

# REINVENTING VOTING RIGHTS PRECLEARANCE

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“The law was never passed  
But somehow all men feel they’re truly free at last  
Have we really gone this far through space and time,  
Or is this a vision in my mind?”<sup>1</sup>

“[W]e cannot chase our highest ideals unless they are grounded in workable, practical, responsible self-governance.”<sup>2</sup>

## INTRODUCTION

The more things change with Voting Rights Act (VRA) politics, the more they seem stubbornly stuck in place. When President Bush signed into law the Voting Rights Act Reauthorization and Amendments Act of 2006, observers marked the moment as a political triumph.<sup>3</sup> Given the long odds of passing the legislation, there was surely good reason to celebrate. Each of the law’s previous renewals occurred when Democrats controlled at least one chamber of Congress.<sup>4</sup> During the previous renewal in 1982, House Democrats managed to move the bill through a Republican Senate with compromises that ultimately won the President’s support.<sup>5</sup> Few expected that a process dominated by Republicans would produce a civil rights statute that conservatives often assailed for

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1. STEVIE WONDER, *Visions, on INNERVISIONS* (Motown Records 1973).

2. Vice President Albert Gore, Remarks at the International Reinventing Government Conference (Jan. 14, 1999) (transcript available at <http://govinfo.library.unt.edu/npr/newsroom/interego.html>).

3. 42 U.S.C. § 1973c (2006). At the official signing ceremony for the VRA extension, President Bush was joined by a delegation of civil rights leaders, some of whom were present at the initial signing of the legislation by President Johnson in 1965. See LAURIE COLLIER HILLSTROM, *DEFINING MOMENTS: THE VOTING RIGHTS ACT OF 1965*, at 122-23 (2009); Hamil R. Harris & Michael Abramowitz, *Bush Signs Voting Rights Act Extension; President Vows to Build on ‘Legal Equality’ Won in Civil Rights Era*, WASH. POST, July 28, 2006, at A3; E.W. Kenworthy, *Johnson Signs Voting Rights Bill, Orders Immediate Enforcement; 4 Suits Will Challenge Poll Tax*, N.Y. TIMES, Aug. 7, 1965, at 1, available at <http://partners.nytimes.com/library/national/race/080765race-ra.html>.

4. The most relevant temporary provisions of the Voting Rights Act were extended by Congress in 1970, 1975, and 1982. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 179-80 (2007). In some of these instances, Congress did enact important substantive changes, such as extending these protections to new jurisdictions and to protect new groups of citizens. However, the thrust of the debate around these amendments largely followed the template of concerns first raised by opponents in 1965. See *id.*

5. See generally J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 135 (Bernard Grofman & Chandler Davidson eds., 1992).

offending principles of color-blindness and federalism.

This latest VRA extension effort was largely characterized by a defensive strategy. Supporters mostly concerned themselves with preserving the rules collectively known as the “preclearance” regime<sup>6</sup>—the administrative oversight system originally crafted to assure that state and local jurisdictions with a history of government-ratified racial discrimination do not violate the Fifteenth Amendment’s racial fairness principle.<sup>7</sup> Most observers agree that during the last forty years of its enforcement, the preclearance regime has promoted improvements in political participation and office-holding for racial minority groups and their preferred candidates.<sup>8</sup> Relying heavily on these and other factual findings, overwhelming bipartisan majorities in both houses of Congress ultimately agreed to reauthorize the oversight system for another twenty-five years.<sup>9</sup>

The architects of the 2006 legislation deserve great credit for passing a bill in a largely unfriendly political context. However, their largely preservative strategy carried with it an important practical substantive cost. By limiting changes to eliminating the most politically offensive judicial interventions of the law, Congress essentially left in place some pathologies that have plagued the system during the last few decades. More importantly, the renewal process again has left crucial questions about the system’s ends and means unanswered. Forty years into the “temporary” era of federal administrative review of state election systems, Congress has avoided the two most vexing questions about the preclearance system: When, if ever, should this oversight structure reach its endpoint? And if there is to be an end, how will we know when we have reached it?

This Article offers a conceptual framework called “reinventing” preclearance

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6. Throughout this Article, I use the terms “preclearance” and “Section 5” to refer to a broad set of provisions in the Voting Rights Act that define a special remedy that protects racial minority against the enactment of new laws and practices that would deny or abridge the right to vote with respect to race. I describe the preclearance remedy at greater length in later sections, but it is helpful to speak with precision at this stage. The term “preclearance” refers to the special remedy that “freezes” existing voting laws in certain designated state and local jurisdictions with a pattern of depressed participation in the electoral arena. See *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 323 (2000). In order to make changes to existing law, the jurisdiction must receive permission from the Justice Department or the U.S. District Court in Washington D.C. *Id.* In either case, the state must show that its proposed change “does not have the purpose and will not have the effect of denying or diluting the right to vote on account of race or color.” *Id.* at 328 (quoting 42 U.S.C. § 1973c (2006)).

7. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

8. See generally QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994) (offering an empirical assessment of state level political advancement for minority communities as a result of the VRA’s adoption and enforcement).

9. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

that responds to these pathologies and helps to address these perplexing questions. Taking the reorganization of basic governing structures as a starting point, this Article proposes adjustments to Section 5 that provide a more clear, effective, and lasting means of enforcing voting rights. Distinct from other reform proposals, reinvention identifies and embraces a specific systemic aim—transforming political institutions. The key to this proposal is its practical benefits for both sides in the current preclearance debate. The idea satisfies the conservative goal of reducing federal presence in a traditionally state-run area of policymaking. At the same time, reinventing preclearance also provides some assurances to those who favor more robust tools of voting rights enforcement than those that exist under the current regime.

Part I of this Article reviews some of the major pathologies associated with the current preclearance process. Despite its many benefits and positive results, the review process in Section 5 imposes particular burdens on each of the major stakeholders in covered jurisdictions. Some of these pathologies result from the intentional policy choices by Congress and the courts in framing the VRA, while others are unintentional consequences of the ground-level actors who are involved in the development and management of local elections. Today, very few people are entirely satisfied with how the contemporary system works, even though the recent extension of the VRA was vigorously defended by civil rights advocates.

Part II points out that the result of the most recent legislative amendments left many of these pathologies unaddressed. This Part addresses some of the academic criticism highlighting the most crucial issues that Congress either ignored or sidestepped in 2006. For fear of dismantling an already fragile bipartisan majority favoring renewal, preclearance supporters focused their energy on undoing the most troubling judicial interpretations of the statute. The extension of the statute missed an opportunity to address important long-term questions about the VRA, which the Supreme Court provocatively noted in *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*.<sup>10</sup> These developments provide salient reasons for Congress to revisit its fashioning of the preclearance system.

Part III presents the theoretical grounding for an invitation to commence a new approach to preclearance. It lays out the concept of “reinventing” preclearance in greater detail, focusing on its sensitivity to local agency concerns. Drawing partly on the role that the National Partnership for Reinventing Government played in streamlining federal regulation in the 1990s, this part suggests how traditional reinvention has insights relevant to preclearance politics. In contrast to legislative efforts that only tinker with the existing structure of the preclearance system, “reinventing” the preclearance regime requires a deeper, more fundamental examination of the remedy’s purposes and methods. A more ambitious and likely more fruitful approach is to start from the

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10. 129 S. Ct. 2504, 2511-12 (2009) (noting that the VRA data are thirty-five years old and that conditions have significantly improved since the Court upheld provisions of the VRA in the past).

principle that the preclearance mechanism has to focus on the goal of transforming political structures in state and local governments.

Finally, Part IV offers some specific ideas about how a reinvented preclearance system can operate in practice. To demonstrate that this idea is both politically viable and practically effective, I offer examples of flexible provisions that Congress might adopt to achieve the goal of reinventing the preclearance system. While not every state needs to adopt an identical reform, this example of innovative lawmaking at the state level can effect a substantial improvement in the protections for minorities.

## I. THREE PRECLEARANCE PATHOLOGIES

### A. *Preclearance 101: A Primer on the Current System*

The terms “preclearance system” and “Section 5” both refer to a set of administrative processes found in the VRA designed to remedy racial discrimination in the political arena.<sup>11</sup> For designated places, the provision calls for prior review of proposed changes in state and local election law by the federal government.<sup>12</sup> Preclearance is a specific response to years of evasion of federal court orders and executive enforcement actions by Southern jurisdictions.<sup>13</sup> Congress resolved to end this evasive behavior by effectively “freezing” local election laws and placing federal officials in an oversight role.<sup>14</sup> Some courts have characterized the preclearance system as the “shield” of the VRA, which protects voters against future practices and procedures that would enact new forms of discrimination in the election arena.<sup>15</sup>

There are numerous details that would be covered in any comprehensive discussion of the internal workings of this provision, but a basic understanding for present purposes requires attention to its three major components of the provision—its trigger, its scope, and its standard of review.<sup>16</sup> Elsewhere, I have employed these three concepts to expound at greater length on the peculiar ways that the preclearance remedy has evolved over time due to a series of related

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11. See *Bossier II*, 528 U.S. at 323. See generally HILLSTROM, *supra* note 3, at 75-123 (outlining the events leading up to the VRA’s passage and its subsequent amendments).

12. See *Bossier II*, 528 U.S. at 323.

13. See *South Carolina v. Katzenbach*, 383 U.S. 301, 336 (1966) (noting that “voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance or evasion of federal court decrees”).

14. See generally QUIET REVOLUTION IN THE SOUTH, *supra* note 8, at 30-32; Kousser, *supra* note 5.

15. See, e.g., *Katzenbach*, 383 U.S. at 318. The Supreme Court noted that “Congress had reason to suppose that” states covered by the VRA might continue resorting to “the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. *Id.* at 335.

16. See Kareem U. Crayton, *Interactive Pre-Clearance Development*, 27 ST. LOUIS U. PUB. L. REV. 319, 324-40 (2008).

legislative and judicial interventions.<sup>17</sup>

The first element of the remedy is its triggering mechanism. Unlike the civil litigation remedy of the VRA contained in Section 2, the preclearance system identifies parts of the country where Congress originally observed a heightened pattern of evasion.<sup>18</sup> The text of the statute says a great deal about the targeted places where the law applies.<sup>19</sup> Its triggering formula relies upon objective, voting-related factors to specify “covered” jurisdictions. For a state or local entity to fall within the ambit of the system, federal officials must find two things: (1) that a state’s laws contain one of a limited set of voting prerequisites; and (2) that registration and participation rates in certain national elections fall below a threshold percentage of the voting age population.<sup>20</sup> Congress has gradually expanded the reach of the triggering provision since 1965, bringing much of the Southwest (and with it, attention to language discrimination) into the preclearance regime.<sup>21</sup>

If a state or local jurisdiction is deemed subject to the system, the statute imposes a submission requirement.<sup>22</sup> Specifically, the law mandates that all proposed changes in laws related to voting be presented to federal officials for review and approval.<sup>23</sup> For most of the last four decades, the courts have construed the scope of “election-related law” relatively broadly.<sup>24</sup> No such legislation that is adopted in a covered jurisdiction may be enforced without the permission of the federal government.<sup>25</sup> This provision of the VRA shifts the balance of authority between state and federal government, since election management is traditionally an area of control for the states.<sup>26</sup> Even after the normal legislative process has been completed in a covered state, local officials

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17. *See id.*

18. *See* Holder v. Hall, 512 U.S. 874, 884 n.2 (1994) (comparing the application of Section 2 to Section 5).

19. *See* 42 U.S.C. § 1973b(a) (2006 & Supp. 2008).

20. Crayton, *supra* note 16, at 325-26.

21. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 470-71 (3d ed. 2007) (noting that many Southwestern states had to provide bilingual election materials in order to comply with Section 5).

22. *See* Crayton, *supra* note 16, at 329.

23. *See id.*

24. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969) (“Congress intended to reach any state enactment which altered the election law of a covered [s]tate in even a minor way.”); Crayton, *supra* note 16, at 330.

25. 42 U.S.C. § 1973b (2006 & Supp. 2008).

26. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511 (2009) (noting that Section 5 “authorizes federal intrusion into sensitive areas of state and local policymaking [and] imposes substantial ‘federalism costs’ . . . that have caused [m]embers of this Court to express serious misgivings about the constitutionality of § 5”) (internal quotations and citations omitted); *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966) (noting that preclearance is an “uncommon exercise of congressional power”). *But see* *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491 (1992).

must present their proposal to either the Department of Justice or the U.S. District Court in Washington, D.C. for approval.<sup>27</sup>

The substantive heart of the preclearance process is the standard that federal officers use to examine proposed changes. The Department of Justice (DOJ) has the power to block any proposed change in law that has “the purpose . . . [or] the effect of denying or abridging the right to vote on account of race or color.”<sup>28</sup> The test embodied in this standard calls attention to the jurisdiction’s intent along with the extent to which the plan’s likely results impose negative effects on minority voting power. And importantly, the standard places the burden of proof on the covered jurisdiction.<sup>29</sup> Thus, a proposed change cannot proceed without affirmative evidence that its purpose and effect does not “deny or abridge” the right to vote. This analysis has experienced a different trajectory since the courts have pared back the standard. Over the last thirty years or so, the standard has been that the government may object only to proposed changes that impose a retrogressive effect (i.e., worsening the position of minority political power).<sup>30</sup>

I have argued in previous writing that the development of the preclearance system has followed a somewhat mixed path, largely due to the interaction between the judicial and legislative constructions of the remedy.<sup>31</sup> Through judicial interpretation and legislative amendment, these aspects of the law have developed in some surprising ways over time. While the scope of the preclearance provision has largely expanded over time, the substantive standard to be applied in federal review has almost uniformly narrowed.<sup>32</sup> Even as more jurisdictions and more types of election changes are submitted to the federal government, the level of scrutiny applied in the review process has diminished substantially.

### B. *The Players in Preclearance*

Before discussing the specific pathologies in the current preclearance system, a brief discussion of the goals of the major actors involved in the process is in order. Generally speaking, there are three primary stakeholders in jurisdictions subject to the preclearance system: (1) the agency officials who administer election rules for the jurisdiction; (2) the racial minority group(s), including (but not limited to) their elected representatives; and (3) the political parties.<sup>33</sup> The

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27. See *Bossier II*, 528 U.S. 320, 323 (2000).

28. *Miller v. Johnson*, 515 U.S. 900, 906 (1995) (citing 42 U.S.C. § 1973c).

29. *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 478 (1997) (noting judicial preclearance); 28 C.F.R. § 51.52(a) (2010) (noting Attorney General preclearance).

30. *Bossier II*, 528 U.S. at 329. It should be noted that the standard for prohibited intent in Section 5, however, has been more varied.

31. See Crayton, *supra* note 16, at 335-41; see also Michael J. Pitts, *What Will the Life of Riley v. Kennedy Mean for Section 5 of the Voting Rights Act?*, 68 MD. L. REV. 481 (2009).

32. Crayton, *supra* note 16, at 325.

33. See, e.g., Luis Fraga & Maria Ocampo, *More Information Requests and the Deterrent Effect of Section 5*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON

preferences and goals of these different groups can sometimes overlap or coincide, but the interplay of their strategies often results in competitive and (at times) obstructive behavior.

The local civil servants who manage the election process in a covered jurisdiction often find themselves in an unenviable and thankless position. If it is true about voting rights politics that “someone always gets screwed,”<sup>34</sup> then those who must execute the policy choices crafted by legislative and executive officials quite consistently rank near the top of the list of candidates. On one hand, they are primarily responsible for preparing and submitting the jurisdiction’s proposed change to the federal government for review. Yet doing their job properly also invites criticism and litigation threats coming from at least one of the other two sets of actors who find themselves aggrieved by the jurisdiction’s policy choices.<sup>35</sup>

While complying with the submission itself is not terribly burdensome, civil servants must develop and produce evidence showing that the proposed election change does not run afoul of the prohibitions in Section 5.<sup>36</sup> Election administrators take their charge seriously, even if the political actors who vote on proposed changes are busy pursuing their own distinct ends. So long as they are not themselves captured by ideological forces, these actors usually maintain a neutral view with respect to adopting a particular election approach. Their foremost desire out of any policy submission is a predictably successful outcome in the federal review process.<sup>37</sup> As some research has shown, covered

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DEMOCRACY, PARTICIPATION, AND POWER OF THE VOTING RIGHTS ACT 47, 51 (Ana Henderson ed., 2007). While Fraga and Ocampo’s framework includes the Department of Justice as a major actor, the framework in this Article focuses on the relationship among the parties within the jurisdiction. The present model addresses the processes leading to a jurisdiction’s submission of a preclearance proposal to the federal government, which is largely dependent upon the relationships among the actors who reside within a given jurisdiction.

34. See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733 (1998). Karlan states in her description of the redistricting process that “[r]edistricting, like reproduction, combines lofty goals, deep passions about identity and instincts for self-preservation, increasing reliance on technology, and often a need to ‘pull [and] haul’ rather indelicately at the very end. And of course, it often involves somebody getting screwed.” *Id.* (internal citation omitted).

35. See generally Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125 (2009).

36. See *Bossier II*, 528 U.S. 320, 323 (outlining the burdens and requirements necessary to successfully pass preclearance).

37. See, e.g., Raquel A. Rodriguez, *Reflections of Another Bush v. Gore Lawyer*, 64 U. MIAMI L. REV. 631, 636 (2010) (stating that legislators and election officials are faced with challenge of creating policies that “do not create inordinate burdens on the right to vote while enacting laws to ensure that elections are fair, honest, and efficient”); see also HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 16 (2009) (stating that election officials also face the pull of the political parties they are affiliated with because “[t]he problem is that election officials depend on their party for their jobs”); Tokaji, *supra*

jurisdictions tend to withdraw or modify a proposed change even in the face of federal responses like More Information Requests.<sup>38</sup> Even the more subtle suggestion of an explicit rejection deters submissions. Additionally, these actors desire latitude to implement the proposed election changes in order to satisfy the demands of local political authorities and the jurisdiction's governing law.<sup>39</sup>

A second important set of players in the preclearance jurisdiction is the racial minority community, the intended beneficiaries of the preclearance regime. Minority voters desire a relatively robust federal enforcement approach that affords strong protections against discrimination. In practice, this position encourages frequent federal objections to proposed changes whose purpose or effect cause even the most subtle harms to minority political interests. This community often seeks improvements in the levels of representation in elected offices and promotes substantive policies that expand access to voting, especially for members of the minority group.<sup>40</sup> Increasingly, this category of stakeholders includes multiple racial groups whose political interests may not always coincide. The goals of the minority community are often (but not always) conveyed by the political officials who are elected to represent them as well as by private organizations like the Legal Defense Fund, whose members often work to articulate the political interests of minority communities.<sup>41</sup>

Finally, the traditional political parties are an ever-present and significant category of actors in almost every preclearance-covered jurisdiction.<sup>42</sup> Since

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note 35, at 133 (stating that election officials have two interests that are often conflicting: (i) their "professional obligation to discharge their duties impartially," and (ii) their self interest in portraying loyalty to their party in order to ensure their own re-election to a higher office).

38. Fraga & Ocampo, *supra* note 33, at 65-67.

39. *Id.*

40. See, e.g., Brief of the Congressional Black, Hispanic, and Asian Pacific American Caucuses et al. as Amici Curiae Supporting Appellees at 21, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322).

41. Since 1940, the Legal Defense Fund

has been a pioneer in the struggle to secure and protect the voting rights of African-Americans. LDF has been involved in nearly all of the precedent-setting litigation relating to minority voting rights. LDF's political participation group uses legal, legislative, public education and advocacy strategies to promote the full, equal and active participation of African-Americans in America's democracy.

*Political Participation*, LEGALDEFENSE FUND, <http://naacpldf.org/category/political-participation> (last visited Nov. 14, 2010).

42. See, e.g., *Morse v. Republican Party of Va.*, 517 U.S. 186, 213 n.27 (1996) (noting that political parties played an integral role in continuing discriminatory practices before the VRA); Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 223, 227-28 (David L. Epstein et al. eds., 2006) (noting that the "politicization of the preclearance process" has resulted in a "great risk that political appointees, of whichever political affiliation, at the DOJ will deny preclearance to changes that might be detrimental to their party, while granting it to laws that might retrogress with respect to minority voters yet benefit their party").



decisions about the design of electoral structure are inherently political issues, the parties heavily involve themselves in the shaping of the system. This set of actors includes both elected officials responsible for governing the jurisdiction as well as the informal operatives who run the supporting party organizations. As much as with any substantive debate about public policy, one's ideological alignment tends to drive the terms of the debate on a proposed election change that is subject to preclearance. The inherent competition among the parties is perhaps at its zenith in the context of redistricting decisions, where the share of each party's governing power is at stake.<sup>43</sup>

On redistricting and other election-related issues, these ideological groups struggle to maintain or improve the probability that their candidates will control government. Like racial minority groups, partisan agents also fight for election policies that tend to improve their standing among the electorate—especially those voters who consistently support their candidates in elections. This competition can sometimes become complicated when one takes account of the intersecting role that race plays in the pursuit of the party's interest. When a significant portion of the party's membership represents a majority-minority constituency, pursuing the party's overall interests may not entirely coincide with what benefits the racial minority community.<sup>44</sup> However, the simplest means of understanding the interests of the political parties is that each sets out to pursue a greater share of political power by disadvantaging the others.

### C. Systemic Pathologies

There are many positive things to say about the benefits associated with preclearance, much of which are contained in the rather voluminous record supporting the most recent renewal of the VRA.<sup>45</sup> Despite its multiple benefits, though, the preclearance system also has encouraged some troubling pathologies in the ways that covered jurisdictions address election policy changes. These local politics are often characterized by strategies that impede the development of new election policies. Over time, this paralysis prevents the jurisdiction from advancing toward a more permanent arrangement that embodies the anti-discrimination norms that the preclearance system commands. Below, I identify three particular problems that contribute to the longstanding stalemate that exists among the actors in preclearance jurisdictions.

The first pathology in preclearance jurisdictions is the lack of serious attention to long-range goals in election policymaking. Decisions about public policy, either in legislatures or in operating agencies, tend to involve both short-

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43. See Persily, *supra* note 42, at 227-28. While it is certainly the case the party involvement is most significant during redistricting, the parties are also concerned with the more common policies like the adoption of new voting equipment or location of polling places that are also subject to preclearance review.

44. *Id.* at 227 (noting that there is a risk that DOJ officials will preclear laws that benefit their own party, regardless of how it impacts racial disparities).

45. See generally Persily, *supra* note 4.

term and long-term considerations.<sup>46</sup> In the election arena, an example of a short-term consideration might involve the possible effects of increasing or decreasing the number of polling places or the percentage of citizens who can cast a ballot in the next election. On the other hand, adopting a new type of polling machinery at every polling place in a jurisdiction may require attention to effects that may only materialize after a series of elections. Preclearance stakeholders rarely reach consensus about the types of policy proposals that require an assessment of long-range factors.<sup>47</sup> Their decisions tend to reflect more limited applications so that they do not entrench a particular election device or procedure for an extended period.<sup>48</sup>

This pattern of decisionmaking is linked to a pair of features inherent to the current preclearance system. One of these features is the indeterminate nature of the preclearance standard in the federal review process. The standard for reviewing changes has shifted substantially due to a lingering dispute between the judicial and legislative branches.<sup>49</sup> As each branch has taken its turn construing the statute, the standard has evolved from a strong emphasis on proportionality to a more limited concern with whether the change diminishes minority political power.<sup>50</sup> Election administrators tend to encourage the adoption of more limited changes as the best way to avoid a preclearance challenge.<sup>51</sup> For their part, minority communities and political parties also tend to rely upon short-term thinking. With unpredictable constructions of the federal test for approving election changes, an actor who is unsatisfied with the existing standard might prefer to hold out for a later, more favorable climate to pursue his or her preferred election policy.

Another reason for the absence of long-range thinking is the absence of a guiding principle for assessing a proposed policy. Policy decisions with longer life spans or broader application can invoke greater scrutiny in the federal review process than more discrete ones.<sup>52</sup> The effects of such discrete changes are often readily apparent, which means that federal review is a more straightforward matter.<sup>53</sup> By contrast, major structural changes to a voting system do not usually have fully discernible effects. The uncertainty in the latter set of changes leaves substantial room for debate. The difficulty in stating long-term effects on

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46. See generally Tokaji, *supra* note 35.

47. See *id.* at 141-42.

48. *Id.* at 145-46.

49. See generally Crayton, *supra* note 16.

50. *Id.* at 321.

51. See Tokaji, *supra* note 35, at 136-37.

52. See Katherine Culliton-González, *Time to Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27, 43 (2008) (stating that “Section 5 provides for a high level of scrutiny—it requires that the DOJ conduct an advance review of any proposed changes in voting procedures to determine if they would have a discriminatory impact. Section 5 covers jurisdictions through findings of a history of racial discrimination in voting through the use of discriminatory tests or devices”).

53. See *id.*

political power with precision forces federal authorities to project these changes over time, which leaves ample room for uncertainty and dispute. To avoid an uncertain review outcome or a prolonged review process, local authorities running preclearance advocate limited changes.<sup>54</sup> The additional procedural steps could seriously complicate (and most certainly will delay) the jurisdiction's effort to enact change.

