# In *Shelby's* Wake: Confronting the Third Generation of Voting Barriers

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In June 2013, the United States Supreme Court in *Shelby County v. Holder*[1] struck down Section 4 of the Voting Rights Act of 1965 (VRA), rendering the landmark civil rights law largely impotent. The VRA prohibits state and local governments from imposing any "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . to deny or abridge the right of any citizen of the US to vote on account of race or color."[2] Section 4 establishes the coverage formula designating that certain states and counties with a history of voting discrimination are subject to Section 5 preclearance requirements. Under Section 5, the jurisdictions identified in Section 4 must appeal to a panel of judges on the DC federal court ("judicial preclearance") or to the U.S. Department of Justice ("administrative preclearance") before making any changes to election procedures. Section 4 is therefore the mechanism by which the Section 5 preclearance requirements function; without Section 4, now invalidated by the Supreme Court, those jurisdictions are no longer covered by Section 5 protections. Observers claim that the *Shelby* ruling will potentially disenfranchise citizens whose right to vote was previously protected by Section 5 of the VRA.[3]

By August 2013, conspicuously only two months after the *Shelby* decision, the North Carolina state legislature passed an omnibus election law that opponents claim will restrict access to the ballot.[4] The Voter Information Verifi-

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1: 133 S. Ct. 2612 (2013).

2: 42 U.S.C. §§ 1973-1973aa-6 (2012). The VRA also protects language minorities.

3: Editorial, *An Assault on the Voting Rights Act,* NY Times (Jun. 25, 2013), online at http://nyti.ms/1hbTHlS.

4: Jamelle Bouie, *North Carolina's Attack on Voting Rights*, The Daily Beast (Aug. 13, 2013), online at http://thebea.st/1hv24ao.

cation Act (VIVA)[5] implements unprecedented changes to election practices;[6] it is a uniquely bold measure in its wide-ranging provisions that transform established election procedures. Particularly controversial provisions of the law require photo identification for voters, shorten the early in-person (EIP) voting period, and eliminate same day registration (SDR). This article will use the North Carolina law as a framework to evaluate the recent changes to the VRA. Specifically, would VIVA survive pre-*Shelby* preclearance requirements under Section 5? Would VIVA violate the VRA as it stands in the wake of the *Shelby* decision?

A preliminary answer to the second question should be noted. Specifically, the law may still violate the VRA under Section 2, a provision untouched by the *Shelby* decision. Unlike Section 5, Section 2 applies nationwide. Section 2 establishes a cause of action for individual plaintiffs to initiate lawsuits against changes to voting procedures that, "in the totality of the circumstances," may cause minority voters to have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[7] In fact, the Department of Justice (DOJ) has recently signaled that it will move forward with this tool to challenge VIVA, alleging that certain provisions of the law illegally obstruct voting rights even in the wake of *Shelby.*[8]

Part I of this article examines the differences between Sections 2 and 5, how they operated in tandem in the pre-*Shelby* legal landscape, and how Section 2 may operate alone post-*Shelby*. Part II offers a brief background on the features of the three controversial provisions of VIVA, and evaluates how similar provisions have previously fared with Section 2 challenges and Section 5 applications for preclearance before *Shelby*. Part III introduces the concept of third generation barriers to the franchise to explain why the civil rights community should not focus its attention on re-establishing a Section 4 preclearance formula to re-activate Section 5. This article concludes with a proposal to transform the voting rights framework from one of legal protection from discrimination for race and language minorities to an affirmative,

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5: Voter Information Verification Act, 2013 N.C. Sess. Laws 589.

6: *Monster Law: More Money, Less Voting*, Democracy North Carolina, online at http://www.democracy-nc.org/downloads/MonsterLaw-IDAug2013.pdf.

7: *Id*.

8: Josh Gerstein, *Justice Department Challenges North Carolina Voter ID Law*, Politico (Sept 30, 2013), online at http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html; Section 2 suits are also being brought by the NAACP, the Advancement Project, the ACLU, the ACLU of North Carolina Legal Foundation, the League of Women Voters of North Carolina, and the Southern Coalition for Social Justice.

substantive right to vote for all American citizens.

## I. Section 2 Minus Section 5[9]

How did Sections 2 and 5 operate in tandem, and how might Section 2 operate alone? How effective is Section 2 at protecting minorities' voting rights compared with Section 5?[10] In the past, Sections 2 and 5 have functioned very differently. Here I seek to analyze, using examples of previous applications of Sections 2 and 5, how Section 2 by itself might operate in lawsuits like those against VIVA.

Little research exists on the relative effectiveness of and interactions between Sections 2 and 5. According to Nicholas O. Stephanopoulos, who very recently undertook this subject, "When academics have [previously] explicitly addressed the space between Section 2 and Section 5, they have tended to conclude (without much elaboration) that it is not very large."[11] Even Justice Anthony Kennedy remarked during the *Shelby* oral arguments in February 2013, "it's not clear to me that there's that much difference in a Section 2 suit now and preclearance."[12]

Litigation under Sections 2 and 5 differs in procedure. First, the bodies invoking the protections of the VRA are usually different.[13] Private parties typically initiate Section 2 suits, and the Department of Justice or the federal district court in Washington, D.C. operate Section 5 preclearance.[14] Thus while the federal government is responsible for the relatively low costs of preclearance procedures, private plaintiffs must bear the relatively greater costs of Section 2 litigation themselves.[15]

Second, under Section 2, the burden of proof is on the plaintiff to demon-

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9: The title for this section was inspired by an earlier working title of a particularly illuminating article from Professor Stephanopoulos. See Nicholas Stephanopoulos, *The South After Shelby County,* 2013 Sup. Ct. Rev. (forthcoming 2014), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336749.

