protecting Gerrymanders*, 116 HARV. L. REV. 649, 649-50 (2002) (seeking ways to “end the racialization of political redistricting fights”).

16. The exceptions involve various efforts at reform that seek to excise partisanship from the redistricting calculus. See, e.g., *Background on Commission*, CALIFORNIA CITIZENS REDISTRICTING COMMISSION, <http://wedrawthelines.ca.gov/commission.html> (last visited Feb. 22, 2012); Adam Clymer, *Democracy in Middle America: Why Iowa Has so Many Hot Seats*, N.Y. TIMES (Oct. 27, 2002), available at <http://www.nytimes.com/2002/10/27/weekinreview/the-nation-democracy-in-middle-america-why-iowa-has-so-many-hot-seats.html?scp=1&sq=adam%20clymer%20hot%20seats%20iowa&st=cse>.

17. See *Georgia v. Ashcroft*, 539 U.S. 461, 470-71 (2003); Issacharoff, *supra* note 5, at 1730 (recognizing the inextricable link between race, redistricting, and partisan representation described in *Georgia v. Ashcroft*).

18. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) (plurality opinion).

partisan dispute, but instead were the predictable and unavoidable consequence of the gerrymanders themselves.<sup>19</sup>

Put differently, the VRA claims brought in these cases did not “racialize” non-racial disputes. The disputes were racial from the start. They were racial because the disputed gerrymanders were constructed through sequential racial moves. True, those moves were also political but, as Sam Issacharoff and Rick Pildes observed fifteen years ago, “[r]ace and politics are intertwined in nearly impenetrable ways” in redistricting disputes.<sup>20</sup> Just as this linkage renders efforts to disentangle the role played exclusively by race “artificial and unduly explosive,”<sup>21</sup> it also exposes as flawed the insistence that the pursuit of partisan gain precludes racial injury under the VRA. That politics plays a role, even a predominant one, does not, and should not, resolve the question of statutory injury under the VRA. No one should be surprised that viable VRA claims result when race-based tactics are used to secure partisan ends.

Partisan-propelled VRA claims of this sort may well be “manufactured” in the sense that partisanship animates their assertion (or so this Article assumes). Still, such manufacture does not mean the claims are necessarily frivolous or otherwise contrived. In fact, what looks like partisan use of the VRA has repeatedly helped elicit credible claims that might otherwise have lacked a proponent, or that would have been litigated less effectively had the quest for partisan advantage not been pursued.

For example, the legal claim the Bush Administration pressed to challenge the Democratic gerrymander disputed in *Georgia* represented a credible reading of the statute. Even if we assume that the prospect of partisan gain was the animating force, the argument identified nontrivial injuries suffered by minority voters under the redistricting plan engineered by Georgia Democrats.<sup>22</sup> To be sure, that argument lost in the Supreme Court, but along the way it captured the votes of six federal judges, including the four most “liberal” Justices at the time, and was (arguably) codified by Congress in 2006.<sup>23</sup>

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19. See Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1163-64 (2007).

20. See Samuel Issacharoff and Richard Pildes, *No Place for Political Gerrymandering*, TEX. LAW., Aug. 5, 1996, at 25 (describing as folly the effort to determine whether race “predominate[d]” when district lines are drawn).

21. *Id.*; see also Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL’Y 119, 138 (2000) (“Any doctrine that seeks to single out racial gerrymandering without simultaneously addressing partisan gerrymandering is destined to be highly artificial, at best, and perhaps altogether unintelligible.”).

22. See *Georgia*, 539 U.S. at 495 (Souter, J., dissenting); *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 76 (D.D.C. 2002); Karlan, *supra* note 5, at 28 (2004); cf. Richard H. Pildes, *Political Competition and the Modern VRA*, in THE FUTURE OF THE VOTING RIGHTS ACT 1, 6 (David L. Epstein, Rodolfo O. de la Garza, Sharyn O’Halloran & Richard H. Pildes eds., 2006) (describing a denial of preclearance in *Georgia v. Ashcroft* as a “perversion of the VRA”).