A second preclearance pathology is the propensity toward oppositional relationships in the consideration of new policy. Adopting new election law in a covered jurisdiction typically requires an alignment of most (if not all) of the various preclearance stakeholders.<sup>55</sup> However, these interests are not especially inclined toward the norm of cooperation. Aside from the usual partisan competition that shapes all political decisionmaking, preclearance adds an extra constraint because each of the stakeholders holds the ability to either stall or block the adoption of a new policy.<sup>56</sup> The principle of bipartisanship is therefore crucial to avoid floor fights and subsequent litigation over the legitimacy of a new law. Furthermore, the consent of the relevant racial minority group often proves crucial to the success of a policy.<sup>57</sup> This is so because the DOJ regularly consults with leaders within the local minority community when considering the likely effects of the proposed change.<sup>58</sup>

For both the partisan and racial stakeholder groups, the conventional approach for assessing a policy idea is to focus on self-interested and zero-sum concerns. Part of this surely is rooted in a not-so-distant past in which interests were in violent opposition to each other. However, it is also due to the absence of generally accepted ways to measure the benefits and costs associated with the proposed changes. In other words, the terms of the debate themselves are disputed. For any given group, the overall effect of a given proposal depends upon the perceived advantages for that particular group.<sup>59</sup> Further complicating the matter, these debates are often regarded as zero-sum endeavors; one group's potential advantage under a new regime is automatically viewed in terms of another's political detriment. Thus, the result is the politics of trench warfare—where any concessions are tantamount to surrender. Few discussions

54. See Ellen D. Katz, *Congressional Power to Extend Preclearance: A Response to Professor Karlan*, 44 HOUS. L. REV. 33, 46-47 (2007) ("Indeed, the Department of Justice has objected more often to changes proposed at the local level than to statewide changes such as congressional redistricting plans.").

55. See Tokaji, *supra* note 35, at 128.

56. *Id.*

57. See Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 57 S.C. L. REV. 827, 845-46 (2006) (stating that the DOJ considered the concerns of minority voters and the impact of electoral structures on communities of color).

58. See *id.* at 853.

59. See Tokaji, *supra* note 35, at 135 ("Where there is ambiguity over which forms of identification should be allowed or how states may go about purging voters from registration lists, for example, it is difficult to imagine Republicans and Democrats reaching agreement.").

about a specific proposal employ a shared language of assessing the merits for the election system as a whole.<sup>60</sup>

Put another way, the legislative process in a preclearance jurisdiction turns on “veto points” that are available to each of the relevant stakeholders. The negative power to derail any proposed change encourages oppositional behavior from others in discussions about policy.<sup>61</sup> A political party that fervently disagrees with a proposed change will either credibly threaten to defeat the proposal in a vote or to later challenge it in court.<sup>62</sup> For racial minority groups, expressing their displeasure to federal authorities who investigate a jurisdiction’s proposal can potentially draw a request for additional information or a formal preclearance objection.<sup>63</sup> Additionally, their strong opposition could signal a later challenge in federal court under a different provision in the VRA.<sup>64</sup> Real or perceived disadvantages to any preclearance stakeholder are likely to doom any proposed change in the law.

The final pathology in preclearance jurisdictions is the lack of policy innovation. The inclination toward short-term decisionmaking along with the

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60. See Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203*, 58 ALA. L. REV. 377, 394 (2006). Ao notes that there were instances of minority group unity during the 1982 and 1992 reauthorization processes after opponents of the VRA attempted “to drive a wedge between Section 203 and Section 5 (preclearance) supporters and thereby [tried] to split the African-American community from the others (despite the fact that other minority groups also benefit from Section 5).” *Id.* However, those minority groups unified once they realized that a strong Section 5 and Section 203 would be beneficial for all. *Id.*

61. See Tokaji, *supra* note 35, at 132.

62. See *id.* For example, Democratic officials will fight for policies that “include as many voters as possible,” while Republican officials will fight against policies that may foster fraudulent voting. *Id.* at 133. As the politics of redistricting in the 1990s demonstrated, states with divided governments often produced stalemates that required judicial interventions to establish district plans.

63. See Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 837 (2006). Tokaji notes that even if there is considerable influence by racial minority groups,

[t]here is also the problem of determining which civil rights groups can best serve as the ‘proxy’ of minority voters in a given community, so as to justify deference to solutions that these groups negotiate with state or local election officials. One can easily imagine dueling groups emerging, each claiming to represent the interests of the minority community, yet taking opposing positions on particular issues.

*Id.*

64. See, e.g., Fuentes-Rohwer & Charles, *supra* note 57, at 853-54. In South Carolina, a delegation of black citizens objecting to proposed changes in election standards influenced the DOJ to move from a provisional objection to part of the proposed election plan to a complete objection to the whole proposed plan. The data show that the DOJ frequently issued objections while citing the influence of communities of color in making those decisions. If this trend continues, then challenges in federal court are a likely progression from current administrative oppositions from minority communities. *Id.*

adversarial nature of the legislative process in preclearance jurisdictions tend to chill any serious effort to pursue innovative election changes. This third pathology is especially lamentable in the wake of several controversial elections at the national and statewide levels.<sup>65</sup> Even with significant federal financial resources available for jurisdictions to experiment with improving the election process, preclearance jurisdictions have tended to shy away from more ambitious proposals. Rather than exploring new ways to prevent the kinds of election day train wrecks that result in extended litigation and political wrangling, preclearance jurisdictions tend to employ a minimalist approach to policymaking. As it is practiced, the current preclearance system favors the maintenance of the status quo, which leaves little room for creativity in the development of election policy.<sup>66</sup>

While the lack of innovation is surely evident with respect to the minority community and political parties, its effects are most troubling for the officials who manage elections in preclearance jurisdictions. These officials often show interest in exploring new methods of balloting and administration;<sup>67</sup> however, the very strict enforcement of the preclearance submission requirement coupled with the inclination of the stakeholders toward adversarial interactions dissuades these actors from proposing or pursuing new approaches.<sup>68</sup> The result is that possible improvements to the election system are rarely raised to avoid conflicts among the stakeholders. These experts are the very persons charged with developing a system that is both reliable and efficient, yet the politics of preclearance can sometimes work against these very norms.

65. See *Crawford v. Marion Cnty. Election Bd.*, 128 S. Ct. 1610 (2008). In this case, the Indiana Democratic Party, the League of Women Voters, and other interested voters brought a challenge against an Indiana law that required all voters to show a government-issued photo ID before casting their ballots. *Id.* at 1614. The Supreme Court held that the law was valid because it was not unreasonable to require photo ID to vote and the law was in line with protecting the validity and integrity of the voting process. *Id.* at 1624; see also *Common Cause/Ga. League of Women Voters v. Billups*, 439 F. Supp. 2d 1294, 1305-06, 1360 (N.D. Ga. 2006) (in which a similar voter ID law was upheld in Georgia despite the fact that 300,000 Georgians did not possess a valid government-issued photo ID).

66. See Tokaji, *supra* note 35, at 137 (stating that “[d]espite the significant improvements that have occurred since 2000, then, little has changed in regard to the decentralization and partisanship of American election administration”).

67. See Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation That Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 74-77 (2008). Especially since the 2000 presidential election, legislators and officials have attempted to address the complicated task of correcting the many problems that were exposed, such as outdated voting machines, voter purges, and voter discontent. However, despite the passage of the Help America Vote Act (HAVA) to help states eliminate punch-card voting systems, these efforts have been largely ineffective. *Id.*

68. See Tokaji, *supra* note 63, at 836 (indicating that election officials are even faced with the adversarial interests of more than one group within the same minority community who have conflicting interests).

## II. WHY THE AMENDMENTS ENTRENCH THESE PATHOLOGIES

### A. *The Academic Criticism*

Before, during, and after the recent legislative debate on the VRA extension, academic commentators had much to say about what happened—and what should have happened. Much of the writing on the topic registered discontent with the debate in Congress and with the details of the statutory extension itself.<sup>69</sup> Some of this work showed sympathy to the VRA sponsors in recognition of the challenges they faced in achieving a bipartisan compromise while also racing against the clock to pass the bill before an important midterm election.<sup>70</sup> However, far more of the writing concerned the implications of Congress's failure to address unanswered questions and lingering issues.

1. *Clarifying/Redefining Standards.*—Some of the criticism highlighted lingering ambiguities in the operational concepts found in the statute. The most apparent of these is the idea of retrogression, a bedrock test that Congress set out to change in its extension.<sup>71</sup> The sponsors of the extension announced the limited goal of reversing the Supreme Court's interpretation in *Georgia v. Ashcroft*.<sup>72</sup> There, the Court narrowly applied a retrogression analysis to permit the elimination of several majority-black legislative districts if the state compensated by employing a sufficiently large set of "minority influence" districts.<sup>73</sup> Congress very clearly rejected the reasoning advanced in *Ashcroft* and its related decisions, returning the law to the original retrogression standard announced in the *Beer*<sup>74</sup> decision (which would have faulted Georgia's proposed plan due to its reducing the number of minority-majority districts).<sup>75</sup>

Defending the final statute that Congress produced, Nathaniel Persily tries mightily to recast the legislative process to clarify a standard with multiple meanings.<sup>76</sup> He finds that the legislative history from the Senate casts great doubt on how the courts or the DOJ might apply the retrogression standard in practice.<sup>77</sup> Concerned that the Senate's very fractious legislative history revealed severe weaknesses in the new standard, Persily suggests that the Court utilize the

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69. See generally Persily, *supra* note 4; James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007).

70. Tucker, *supra* note 69, at 206-17 (recounting the difficulty involved in gaining bipartisan support for the reauthorization of the Act).

71. *Id.* at 254. Representative Sensenbrenner, Chairman of the House Judiciary Committee, subsequently engaged in a colloquy with Representative Watt to "confirm that determination of the retrogression standard was to be made 'without consideration of political party control.'" *Id.*

72. 539 U.S. 461 (2003).

73. *Id.* at 490.

74. *Beer v. United States*, 425 U.S. 130 (1976).

75. *Id.* at 141.

76. See generally Persily, *supra* note 4.

77. *Id.* at 183, 226-27.

more cohesive House report as the best evidence of legislative intent.<sup>78</sup> The House report includes a clear, well-reasoned argument in favor of the bill's constitutionality, and it rejects any specific definition of the new retrogression standard.<sup>79</sup>

Nevertheless, due to the constraints inherent in bipartisanship, even the House report contains its share of vagueness. Persily concedes that the report sidesteps tough analytical questions about how to define minority political power.<sup>80</sup> For example, the retrogression inquiry seems focused on minorities' "ability to elect," but it provides no guidance on how the ability-to-elect determination should, as an approximation of political power, be made.<sup>81</sup> Fearing that this broad and vague standard may permit an overly broad application to emphasize those rare elections involving minority candidates with broad cross-racial appeal, Persily suggests additional criteria for the "ability-to-elect" determination.<sup>82</sup> More specifically, he proposes limiting the application of any new standard to a protected group's ability to elect its uniquely preferred candidate of choice.<sup>83</sup> Persily further suggests that the standard only apply where minority voting cohesion is at a level of ninety percent or more for a candidate that minorities prefer but white voters do not.<sup>84</sup>

2. *Loosening Bailout Procedure.*—Aside from the muddled conceptual issues that remain in the renewed VRA, scholars have also criticized how Congress handled problems of quantifiable evidence in the record supporting the Act.<sup>85</sup> On this more than any other single issue in the debate, scholars have registered grave doubts<sup>86</sup> about whether the empirical case could be made for a renewed Section 5 in light of *City of Boerne*.<sup>87</sup> This approach accepted the congressional finding that the best way to mark progress under the Act was to measure political improvements for minority groups.<sup>88</sup>

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78. *Id.* at 189-92. In fact, the cognizant Senate committee quite infamously produced a pair of conflicting reports reading the Act in diametrically opposed ways.

79. *Id.* at 190.

80. *Id.* at 231-32.

81. *Id.* at 240-42.

82. *Id.* at 219-26.

83. *Id.* at 220.

84. *Id.* at 230.

85. See 152 CONG. REC. S8012 (daily ed. July 20, 2006); 152 CONG. REC. H5131, H5207 (daily ed. July 13, 2006).

86. See James Thomas Tucker, *The Battle Over "Bilingual Ballots" Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 513 (2008); see also Richard H. Pildes, *Is Voting Rights Law Now at War with Itself?: Safe Election Districts Versus Coalitional Districts in the 2000s*, 89 N.C. L. REV. (forthcoming Dec. 2010), available at <http://ssrn.com/abstract=304587>.

87. *City of Boerne v. Flores*, 521 U.S. 507, 517-19 (1997).

88. See Tucker, *supra* note 86, at 578 (stating that "Section 203 has proven extraordinarily effective in addressing the effects of education discrimination on language minority voters. While a marked difference in participation rates remains between non-Hispanic whites and language

However, the evidence on minority registration and participation rates, office-holding, and (to some degree) racial polarization indicated that significant progress had been made. These trends were especially clear in the jurisdictions where Section 5 had been enforced.<sup>89</sup> In some of these jurisdictions, minority participation rates even exceeded those of white voters.<sup>90</sup> At the same time, the DOJ only rarely objected to proposed election changes, suggesting that states no longer engaged in the kind of wholesale discrimination that was commonplace in the 1960s.<sup>91</sup> How could the continuance of the preclearance system remain justifiable in the face of evidence showing its success? To be sure, some scholars introduced additional evidence that placed these findings in context,<sup>92</sup> but these studies were eclipsed by the alarms about the case for an extension.