10: Nicholas Stephanopoulos, *The Future of the Voting Rights Act,* Slate (Oct. 23, 2013), online at http://slate.me/1nAjYud.

11: Stephanopoulos, 2013 Sup. Ct. Rev. at *2 (cited in note 9).

12: Transcript of Oral Argument, *Shelby County v. Holder*, 133 S. Ct. 2612, No. 12-96 at 37 (Feb. 27, 2013), online at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96_7648.pdf.

13: The Section 2 suit brought by the Department of Justice against VIVA is indeed unusual. Several independent groups are also challenging the law.

14: Stephanopoulos, 2013 Sup. Ct. Rev. at *3 (cited in note 9).

15: *Id*. at *8. However, judicial preclearance is more expensive than administrative preclearance.

strate that the voting policy in question violates the VRA. Under Section 5, the burden of proof is on the jurisdiction to demonstrate that the voting policy it proposes does not violate the VRA; the jurisdiction must establish that its change to voting practices "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."[16] Often, the lawfulness of a challenged policy is clear enough that the Section 2 plaintiff would meet its burden of proof and the Section 5 jurisdiction would likewise not obtain preclearance, or, vice versa, the Section 2 plaintiff would not meet its burden of proof and the Section 5 jurisdiction would likewise obtain preclearance. However, "there necessarily exist circumstances" in close cases in which a Section 2 plaintiff would be unable to demonstrate that the VRA has been violated but in which a Section 5 jurisdiction, on the same facts, would have its proposed electoral changes blocked by the courts or the DOJ.[17] In these situations post-*Shelby*, a challenged policy that would have been blocked by Section 5 would still go into effect because the Section 2 suit proved unsuccessful.

Ultimately these two differences in procedure mean it is likely that a number of voting policies will fall into a procedural gap between Sections 2 and 5. Some policies that would have been blocked by Section 5 will not be challenged at all; some policies will be challenged under Section 2 but will be upheld; and fewer policies will actually be struck down in a Section 2 suit.[18]

Sections 2 and 5 also differ in substance. Looking again to the burden of proof, Section 5 preclearance for a proposed voting procedure is typically denied when there is a simple showing of statistically significant disparate impact on racial or language minorities. The courts have repeatedly confirmed that this interpretation of the Section 5 burden of proof is correct.[19] However, Section 2 plaintiffs have had to demonstrate "something more than disproportionate impact to establish a Section 2 violation."[20] Despite that Section 2 was amended upon the VRA's reauthorization in 1982 to clarify that plaintiffs could bring a complaint under a simple intent or results standard, the courts have consistently misapplied the legislative objective and have demanded "something more."[21] Judicial interpretations of what this "something

16: 42 USC § 1973c(a) (emphasis added).

17: Stephanopoulos, 2013 Sup. Ct. Rev. at *7 (cited in note 9).

18: *Id*. at *6.

19: *Florida v. United States,* 885 F. Supp. 2d 299, 312 (D.D.C. 2012); *Texas v. Holder*, 888 F. Supp. 2d 113, 126, 138 (D.D.C. 2012); *South Carolina v. United States*, 898 F. Supp. 2d 30, 39 (D.D.C. 2012).

20: *Brown v. Detzner,* 895 F. Supp. 2d 1236, 1249 (M.D. Fla. 2012).

21: *Voting Rights Extension, Report of the S. Comm. On the Judiciary on S. 1992*, 97th Cong. 2d Sess., S. Rep. 97-417 at 27 (1982); see generally Bernice Bird,

more" standard actually requires are inconsistent; some rely on vague "Senate Factors" articulated in the Senate Judiciary Committee's Report on the reauthorization, and others require an interaction with social and historical conditions to cause the disparate impact.[22] Section 2 plaintiffs therefore face a heightened yet ambiguous standard of proof, making their demonstration of a violation of the VRA more difficult.

This substantive difference, like the procedural differences, indicates that it is likely that a number of voting policies will fall into a substance gap between Sections 2 and 5. Some policies that would have been blocked by Section 5 may not result in a Section 2 violation if the plaintiff cannot establish the necessary "something more" in addition to the disparate impact on racial or language minorities.[23]

Plainly, given these procedural and substantive gaps, "It is difficult to determine from historical data how many policies that were blocked by Section 5 would have gone into effect had only Section 2 been available to challenge them."[24] It is also difficult to quantify the deterrent effect of Section 5; undoubtedly some voting policies were never proposed in the first place because Section 5 existed as a substantial obstacle to implementation. Additionally, the DOJ occasionally requests "more information" from jurisdictions applying for preclearance, which can prompt the jurisdiction to withdraw its application or revise its proposed voting policy.[25] In these cases it is impossible to know whether the original proposals would have violated Section 5, or Section 2.

How will Section 2 suits fare against North Carolina's new omnibus election law (VIVA)? Before *Shelby*, 40 counties in North Carolina were covered by the Section 5 preclearance requirement. It was in August, only two months after *Shelby* invalidated the VRA's mandated oversight of North Carolina, that the state's legislature passed VIVA. This article will next evaluate how VIVA's three most controversial provisions may have fared under pre-*Shelby* Section 5 preclearance protections and how they are likely to fare in the face of the upcoming Section 2 challenges.

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*Section 2 as An 'Adequate Substitute' for Section 5: Proposing an 'Effects-Only' Test as an Amendment to Section 2 of the Voting Rights Act of 1965* (September 2013) (unpublished manuscript on file with author).

