

# COLUMBIA LAW REVIEW

## SIDEBAR

---

VOL. 113

MARCH 29, 2013

PAGES 55-65

---

### SOUTH CAROLINA'S "EVOLUTIONARY PROCESS"

*Ellen D. Katz*\*

#### INTRODUCTION

When Congress first enacted the Voting Rights Act (VRA) in 1965, public officials in South Carolina led the charge to scrap the new statute. Their brief to the Supreme Court of the United States described the VRA as an “unjustified” and “arbitrary” affront to the “Equality of Statehood” principle, and a “usurp[ation]” of the State’s legislative and executive functions.<sup>1</sup> Not surprisingly, the Warren Court was unpersuaded and opted instead to endorse broad congressional power to craft “inventive” remedies to address systematic racial discrimination and to “shift the advantage of time and inertia from the perpetrators of evil to its victims.”<sup>2</sup> *South Carolina v. Katzenbach* and the statutory regime it upheld have remained good law for decades.

That may change very soon. In *Shelby County v. Holder*,<sup>3</sup> the Justices are again considering the validity of the contemporary versions of VRA provisions South Carolina first challenged decades ago. South Carolina is again participating in the litigation, now as amicus, and is again urging the Court to scrap the statute. This time around, the challenge concedes congressional power to craft the VRA’s regional provisions, in the first instance, but posits that these obligations—known as “section 5”—are no longer constitutional today because, as Chief Justice Roberts observed four years ago, “[t]hings have changed in the South.”<sup>4</sup>

Undeniably, things have changed. Opportunities for minority political participation in places like South Carolina have evolved since Congress first enacted the VRA. Supporters of the VRA readily acknowledge as much but

---

\* Professor of Law, University of Michigan Law School.

1. Brief for Plaintiff at 4–5, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22), 1965 WL 130083, at \*4–\*5.

2. *Katzenbach*, 383 U.S. at 327–28.

3. 679 F.3d 848 (D.C. Cir. 2012), cert. granted, 133 S. Ct. 594 (argued Feb. 27, 2013) (No. 12-96).

4. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009); see also Brief for Arizona et al. as Amici Curiae Supporting Petitioner at 2–3, *Shelby Cnty.*, 133 S. Ct. 594 (No. 12-96), 2013 WL 50688, at \*2–\*3 (“Section 5 has served a noble purpose, but its remedy is no longer justified by the decades-old coverage formula.”).

argue that this evolution is less developed, more fragile, and more dependent on section 5's continued operation than South Carolina and others siding with the petitioners in *Shelby County* maintain.<sup>5</sup> The pending case accordingly presents the Court with competing narratives, one of a problem solved and, hence, a statute that has run its course, and another depicting a vulnerable work in progress that requires the sustained attention the VRA provides.

There is, nevertheless, an additional narrative the Justices should consider when they evaluate how far places subject to the VRA's regional provisions have evolved. This narrative posits that section 5 is far from obsolete and operates not only as a restraint on the ill-intentioned, but also as an affirmative tool of governance. On this account, one of the VRA's most critical, albeit least appreciated, functions is the way in which it helps public officials navigate complex contemporary questions concerning equality of opportunity in the political process.<sup>6</sup>

A good example of the VRA's role in this regard is found in the recent dispute over voter identification (ID) in South Carolina. The "evolutionary process"<sup>7</sup> through which voter ID came to be approved in South Carolina shows section 5 operating not only as a constraint, but also as a constructive mechanism for dispute resolution. In this capacity, section 5 helped produce a voter ID measure which, as one reviewing judge explained, "accomplishes South Carolina's important objectives, while protecting every individual's right to vote and . . . addressing the significant concerns" about the measure's impact on minority voters.<sup>8</sup>

In other words, section 5 provided a valuable service. It is a service that should not be obscured by South Carolina's stance in the *Shelby County* case. It is, moreover, a service that should fall within Congress's power to provide.