23. See *Georgia*, 539 U.S. at 495 (Souter, J., dissenting); *Georgia*, 195 F. Supp. 2d at



So too, consider *Bartlett v. Strickland*, a section 2 case that one might fairly suppose was pursued because North Carolina Democrats saw partisan advantage in reading the VRA broadly to displace a state constitutional provision. Assuming, for present purposes, that partisanship propelled the litigation, the statutory reading pressed by the state officials was still a plausible one, and one that, in my view at least, would have productively advanced voting rights jurisprudence.<sup>24</sup> True, George W. Bush's Justice Department opposed their reading, and the Supreme Courts of North Carolina and of the United States both rejected it. Still, the state officials persuaded four Justices that their reading was sound and prompted Ruth Bader Ginsburg to call for congressional action to codify their view.<sup>25</sup>

Finally, even if we assume partisanship informed the Obama Administration's position in *Texas v. United States*, the Department of Justice is pressing several credible VRA claims in the case.<sup>26</sup> To be sure, various civil rights groups have intervened to press similar arguments, but their claims are distinct and reach more broadly, challenging additional aspects of Texas's 2011 redistricting project that the Obama Administration deemed compliant with the statute. How the DOJ's more targeted claims ultimately fare remains to be seen. That they raise credible readings of the statute seems clear.<sup>27</sup>

More generally, then, the simple fact that partisan concerns may animate claims under the VRA does not mean the claims necessarily lack merit. The race-based ways partisan aims are achieved in the redistricting process repeatedly has given rise to substantial claims of racial injury under the VRA. That such claims do not always succeed in judicial proceedings does not mean they rested on insubstantial or otherwise flimsy legal arguments.

In short, a partisan motive may not be the problem it is often feared to be. Such motives may generate sound statutory claims that respond to and reflect the unavoidable racial nature of many contemporary electoral disputes. Indeed, by pushing back against racially informed redistricting moves by the state actors of the opposing party, partisan use of the VRA may actually facilitate the statute's operation. Some redistricting moves may be animated by racial animus;<sup>28</sup> others reflect the legacy of once-widespread animus that today

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76; Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174 (2007) (discussing legislative history behind the "Georgia v. Ashcroft fix").

24. See Ellen D. Katz, *Engineering the Endgame*, 109 *MICH. L. REV.* 349, 370-71 (2010).

25. See *Bartlett v. Strickland*, 556 U.S. 1, 44 (2009) (Ginsburg, J., dissenting).

26. See Complaint for Declaratory Judgment Pursuant to Section 5 of the Voting Rights Act of 1965 and Request for Three-Judge Court, *Texas v. United States*, No. 1:11-cv-01303 (RMC-TBG-BAH) (D.D.C. July 19, 2011), available at <http://legaltimes.typepad.com/files/texas-complaint.pdf>; Order, *Texas v. United States*, No. 1:11-cv-01303 (RMC-TBG-BAH), (D.D.C. Nov. 8, 2011), available at <http://web.caller.com/2011/pdf/DCRedistricting.pdf> (denying summary judgment).

27. See Order, *supra* note 26.

28. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440

renders racially informed redistricting moves such an effective means to advance partisan interests.<sup>29</sup> Either way, partisan use of the VRA helps ensure that worthwhile claims are pursued by operating as a check on the complex ways party and race shape electoral lines.

## II. A FRAMEWORK FOR DISPUTE RESOLUTION

Apart from generating worries about frivolous claims and unnecessarily racialized disputes, partisan use of the VRA presents a serious challenge to the conventional narrative used to justify the regime. That narrative posits that the VRA operates as a necessary constraint on active discrimination and the ill-intentioned state and local actors inclined to engage in it.<sup>30</sup> Partisan use of the VRA is not easily reconciled with such a regime, and thus, is, on occasion, taken to suggest the regime's obsolescence.

This Part argues otherwise. Partisan use of the VRA seems problematic largely because the regime has been long understood too narrowly. Debate tends to focus on whether or not the VRA remains necessary as a shield against ongoing discrimination,<sup>31</sup> while failing to appreciate a distinct yet critical role the regime performs as an operational forum for dispute resolution. Through a complex web of substantive norms and procedures, the regime provides a venue in which interested parties resolve competing views about minority political participation in a majoritarian system. Partisanship shapes these competing views and propels the VRA claims that reflect them. As such, partisan use of the VRA both relies on the regime and shows it to be a mechanism for dispute resolution.