22: Stephanopoulos, 2013 Sup. Ct. Rev. *40 (cited in note 9).

23: *Id*. at 41.

24: *Id*. at 9.

25: Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 756 n. 66 (2006).

## II. Restrictive Provisions of VIVA

Among many controversial measures, critics claim that three particular provisions of VIVA have the potential to restrict minority access to the ballot: a strict photo voter ID requirement, a shortening of the early in-person (EIP) voting period, and an elimination of same day registration (SDR).

### IIa. Strict Photo Voter ID

The concept of a voter ID is nothing new. According to experts, "what is new, however, is the degree to which the voter ID bills that were proposed and passed the 2012 [and other recent] session[s] were restrictive," prohibiting common forms of photo and non-photo IDs and offering no alternative mechanisms for eligible citizens without the required IDs to cast regular ballots.[26] Voter ID rules can vary considerably, and the last few years have witnessed proposals for the strictest laws to date. Only in 2006 did certain states begin to require voters to show government-issued photo ID at the polls in order to cast their ballots.[27] As of 2013, eight states have strict voter ID rules in effect,[28] and seven more will implement similar laws within the next year.[29]

Proponents of photo voter ID rules explain that strict laws are necessary to protect elections from voter fraud. But the type of voter fraud that does exist is on the absentee ballot level; it is not committed by individuals voting in person at the ballot box.[30] Abundant research conclusively demonstrates that in person voter fraud is exceedingly rare and statistically insignificant.[31] Recent research also indicates that three specific factors contribute to the like-

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26: Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012* at 4, Brennan Ctr. for Justice (2012), online at https://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf.

27: *Id*. There, the authors identify Indiana as an example of one such state.

28: Voter Identification Requirements, Nat'l Conference of State Legislatures (visited Dec. 14, 2013), online at http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. The states that currently have strict voter identification rules in effect are Georgia, Indiana, Kansas, Tennessee, Texas, Arizona, Ohio, and Virginia.

29: *Id*. The states that are due soon to implement strict voter identification measures are Alabama, Arkansas, Mississippi, North Carolina, Pennsylvania, Virginia, and Wisconsin.

30: Lorraine Minnite, *Voter Identification Laws: the Controversy over Voter Fraud*, in Matthew Streb, ed., *Law & Election Politics* 88, 95-102 (Routledge 2013).

31: Richard Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* 41-73 (Yale 2012).

lihood that states will propose or adopt strict photo ID laws: Republican control of the state legislature, a traditionalist state political culture, and greater levels of racial diversity.[32]

Critics argue that strict photo voter ID rules may discourage some otherwise eligible voters from casting ballots at all because the burden of obtaining an acceptable ID falls more heavily on vulnerable populations.[33] But the research on the impact of voter ID laws on overall election turnout is inconclusive.[34] Scholars explain that this is because the strictest photo ID laws have been implemented only in very few and very recent elections.[35] The necessary data simply does not yet exist. In the interim, experts suggest that the best approach to measure the effect of strict photo voter ID requirements, particularly in their potential to have a disparate impact on racial minorities subject to VRA protections, is to analyze the population of eligible voters who are least likely to possess an acceptable ID.[36]

In North Carolina, 5% of registered voters have no acceptable photo ID. Black Americans compose 23% of North Carolina's registered voters, but are 34% of those without the photo IDs required under the new law.[37] As a result, the law places the burden of obtaining the required photo ID on more black North Carolinians than on white North Carolinians. This provision of VIVA will therefore apply disproportionately to black Americans.

Neither of the two Section 2 suits litigated thus far against photo voter ID requirements proved successful.[38] However, it is important to note that the courts in each Section 2 case determined that the plaintiffs failed to provide

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32: See generally Kathleen Hale & Ramona McNeal, *Election Administration Reform and State Choice: Voter Identification Requirements and HAVA*, 38 Pol. Stud. J. 281 (2010).

33: Richard Sobel & Robert Ellis Smith, *Voter-ID Laws Discourage Participation, Particularly Among Minorities, and Trigger a Constitutional Remedy in Lost Representation*, 42 PS: Pol. Sci. & Pol. 107, 110 (2009); E. Earl Parson & Monique McLaughlin, *The Persistence of Racial Bias in Voting: Voter ID, The New Battleground for Pretextual Race Neutrality,* 8 J.L. Soc'y, 75, 89 (2007); John Lewis, *A Poll Tax by Any Other Name,* NY Times (Aug. 26, 2011), online at http://nyti.ms/1fRr0qm.

34: See generally Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification – Voter Turnout Debate,* 8 Elec. L.J. 85 (2009).

35: Minnite, *Voter Identification Laws* at 102 (cited in note 30).

36: *Id*.

37: Nick Byrne, *North Carolina Restricts Voting Access in the Name of Reform*, Jurist-Dateline (Aug. 27, 2013), online at http://jurist.org/dateline/2013/08/nick-byrne-voter-ID.php.