### I. THE DISPUTE AND ITS RESOLUTION

Since 1988, South Carolina has required voters to present identification in order to vote in person. Under state law, voters were able to meet the ID requirement by presenting either a qualifying photographic ID (specifically, a South Carolina driver's license or a photo ID card issued by the state's Department of Motor Vehicles) or a non-photo voter registration card South Carolina provided to all registered voters.<sup>9</sup> On May 11, 2011, the South Carolina General Assembly passed a new law, called Act R54, which seemed

---

5. See, e.g., Brief for the Attorney General as Appellee at 25–26, *Shelby Cnty.*, 679 F.3d 848 (No. 11-5256), 2011 WL 6008650, at \*25–\*27 (outlining repeated congressional findings that "jurisdictions covered by Section 5 have engaged in a pattern of suppressing and diluting the voting strength of minority citizens").

6. See Ellen D. Katz, *Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All*, 23 *Stan. L. & Pol'y Rev.* 415, 425 (2012) [hereinafter Katz, *Democrats at DOJ*] (arguing "the VRA's terms modulate inherently difficult discussions regarding complex questions like the distribution of political power by channeling debate through a structured inquiry").

7. *South Carolina v. United States*, No. 12-203, 2012 WL 4814094, at \*21 (D.D.C. Oct. 10, 2012) (Bates, J., concurring).

8. *Id.*

9. *Id.* at \*2 (majority opinion).

to require that only photographic identification would suffice if voters intended to vote in person.<sup>10</sup> Act R54, however, was not entirely clear on this point.

The ambiguity arose even though the new law facially banned use of the non-photo voter registration card as qualifying identification. Act R54, however, also excused voters from presenting photo ID if the voter could show that a "reasonable impediment . . . prevent[ed] [him or her] from obtaining photograph identification."<sup>11</sup> Notably, Act R54 did not specify what constituted a reasonable impediment, or how the local officials charged with administering the provision should interpret or apply it.<sup>12</sup> The Act, moreover, did not specify whether the previously issued non-photo ID cards might be used in cases in which a voter established a reasonable impediment to obtaining photo ID.

This lack of specificity gave rise to concern when South Carolina sought the federal approval the VRA requires it to obtain before making changes to its electoral system.<sup>13</sup> Discussions ensued regarding the way in which local officials would implement Act R54's "reasonable impediment" provision, and unresolved uncertainty about implementation was a primary reason why the Department of Justice (DOJ) denied South Carolina's request for preclearance.<sup>14</sup>

In a letter explaining the denial, Assistant Attorney General Tom Perez noted uncontested evidence that minority voters in South Carolina were nearly twenty percent more likely to lack DMV-issued photographic ID than were white registered voters.<sup>15</sup> Perez also noted that this disparity would not be mitigated by the reasonable impediment provision, "[g]iven the [provision's] ambiguity . . . and uncertainty as to how it may be applied."<sup>16</sup> In fact, the exemption's "vagueness" raised the possibility of inconsistent application "and

---

10. Act R54, § 5, 2011 S.C. Acts 90, 94–96 (amending S.C. Code Ann. § 7-13-710(D)(1)(b) (1976)).

11. *Id.* at 95.

12. *South Carolina v. United States*, 2012 WL 4814094, at \*3–\*4.

13. See 42 U.S.C. § 1973c (2006) (setting forth preclearance process).

14. See Letter from Robert D. Cook, S.C. Deputy Att'y Gen., to Marci Andino, Exec. Dir., S.C. Election Comm'n 4 (Aug. 16, 2011) (on file with the *Columbia Law Review*). While the request was pending, DOJ sought additional information regarding how the provision would be implemented, and South Carolina's Attorney General responded with an opinion defining a reasonable impediment to be "any valid reason, beyond the voter's control which created an obstacle to the voter's obtaining the necessary photographic identification in order to vote," and included some examples. *Id.* DOJ then asked how local officials would apply this standard, what training they would receive in order to do so, and how voters would learn about the standard. South Carolina submitted conflicting drafts of training and educational materials but never submitted final versions to DOJ. Letter from Thomas E. Perez, Assistant U.S. Att'y Gen. for Civil Rights, to C. Havird Jones, Assistant S.C. Deputy Att'y Gen. (Dec. 23, 2011) [hereinafter Perez Ltr.] (on file with the *Columbia Law Review*).