Consider, for example, the ongoing dispute over redistricting in Texas. The

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(2006) (plurality opinion) (observing that the "State took away the Latinos' opportunity because Latinos were about to exercise it" and that doing so "bears the mark of intentional discrimination that could give rise to an equal protection violation").

29. See, e.g., Pamela Karlan, *Loss and Redemption: Voting Rights at the Turn of the Century*, 50 VAND. L. REV. 291 (1997) (discussing ways in which the VRA has shaped partisan affiliation).

30. See, e.g., Motion to Affirm at 17, Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009) (No. 08-322), 2008 WL 5079036; NINA PERALES, LUIS FIGUEROA & CRISELDA G. RIVAS, VOTING RIGHTS IN TEXAS 1982-2006, RENEWTHEVRA.ORG 39 (2006), available at <http://www.maldef.org/resources/publications/TexasVRA.pdf> (arguing that the VRA "is crucial to . . . guard against the backsliding that would occur if the VRA's enforcement provisions were weakened or abandoned").

31. I have weighed in elsewhere. See 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 (A. Henderson ed., 2007); Ellen D. Katz, *Congressional Power to Extend Preclearance: A Response to Professor Karlan*, 44 Hous. L. Rev. 33 (2007); Ellen D. Katz, *Mission Accomplished?*, 117 YALE L.J. POCKET PART 142 (2007), <http://yalelawjournal.org/images/pdfs/613.pdf>; Ellen D. Katz & Anna Baldwin, *Why Counting Votes Doesn't Add Up: A Response to Cox and Miles' Judging the Voting Rights Act*, 108 COLUM. L. REV. SIDEBAR 23 (2008), [http://www.columbialawreview.org/Sidebar/volume/108/23\\_KatzBaldwin.pdf](http://www.columbialawreview.org/Sidebar/volume/108/23_KatzBaldwin.pdf).

state's population grew dramatically during the last decade, with most of the growth occurring in the Latino community. When state officials set out to redraw electoral districts to reflect this growth in population, the Republican leaders who controlled the redistricting process sought to maximize the number of seats their party would hold, while Democrats resisted that effort to the extent they could. Predictably, the dispute centered on the number of electoral districts in which Latino voters, who in Texas typically vote Democratic, would exercise controlling influence. The question now being litigated is whether various districting plans adopted by the Texas Legislature and signed into law by the Governor last year provide a sufficient number of such districts given the representational requirements of the Voting Rights Act.

Resolution of this question remains months and potentially years away. Various, related questions have, thus far, immersed fifteen federal judges in deeply partisan controversies that involve mounting allegations of bad faith and misconduct in all directions.<sup>32</sup> The Supreme Court has already been involved,<sup>33</sup> and sufficient knotty issues remain that the Justices are likely to weigh in again before the dispute is resolved.<sup>34</sup> Add in the fact that the underlying VRA claims are the sort of claims that tend to generate worries about "racializ[ing] partisan disputes,"<sup>35</sup> and it is easy to find much to be unhappy about in Texas.

Even so, a closer look at this dispute enables us to see the ways in which the VRA is doing critically important work. On the one hand, there is a powerful argument that the VRA claims being pursued in the case address the traditional concerns underlying the VRA and hence promise to advance its mission.<sup>36</sup> On the other hand, there is the distinct and equally important assistance the regime is providing as an operational forum for dispute resolution.

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32. See TEX. REDISTRICTING, <http://txredistricting.org> (last visited May 10, 2012) (collecting a number of documents, including briefs, court opinions, and statements by government officials, relating to redistricting in Texas, many of which note misconduct and bad faith on the part of many involved parties).