38: *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1375 (N.D. Ga. 2005); *Gonzalez v. Arizona,* 677 F .3d 383, 407 (9th Cir. 2012) (en banc).

sufficient evidence that minorities were less likely than white Americans to possess the required identification; neither case even reached the question of satisfying the "something more" standard.[39] Meanwhile, Section 5 preclearance, prior to *Shelby*, successfully blocked three voter ID policies in Louisiana, Texas, and South Carolina.[40]

### IIb. Shortened EIP Voting Period

Early in person (EIP) voting is a particular type of early voting that does not account for the use of no-fault absentee ballots. EIP voters cast their ballots at specified early voting stations in locations similar to traditional polling places,[41] with the available period ranging from four to forty-five days before Election Day depending on the state.[42] EIP voting has become increasingly popular in recent years; while in 1972, only five states offered EIP voting, by 2010, thirty states and Washington, DC had an EIP policy in place.[43] And while only 4% of the voting population cast ballots at early voting sites in 2000, the rate more than quadruped in eight years: 18% used EIP voting in 2008.[44] Despite this widespread popularity, the last two years have witnessed proposed cutbacks to early voting.[45] In 2012 alone, at least nine states considered bills to reduce their respective EIP voting periods.[46]

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39: Stephanopoulos, 2013 Sup. Ct. Rev at *42 (cited in note 9).

40: Department of Justice, *Section 5 Recommendation Memorandum* 45 (Aug. 25, 2005); *Texas v. Holder*, 888 F. Supp. 2d 113, 138 (D.D.C. 2012), *vac'd*, 133 S. Ct. 2886 (2013). The DOJ also objected to the law prior to the judicial proceeding. See *Texas v. Holder*, 888 F. Supp. 2d at 117-118; See *South Carolina v. United States*, 898 F. Supp. 2d 30, 48-51 (D.D.C. 2012). South Carolina's law was blocked only temporarily.

41: Paul Gronke, *Early Voting: The Quiet Revolution in American Elections*, in Matthew Streb, ed., *Law & Election Politics* 134, 139 (Routledge 2013).

42: *Absentee and Early Voting*, Nat'l Conference of State Legislatures (visited Dec. 14, 2013), online at http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

43: Jan E. Leighley & Jonathan Nagler, *The Effects of Non-Precinct Voting Reforms on Turnout, 1972 -2008* at 22 tbl. 1, Pew Center on the States (2009), online at http://pewcenteronthestates.org/uploadedFiles/wwwpewcenter-onthestatesorg/Initiatives/MVW/Leighley_Nagler.pdf?n=8970; *Absentee and Early Voting* (cited in note 42).

44: R. Michael Alvarez, et al, *2008 Survey of the Performance of American Elections* (2009), online at http://www.vote.caltech.edu/drupal/files/report/Final%20report20090218.pdf.

45: Gronke, *Early Voting* at 135, n. 37 (cited in note 41).

46: Weiser & Norden, *Voting Law Changes in 2012* at 29 (cited in note 26). These

Proponents praise the convenience of EIP voting for populations that work long hours or lack reliable transportation, and claim that early voting is a tool for increasing voter turnout overall.[47] Those in favor of shortening the EIP voting period cite cost reduction and easing administrative burdens as justifications for the cutbacks.[48] But evidence is beginning to show that such policies in fact do not accomplish those goals.[49] Moreover, as with the strict photo voter ID rules, almost all of the states that have proposed or passed bills curtailing EIP voting have Republican-majority legislatures, with support being sharply divided on partisan lines. Opponents, overwhelmingly Democrats, have argued that "the real motivation for reducing early voting was the success of the Obama campaign in using early voting in 2008."[50] According to a New York Times editorial, "Early voting skyrocketed to a third of the vote in 2008, rising particularly in the South and among black voters supporting Barack Obama, and that, of course, is why Republican lawmakers in the South are trying desperately to cut it back."[51]

In North Carolina, VIVA will eliminate the first full week of the previously allotted 17 days of the early voting period. In the 2012 election, more than half of all North Carolina voters cast their ballots through EIP voting.[52] Black Americans voted early at higher rates, and, even then, voted earlier in the early voting period than white Americans.[53] While it is impossible to determine who would be less likely to vote because of the fewer available days, limiting the number of days of the early voting period displaces the votes cast during the first days of the period. And black votes will be displaced more than white votes. This provision, like the voter photo identification require-

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states are Florida, Georgia, Maryland, Nevada, New Mexico, North Carolina, Ohio, Tennessee, West Virginia.

47: *Id*. at 32.

48: *Id*.

49: See generally Joseph D. Giammo & Brian J. Brox, *Reducing the Costs of Participation: Are States Getting a Return on Early Voting?*, 63 Pol. Res. Q. 295 (2010); Editorial, *Only the Foolish Shorten Early Voting*, News & Record (May 18, 2011), online at http://www.news-record.com/content/2011/05/17/article/editorial_only_the_foolish_limit_early_voting.

50: Weiser & Norden, *Voting Law Changes in 2012* at 32 (cited in note 26).

51: Editorial, *They Want to Make Voting Harder?*, NY Times at A20 (Jun. 6, 2011), online at http://nyti.ms/Ms6u7D.

52: *2012 Election Snapshot – North Carolina*, Pew State & Consumer Initiatives (Sep. 5, 2013), online at http://www.pewstates.org/research/analysis/2012-election-snapshotnorth-carolina-85899502663.

53: Paul Gronke, *Proposed Changes to Early Voting in NC Could Affect Over 30% of Electorate* (Apr. 4, 2013), online at http://earlyvoting.net/author/gronkep/page/3/.

ment, would seem to burden disproportionately black Americans as opposed to white Americans.