Despite problems with the legislative evidence, Rick Hasen cautiously agreed during legislative hearings that an extended version of Section 5 could be a constitutional enactment.<sup>93</sup> He concluded from an analysis of the evidentiary standard applied in post-*Boerne* cases that a reauthorization of Section 5 would likely be valid, but it would need to overcome clear evidence of declining racial discrimination in the political sphere.<sup>94</sup> The most significant piece of evidence in the record was the “Bull Connor Is Dead” problem.<sup>95</sup> Hasen observed that the starkly racist viewpoint is now highly disfavored in Southern political discourse.<sup>96</sup> The “segregation now and forever” regime (of which Connor was a key part) is now largely extinct, powerless, or disfavored due to shifting

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minorities, the gap has narrowed considerably.”).

89. See *Nw. Austin Mun. Util. Dist. One v. Mukasey*, 573 F. Supp. 2d 221, 247-65 (D.D.C. 2008).

90. *Id.* at 247. Rome pointed out that by 1976 black registration rates in four southern states exceeded the national average for blacks and argued that the “emergency with respect to which Congress acted in 1964 ha[d] passed.” *Id.* at 247 (quoting Brief for Appellants at 173, *City of Rome v. United States*, 446 U.S. 156 (1980) (No. 1801840)).

91. Tucker, *supra* note 69, at 210 (stating that many “civil rights groups [perceived] the Bush Administration’s Justice Department [as reluctant] to enforce Section 5” and that “reauthorization would be an uphill battle”).

92. See generally Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation’s History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 51 (2006) (discussing why reauthorization of Section 5 was still necessary).

93. See Rick Hasen, *Drafting a Proactive Bailout Measure for VRA Reauthorization*, ELECTIONLAW BLOG (May 18, 2006, 9:37 AM), <http://electionlawblog.org/archives/005655.html>.

94. See Rick Hasen, *Can “Proactive Bailout” Save VRA Renewal from Constitutional Attack?*, ELECTION LAW BLOG (May 16, 2006, 5:03 PM), <http://electionlawblog.org/archives/005638.html>.

95. See *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing on S.B. 2703 Before the S. Judiciary Comm.*, 109th Cong. 8-10 (2006) (statement of Richard L. Hasen, Professor of Law, Loyola Law School) [hereinafter *An Introduction to the Expiring Provisions of the Voting Rights Act*].

96. *Id.* at 9.



cultural norms. And the aforementioned evidence reflecting this political shift is a testament to the success of VRA enforcement. Nevertheless, the suggested “proxies” for discrimination are not entirely equal to the task of justifying the Act. Hasen explained that declining DOJ preclearance objections and evidence of private discrimination would either be inadequate or irrelevant in judicial inquiry into ongoing state-sponsored discrimination.<sup>97</sup>

To confront these problems, Hasen later suggested that Congress incorporate new elements into the VRA to demonstrate greater constitutional tailoring in the preclearance remedy.<sup>98</sup> One of his proposed fixes during the legislative hearings was to simplify the bailout process by providing an accessible exit strategy for more covered jurisdictions.<sup>99</sup> Under his formulation, called proactive bailout, DOJ officials would compile a list of jurisdictions that might be eligible for bailout and then notify local officials in those locations about this possibility.<sup>100</sup> Reducing the impact of the federal oversight power would arguably help counteract doubts about the strength of the evidentiary record. While it received the endorsement of some Southern members of Congress, Hasen’s idea was summarily dismissed by advocates as an effort to weaken the provision and as a tool that would introduce too much uncertainty into its application.<sup>101</sup>

3. *Broadening the Concept of Rights.*—A final area of criticism poses perhaps the most provocative claim—that congressional adoption of the VRA ignored the possibility of a more ambitious election reform agenda. This position accepts the earlier points concerning the deficiencies in the record evidence. Demonstrating a sustained need for the preclearance regime may be difficult in light of changing racial norms, but the broader indicators of a systemic meltdown in election management are ever-present. The critique suggests that the challenges relating to racial equality in the political sphere are only symptomatic of a broader set of structural problems in the political system. The obsession with replaying past debates about racial politics has obscured the more fundamental issue of reforming election structures. According to this view, the only way to make real progress in entrenching the right to vote for all citizens is to scrap the VRA discussion altogether.

Going a step beyond Hasen’s recommendations, Richard Pildes has proposed that the entire anti-discrimination framework ought to be replaced with a conversation about systemic reforms.<sup>102</sup> He finds that recent cases involving racial discrimination in the political sphere more often involve partisan politics

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97. *Id.*

98. *Id.* at 10.

99. See Hasen, *supra* note 94.

100. Hasen, *supra* note 93.

101. See, e.g., Bob Bauer, *The Uses of Hearings and the Strength of the “Deal” in the Renewal of the VRA*, MORE SOFT MONEY HARD LAW (May 16, 2006), <http://www.moresoftmoneyhardlaw.com/news.html?AID=712>.

102. See Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 755-62 (2006).

than concerns about the political power of excluded racial groups.<sup>103</sup> The “racial gerrymandering” cases, for example, are often dominated by a discussion of whether a plan has implications for the Democratic or the Republican Party.<sup>104</sup> The same is true for more recent controversies involving voter ID requirements, which are often cast as racial discrimination problems.<sup>105</sup> Because the Court has declined to regulate partisan competition, a coherent model for combating racial discrimination has become illusory; the entire project has been hijacked by political parties.<sup>106</sup> Thus, Section 5 has failed to evolve to address more systemic problems. Because of the politics around its application, Section 5 had very little influence in addressing the vote counting controversies in Ohio and Florida.<sup>107</sup> These problems represent the future of controversies involving the right to vote, yet the major tool of enforcement seems inadequate to accomplish the task.

In this light, the entire effort to show that the VRA remains a viable enforcement remedy misses the point. Pildes suggests that rather than focusing strictly on anti-discrimination, a more comprehensive strategy is to adopt legislation that formally entrenches the right to vote.<sup>108</sup> A positive affirmation of a standard that governs the right to vote would respond more effectively to the racial discrimination problems and would provide broader protections against partisan manipulation in the political system.<sup>109</sup> His proposed structure would permit a much narrower version of Section 5, but that provision would only address a very small number of jurisdictions. The system would adopt a formula with transparent and current information to identify the most recalcitrant jurisdictions.<sup>110</sup> However, its reach would only supplement the more fundamental set of protections that follow from the positive grant of the franchise.

Pildes’s idea acknowledges the political impasse that has defined the nature of debate around the preclearance system. New approaches to improve the protection of the franchise and respond to problems often face great skepticism in this highly divisive environment.<sup>111</sup> Recognizing the practical difficulties in promoting this ambitious idea as an actual policy measure, Pildes suggests that sponsors of Section 5 might leverage his proposed changes in exchange for the establishment of his model provision.<sup>112</sup> As it exists in other constitutional democracies, a uniform national voting-rights protection would effectively respond to both the remaining challenges involving racial exclusion as well as the

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103. *Id.* at 751.

104. *Id.* at 763-64.

105. *Id.* at 751, 758-62.

106. *Id.* at 761-64.

107. *Id.* at 748-49.

108. *Id.* at 756.

109. *Id.* at 761.

110. *Id.* at 761-62.

111. *Id.* at 756 (stating that “the concept of preclearance review . . . [is] fundamentally tied to suspicion of changes to voting practices”).

112. *Id.* at 756-57.

more generalized problems related to systemic failures to regulate the ballot box.

### B. Enter the Roberts Court

With opposition to Section 5 and several critics suggesting what the statute ought to have addressed, few were shocked when a local jurisdiction in Texas filed a lawsuit challenging the application of the preclearance system in *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*.<sup>113</sup> While the main alleged legal injury was that this jurisdiction had been denied bailout of the preclearance system in the lower court,<sup>114</sup> most of the briefing in the case by the parties and amici concerned the matter that had been the million dollar question since *Boerne* and a key concern during the legislative reenactments—whether the preclearance provisions after 2006 remained a constitutional exercise of Congress’s enforcement power.<sup>115</sup> The district contended that if bailout was not permissible under the law, then Section 5 as a whole was unconstitutional under the *Boerne* line of cases.<sup>116</sup>

With a thoroughly researched legislative record and a flurry of supporting briefs in the case, one might have expected that a definitive statement from the Court was unavoidable. However, the Court declined to decide the law’s constitutionality in its holding. Instead, the majority (re)interpreted its earlier decision in *City of Rome*, holding that local jurisdictions like NAMUDNO within covered states could independently seek preclearance bailout.<sup>117</sup>

This is not to say that Chief Justice Roberts remained entirely silent about his views of the provision itself. The most charitable way to describe his characterization of the preclearance provision is cautiously ambivalent. His review of the achievements of the VRA resembled many offered by opponents during the reenactment proceedings.<sup>118</sup> Compared to the landscape that existed both times it addressed the constitutionality of Section 5, Chief Justice Roberts claimed, “Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”<sup>119</sup> In light of these accomplishments, Chief Justice Roberts registered doubt about the legitimacy of the provision because its “current burdens . . . must be justified by current needs.”<sup>120</sup>

113. 129 S. Ct. 2504 (2009).

114. *Id.* at 2509-10.

115. See Brief for Appellant at 7, *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 129 S. Ct. 2504 (2009) (No. 08-322); see also Brief of Scharf-Norton Center for Constitutional Litigation as Amici Curiae Supporting Appellant at 6, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322).

116. See *NAMUDNO*, 129 S. Ct. at 2510.

117. *Id.* at 2516-17.

118. See *id.*

119. *Id.* at 2511.

120. *Id.* at 2511-12.

The remainder of the opinion's discussion of constitutionality concerns raises questions that should give sponsors of the provision great pause. Notwithstanding its success, Chief Justice Roberts wrote, the provision infringes on "sensitive areas of state and local policymaking [and] imposes substantial 'federalism costs.'"<sup>121</sup> Chief Justice Roberts then recited almost every one of the concerns mentioned by Section 5 opponents in the reenactments, ranging from the statute's potential violation of the equal sovereignty doctrine, to its use of thirty-five-year-old data, to its selective targeting of states for coverage.<sup>122</sup> As to the last matter, Chief Justice Roberts seemed entirely unconvinced of the logic in any law enforcing a standard that would find the same policy illegal in a covered state while permissible in another.<sup>123</sup>

There are, of course, many ways to read the opinion. The most sanguine observers view the language gesturing toward a rather unfavorable constitutional analysis as nothing more than dicta.<sup>124</sup> Some advocates declared that the 8-1 decision effectively endorsed Section 5 since it ultimately sidestepped a serious constitutional challenge.<sup>125</sup> Further, as a practical matter, the decision foreclosed any follow-up claim to the one mooted by this decision.<sup>126</sup> Because smaller jurisdictions like NAMUDNO now may seek bailout, the likelihood of a serious constitutional challenge from a state government is minimal.

Yet one can just as easily read *NAMUDNO* as a how-to manual for a particularly intrepid state government that is willing to pick up where *NAMUDNO* left off. Indeed, two jurisdictions have recently commenced proceedings to challenge the constitutionality of Section 5 on the merits. Nothing in that passage (dicta or not) indicates that the Court will reject a future invitation to address a direct challenge from an intrepid state government. A constitutional challenge could renew the assertions that the level of progress in the political system is substantial enough to warrant greater scrutiny in the Court's review of the statute. To the extent that the current reenactment of preclearance cannot provide a direct response to the questions that Chief Justice Roberts poses, the future of preclearance remains in some doubt. Accordingly, Congress may have good reason to revisit this issue in the short term.

### III. REINVENTION AS AN ANSWER

As Part II shows, the chances that Congress will need to address the VRA extensions of 2006 are quite considerable. Scholars have pointed out that several issues remain unsettled with the existing statute. At the same time, the Supreme

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121. *Id.* at 2511 (internal citations omitted).

122. *Id.* at 2512.

123. *Id.* at 2515-16.

124. See Rick Hasen, *Initial Thoughts on NAMUDNO: Chief Justice Roberts Blinked*, ELECTIONLAWBLOG (June 22, 2009, 8:00 AM), <http://electionlawblog.org/archives/013903.html>.

125. See Erin Miller, *NAMUDNO: Right Question, Wrong Case*, SCOTUSBLOG (Feb. 8, 2010, 10:53 AM), <http://www.scotusblog.com/2010/02/namudno-right-question-wrong-case/>.