33. See *Perry v. Perez*, 132 S. Ct. 934 (2012); see also Richard Hasen, *Breaking News: Supreme Court Decides Texas Redistricting Case, Reverses Lower Court*, ELECTION L. BLOG (Jan. 20, 2012, 7:25AM), <http://electionlawblog.org/?p=28312> (noting decision is a "big win" for Texas).

34. Assuming the VRA's preclearance process survives that long. See *Shelby Cnty. v. Holder*, No. 10-651, 2011 WL 4375001 (D.D.C. Sept. 21, 2011) (appeal docketed).

35. See Issacharoff, *supra* note 15, at 633.

36. See, e.g., Nolan Hicks, *State Redistricting Open to Lawsuit, Expert Says*, HOUS. CHRON., Sept. 14, 2011, available at <http://www.chron.com/news/houston-texas/article/State-redistricting-open-to-lawsuit-expert-says-2171328.php> (noting that the State's expert witness testified that the plan causes retrogression); News Release, MALDEF, Supreme Court's Ruling in *Perry v. Perry* Affirms Preclearance Provisions of Voting Rights Act, [http://www.maldef.org/news/releases/perry\\_vs\\_perry](http://www.maldef.org/news/releases/perry_vs_perry) (noting that "Latinos accounted for 65% of the population growth in Texas, and that Latinos are largely responsible for Texas gaining 4 additional congressional seats" and that "the plans discriminate against Latino voters").

Admittedly, this latter claim may strike some as curious and even implausible given the complexity and vitriol that has marked the Texas dispute to date and that undoubtedly promises to continue. And yet, closer examination shows that, even in Texas on these facts, the VRA is productively aiding resolution of this dispute. Understanding why requires that we examine three distinct components that together constitute the dispute resolution service provided by the VRA. One structural, one modulating, and one prescriptive, all three are on display and at work in the Texas dispute.

First, the structural component. The very existence of the VRA means that public officials in Texas did not need to create a process to resolve divisive questions about representation on their own. Thus, when the 2010 census data revealed Texas would gain four additional congressional seats and that Latino residents comprised the majority of the population growth that led to the award of those seats, state officials had no need to consider whether the Latino community should be able to assert group-based claims to political power or the nature of the process by which questions of this sort should be addressed. That is, they had no need to confront or resolve troublesome foundational questions about equality and participation or craft rules and procedures to govern how such questions are to be addressed. The VRA had already set up both the substantive norms and the procedural framework to guide their application, and state officials knew they needed to comport with both.

These procedures and norms, moreover, are performing a significant modulating function. Because of the VRA, the question of how much political control the Latino community in Texas should exercise is being addressed not in an open-ended inquiry into what abstract notions of fairness or equality might dictate, but instead, with a far more concrete and narrow examination of what the VRA mandates.

To be sure, the latter question remains hotly disputed. The question of how much representation Texas's Latino community "should" receive under the VRA is a controversial one, with sound arguments supporting a variety of interpretations. Hardly something to lament, such indeterminacy is an unavoidable component of any contemporary debate about representation. The VRA's contribution is not that it eliminates all uncertainty or divisive debate, but rather that it provides the terms under which that debate will occur and the procedures those engaged in it must follow. State and local officials can rely on the framework to guide and temper contentious debates through a structured discussion.

More generally, then, when disputes arise (as they inevitably will), the VRA's terms modulate inherently difficult discussions regarding complex questions like the distribution of political power by channeling debate through a structured inquiry. Even if state and local officials were inclined and able to structure such an inquiry on their own,<sup>37</sup> the VRA means they need not devote

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37. Assuming the Constitution presently gives them sufficient authority to do so.

the time, energy, and resources required to do so. When disputes arise, moreover, federal law helps ensure that the resulting fights, while undeniably contentious, are also circumscribed, focusing on what federal law requires rather than on the more open-ended question of what is normatively fair. This more limited inquiry lets the parties avoid full ownership over the claims and thereby usefully lowers the heat on divisive topics.<sup>38</sup>

Of course, the VRA does more than provide structure to debate and modulate its tone. The regime also has an important prescriptive component. That is, the norms and procedures it sets forth have substantive content and that content is meant to be consequential in ways that advance the regime's traditional mission. This prescriptive component, however, also contributes to the regime's role as a forum for dispute resolution.