Litigation over the Florida House Bill 1355's (HB 1355)[54] cutback of EIP voting is particularly illuminating for examining this provision of VIVA. Specifically, Florida's 2011 bill was subject to both Section 5 preclearance and a Section 2 suit. Pre-*Shelby*, only five counties in Florida were covered by the Section 5 regime, and HB 1355 was blocked from going into effect in those counties when the courts denied preclearance.[55] But the statewide Section 2 challenge to the law failed, and the cutback from 14 to eight days of early voting was implemented in the remaining 62 Florida counties.[56] Notably, the court in the Section 2 case "unsubtly hinted" that it would have in fact invalidated HB 1355 had it been evaluated instead under Section 5.[57] The trial court judge explicitly noted that the "important distinction between a Section 5 and a Section 2 claim plays a significant role in the Court's decision in this case."[58] This does not bode well for the Section 2 suit against the provision of VIVA that shortens EIP voting in North Carolina.

### IIc. Eliminated SDR

Same Day Registration (SDR) allows citizens to register and vote in a single act during a specified period prior to Election Day. SDR is different from Election Day Registration (EDR); with SDR, the option to register and vote together is offered only during the early voting period while EDR is offered only on Election Day itself. SDR was implemented in North Carolina in 2007 to offer the convenience of 'one stop shopping.' Because North Carolina remains the only state in the US that offers SDR only and not SDR in addition to EDR,[59] there is little data on the effects of a policy that implements SDR exclusively. Presuming that SDR alone reflects similar outcomes

54: HB 1355 amended the Florida Election Code (Chapters 97-106, Florida Statutes) and became law (Chapter 2011-40, Laws of Florida) on May 19, 2011; see generally Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 Elec. L.J. 331 (2012).

55: *Florida v. United States*, 885 F. Supp. 2d at 320.

56: *Brown*, 895 F. Supp. 2d at 1250-51 (D.D.C. 2012).

57: Stephanopoulos, 2013 Sup. Ct. Rev. at *42 (cited in note 9).

58: *Brown*, 895 F. Supp. 2d at 1251.

59: However, from 2008 to 2010 Ohio offered a policy similar to SDR alone because the first week of early voting overlapped with the final week before the voter registration deadline. See Weiser & Norden, *Voting Law Changes in 2012* at 26 (cited in note 26).

as SDR plus EDR, evidence shows that such policies increase overall turnout and especially increase turnout among young voters.[60]

Evidence from North Carolina indicates that eliminating SDR will also have a racial disparate impact. Again, black Americans compose 23% of North Carolina's registered voters, but were a full 36% of those who in 2012 registered and voted on the same day during the early voting period.[61] The black population of North Carolina was disproportionately more likely than the white population to take advantage of SDR. Eliminating SDR will disproportionately impact a racial minority.

The elimination of SDR has not been the subject of any Section 2 or Section 5 activity to date. There is no data regarding how such a provision would fare under Section 5 preclearance or a Section 2 suit.

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Thus far Section 2 has not been effective in protecting voting rights from the types of restrictions imposed by VIVA, whereas Section 5 has proven effective. The data suggests that the provisions for a strict photo voter ID requirement and shortening the EIP voting period would not have satisfied Section 5 preclearance before *Shelby* when much of North Carolina was covered by the Section 4 formula. Given the evidence from previous Section 2 litigation regarding these types of election policies, there is no indication that any of the three VIVA provisions will succumb to a Section 2 suit.

## III. A Third Generation

This does not look good. The data from North Carolina reveal that VIVA will restrict access to the ballot to a greater degree for minorities than for white Americans, and it appears that the *Shelby* decision is allowing this to happen. Absent the *Shelby* decision, these minorities may have been protected by the Section 5 preclearance requirement. However, the voting rights community should not simply rush to restore Section 5 with a new Section 4 preclearance formula. The following section will reveal that, despite its successes, Section 5 before *Shelby* was not actually adequately protecting the right to vote.

The VRA as it existed before *Shelby*, with Sections 2 and 5 operating in tandem, ended the racial discrimination in voting of the Jim Crow era. It was

60: Roger Larocca & John S. Klemanski, *U.S. State Election Reform and Turnout in Presidential Elections*, 11 St. Pols. & Pol'y Q. 76 (2011).

61: *Demos Fact Sheet: Same Day Registration*, Demos (visited Feb. 25, 2014), online at http://www.demos.org/sites/default/files/publications/EDR_factsheet.pdf.

very effective at fighting what have been termed "first generation barriers" to the right to vote.[62] First generation barriers were direct obstacles to the ballot: "tests and devices" of voter elimination such as poll taxes and literacy tests.[63] And the VRA as it existed before *Shelby* was very effective at fighting 'second generation barriers' to the right to vote. These second generation barriers were indirect obstacles: mechanisms of vote dilution such as redistricting, suburban annexation, and at-large voting.[64] Congress acknowledged the VRA's continued effectiveness with second generation barriers during the 2006 re-authorization process, determining that "eliminating preclearance would risk loss of the gains that had been made."[65]

But the VRA Section 5's undeniable successes notwithstanding, the section has not been very effective at fighting what I identify as third generation barriers to the right to vote. Third generation barriers, such as the three provisions of VIVA examined above, are these more modern policies that restrict access to exercising the right to vote but are not a means of pure voter elimination (as first generation barriers were) nor a means of vote dilution (second generation barriers).

Third generation obstacles are also a relatively recent phenomenon.[66] From the 1970s until the end of the first decade of the twenty-first century, widespread efforts to ease access to the franchise were expanding, including implementing EIP voting and SDR/EDR; restrictive measures have become common only within the last few years.[67] The first photo voter ID rule, again, was introduced in 2006, and the issue has exploded in the years since. These third generation barriers are indeed novel, and are confounding the courts. While VRA litigation has generated "a well-established standard for vote dilution, a satisfactory test for [third generation] vote denial cases under Section 2 [or Section 5, for that matter] has yet to emerge."[68] And of the recent measures of vote restriction surrounding the 2012 elections that were thwarted, "few [were] by the operation of traditional civil rights–based voting laws"–i.e., the

62: Bruce E. Cain, *Moving Past Section 5: More Fingers or a New Dike?*, 12 Elec. L.J. 338, 339 (2013).