126. *Id.*

Court may soon hear one of the many renewed constitutional challenges of Section 5 presently in the lower courts, which may ultimately lead to a decision to strike down the statute. Thus, Congress may well need to reconsider the existing provision to shore up the legislative scheme. This part provides some background on a concept that should prove helpful in this renewed conversation: the reinvention of government.

Reinventing government was a major policy initiative to streamline governmental operations and service delivery during the 1990s. In the face of widespread indicators of public cynicism about the efficacy of government services, President Clinton launched a multi-stage strategy to review and redesign the way that these agencies function.<sup>127</sup> Many policy and administrative scholars credit this reform of government services as among the most successful programs ever launched at the federal level.<sup>128</sup> After reviewing the historical development of this initiative along with its results, this Part identifies the most significant factors that accounted for its effectiveness. The process of reinventing government provides an especially helpful model for adopting a new framework for the preclearance process in the VRA.

#### A. *The Foundations of Reinvention*

The origin of “reinvention” as a concept is traceable to three related sources. The most dominant accounts find that the idea emerged in the private sector, where large corporations saw the potential for changing internal workplace culture to resolve systemic problems in their traditional hierarchical governance structures.<sup>129</sup> Borrowing heavily from academic studies in organizational behavior, proponents of reinvention in these companies presented their ideas as a route to enhance output efficiency and improve workplace morale.<sup>130</sup> In management settings, reinvention principles included specific reforms such as decentralizing authority, flattening governing structures, and increasing employee control over the workplace decisionmaking.<sup>131</sup> All of these changes were accomplished with the goal of increasing consumer satisfaction with a company’s

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127. See John Kamensky, *A Brief History of Vice President Al Gore’s National Partnership for Reinventing Government During the Administration of President Bill Clinton 1993-2001*, NAT’L P’SHP FOR REINVENTING GOV’T (Jan. 12, 2001), <http://govinfo.library.unt.edu/npr/whoware/historyofnpr.html>.

128. These scholars include Ted Gaebler, David Osborne, Jonathan D. Breul, and John M. Kamensky.

129. John M. Kamensky, *Role of the “Reinventing Government” Movement in Federal Management Reform*, 56 PUB. ADMIN. REV. 247, 248-49 (1996).

130. See generally DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1993). This book sparked the movement and coined the phrase “reinventing government” that would later become the basis for the National Partnership for Reinventing Government.

131. See *id.* at 20-24.

products and services.<sup>132</sup>

The fundamental ideas giving rise to reinvention also can be found in the traditional work in public choice theory. Writers such as Mancur Olson,<sup>133</sup> Gordon Tullock,<sup>134</sup> and William Niskanen<sup>135</sup> developed models of governance that emphasized the role of local government officials in maintaining a democratic society.<sup>136</sup> Aside from the functions of more formal institutions such as legislatures and courts, a bureaucracy's relationship with private citizens affects the level of public acceptance of and adherence to governmental authority.<sup>137</sup> A record of bureaucratic competence and effectiveness creates confidence in the state's ability to address collective problems; it also enhances the credibility of the state's commitments and threats. Without reliable performance and responsiveness from administrative agencies, the individual citizen has little reason to comply with the demands of the state.<sup>138</sup> Accordingly, this literature teaches that the proper functioning of bureaucracies can contribute to the longevity of any political regime.

The roots of reinvention also have a home in public administration literature, which commonly takes a cause-and-effect approach to examine efforts to reshape government structures. Much work in this area is concerned with more measurable outcomes such as public welfare and distributional equality, as opposed to more abstract concepts relevant to political theories of governance.<sup>139</sup> Unlike public choice models for bureaucratic service, public administration scholars commonly trace the historical development of the state's bureaucratic structure.<sup>140</sup> They often examine the results of reorganization strategies to determine how effectively a given approach succeeds in aligning the various political interests necessary to achieve a structural change.<sup>141</sup> A common focus

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132. See *id.* at 16-20.

133. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

134. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

135. See WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

136. *Id.*

137. See generally Richard S. Whitt, *Adaptive Policymaking: Evolving and Applying Emergent Solutions for U.S. Communications Policy*, 61 *FED. COMM. L.J.* 483 (2009).

138. See *id.* at 496-504.

139. See Margo L. Bailey, *Cultural Competence and the Practice of Public Administration*, in *DIVERSITY AND PUBLIC ADMINISTRATION: THEORY, ISSUES, AND PERSPECTIVES* 177, 180-85 (Mitchell F. Rice ed., 2005); see also Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 *AM. POL. SCI. REV.* 1057, 1060-62 (1956).

140. See, e.g., DAVID G. FREDERICKSON & H. GEORGE FREDERICKSON, *MEASURING THE PERFORMANCE OF THE HOLLOW STATE* 1 (2006) (noting that "in the classic public administration ethos, well-managed governments will perform well").

141. See Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 *TEX. L. REV.* 1741, 1759 (2008) ("For public administration, the tool of choice to

of study is how the U.S. President and his cabinet can enact organizational changes in the executive branch that can further his policy goals. Significant changes are rarely possible through executive orders alone because of the multiple centers of power in agencies; persuasion and consensus are essential to developing a new governing structure.<sup>142</sup> This work is often quite dependent upon context, although many writers attempt to draw parallels across historical periods and government agencies.

### B. *The Reinventing Government Experience*

In the 1990s, the National Performance Review (NPR) was the Clinton administration's comprehensive effort to improve the function of government agencies.<sup>143</sup> Reacting to the historical association of Democrats with the runaway growth of an ineffective bureaucratic state, President Clinton campaigned on a commitment to "mov[e] from red tape to results to create a government that works better and costs less."<sup>144</sup> This approach, adapted from a scholarly study of agency development called *Reinventing Government*, was a prominent theme in Clinton's blueprint for a domestic program. Government reform was an influential element in substantive policies that formed the "New Democrat" agenda.<sup>145</sup> Citing the lack of public confidence in government efficacy, the administration called for "a new customer service contract"<sup>146</sup> in citizen-government relations, and it sought "to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment."<sup>147</sup>

Earlier presidential efforts at reforming administrative agencies typically relied upon external commissions to conduct reviews and provide recommendations. The problem with the so-called "blue ribbon panel" strategies, though, was that partisan wrangling over panel appointments sometimes consumed large quantities of time and resources; in some cases, naming a panel blunted momentum for reform. Additionally, the selected members tended to avoid more critical examinations for fear of potentially

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promote good management is rigorous measurement of agency and program performance.").

142. See Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 477 (2010) ("By increasing the numbers of political appointees in the executive branch, Presidents have also increased their own managerial responsibilities as they try to implement coherent policies.").

143. See AL GORE, *COMMON SENSE GOVERNMENT: WORKS BETTER & COSTS LESS* 1 (1995).

144. AL GORE, *FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS*, at i (1993).

145. OSBORNE & GAEBLER, *supra* note 130; see generally KENNETH S. BAER, *REINVENTING DEMOCRATS: THE POLITICS OF LIBERALISM FROM REAGAN TO CLINTON* (2010).

146. GORE, *supra* note 144, at i.

147. President Bill Clinton, Remarks Announcing the Initiative to Streamline Government (Mar. 3, 1993), available at <http://govinfo.library.unt.edu/npr/library/speeches/030393.html>.

divisive and volatile choices about downsizing or eliminating an agency.<sup>148</sup> Accordingly, the final reports from these panels rarely offered any serious plan of action for restructuring government; once announced, these commission recommendations often sat untouched. In fact, the review panel authorized by Congress in 1992 (months before Clinton was elected) never was staffed by his predecessor due to internal bickering about basic staffing decisions.

The Clinton approach was decidedly different. Shortly after entering office, Clinton tasked Vice President Gore to lead a six-month review of government administration, which culminated in a report that included specific policy recommendations.<sup>149</sup> Gore amassed an NPR team of 250 civil servants representing multiple sectors within the government workforce to gather information from various government agencies.<sup>150</sup> This review team consisted of top officials in Washington, D.C., local bureaucratic employees, and state officials who had run similar reinvention efforts for their own civil service systems.<sup>151</sup> Importantly, the group's review strategy utilized its diversity to obtain several perspectives on governmental performance. The NPR spoke directly and extensively with federal employees and gathered input from over 30,000 citizens about their experiences with government administration.<sup>152</sup>

The NPR recommended that agencies form separate "reinvention teams" to direct the implementation of the new agency policies developed in the system-wide review stage.<sup>153</sup> Additionally, the NPR encouraged the creation of "reinvention laboratories" within agencies—more informal groups that could think creatively and pioneer innovative solutions to administrative problems—and researched successful pilot programs already underway.<sup>154</sup> Vice President Gore personally conducted a series of town hall meetings, and a public summit took place to engage business, government, and academic elites in the discussion on reform.<sup>155</sup>

While the NPR was in the midst of compiling its report in 1993, Congress passed the Government Performance and Results Act, which was intended to facilitate a results-oriented approach to the administration of government.<sup>156</sup> Permitting "flexibility in return for accountability," the Act allowed agencies to request waivers of compliance with certain regulatory requirements if they met

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148. See, e.g., William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503, 517-20 (2006).

149. Jonathan D. Breul & John M. Kamensky, *Federal Government Reform: Lessons from Clinton's "Reinventing Government" and Bush's "Management Agenda" Initiatives*, 68 PUB. ADMIN. REV. 1009, 1011 (2008).

150. *Id.*

151. *Id.*

152. See GORE, *supra* note 144, at 14-15.

153. JOHN KAMENSKY, NAT'L P'SHIP FOR REINVENTING GOV'T, WHO WE ARE, A BRIEF HISTORY (Jan. 1999), available at <http://govinfo.library.unt.edu/npr/whowere/history2.html>.

154. *Id.*

155. *Id.*

156. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285.



certain other requirements.<sup>157</sup> The 103rd Congress passed thirty bills implementing NPR recommendations.<sup>158</sup>

In 1994, the NPR assisted numerous federal agencies in creating standards for customer service;<sup>159</sup> hundreds of obsolete programs were eliminated;<sup>160</sup> Congress successfully passed legislation reforming the procurement system;<sup>161</sup> and the NPR alleged that levels of satisfaction among citizens and federal employees had doubled.<sup>162</sup> By 1995, over 100,000 employees had been removed from the federal workforce<sup>163</sup> (that number was predicted to exceed 200,000 by 1996, leading to the smallest federal workforce in 40 years<sup>164</sup>). The NPR also claimed billions of dollars of reduction in debt,<sup>165</sup> although the U.S. Government Accountability Office disputed a direct correlation with adopted NPR recommendations.<sup>166</sup>

In September 1995, the NPR generated a second major report, *Common Sense Government*, with a new list of 250 recommendations.<sup>167</sup> And at the beginning of President Clinton's second term, the NPR effort underwent a change in focus.<sup>168</sup> The effort was renamed the "National Partnership for

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157. GORE, *supra* note 144, at 34.

158. 141 CONG. REC. H1960 (daily ed. Feb. 21, 1995) (statement of Rep. Thurman).

159. See KAMENSKY, *supra* note 153.

160. 141 CONG. REC. H1959 (daily ed. Feb. 21, 1995) (statement of Rep. DeLauro); Breul & Kamensky, *supra* note 149, at 1014.

161. 141 CONG. REC. H1957 (daily ed. Feb. 21, 1995) (statement of Rep. Maloney).

162. Breul & Kamensky, *supra* note 149, at 1014.

163. CONG. REC. H1957 (daily ed. Feb. 21, 1995) (statement of Rep. Maloney). Most of the phasing out occurred through a legislated buyout plan (the Federal Workforce Restructuring Act of 1994). See Statement on the National Performance Review, 140 CONG. REC. S12937 (daily ed. Sept. 14, 1994) (statement of Sen. Glenn, Chairman of the Sen. Gov't Affairs Comm.) (referring to the federal employee buyout bill); GORE, *supra* note 144, at 14 (expressing the intention to implement the downsize of the workforce through a buyout). Indeed, the issue of eliminating federal jobs had raised some attention in the media. See, e.g., Gwen Ifill, *Plan to Tighten Government Could Affect 100,000 Jobs*, N.Y. TIMES, Sept. 1, 1993, at A16; Gwen Ifill, *Washington Memo: In Trying to Streamline Government, Gore Fights a Battle Many Have Lost*, N.Y. TIMES, Sept. 5, 1993, at 38 (noting that proponents of the downsize avoided using the word "layoff").

164. 141 CONG. REC. H1957 (daily ed. Feb. 21, 1995) (statement of Rep. Maloney); *id.* at H1959 (statement of Rep. DeLauro); George Nesterzczuk, *Reviewing the National Performance Review*, 1996 REGULATION 31, 35-36 (1996).

165. 141 CONG. REC. H1958 (daily ed. Feb. 21, 1995) (statement of Rep. DeLauro); Breul & Kamensky, *supra* note 149, at 1014.