Again, the Texas dispute helps us see why. Under the VRA, it has long been established that public officials in places like Texas cannot implement electoral changes until they obtain federal approval, or preclearance, certifying that the changes are not discriminatory in purpose or effect.<sup>39</sup> State officials in Texas have, as yet, been unable to show that their redistricting plans satisfy this standard. In part, that is because the standard requires a showing that the plans do not cause retrogression, that is, that they do not make things worse for protected minority groups.<sup>40</sup> What constitutes retrogression for a minority community that has grown considerably in size and yet is decidedly not entitled to proportional representation remains vehemently contested.<sup>41</sup>

In other words, the procedural and substantive requirements the VRA sets forth and with which Texas must—at least for now<sup>42</sup>—comply embody numerous normative judgments. The idea of preclearance reflects mistrust that the ordinary political processes in designated jurisdictions will adequately protect the participatory rights of particular minority groups.<sup>43</sup> The concept of

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*See, e.g.,* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720-21 (2007) (holding that local officials lacked authority to implement non-remedial race-based school assignment plan); Bush v. Vera, 517 U.S. 952, 997 (1996) (Kennedy, J., concurring) (“The State may not engage in districting based on race except as reasonably necessary to cure the anticipated § 2 violation, nor may it use race as a proxy to serve other interests.”).

38. *Cf.* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 735 (1998) (arguing that one benefit of a “results-based” test for discrimination is that it avoids “requiring courts to label [anyone] as racist”).

39. *See* 42 U.S.C. § 1973c (2006).

40. *See, e.g.,* Georgia v. Ashcroft, 539 U.S. 461 (2003).

41. *See* Complaint for Declaratory Judgment Pursuant to Section 5 of the Voting Rights Act of 1965 and Request for Three-Judge Court, Texas v. United States, No. 1:11-cv-01303 (RMC-TBG-BAH) (D.D.C. July 19, 2011), *available at* <http://legaltimes.typepad.com/files/texas-complaint.pdf>; Order, Texas v. United States, No. 1:11-cv-01303 (RMC-TBG-BAH), (D.D.C. Nov. 8, 2011), *available at* <http://web.caller.com/2011/pdf/DCRedistricting.pdf> (denying summary judgment).

42. *See supra* note 36.

43. *See* South Carolina v. Katzenbach, 393 U.S. 301, 328 (1966) (noting that the

retrogression is meant to guard against “backsliding” in the political power enjoyed by racial minorities, and thus guards the status quo as a baseline entitlement.<sup>44</sup> And the very idea that Latino voters should exert controlling influence in at least some districts posits that vote dilution is legally cognizable and that a sufficient number of factual conditions that give rise to it exist.<sup>45</sup>

Needless to say, the VRA’s terms and procedures are not the only way to structure debates about equality and fairness in the political process. In one view, the value of the VRA as a forum for dispute resolution lies not in its manifest superiority to other methods, or even in the statute’s undeniable historic salience, but instead simply in its very existence as a means to assess and resolve questions of equality.

And yet, the VRA’s rules are meant to operate not merely as salient focal points,<sup>46</sup> but as the expression of normative commitments we share. Thus, in Texas, the VRA demands that state officials get federal approval before implementing new districting plans, but otherwise leaves to these officials the task to develop those plans and electoral rules more generally.<sup>47</sup> Likewise, the VRA demands that Texas craft its district boundaries in ways that recognize the Latino community possesses a group-based claim to representation, but makes clear that the State need not provide proportional representation.<sup>48</sup>

In other words, these provisions of the VRA chart a middle course between fixed extremes. By allowing group-based claims without mandating rigid quotas or guaranteed results, these rules, at least arguably, reflect the shared normative commitments and more inclusive politics federal anti-discrimination law aspires to express. By so doing, moreover, the federal regime guards against the vagaries of local majoritarian politics that left unchecked might approach foundational questions of equality from a less general perspective and in ways that enshrine these more fixed extremes.