15. Perez Ltr., *supra* note 14, at 2 ("[A]ccording to the state's data, . . . minority registered voters were nearly 20% more likely to lack DMV-issued ID than white registered voters, and thus to be effectively disenfranchised by Act R54's new requirements.").

16. *Id.* at 3.

thus risk[ed] exacerbating rather than mitigating the retrogressive effect of the new requirements on minority voters.”<sup>17</sup>

Based on these findings, Perez concluded that South Carolina had failed to sustain its burden under the VRA to demonstrate the proposed change would be nondiscriminatory. DOJ accordingly refused to approve implementation of the measure.<sup>18</sup>

That decision was a controversial one. While some praised it as well founded and justified,<sup>19</sup> South Carolina Governor Nikki Haley called the DOJ’s preclearance ruling “outrageous, . . . terrible [and] clearly political” and pledged “to look at every possible option” to get the decision overturned and “protect the integrity of our electoral process and [South Carolina’s] 10th Amendment rights.”<sup>20</sup> State Attorney General Alan Wilson announced he would fight the decision in court, a move some observers read to signal that a constitutional challenge to section 5 was forthcoming and that it would leapfrog *Shelby County* as the vehicle by which the Supreme Court might strike down the statute.<sup>21</sup>

Litigation did indeed follow, but it was not as fiercely contentious as the initial reactions to the DOJ’s decision suggested it would be, nor did it produce the sort of sweeping outcome some predicted. It turned out that South Carolina opted against a constitutional challenge and instead asked a panel of three federal judges in Washington, D.C., to approve Act R54 under the VRA.<sup>22</sup> The panel heard testimony, collected evidence, and ultimately decided it would approve the measure. In so doing, however, the panel made clear that DOJ made no mistake in denying preclearance months earlier. Instead, the panel explained that its decision to approve Act R54 rested on a construction of the statute that only developed during the course of the litigation.<sup>23</sup>

Judge Kavanaugh’s lead opinion, which Judges Kollar-Kotelly and Bates joined in full, explained that, “[a]s this litigation unfolded, the responsible South Carolina officials determined, often in real time, how they would apply the broadly worded reasonable impediment provision.”<sup>24</sup> The opinion credited two specific “responsible” officials, namely, South Carolina’s Attorney

---

17. *Id.*

18. *Id.* at 4 (“Until South Carolina succeeds in substantially addressing the racial disparities described . . . the state cannot meet its burden of proving that . . . the voter identification requirements proposed in section 5 of Act R54 will not have a retrogressive effect.”).

19. See, e.g., Richard L. Hasen, *Holder’s Voting Rights Gamble*, *Slate* (Dec. 30, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/the\\_obama\\_administratio\\_n\\_s\\_risky\\_voter\\_id\\_move\\_threatens\\_the\\_voting\\_rights\\_act.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/the_obama_administratio_n_s_risky_voter_id_move_threatens_the_voting_rights_act.html) (on file with the *Columbia Law Review*) (describing partisan responses to DOJ’s blocking South Carolina’s voter ID law).

20. Charlie Savage, *U.S. Cites Race in Halting Law over Voter ID*, *N.Y. Times*, Dec. 24, 2011, at A1.

21. See Hasen, *supra* note 19 (stating “it now seems pretty likely that the South Carolina case will leapfrog over” other pending challenges to section 5).

22. Complaint at 12, *South Carolina v. United States*, No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012).

23. *South Carolina v. United States*, 2012 WL 4814094, at \*6 (approving reading of Act R54 as allowing election officials to challenge “affidavit’s factual *falsity*,” but not “impediment’s *reasonableness* or *unreasonableness*”).

24. *Id.* at \*4.