166. U.S. ACCOUNTABILITY OFFICE, GAO/BGO-99-120, NPR'S SAVINGS: CLAIMED AGENCY SAVINGS CANNOT ALL BE ATTRIBUTED TO NPR (1999), available at <http://www.gao.gov/archives/1999/gg/99120.pdf>; Breul & Kamensky, *supra* note 149, at 1014; Nesterzczuk, *supra* note 164, at 35.

167. See GORE, *supra* note 143.

168. Following a difficult period in 1995 when the government was trying to balance the budget, some said that the NPR movement had ebbed slightly. See, e.g., Stephen Barr, *Gore's*

Reinventing Government,” and proponents began targeting thirty-two “high impact” agencies, chosen because of their level of interaction with the public.<sup>169</sup> The NPR focused on assisting in the complete “culture change” at those entities by allowing reinvention policy to permeate every aspect of their day-to-day administration.<sup>170</sup> The NPR compiled practical “reinvention rules” in the *Blair House Papers* and pursued initiatives such as “Access America,” a project designed to facilitate electronic government.<sup>171</sup>

The NPR also facilitated communities of practice, working with state and local governments to address different but related policy issues in logical, effective combination. In this way, the NPR “became a convening authority and a neutral meeting place of cross-agency efforts”<sup>172</sup> and “piloted the development of performance-based organizations”<sup>173</sup> (PBOs). The innovation successfully transformed three of the substantive policy areas at the core of the President’s agenda: “child health insurance, safe cities, and the twenty-first century workforce.”<sup>174</sup>

### C. Key Elements of Reinvention

While scholars have discussed a variety of reasons for the overall success of the Clinton-Gore reinventing government strategy, the point of the present examination is to identify aspects of the reinvention program that can be applied to the voting rights preclearance system. In this connection, three specific elements of the reinventing government initiative are worthy of consideration: setting goals, enhancing efficiencies, and encouraging innovation.

1. *Clarifying Goals.*—One of the core governing principles expressed by the NPR was “back to basics,” a concept that meant returning to the core goals of each agency’s work. A common complaint during the NPR’s systemic review was that agency officials showed little interest in pursuing any goals associated with their perceived functions.<sup>175</sup> Instead of providing quality service to a

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*Team Turns to Making Reinvention Deliver; At 5-Year Point, 32 Agencies’ Goals Are Readjusted*, WASH. POST, Mar. 3, 1998, at A15 (noting that commentators said the effort had “defused,” lost momentum, and was on “automatic pilot”).

169. Breul & Kamensky, *supra* note 149, at 1013-14; KAMENSKY, *supra* note 153.

170. See JOHN M. KAMENSKY, NAT’L P’SHIP FOR REINVENTING GOV’T, REINVENTION IN THE SECOND CLINTON-GORE ADMINISTRATION: CHANGING THE CULTURE OF GOVERNMENT AGENCIES—1997-2001 (last visited Nov. 14, 2010), available at <http://govinfo.library.unt.edu/npr/whoware/historypart4.html>.

171. See generally BILL CLINTON & AL GORE, NAT’L PERFORMANCE REV., BLAIR HOUSE PAPERS (1997), available at [govinfo.library.unt.edu/npr/library/papers/bkgrd/blair.html](http://govinfo.library.unt.edu/npr/library/papers/bkgrd/blair.html) (Jan. 1997); see also ACCESS AMERICA, <http://govinfo.library.unt.edu/accessamerica/> (last visited Nov. 14, 2010).

172. Breul & Kamensky, *supra* note 149, at 1014.

173. *Id.*

174. *Id.*; see also KAMENSKY, *supra* note 153.

175. See Breul & Kamensky, *supra* note 149, at 1013-14.

constituency or enhancing some substantive goal identified in legislation, the public reported that agency officials neglected or ignored the needs of constituents.<sup>176</sup> Their attention seemed less directed to responding to requests for assistance than to extending the life of the agency. In other cases, agencies had failed to fulfill any mandate due to an absence of clear goals; others failed because different levels in the agency pursued multiple or even conflicting policy goals.<sup>177</sup>

In response to this combination of bureaucratic lethargy and confusion, the reinvention program mandated that all agencies identify clear, attainable objectives to guide their operation.<sup>178</sup> Unlike a typical command-and-control directive, however, the NPR established working groups that included agency employees, federal managers, and consumers to articulate these operational goals. These working groups gathered information from a variety of sources, including public surveys, agency manager interviews, and records from the relevant congressional oversight committee.<sup>179</sup>

Furthermore, these initial working groups were tasked to identify objective goals within each agency that could be assessed by the public. The goals were tailored to the particular needs and capacity of a given agency because the groups were differentiated by substantive area.<sup>180</sup> Additionally, the goals reflected a common understanding because each group also reflected a variety of major interests that were relevant to the agency's work. With these articulated objectives in place, NPR officials predicted that reinvented agencies could employ internal reforms organized around a uniform purpose.<sup>181</sup>

2. *Assessing & Enhancing Efficiencies.*—A core feature of the NPR reinvention campaign was “cutting red tape” inside the various federal agencies.<sup>182</sup> With a guiding purpose for its work clearly established, an agency could then begin a close review of its internal operations to assess how well employees accomplished its aims. Reinvention teams recognized that this effort required reducing or eliminating regulations that interfered with agency performance. The NPR team also pursued financial savings by removing redundant or inefficient sectors of the federal workforce.

Both of these tactical steps were politically important. Each helped to dismantle the very stark image of bloated, inefficient agencies, a powerful symbol that fed into the public's strongly negative perceptions of government performance and responsiveness. A common frustration reported in the NPR's early public satisfaction surveys was that internal rules were so indecipherable

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176. *Id.*

177. *Id.*

178. *Id.* at 1017 (“Agencies were expected to develop plans, identify the responsible officials, and apply resources to achieve these improvement goals within their own organization.”).

179. *Id.* at 1011.

180. *See id.*

181. *See id.*

182. *Id.* at 1013; *see also* GORE, *supra* note 144, at 2-3.

that they deterred citizens from seeking services.<sup>183</sup> Simplifying the maze of forms, procedures, and requirements improved accessibility for citizens—particularly persons with limited education and financial means who depended on the reliable and efficient delivery of agency service.

How was this part of the reinvention regime implemented? The NPR summarized its practical aims as challenging agencies so that they worked better and cost less.<sup>184</sup> By focusing on aspects that would accomplish their agreed-upon ends more efficiently, the agencies would become more results-oriented under this approach. Removing procedural barriers started with identifying essential components of each agency's operation.<sup>185</sup> These assessments involved interests at every stage of policymaking from formation to delivery at the point-of-contact with consumers. This effort made it possible to eliminate unnecessary or unhelpful steps while promoting those functions that promoted the agency's effectiveness.

For the thirty federal agencies and bureaus whose functions directly engaged segments of the public, including the National Park Service and the Internal Revenue Service, the program prompted the implementation of discrete but visible policy changes that helped improve public accessibility. In the IRS, for instance, this meant expanding telephone service so that customers could contact officials twenty-four/seven during tax season.<sup>186</sup> Similarly, the National Park Service directed employee guides to include explanations in their formal tours showing why a particular location merited funding from the taxpayer.<sup>187</sup> Each of these changes provided a strong signal to the user that agencies were adopting a more open and responsive culture.

Aside from promoting these policies, the NPR established agreed-upon metrics for tracking improvements in agency functions. Using the findings from the multi-level working groups, the NPR operationalized the concept of "work[ing] better" by identifying objective markers of efficiency that were specific to each agency's function.<sup>188</sup> Accounting for these measurements in the reinvention program provided agency operatives with an incentive to succeed in promoting the goals of the agency. Further, the agency's managers could easily mark the progress of its units and test various programmatic ideas. Perhaps most importantly, these measures were transparent. Accordingly, they recruited public involvement in maintaining the quality of agencies. A typical metric of success

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183. See Breul & Kamensky, *supra* note 149, at 1014.

184. See *id.*

185. *Id.* NPR's efforts to reduce costs "led to a reduction in the size of the federal workforce of 426,200, the passage of 90 pieces of legislation, the elimination of 250 obsolete programs, the reduction of 640,000 pages of unnecessary internal regulations, and the elimination of another 16,000 pages of regulations affecting the public and businesses." *Id.*

186. See *id.*

187. See *id.*

188. *Id.* (using objective markers such as customer and employee surveys to gauge the perceived success of the NPR's efforts).

was public satisfaction with the delivery of services.<sup>189</sup> While it was not the only basis for assessment, noting public sentiment helped assure that bureaucracy remained alert to address the needs and concerns of the end-users of public services.

3. *Encouraging Innovation.*—The third notable aspect of reinvention was encouraging innovation at the agency level. If identifying efficiency was the core of reinvention, innovation was the most enduring way of entrenching the effects of a reform strategy. Reinvention's departure from more traditional reorganization efforts was declining the formal announcement of major policy changes from the cabinet secretary's office in Washington, D.C. Instead, the NPR redefined the agency's internal culture starting with the day-to-day functionaries within the agencies.<sup>190</sup> The theory behind this approach was that changes in culture depended upon mid- to low-level civil servants embracing different norms. Only with their willingness to pursue innovation could the agency avoid the low ratings in public surveys that gauged their flexibility in responding to new types of problems.

In at least two specific ways, the bottom-up approach to reinvention improved the agency's ability to innovate. First, the internal innovation laboratories established a greater sense of ownership and control at the point-of-contact with the public because these entities involved employees at every agency level. Under the traditional system, local agency officials had little opportunity to contribute to the framing of important management policies.<sup>191</sup> Frontline workers stationed outside of Washington, D.C. were generally the objects rather than subjects of significant reform efforts. With a clear stake in the success of the new management strategy, civil servants had greater incentive to exercise their discretionary authority to address unanticipated problems of those seeking assistance.<sup>192</sup> The reoriented approach engendered a greater sense of ownership and regard for the new culture.

Additionally, the reinvention program was also mindful to permit the agency to evolve over time. Long after the initial reinvention campaign had run its course, the NPR members desired to leave a structure that could continue to foster new management ideas.<sup>193</sup> This formula for ongoing innovation relied on maintaining channels of communication to all parts of the agency. It also required the ability of local agency officials to experiment with policy ideas that

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189. *Id.*

190. *Id.* at 1011 (noting that breaking from tradition included recruiting career government employees and forming a team of 250 staff “with each major agency creating its own internal teams”).

191. *See id.* at 1013.

192. *Id.* (“The NPR launched a broad effort to encourage frontline staff to incorporate the principles of reinvention into their day-to-day work: putting customers first, cutting red tape, empowering employees, and cutting back to basics. This became a broader movement in the federal workforce to reshape the governmental bureaucratic culture to be more entrepreneurial and less rule driven.”).

193. *See id.*

were tailored to their specific experiences. Not only did these laboratories create an incentive to accept the standards-based culture in governmental agencies; the people most likely to interact with the public possessed authority to find new ways to be responsive. In other words, local officials were empowered to seek innovative solutions (within limits) in their agencies and then pass along their experiences to agency leaders in Washington, D.C.

The reinvention campaign included other incentives for agency employees to participate in the innovation agenda. The most publicized of them was the Hammer Award, a prize given to federal employees throughout the government who had succeeded in introducing new, effective ways of controlling costs and improving the quality of agency service.<sup>194</sup> By making these awards available, the framers established a multi-agency network for passing along ideas to advance agency management. The reinvention movement allowed even lower-level employees to transplant their ideas across substantive areas. These efforts were not always popular among senior management in the executive branch,<sup>195</sup> but they established a norm of continually improving public works in response to new conditions.

#### IV. APPLYING REINVENTION TO THE PRECLEARANCE SYSTEM

This final Part applies the concept of reinvention to the VRA's preclearance system. Building on observations from Part III, I discuss the preconditions necessary for reinvention of the preclearance system to work in practice. As noted earlier, the present submission and review process suffers from three specific pathologies: (1) a lack of clear goals; (2) indeterminate metrics for charting the jurisdiction's progress; and (3) a stalemate on innovative changes in electoral structures. The politics at play in each of the legislative reenactments of the statute contributed to this outcome. The discussion in Congress avoided any resolution of these difficult issues in order to avoid a political impasse.<sup>196</sup>

I submit that a different approach—reinvention—would respond to these systemic problems. Also included in this section are some concrete ideas about what state and local governments might do to in furtherance of reinvention. This new framework provides clear goals for covered jurisdictions to accomplish, identifies ways to track and enhance efficiencies in the process, and creates opportunities for the stakeholders in covered jurisdictions to develop innovative methods of achieving their goals.

##### *A. The Goal of Reinvented Preclearance System*

The most controversial task for a reinvention effort in this context is establishing a clear purpose for the preclearance system. What exactly is to be

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194. *Id.* at 1021.