By opting for more fluid rules, the federal regime invites dispute about their application. This is by design. Ultimately, the VRA, like federal anti-

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preclearance regime “shift[s] the advantage of time and inertia from the perpetrators of the evil to its victims”).

44. See *Beer v. United States*, 425 U.S. 130, 141 (1976) (“[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”).

45. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (listing three preconditions to liability based on vote dilution under section 2 of the VRA); S. REP. NO. 97-417, at 28-29 (1982) (listing various factors that contribute to liability under section 2 of the VRA). *But see* *Holder v. Hall*, 512 U.S. 874, 893-94 (1994) (Thomas, J., concurring) (arguing that vote dilution is not a concept capable of judicial administration and that the Court’s jurisprudence on the subject is deeply flawed).

46. See generally THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 54-57 (1960).

47. See Michael Halberstam, *The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 948 (2011).

48. See *supra* notes 42-46 and accompanying text.

discrimination law more generally, is premised on the idea that some fights are worth having. As traditionally understood, the regime insists that we examine, and, at times, displace, the ways in which past discrimination entrenches inequality.<sup>49</sup> Understood somewhat differently, however, the regime may also be seen to recognize that some disputes are unavoidable. The legacy of discrimination is such that a less fluid system would not preclude disputes, but instead would shift the terrain on which they are fought. By its very terms, then, the VRA assumes a critical role in shaping the terms under which such disputes proceed, with the hope that doing so makes productive outcomes more likely.

The result is an imperfect, yet vibrant and necessary forum for dispute resolution. With its structural, modulating, and prescriptive components, this forum provides state and local officials critical assistance in resolving difficult, recurring issues. State and local officials can rely on this system, and this reliance empowers them in critical ways.

By empowerment, I mean something distinct from the noted way in which the VRA helps beleaguered local officials striving to resist the discriminatory impulses of local majorities. While mindful that the statute provides critical political cover to such officials to “do the right thing” in the absence of political capital to do so independently,<sup>50</sup> my claim is that the VRA empowers all state and local officials regardless of their inclination to resist or conform to majoritarian desires. That is, the structural, modulating, and prescriptive components of the regime aid all public officials, from those most resistant to traditional mission of the VRA to those most steadfastly committed to it.

Put differently, the VRA (like federal civil rights law more generally) operates not unlike the Constitution itself. Not simply the rope that binds us to the mast, or more mundanely, the insight to place the alarm clock out of reach, the regime not only inhibits discriminatory conduct, but also affirmatively enhances local power through the very constraints it imposes on it.<sup>51</sup> It is an

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49. See generally IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* (2003).

50. See, e.g., *Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey*, 573 F. Supp. 2d 221, 265 (D.D.C. 2008), *rev'd sub nom.* *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009) (describing how a city attorney reportedly blocked local efforts to dismantle majority-Black district simply by stating “listen, you can’t do it . . . under any interpretation of [section 5]”); see also *Voting Rights Act: An Examination of the Scope and Criteria for Coverage under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 98 (2005) (statement of Armand Derfner, Voting Rights Attorney, Derfner, Altman & Wilborn), available at <http://judiciary.house.gov/media/pdfs/printers/109th/24034.pdf> (“[Proposals] . . . never even get off the ground because it’s understood that they will not get precleared . . .”); Karlan, *supra* note 38.

51. See also JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 65-77 (1979); THOMAS C. SCHELLING, *CHOICE AND CONSEQUENCE* 83-87 (1984). See generally Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 227 (Jon Elster & Rune Slagstad eds., 1988) (distinguishing, in another context, between disabling and enabling rules, noting that the

enabling tool that helps state and local officials get on with what Daryl Levinson has aptly called “the profitable business of collective decisionmaking.”<sup>52</sup> State and local officials need not be ill-intentioned to “benefit from pre-established procedures for resolving conflicts”<sup>53</sup> and the tempering quality and direction they bring to necessarily contentious issues.