General Alan Wilson and the State's Executive Director for State Election Administration, Marci Andino, for generating the construction of the "reasonable impediment" provision that became the linchpin for the court's holding.<sup>25</sup>

That construction made clear that "all voters in South Carolina who previously voted with (or want to vote with) the non-photo voter registration card may still do so, as long as they state the reason that they have not obtained a photo ID."<sup>26</sup> As Judge Kavanaugh explained, under the approved construction, voters must be truthful when offering a reason, but the "reasonableness" of the impediment would be left to the voter's judgment.<sup>27</sup> Neither poll managers nor county boards would be allowed to "second guess" the reasonableness of the impediment proffered.<sup>28</sup> Any reason asserted by the voter, and a host of reasons were documented,<sup>29</sup> "must be accepted—and his or her provision ballot counted" unless the reason was shown to be false.<sup>30</sup>

The grant of preclearance ultimately rested on this construction. To be sure, other facets of Act R54 also contributed to the court's decision that preclearance was appropriate. Judge Kavanaugh, for example, emphasized that Act R54 made the acquisition of photographic identification far easier than it had been previously and contained other provisions regarding notice and education that his opinion concluded blunted the measure's potentially exclusionary impact.<sup>31</sup> But it was the "expansive" construction of the reasonable impediment provision that state officials espoused during trial that enabled the panel to approve Act R54. This construction allowed the panel to conclude the new voter ID measure changed existing practice far less than one might have initially thought<sup>32</sup> and explain why it compared so favorably to other voter ID provisions that passed muster under the VRA.<sup>33</sup>

The panel in *South Carolina v. United States* accordingly decided to preclear Act R54, albeit not for use in the November 2012 election. Judge Kavanaugh wrote that insufficient time remained before that election to ensure implementation in accordance with the decision.<sup>34</sup> In January 2013, the court awarded South Carolina limited attorneys' fees, finding in its decision sufficient grounds to deem the State the prevailing party. The panel wrote, "South Carolina did not obtain everything it sought . . . [but] undoubtedly

---

25. Id.

26. Id. at \*3.

27. Id. at \*5.

28. Id. at \*5–\*6.

29. These include having no car, being disabled, lacking a birth certificate, needing to work, looking for work, lacking money to make the trip to get ID, caring for one's children, helping one's family, and doing charitable work. Id. at \*5.

30. Id.

31. Id. at \*8.

32. Id. at \*1, \*5–\*12.

33. Id. at \*15–\*17.

34. Id. at \*17–\*19.

achieved some of the benefit it sought: it obtained preclearance of Act R54 for elections in 2013 and subsequent years.”<sup>35</sup>

## II. “DETECTING . . . AND ENCOURAGING” NONDISCRIMINATION

In many respects, the South Carolina voter ID dispute offers something for everyone. The outcome crafted by the court left the judges praising one another and the federal statute they enforced<sup>36</sup> and all the parties to the litigation declaring victory.<sup>37</sup> Beyond the actual participants, moreover, the dispute is one in which the VRA’s critics and supporters alike are able to find confirmation of either the statute’s critical importance or its abject obsolescence.<sup>38</sup> For present purposes, three aspects of the dispute are worth noting.

First, the South Carolina voter ID measure approved by the court last October is a different measure from the one the state enacted the year before and from the one the state would have enacted in the absence of section 5. Judge Bates wrote separately to make these points. He observed that “Act R54 as now pre-cleared is not the R54 enacted in May 2011,” and characterized his observation as stating “the obvious.”<sup>39</sup> The measure, Judge Bates explained, had undergone an “evolutionary process,” as measures subject to preclearance often do,<sup>40</sup> and this process yielded a result that “accomplishes South Carolina’s important objectives while protecting every individual’s right to vote and . . . address[ing] the significant concerns raised about Act R54’s potential impact” on minority voters.<sup>41</sup>

Judge Bates also posited that South Carolina would have enacted a “more restrictive” photo ID law had it not been subject to the VRA’s review process.<sup>42</sup> He pointed out that “key ameliorative provisions were added during that legislative process and were shaped by the need for pre-clearance,”<sup>43</sup> and

---

35. Order of Jan. 4, 2013, *South Carolina v. United States*, No. 12-203, 2012 WL 4814094, at \*2.

36. See, e.g., *South Carolina v. United States*, 2012 WL 4814094, at \*2 (describing VRA’s remarkable effectiveness); *id.* at \*20 (Kollar-Kotelly, J., concurring) (noting agreement with “both the Court’s excellent opinion and Judge Bates’ thoughtful concurrence”); *id.* at \*21 (Bates, J., concurring) (praising Judge Kavanaugh’s “excellent” opinion).