195. *See id.* at 1020. NPR efforts were met with skepticism from the Executive Branch, who doubted the NPR's ability to follow through with its initiatives. *Id.*

196. *See, e.g.*, 152 CONG. REC. S8024 (daily ed. July 20, 2006); 152 CONG. REC. H5131-207 (daily ed. July 13, 2006).

accomplished with an additional twenty-five years of preclearance oversight? The text of Section 5 indicates that its function is to deny practices with a purpose or effect of denying or abridging the effective exercise of the franchise.<sup>197</sup> But this tells us very little about the strategic goal for the provision in the places where it applies. The question about purpose is a deceptively simple one, especially since the original framers of the original provision were vague about any goal. Further, each reenactment reveals a lack of consensus about how to resolve this issue.

The absence of a shared understanding is evident from the competing characterizations of Section 5's purpose. For its part, the U.S. Supreme Court has shifted its view of what the provision is designed to do. Shortly after 1965, the Court had endorsed a very robust application of the provision in *Allen v. State Board of Elections*.<sup>198</sup> Since then, the Court has supplanted that view with a more limited understanding—that Section 5 simply serves as a deterrent for “backsliding” by covered jurisdictions.<sup>199</sup> This “retrogression only” view of the provision would address only a small share of discriminatory practices, leaving the bulk of enforcement tasks to other parts of the statute.<sup>200</sup> The Justices have consistently rejected interpretations that preclearance should provide significant, independent protections beyond the remedies found in Section 2 of the statute.<sup>201</sup> This approach suggests a very modest end for Section 5, since only the most overt state conduct would be considered retrogressive.

But the Court is not alone in its confusion about the goal of the preclearance remedy. The reenactment debates in Congress included several asserted purposes of Section 5.<sup>202</sup> Those who opposed legislative extension of Section 5 viewed this provision as a temporary means of blocking the specific types of racial exclusion from the political system.<sup>203</sup> By eliminating the most significant

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197. 42 U.S.C. § 1973 (2006).

198. 393 U.S. 544, 565-66 (1969). In rejecting a narrow conception of the provision, the Court stated:

The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover . . . the Act gives a broad interpretation to the right to vote, recognizing that voting includes “all action necessary to make a vote effective.”

*Id.* (internal citations omitted).

199. H.R. REP. NO. 94-196, at 57-58 (1975) (“Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.”).

200. See *Bossier II*, 528 U.S. 320, 329 (2000) (finding the concept of retrogression to apply to both the “purpose” and “effects” prongs of the prohibitions found in Section 5); *Beer v. United States*, 425 U.S. 130, 141 (1976).

201. See generally Crayton, *supra* note 16.

202. See generally Luis E. Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 130 (2007).

203. See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act*, *supra* note 95, at 8-10 (statement of Richard L. Hasen, Professor of Law, Loyola School of Law); *id.* at 13-14

barriers to minority political participation, these members expected that the provision would be in place only for a very limited time. Accordingly, this group grew far less comfortable with the repeated extension of these tools to address new political problems, especially where its application was arguably uneven or inequitable.

Contrasting with this view is the claim by Section 5 advocates. Their understanding was that Section 5 was directed toward achieving more substantive changes than either of the aforementioned approaches would allow.<sup>204</sup> Applying the statute as they imagined would address multiple types of voting problems. And the process would remain in place until the vestiges of racial discrimination entirely disappeared. This conception of the remedy reflects the aim found in the story of Sisyphus.<sup>205</sup> While that character's reasons for moving the stone up the hill were never quite clear, he remained committed to the seemingly endless task.

In contrast to both of these contrasting approaches, I propose a distinct way of defining the aims of the preclearance system. Breaking the impasse from these reenactments requires a new understanding that embodies elements of what each side desires in a refined preclearance provision. Rather than adopting an indefinite procedural goal (as the current defenders of Section 5 want) or one that is too limited to be effective (which reflects the Court's thinking and perhaps that of some opponents to the current law), the framers of a reinvented system should specifically announce that *jurisdictional transformation* is the goal of the provision.

By transformation, I refer to a deep and durable change in the electoral structures and processes within a jurisdiction so that their inputs include the opinions of minority communities and their outcomes reliably reflect the exercise of that community's political power.<sup>206</sup> As a concept, transformation cannot be

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(statement of Samuel Issacharoff, Professor of Law, New York University Law School); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10-12 (2006) (statement of Richard Pildes, New York University Law School) [hereinafter *The Continuing Need for Section 5 Pre-Clearance*].

204. See, e.g., J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 53 (1999) (stating that the VRA is vital to the enforcement of the Fourteenth and Fifteenth Amendments); Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in *CONTROVERSIES IN MINORITY VOTING* 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992) (stating that the VRA is "one of the most effective instruments of social legislation in the modern era of American reform"). See generally ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 264-66 (2000).

205. See Albert Camus, *The Myth of Sisyphus*, in *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 88, 91 (Justin O'Brien trans., 1955). In this myth, the gods condemned Sisyphus to spend every day rolling a rock up a hill, only to have the rock fall to the bottom, requiring Sisyphus to begin his labors endlessly yet again.

206. The idea for the term "transformation" is partly drawn from the program of reform of government and economic institutions in South Africa. See *Bato Star Fishing (Pty) Ltd. v. The Minister of Envtl. Affairs* 2004 (2) SA 616 (CC) at 3 (S. Afr.). There, the term relates to a broader



easily characterized as a goal that is purely “procedural” or “substantive” in the manner that these terms are commonly employed in scholarly discussions. Instead, transformation takes aim at the basic structures and practices that inform governing institutions.

A crucial element of transformation is that it is sensitive to the problems associated with path dependence in institutions. Covered jurisdictions are home to governing institutions that have historically excluded or limited the political involvement of racial minority groups over decades. The enduring effects of this long term exclusion are not comprehensively addressed by simply changing procedural rules. Such changes do not address the enduring advantages and opportunities that the institutional structure has provided for favored groups. Traditional voting rights remedies have certainly improved such systems with procedural changes, but their reforms accept as given much of the underlying structures in institutions. They do not encourage a more comprehensive consideration of the effects of years of institutional exclusion. Put differently, these traditional reforms do not encourage jurisdictions to start afresh in redesigning governing structures.

A transformed jurisdiction would ensure access to racial and political groups in a given jurisdiction to join deliberations about the merits of proposed electoral rules and procedures. Further, transformation would call attention to the likely results of a change in minority communities as an indication of its merit.<sup>207</sup> Most importantly, transformation offers a specific target that can guide jurisdictions that wish to emerge from the preclearance system. The point of transformation is to organize jurisdictions to do the work of protecting minorities themselves; it would ultimately obviate the need for federal oversight.

### *B. The Means for Reinvention*

Aside from setting a specific goal for a reinvented preclearance system, a proposal must also take serious account of the ways that covered jurisdictions can achieve this end. This aspect involves developing incentives for stakeholders in the relevant unit (in the 1990s version, this consisted of employees, end-level customers, and cabinet level officers). Unlike traditional command policies, which can invite opposition and shirking by those who execute the strategy, reinvention tends to harness the traditional interests within the targeted institution.<sup>208</sup> At the same time, reinvention advocates in the Clinton era also

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effort to shift a greater share of financial power to black Africans who were excluded from enjoying the wealth under the apartheid regime. This idea also is similar to the concept of unitary status in the school desegregation cases, in which courts have established a benchmark that determines when a school district no longer requires federal oversight.

207. Importantly, I mean to distinguish a concern about quotas from the one advanced here; as the Court has itself acknowledged, the likely effects of a proposed change on minority communities is a relevant consideration in assessing its viability under Section 5.

208. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 13 (1995) (noting that command policies are a remnant of the Brownlow Commission,

championed the adoption of quantifiable metrics within each agency to gauge performance over time.<sup>209</sup> These measures assess matters that are relevant to improving efficiency in the short term and chart the agency's overall progress in achieving its goals in the long term.

Reinventing preclearance can utilize both of these features in order to improve the existing system. First, the provision should take a more explicit account of the relevant stakeholders in the process. The current system empowers only two major players in a formal preclearance review—state officials and the DOJ. But these are not the only groups with significant stakes in the outcome of a review; the concerns of minority voters, minority representatives, and the political parties are all relevant to whether a proposed change in election law will actually be enacted.<sup>210</sup> However, they may normally play only a background role in determining whether a change violates the provision.<sup>211</sup>

As the preceding discussion suggests, the additional groups that are only indirectly involved in the preclearance process might be interested in playing a more formalized role in election policy development. Perhaps because they are not fully involved in the review stage of the process, they also do not often find common cause with each other. To break the logjam, Section 5 should develop incentives that help to align these interests. One way of doing so is by encouraging two cultural norms in local jurisdictions—cooperation and deliberation.<sup>212</sup> These incentives serve the overall goal of transformation in that each requires actors to pay due regard to the interests of racial minorities, along with their other self-interested concerns.

Further, a reinvented preclearance system should provide better guidance for jurisdictions that wish to emerge from federal review. Assuming that transformation is the appropriate goal of the system, the internal workings of Section 5 should all serve that aim. However, the current system does a rather poor job of providing specific guidelines for obtaining what some of the 2006

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which saw “‘policy’ as the joint domain of the President and Congress, whereas ‘administration,’ it asserted, must be under the direct and exclusive command of the President”); *see also id.* at 112 (explaining that reinventionist economic policies encourage “government (a) to create economic incentives to engage in socially desirable conduct, and (b) to permit the market to decide how companies respond to those incentives”).

209. *See id.* at 6-7 (describing Clinton administration's executive orders asserting centralized control over the regulatory process and evaluating Clinton's executive order as part of a “reinventing government” program).

210. *See, e.g.,* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668-87 (1998).

211. Indeed, the Supreme Court has also denied these actors formal input in the review process by denying lawsuits by any of these actors to challenge the DOJ's administrative decision under Section 5 to permit a proposed election change despite potential discrimination concerns. *See Morris v. Gressette*, 432 U.S. 491, 504-05 (1977).

212. In the final Part of this paper, I describe specific structural innovations in the preclearance system to encourage both of these norms in covered jurisdictions. *See infra* Part IV.C.

opponents described as the “clean bill of health.”<sup>213</sup> Much of the problem relates to the ongoing conflict about how to tell when a jurisdiction has done enough to merit a bailout.

Evident in both of the congressional reenactments of the VRA was an empirical debate about judging the effectiveness of the existing system.<sup>214</sup> To recount the problem briefly, Section 5 opponents argued that improved minority registration and voting rates, coupled with the declining number of federal objections to proposed changes, showed that some of the covered jurisdictions no longer required oversight.<sup>215</sup> Advocates of Section 5 viewed the same information with greater skepticism, claiming that this evidence merely showed that preclearance had effectively deterred possible violations.<sup>216</sup> Facing an impasse, the majority rejected possible amendments to change the coverage and bailout provisions and left the existing system (with little chance for state jurisdictions to effectively exit the system) unchanged.<sup>217</sup>

Disagreements about the value of metrics pose an intractable political problem.<sup>218</sup> One cannot test the validity of the opponents’ claims without dismantling the preclearance system. At the same time, leaving the system in place without a clear way to assess progress prevents even the most ardent Section 5 advocates from credibly defending the provision’s effectiveness. A reinvented system should establish criteria that reflect concerns of both opponents and supporters of the current preclearance system, with the understanding that states may pursue these metrics in order to achieve transformation. Some factors may include the measures that were proposed during the enactments, but advocates could contribute additional indicators that

213. See generally Katz, *supra* note 54. Some scholars have proposed ways of interpreting the present statute to permit more jurisdictions the ability to bail out, and the Court itself has recently allowed local jurisdictions that are nested in covered states to bailout of the preclearance process.

214. See, e.g., Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L.L. REV. 385, 394 (2008).

215. See generally *An Introduction to the Expiring Provisions of the Voting Rights Act*, *supra* note 95, at 8-10 (statement of Richard L. Hasen, Professor of Law, Loyola School of Law); *The Continuing Need for Section 5 Pre-Clearance*, *supra* note 203, at 13-14 (statement of Samuel Issacharoff, Professor of Law, New York University Law School).

216. See *supra* note 204 and accompanying text.

217. See Clarke, *supra* note 214, at 394 (stating that “the record shows that this discrimination is systemic and widespread in the covered jurisdictions, appearing at all levels of government including city, county, and state levels”).

218. Attempts to increase coverage by altering the coverage formula failed because those seeking to expand coverage found it impossible to design a neutral trigger that would expand coverage without inciting strong political opposition. Attempts to alter the bailout provision to mollify critics who claimed that bailout was too stringent failed because there was fear it would also accidentally release “bad” jurisdictions from coverage. And any attempt to change the preclearance procedure would have turned into an unending debate on the purpose and utility of Section 5 itself.

assure the full incorporation of minority political interests.