To be sure, there are those who believe federal anti-discrimination law ought not be available to “ease[] the lot of public officials” and diminish their need to take sides or otherwise assume responsibility over divisive questions.<sup>54</sup> In my view, however, providing a structure for dispute resolution, with the modulation and, yes, cover, it affords, is perhaps the most important function of the contemporary civil rights regime. The local is not always the best nexus at which to conduct struggles over equality,<sup>55</sup> and, in many cases, the benefits of wholly local resolution are far outweighed by the costs divisive battles engender. Public officials themselves may be hostile to the goals underlying the federal civil rights regime, or a majority (or large minority) of their constituents may be. As likely, however, the problem may be that questions of equality are inherently and inescapably difficult, such that, even among people of good will, extreme, and, at times, ugly, viewpoints can find expression and make common ground ever harder to find. To the extent federal civil rights law helps to structure debate and thereby tone down such expression, it is performing valuable service.

Understanding the VRA to provide this service, moreover, not only yields a more complete portrait of what the statute does, but also exposes an underappreciated aspect of what would be lost in its absence. I think one reason the VRA is presently vulnerable is precisely because its role has been understood too narrowly. Supporters tend to defend the VRA as a constraint on local autonomy justified by the continuing need to address ongoing discrimination.<sup>56</sup> Opponents counter that the statute has become an undue burden no longer justified by contemporary conditions.<sup>57</sup> The merits of that

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latter allow people to do “many things they would not otherwise have been able to do or even have thought of doing”).

52. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 675 (2011); see also Holmes, *supra* note 51, at 237 (noting that “even a perfectly rational, clear-eyed and virtuous future generation could benefit from preestablished procedures for resolving conflicts”).

53. See *supra* note 51.

54. See, e.g., *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1574 (11th Cir. 1994) (“The Constitution was not designed to ease the lot of public officials, and it is not the role of federal courts to insulate public officials from the people. Instead, woven throughout the Constitution is a commitment to democratic self-rule, making public officials answerable to the people.”).

55. See, e.g., Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341 (2003).

56. See *supra* note 30.

57. See e.g., Appellant’s Brief, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557



debate aside, the VRA does far more than constrain active discrimination by local officials. Indeed, even if that discrimination has diminished to the degree opponents suggest,<sup>58</sup> the regime nevertheless is still providing localities critical assistance resolving difficult issues that are the legacy of that discrimination.

These issues are recurring and unavoidable, concerning things like how much political influence Latino voters in Texas should have and which electoral structures best serve to achieve that influence. These issues, moreover, are not amenable to permanent resolution, not because racist intentions necessarily shape their resolution (though they may well do so), but because the discrimination that originally made the VRA necessary and our longstanding efforts to address it have shaped contemporary politics in enduring ways. The result is that all public officials, be they of good will or not, unavoidably confront complex, intractable conflicts for which sound arguments support a variety of outcomes. The VRA provides all of these officials vital assistance as a forum in which to address and resolve these conflicts.

This assistance should do more than bolster the VRA's validity. This function provides an independent basis and justification for the VRA itself. To be sure, to withstand pending legal challenges, the statute must be shown to be a congruent and proportional remedy for a constitutional violation,<sup>59</sup> a standard that largely explains why contemporary debates about the VRA focus on the regime's role in deterring and constraining intentional racial discrimination. And yet, the importance of the VRA's role as a congressionally mandated forum for dispute resolution also derives from its close connection to unconstitutional conduct. The constitutional violations the VRA was enacted and extended to address are why present redistricting disputes are so divisive, difficult, and complex. Those violations are the reason an external dispute resolution mechanism remains necessary today and why the VRA has the enabling qualities identified above. Put differently, a full remedy for the constitutional injuries that gave rise to the VRA requires more than outlawing the offending conduct. It requires a mechanism to deal with its lasting consequences.

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U.S. 193 (2009) (No. 08-322), 2009 WL 453246; Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011).

58. See, e.g., Transcript of Oral Argument at 28, *Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. 193 (No. 08-322) ("Well, that's like the old—you know, it's the elephant whistle. You know, I have this whistle to keep away the elephants. You know, well, that's silly. Well, there are no elephants, so it must work."); see also *Riley v. Kennedy*, 553 U.S. 406, 429 (2008) (Stevens, J., dissenting) (noting the VRA may no longer be as necessary as it once was).

59. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).