37. See, e.g., Charlie Savage, *Federal Court Blocks Voter ID Law in South Carolina, but Only for Now*, N.Y. Times, Oct. 11, 2012, at A18 (noting both South Carolina’s attorney general and Justice Department praised ruling); Del Quentin Wilber, *Court Approves South Carolina Voter-ID Law but Delays It Until At Least 2013*, Wash. Post (Oct. 10, 2012), [http://articles.washingtonpost.com/2012-10-10/national/35500354\\_1\\_voter-identification-law-new-voter-id-law-voter-id-measure](http://articles.washingtonpost.com/2012-10-10/national/35500354_1_voter-identification-law-new-voter-id-law-voter-id-measure) (on file with the *Columbia Law Review*) (same).

38. See, e.g., Savage, *supra* note 37 (referencing supporters and opponents praising decision); Wilber, *supra* note 37 (same).

39. *South Carolina v. United States*, 2012 WL 4814094, at \*21 (Bates, J., concurring).

40. See, e.g., Hasen, *supra* note 19 (noting process typically occurs through negotiation rather than in open court).

41. *South Carolina v. United States*, 2012 WL 4814094, at \*21 (Bates, J., concurring).

42. *Id.*

43. *Id.*

that it was the state's "evolving interpretations of these key provisions" that enabled the court to approve the statute.<sup>44</sup>

Second, South Carolina's present voter ID measure is different not only from the one the state itself would have passed absent section 5, but also from the one the VRA, read most expansively, would have required. The approved provision creates new challenges for voters lacking photo identification. While a voter presenting a non-photo voter registration card was previously able to vote a regular ballot in person without question, that voter is now relegated to a provisional ballot and must attest that a reasonable impediment blocked him or her from acquiring qualifying photo ID. That reason, moreover, must be deemed truthful, if challenged.<sup>45</sup> In other words, Act R54 makes voting more difficult than it had been for voters lacking photo ID, and minority voters are disproportionately represented in this group. It does so, moreover, to address a problem, namely, in-person voter fraud, that South Carolina had no evidence ever occurred.<sup>46</sup>

For these reasons, South Carolina's voter ID requirement, even as it "evolved," looks much like the sort of measure the VRA was meant to block and much like the sort of measure a federal court would have blocked during the early years of the VRA's operation. The new obligations imposed on voters and the increased discretion vested in local officials all sound in retrogression, at least as that standard had once been understood.<sup>47</sup> And yet, by the time the *South Carolina v. United States* panel reviewed Act R54, incremental burdens of the sort imposed by the South Carolina measure had been approved in other cases.<sup>48</sup> Far from aberrational, then, *South Carolina* is the latest in a series of decisions that applied section 5 more flexibly than in earlier years.

This flexibility no doubt stems from the Supreme Court's rejection of the analogy between voter ID and the poll tax, as well as from the Justices' voiced reservations about section 5's validity.<sup>49</sup> But it also reflects the changed circumstances in which the statute presently operates. This leads to a third observation about the case. Namely, Judge Kavanaugh's opinion in *South Carolina* may be read to suggest that the panel approved Act R54 not only because the measure's substantive terms evolved during the litigation, but also because the judges ultimately had confidence that the measure would be implemented as interpreted. That confidence stemmed in part from the panel's assumption that the VRA would remain a constraint on state action and that federal officials would continue to supervise implementation of the measure.

---

44. *Id.*

45. See *id.* at \*3 (majority opinion) (describing South Carolina law).

46. See *id.* at \*13 (declaring state's "interests cannot be deemed pretextual merely because of an absence of recorded incidents of in-person voter fraud in South Carolina").