63: *Shelby County,* 133 S. Ct. at 2651 (Ginsburg, J., dissenting).

64: *Id*.

65: *Id*. at 2612 (Ginsburg, J., dissenting) (reviewing Congressional records).

66: See generally Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 Harv. L. Rev. 95 (2013); See generally Weiser & Norden, *Voting Law Changes in 2012* (cited in 26).

67: See generally Pildes, 49 How. L.J. at 741 (cited in note 25), as well as Weiser & Norden, *Voting Law Changes in 2012* (cited in note 26).

68: Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 709 (2006).

Voting Rights Act.[69] The VRA is not the comprehensive stalwart of protecting the ballot that it once was.

Section 5 has not been well suited to fighting these third generation barriers because of a major shortcoming identified in Richard Pildes's scholarship: it too narrowly targets who receives its protection, in two significant ways.[70] First, Section 5 is too limited by geography. Only those nine whole states and individual counties in five others were covered by preclearance before *Shelby*. But third generation obstacles are restricting access to the ballot all over the country, not just in those jurisdictions under the preclearance requirement. Strict voter ID laws have passed in seven states not covered by the old Section 4 formula, and have been at least debated in the legislatures of almost every single state in the country.[71] Proposals for shortening the EIP voting period have faced litigation in Florida–which, as detailed above, was largely uncovered–and Ohio, Nevada, and New Mexico–which are 100% free of Section 5 oversight.[72] While SDR was in effect only in North Carolina, the similar Election Day Registration (EDR) has been challenged by Republican legislatures in Wisconsin, Montana, Iowa, and Maine–which are also free of oversight.[73] Experts are pointing out that these voting restrictions are showing up in so-called "battleground states" or states where there are close elections–not just in primarily southern states with a history of racial discrimination.[74]

Second, Section 5 (and in fact the entire VRA) is too limited by demography. The VRA as a whole protects the right to vote only of racial and language minorities. This suitably responded to the needs of the country in previous decades. But third generation obstacles are restricting access to the ballot for vulnerable populations that are not racial or language minorities: the poor, young people, the elderly, and women.[75] While it is impossible to measure

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69: Issacharoff, 127 Harv. L. Rev. at 107 (cited in note 66); *Obama for America v. Husted,* 697 F.3d 423 (6th Cir. 2012).

70: Richard H. Pildes, *Voting Rights: the Next Generation*, in Guy-Uriel E. Charles, et al, ed, *Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy* 17 (Cambridge 2011); see generally Pildes, 49 How. L.J. at 741 (cited in note 25).

71: *Voter Identification Requirements,* Nat'l Conference of State Legislatures (visited Dec. 14, 2013), online at http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#State_Reqs.

72: Wendy & Norden, *Voting Law Changes in 2012* at 29 (cited in note 26).

73: *Voter Registration: FAQs*, Nat'l Conference of State Legislatures (visited Dec. 14, 2013), online at http://www.ncsl.org/research/elections-and-campaigns/the-canvass-may-2013.aspx.

74: Pildes, *Voting Rights: the Next Generation* (cited in note 70).

75: Sobel & Smith, 42 PS: Pol. Sci. & Pol. at 107 (cited in note 33); R. Michael

to what extent these obstacles would suppress turnout, or how many voters would simply be deterred because of confusion, we can examine which voters will be burdened disproportionately because of these restrictive policies.

Low-income citizens are significantly less likely to have government-issued photo identification.[76] Those earning less than $35,000 per year are only half as likely as those who earn more than $35,000 per year to have an acceptable photo ID.[77] Even when the ID itself is free, the costs of obtaining it can be high. Citizens are required to provide supporting documentation in order to apply for an ID suitable for voting, and these supporting documents themselves often carry a price tag. An official copy of a birth certificate can cost $10 to $30 depending on the state, and the act of requesting the records often incurs additional processing or transaction fees.[78] Aside from the financial burden, obtaining an acceptable photo ID also imposes substantial logistical hurdles for those least able to surmount them. Low-income voters are less likely to have access to reliable transportation to get to an often far-away government office. Then, government offices are unlikely to be open in the evening or on weekends, forcing many hourly wage employees to sacrifice pay just to take the steps necessary to be able to vote.[79]

These limitations in mobility and workplace flexibility also explain why shortening the EIP voting period and eliminating SDR disproportionately affect low-income voters. Research confirms that those who use EIP voting on average have considerably lower incomes than those who vote on election

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Alvarez et al., *The Effect of Voter Identification Laws on Turnout* (California Institute of Technology Social Science Working Paper No. 1267R, Jan. 2008), online at http://ssrn.com/abstract=1084598 (visited Dec. 14, 2013); Teresa James, *Early In-Person Voting: Effects on Underrepresented Voters, Voting Turnout, and Election Administration*, Project Vote (Aug. 2010), online at http://projectvote.org/component/content/article/236-Early%20Voting/527-policy-paper-early-in-person-voting-effects-on-underrepresented-voters-voting-turnout-and-election-administration.html.