Interestingly, some aspects of the 2006 extension point in this direction. One part of the statute provides funding for a DOJ study to track the extent to which covered jurisdictions have improved levels of minority political participation.<sup>219</sup> However, this directive is silent on the actual measures that are relevant in this review. In particular, no guidance is offered on whether matters like registration rates, preclearance objections, or racial polarization should be included in the assessment. By identifying an overall goal for the preclearance process and also seeking meaningful input from preclearance stakeholders about methods of measuring progress, the DOJ's recommendations can gain considerable legitimacy and avoid another reenactment debate. Accordingly, the metrics for the reinvented program should reflect the consensus view of these groups with interests in a jurisdiction's preclearance compliance.

### *C. Developing Innovative Reform Ideas*

Finally, a reinvented preclearance system should encourage stakeholders to seek innovative ways to transform electoral structures. The ultimate success of the 1990s' reinvention program was its ability to spur a sustained effort within agencies to improve their operation through innovation. The bulk of this work was carried out not by Washington officials but by workers in the heart of the relevant agencies.<sup>220</sup> Ideas for improvement were based on the desires of the agencies' workers, which meant that solutions were tailored to the context of the agency. The government agency experience indicates what shifting cultural norms can accomplish over the long term. The standard operating procedure within a reinvented organization is to pursue innovative ways to accomplish tasks more effectively.<sup>221</sup>

The functions of the preclearance system could improve by incorporating this feature of reinvention as well. Among the most significant problems with the competing interests in the present system is that there is very little incentive for any actor to introduce new ideas to improve elections in a covered jurisdiction. The reason is that multiple political interests must be satisfied in order to approve a plan; additionally, there is inherent uncertainty in the federal review process. Put plainly, changing the system increases the chances that the jurisdiction will land in a courtroom. Faced with these barriers to innovation, election officials have little reason to reconsider the established election rules and structures.

This result is a lamentable by-product of an otherwise defensible system. The genius of Section 5 is that it freezes existing structures in place to prevent states from adopting more harmful laws.<sup>222</sup> However, one cost is that the process can also stymie momentum for new policies that might actually improve the

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219. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2, 120 Stat. 577.

220. See KAMENSKY, *supra* note 153.

221. See Breul & Kamensky, *supra* note 149, at 1013-14.

222. See *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

political system. The inherent adversarial culture among stakeholders in some preclearance jurisdictions can resemble trench warfare—and a common result of these skirmishes is a stalemate. The jurisdiction, meanwhile, makes only the most minimal progress toward reforming its system. At the close of an enforcement period, it is no small wonder that these stakeholders differ greatly about the need for federal oversight.

The politics of a reinvented preclearance system would promote cooperative behavior among the different interests present in a particular jurisdiction. Sometimes those interests would emphasize race, partisanship, or both.<sup>223</sup> Reinvention would encourage the search for effective means of improving election structures so that the stakeholders themselves can take responsibility for election management. This change does not require a wholesale embrace of either side's position in the reenactment debates. Rather, it depends upon the willingness of each camp to find some particular benefit in the mutual goal of transformation. The traditional opponents can view these innovations as steps toward the jurisdiction's emergence from federal oversight. And the proponents of preclearance can view the same programs as more permanent protections that assure meaningful participation for racial minorities at all stages of the political process.

Some concrete examples of such innovations should be informative. Taken from three different states that are part of the preclearance regime, these policies show how jurisdictions may craft their own ways of entrenching the incorporation of racial minorities. Admittedly, the scope of the institutional changes reviewed here is relatively minor (partly due to the internal political roadblocks). But the examples they suggest that a more robust level of innovation is possible if reinvention is taken seriously in a future legislative session focused on Section 5.

1. *Constitutional Revisions.*—An innovation agenda can include enacting constitutional changes that assure consideration of the interests of racial minorities in developing election policies. Following its prolonged redistricting litigation of the 1990s, North Carolina's legislature recognized the inherent inefficiency in enacting district maps that would almost immediately face multiple court challenges.<sup>224</sup> The state did not receive final judicial approval for all of its legislative districts until shortly before the start of the 2000 line-drawing process.<sup>225</sup> Much of the debate concerned claims that the state had violated certain racial fairness norms.<sup>226</sup> Not only did the courtroom wrangling cost the state valuable time and money; it also damaged political alliances across lines of race and party that might have otherwise pursued a broader substantive agenda.

223. See generally Tucker, *supra* note 69 (discussing both minority and bipartisan efforts in the reauthorization of the VRA).

224. See Richard L. Hasen, *You Don't Have to Be a Structuralist to Hate the Supreme Court's Dignitary Harm Election Law Cases*, 64 U. MIAMI L. REV. 465, 468 (2010).

225. See Jocelyn F. Benson, *A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 NEB. L. REV. 124, 154-56 (2009).

226. *Id.*

To avoid this problem, the legislature adopted a series of reforms in its redistricting provisions to avoid the problem of multiple, never-ending lawsuits. First, the changes included a jurisdictional provision to prevent state court litigants from forum shopping and created the potential for consolidating multiple claims.<sup>227</sup> A challenge to any redistricting plan would be filed in a single court in the state's capital, and the hearing would be conducted by a specially appointed panel of state judges representing the three major regions of the state.<sup>228</sup> Most importantly, the legislature added a provision laying out the substantive priorities that would guide the redistricting process in future years.<sup>229</sup> First among these priorities was compliance with the federal rule of protecting the interests of racial minority groups.<sup>230</sup>

North Carolina's strategy of constitutional revision is not unique, but it was the first to fundamentally shift the interests of stakeholders in a preclearance jurisdiction. Democrats and Republicans alike endorsed this reform because they saw specific benefits in this legislation. The jurisdictional rule is sensitive to the correlation between region and partisanship in the design of the court panel, which combined judges from the heavily Republican western counties with those from the more Democratic eastern counties. The state entrenches the minority community's participation in the redistricting process, which is a positive factor in federal review. Additionally, the constitutional priorities for districts require attention to multiple legal considerations—including racial fairness. In answer to those who desired a constraint on traditional gerrymandering, for example, the rules directed line-drawers to avoid separating counties wherever possible.<sup>231</sup> By making the protection of minority political power a primary responsibility, the system assures that legislative and community representatives of black voters will have a hand in shaping the contours of election districts.

2. *Non-Political Actors*.—A more common innovation route is creating non-partisan bodies to make important structural decisions about elections. Today, several states employ some form of independent commission in the process of designing election districts. Arizona, a Section 5 state, is a typical example. Members of the state redistricting commission include two nominees from each political party and one independent.<sup>232</sup> The bipartisan group develops a plan for state and federal election districts following a series of public hearings that involve a variety of community input.<sup>233</sup> In addition to using witness testimony to inform its decisions, the commission also follows criteria defined by statute.<sup>234</sup>

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227. See *Redistricting Overview*, N.C. GEN. ASSEMB., <http://www.ncga.state.nc.us/GIS/RandR07/Overview.html> (last visited Nov. 14, 2010).

228. See *id.*

229. *Id.*

230. See *id.*

231. *Id.*

232. See Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 ARIZ. ST. L.J. 575, 578 (2003).

233. *Id.* at 578-81.

234. *Id.* at 580 (citing ARIZ. CONST. art. IV, pt. 2, § 1(23)).

The idea behind this innovation is that the political institutions in government are overrun by partisan actors who are subject to the pressures of re-election. In service to their party, legislators and governors may resort to manipulating the district drawing process without regard to the concerns of the voting public. The advantage of commissions is that they insulate these decisions from the undue influence of partisanship and gridlock.

A reinvented preclearance system could empower commissions to address a wider number of election policy choices. Like redistricting, several other issues have inherently political consequences that have the potential to hopelessly divide legislatures by both party and race. The implementation of photo identification requirements and vote-by-mail statutes, for example, are as appealing to one party as they are threatening to another. Each of these policies also raises major concerns for its effect on the political power of racial minority groups. By removing the most severe partisan pressures, a commission can consider these policy ideas on their merits and reach decisions that reflect the best interests of the jurisdiction as a whole.

A related point to make about this approach is that commissions need not have final decision-making authority to work. Like budget office ratings, a commission's findings can be just as effective in an advisory capacity. Advisory commissions can pressure political institutions to take account of certain interests that might otherwise be ignored. Christopher Elmendorf has explored how the operation of advisory bodies can enhance important policy choices in a variety of settings.<sup>235</sup> Among them is the constraint on political institutions that can be inclined toward manipulating existing rules for partisan advantage.<sup>236</sup> To the extent that these bodies can reflect the level of diversity present in the jurisdiction, advisory commissions may be a positive influence on the work of traditional political institutions.<sup>237</sup> This role can also constrain any effort by parties to supplant the principle of racial fairness in the political process.

3. *Mini-VRAs*.—Finally, innovation strategies can improve the system by replicating the basic structure of the federal government's voting rights remedies. As with the antitrust arena, voting rights advocates can develop a set of "mini-remedies" that support and enhance protections available in the federal system.<sup>238</sup> In this regard, California legislators approved a law that created the first state-based voting rights act in the country.<sup>239</sup> The California Voting Rights Act (CVRA) supplements rights and remedies that are currently available under the federal Voting Rights Act.<sup>240</sup> Among other things, the statute entitles groups to

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235. See Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1386-94 (2005).

236. See *id.* at 1405-17.

237. *Id.* at 1417.

238. See, e.g., Joaquin G. Avila et al., *Voting Rights in California: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 131, 152 (2007) (stating that the California Voting Rights Act is a significant improvement over Section 2).

239. *Id.*

240. See *id.*

sue even when they are too geographically dispersed to elect a candidate of choice from a single member district in a county.<sup>241</sup> By providing evidence of racially polarized voting, a plaintiff is entitled under the CVRA to judicial remedies that include (but do not require) the imposition of proportional voting systems in county governments that would prevent minority vote dilution.<sup>242</sup>

This type of innovation serves both substantive and procedural interests. Substantively speaking, the CVRA expands the field for minority voters to pursue greater levels of political power. By eliminating the geographic concentration requirement that exists in federal law, the state leaves open the possibility that a court may find that an appropriate remedy might be an election model such as cumulative voting. Several scholars have found that these approaches offer more access for racial minority groups.<sup>243</sup>

There are procedural benefits from this kind of approach as well. First, the statute offers a greater chance for experimentation with alternative systems of political representation.<sup>244</sup> By adopting new election structures in county governments, scholars and policymakers can examine the effects of employing different remedies in a political system. Specifically, these studies can consider the extent to which these reforms change political mobilization, party divisions, and policy responsiveness. That information can be helpful for future cases in which courts must consider the merits of applying these remedies in other jurisdictions, and it can vastly enhance policy discussions about the propriety of incorporating these structures into the state's normal election scheme.

Perhaps most importantly, adopting this kind of innovation can further the jurisdiction's march toward a day when it legislates without federal oversight. Section 5 opponents who want to demonstrate that a state no longer requires coverage might well rely upon the adoption of internal review structures as the most tangible proof that minority concerns will continue to be addressed in election-related decisions.<sup>245</sup> For their part, racial minority groups and other advocates of Section 5 should be willing to accept state-based remedial protection so long as it allows them to maintain a seat at the table during the policymaking process. With a commitment that these structures will be permanent parts of the state's system, this innovation would eliminate the uncertainties of a temporary federal protection. No longer would advocates face the awkward position in reenactments of conceding progress in gaining access to the political system while also enumerating multiple ways that the jurisdiction has fallen short.

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241. See *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (holding that the federal Voting Rights Act makes the geographic concentration of a racial group one of the prerequisites for seeking statutory remedies available under Section 2).

242. CAL. ELEC. CODE §§ 14025-14032 (West 2009).

243. Such scholars, including Michael S. Kang, Lani Guinier, Kathleen L. Barber, and Lee Romney, suggest that cumulative voting or "instant runoff" voting is way to ensure minority representation.

244. CAL. ELEC. CODE §§ 14025-14032 (West 2009).

245. See *supra* note 203 and accompanying text.



### CONCLUSION

This Article has developed in broad strokes the basis for an alternative system that Congress may use to guide any future reconsideration of the preclearance system. The politics around this statute are exceedingly high stakes, and the battle lines on this issue are exceedingly well-defined. Added to this is the volatile confluence of the partisanship with race, which makes any consideration of a new approach to policymaking a tough sell. Yet necessity (like politics itself) tends to make strange bedfellows. The potential for a challenge to the constitutionality of the preclearance system makes revisiting the VRA a priority.

Given the present risks inherent in simply reenacting past debates about the statute, this Article invites legislators to consider adopting reinvention as an approach. If for no other reason, the strategy provides each side in the traditional debate with something to embrace. For opponents who long for the day that the federal government plays no role in its decisionmaking, the approach helps identify the steps necessary to reach that goal. Fairly reflecting the desires of all the stakeholders in preclearance, the approach would provide a tangible route to a “clean bill of health.” At the same time, those who have ardently fought to defend the preclearance system can appreciate the commitment to devise permanent tools that will entrench access to minority political power. With structures in place to encourage cooperation across lines of race and party, a reinvented system will promote transformed jurisdictions that give full meaning to the principles of preclearance.