76: See generally Matt A. Barreto, et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate – New Evidence from Indiana*, 42 PS: Pol. Sci. & Pol. 111 (2009); Sobel & Smith, 42 PS: Pol. Sci. & Pol. at 107 (cited in note 33); R. Michael Alvarez et al., *An Empirical Bayes Approach to Estimating Ordinal Treatment Effects*, 19 Pol. Analysis 20, 26-30 (2010).

77: *Citizens Without Proof* at 3, Brennan Ctr. for Justice (2006), online at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

78: Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification* at 16-17, Brennan Ctr. for Justice (2012), online at https://www.brennancenter.org/publication/challenge-obtaining-voter-identification.

79: *Id.*

day or by mail.[80] Another study notes that SDR is almost twice as likely to increase turnout among poor voters as it is to increase turnout among wealthy voters.[81] Restricting these types of "convenience voting" does not simply "inconvenience" low-income voters; it can extinguish the opportunity to register or vote at all.

Third generation obstacles can further restrict access to the ballot according to age. Young voters, for example, are significantly more likely to benefit from same day registration than older voters simply because they are more likely to not yet be registered. SDR is believed to boost voter turnout among voters aged 18-25 at twice the rate it boosts voter turnout overall.[82] College students, in particular, are said to be "one of the groups most affected" by recent restrictive voting measures.[83] They are especially vulnerable to strict photo ID requirements, which may prohibit out-of-state driver's licenses or even government-issued university IDs.[84]

The very oldest along with the very youngest voters are the least likely on the age spectrum to have acceptable photo identification.[85] 20% of seniors do not have a current government-issued photo ID, according to the AARP.[86] Many seniors no longer drive or have the other documentation necessary to obtain a proper photo ID. Some seniors were born in rural areas or private

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80: See generally Mark Salling and Norman Robbins, *Do White, African American, and Hispanic/Latino EIP Voters Differ from Election Day and Vote by Mail Voters in Income?* (Aug 27, 2012), online at http://urban.csuohio.edu/publications/center/northern_ohio_data_and_information_service/Analysis_of_Median_Household_Income_Differences_between_Election_Day-VBM_and_EIP_Voters_8-27-12.pdf.

81: See generally R. Michael Alvarez and Jonathan Nagler, *Same Day Voter Registration in North Carolina*, Demos (2007), online at http://www.demos.org/sites/default/files/publications/updated%20NC.pdf.

82: *Id*.; See generally R. Michael Alvarez and Jonathan Nagler, *Same Day Voter Registration in Maryland*, Demos (2010), online at http://www.demos.org/sites/default/files/publications/SameDayRegistration_Maryland_Demos.pdf.

83: Emily Schultheis, *Students Hit by Voter ID restrictions*, Politico (Nov. 30, 2011), online at http://www.politico.com/news/stories/1111/69465.html.

84: *Id*.; Weiser and Norden, *Voting Law Changes in 2012* at 8 (cited in note 26). Students attending college away from their home state typically have the option to vote from either state.

85: Barreto, 42 PS: Pol. Sci. & Pol. at 114 (cited in note 76).

86: Reid Wilson, *Five Reasons Voter Identification Bills Disproportionately Impact Women*, Wash. Post (Nov. 5, 2013), online at http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/05/five-reasons-voter-identification-bills-disproportionately-impact-women/.

homes rather than hospitals, and may have never had a birth certificate.[87] Older or disabled voters also face considerable mobility limitations, and understandably would be disproportionately affected by laws that shorten the EIP voting period.

Women face unique challenges under strict photo voter ID rules. Approximately 90% of married American women change their legal names upon marriage,[88] leading to inconsistencies among their existing identification documents, supporting personal records, and the government voter rolls. Even a minor mismatch can cause trouble at the polls. In one widely reported story, female Judge Sandra Watts was forced to cast only a provisional ballot in the 2013 Texas election just months after the state's strict photo ID regime was reinstated in the wake of *Shelby*.[89] Watts's driver's license showed her maiden name as her middle name, but the state voter rolls listed her given middle name. "What I have used for voter registration and for identification for the last 52 years was not sufficient yesterday when I went to vote . . . This is the first time I've ever had a problem voting," she told local reporters.[90] In order to obtain an acceptable ID, female voters may be required to present their marriage licenses. Depending on the state, an official copy of a marriage license can cost up to $40.[91]

But the protections of the Voting Rights Act do not extend to these groups; the legal remedies the law offers are only available to racial and language minorities. Capturing this concern for the inadequacy of the VRA in the face of third generation barriers, Samuel Issacharoff explains, "Unfortunately, in the absence of broader protections for the right to vote, claims of improper conduct [have] to be channeled into the 'suffocating category of race.'"[92] Unless plaintiffs can prove that a voting procedure impacts racial or language minorities specifically, along with the Section 2 "something more," the VRA offers no legal protection. The poor, young people, the elderly, and women

87: Sobel & Smith, 42 Pol. Sci. & Pol. at 107 (cited in note 33).

88: Wilson, *Five Reasons Voter Identification Bills Disproportionately Impact Women,* Wash. Post (cited in note 86).

89: *Texas' Voter ID Law Creates a Problem for Some Women*, Nat'l Public Radio, All Things Considered (Oct. 30, 2013), online at http://www.npr.org/2013/10/30/241891800/texas-voter-id-law-creates-a-problem-for-some-women.

90: *Id.*

91: Gaskins & Iyer, *The Challenge of Obtaining Voter Identification* at 16 (cited in note 78).

92: Issacharoff, 127 Harv. L. Rev. at 117 (cited in note 66), citing Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 592, 630-31 (2002).

have no legal recourse when they are disproportionately restricted from the ballot.

The politically liberal inclinations of some of these affected groups, as well as the fact that these voting restrictions are proposed almost exclusively by Republican legislatures, suggest that third generation barriers are being used more out of partisan interest than racial discrimination. According to Pildes:

> The VRA model of selectively focusing on racially discriminatory voting practices requires courts to determine whether race or partisan politics is the cause . . . So long as Black voters remain overwhelmingly Democratic, race and partisanship will remain intertwined . . . The more difficult it is for courts to separate racial from partisan or other considerations, the greater the risk that courts will reject voting-rights challenges on the ground that partisan considerations, not racial ones, account for the practice at issue.[93]

Indeed, the Fifth Circuit in *LULAC v. Clements* declared that the VRA is "implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats."[94] Courts today must examine the claim that party, rather than race, causes minority disenfranchisement.[95]

In 2006, Pildes argued that the VRA re-authorization process offered an opportunity to re-evaluate what is the best model for federal voting rights protection.[96] Was the selective-targeting approach still appropriate?[97] He explained, "Voting-rights policy should not remain so embedded within the model of the past as to preclude looking beyond that model."[98] And the changes in the voting rights landscape in the years since 2006 certainly demand such a reexamination. In the few months since the *Shelby* ruling, Issacharoff has also aptly pondered "how much of the terrain the civil rights model still captures."[99]

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93: Pildes, 49 How. L.J. at 761 (cited in note 25).

94: *LULAC v. Clements*, 999 F. 2d 831, 854 (5th Cir. 1993) (referring to Section 2 specifically).

95: Ellen Katz, et al, *Documenting Discrimination in Voting: Judicial Findings under Section 2 of the Voting Rights Act Since 1982–Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. Mich. J.L. Reform 643, 659 (2006).

96: See generally Pildes, 49 How. L.J. at 741 (cited in note 25).

97: *Id*. at 747.

98: *Id*. at 762.

99: Issacharoff, 127 Harv. L. Rev. at 104 (cited in note 66).

Part II of this article established that Section 2 of the VRA has thus far proven to be weak in dealing with third generation barriers. Here, Part III establishes that, upon closer inspection, even Section 5 is weak in addressing third generation barriers. Issacharoff is correct: "Different times call for different measures and the Court's [*Shelby*] decision, however wrenching, should compel taking stock of what has changed since 1965."[100]

## IV. Conclusion

North Carolina's new election law is a regrettable repudiation of voting rights of the variety Section 5 of the Voting Rights Act was designed to protect. And *Shelby County v. Holder* was a regrettable ruling that will have tangible consequences for racial minorities and other vulnerable populations seeking equal access to the ballot. But to go back to the pre-*Shelby* framework would not offer the solutions needed today to protect the right to vote. *Shelby* and the onslaught of third generation obstacles to the ballot have instead brought an opportunity for the civil rights community to re-frame the legal paradigm in protecting voting rights.

The fundamental philosophy of the Voting Rights Act of 1965 was that federal oversight is justified to protect against racially discriminatory manipulation of the vote – but the VRA remains silent on the responsibility to protect the right to vote as such.[101] That times have changed is undeniable, and the current environment more than justifies Richard Pildes's suggestion to shift from an emphasis on anti-discrimination to an affirmative, substantive right to vote.[102] "Perhaps paradoxically," Pildes posits, "the more general the form of voting-rights protection, the more minority voting rights will be effectively protected."[103]

Pildes's colleagues Pamela Karlan and Samuel Issacharoff agree.[104] According to Karlan, scholars must develop "a more affirmative vision of the right to vote," and government must take "an active responsibility for ensuring that all citizens have full access to the political process, instead of one where constitutional and legal constraints operate primarily to set bounds on the permissible reasons for excluding people from the franchise."[105]

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100: *Id*. at 97.

101: Pildes, 49 How. L.J. at 743 (cited in note 25).

102: *Id*. at 762.

103: *Id*. at 761.

104: Issacharoff, 127 Harv. L. Rev. at 113: "In the aftermath of *Shelby* County...it is time to rethink the basic model of federal supervision of improper state electoral practices in federal elections."

105: Karlan, *The Reconstruction of Voting Rights,* in Guy-Uriel E. Charles, ed, *Race,*

A recent proposal from Issacharoff is promising and deserves consideration.[106] Particularly compelling is his argument to derive federal regulatory authority over elections from the Elections Clause of the Constitution rather than from the Reconstruction Amendments. The Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."[107] This article joins Issacharoff in turning to the Elections Clause in order to create a federal elections oversight organization that, through a disclosure apparatus and liability standard, requires nonpartisan federal endorsement of all election procedures.

However, Issacharoff does not go far enough. The current political environment demands what US citizens have long deserved: a Constitutional Amendment guaranteeing the right to vote as such. The qualifications of the Reconstruction Amendments limit protection of the franchise to consideration of race alone. As discussed above, this is no longer adequate. Restrictions on voting should no longer be barred only when they disproportionately impact racial or language minorities. Rather, they should be barred when they interfere with the right to vote as such, in all circumstances. Given today's political climate, such a proposal that would require unprecedented Congressional activity might be seen as idealistic and naïve. Perhaps it is so.[108] But anything short of a similarly comprehensive universal rights paradigm would be inadequate in protecting the franchise, that most sacred democratic right.

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*Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy* 34, 35 (Cambridge 2011) (emphasis added).

106: See generally Issacharoff, 127 Harv. L. Rev. at 95 (cited in note 65).

107: U.S. Const. art. I, § 4, cl. 1.

108: It is not the purpose of this article to engage the likelihood of such action under present political conditions.