47. See, e.g., *Beer v. United States*, 425 U.S. 130, 141 (1976) (defining retrogression).

48. See *South Carolina v. United States*, 2012 WL 4814094, at \*15-\*16 (discussing laws in other states).

49. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201-06 (2009) (describing federalism concerns of section 5 but reserving judgment for future case); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203-04 (2008) (explaining "if a nondiscriminatory [voter ID] law is supported by valid neutral justifications," it should not "suffer the same fate as [a] poll tax").

But the panel's confidence also suggests that the judges thought the state officials involved differed from the ones who implemented South Carolina's election laws years ago.

More concretely, Judge Kavanaugh referred to officials involved as "responsible" ten separate times in a relatively short opinion.<sup>50</sup> To be sure, Judge Kavanaugh used the word to make clear that the officials involved were the ones authorized by state law to administer provisions they were construing.<sup>51</sup> But the repeated use of the word "responsible," and the tone of the opinion more generally, reads as if the panel understood itself to be dealing with state officials who were not only empowered to administer the law as they said they would, but who would reliably administer the new regime consistently with the terms the court described. That is, these officials were "responsible" not only because they were authorized to act, but also because they could be trusted to act as they were required.

"Responsible" in this sense hardly means the state officials involved relished the obligations the VRA imposed upon them. But it does suggest they understood themselves to be bound by them, and that they would fulfill those obligations to the best of their ability. Indeed, in marked contrast to two recent section 5 decisions addressing voter ID and redistricting in Texas,<sup>52</sup> *South Carolina v. United States* never suggests that the state officials involved were hostile or resistant to the VRA, or that they harbored ill will towards minority voters.<sup>53</sup> To the contrary, the panel's confidence that state officials would conscientiously enforce Act R54, as expansively construed to comply with the VRA, seems to have been a basic premise of the court's decision to grant preclearance.

This conviction, however, is fodder for critics of the VRA. After all, as originally crafted, the preclearance regime is both a reflection of, and a response to, the deep and well-founded mistrust with which Congress viewed public officials in the Jim Crow South. This mistrust is the primary reason why section 5 reverses the conventional burden of proof and posits that electoral changes in covered jurisdictions are illegitimate until public officials in these regions prove otherwise. It is also why South Carolina and other states originally objected so strenuously to the regime.

And yet, Judge Kavanaugh's lead opinion in *South Carolina v. United States* reflects little of this mistrust. True, he made very clear that the preclearance the panel granted was contingent on the approved construction of Act R54 and the court's detailed and precise understanding of how it would be

---

50. See generally *South Carolina v. United States*, 2012 WL 4814094.

51. *Id.*

52. See *Texas v. Holder*, No. 12-cv-128, 2012 WL 3743676, at \*33 (D.D.C. Aug. 30, 2012) (noting state "ignor[ed] warnings" that voter ID law would "disenfranchise minorities"); *Texas v. United States*, 887 F. Supp. 2d 133, No. 11-1303, 2012 WL 3671924, at \*21--\*22 (D.D.C. Aug. 28, 2012) (finding "sufficient evidence to conclude that the [Texas] Congressional Plan was motivated, at least in part, by discriminatory intent").

53. See *South Carolina v. United States*, 2012 WL 4814094, at \*14 (examining and ultimately rejecting failure of one legislator to disavow seemingly racist constituent email as not representative of views propelling voter ID measure); see also *id.* at \*21 (Bates, J., concurring) (praising state officials for their sound interpretation of statute).

implemented.<sup>54</sup> But, ultimately, Judge Kavanaugh and the panel as a whole seemed confident the state officials would act as they said they would.

Insofar as this confidence was warranted—and it does not facially appear misplaced—some will see it as evidence that the section 5 regime has outlasted its purpose. After all, if public officials in covered jurisdictions are “responsible” in the sense that they are trustworthy, is Congress empowered to subject them to the federal oversight the VRA mandates?

The answer is yes, or at least it should be, and that answer need not deny the fact that the categorical mistrust long directed at public officials in covered jurisdictions is less justified today than it once was. Undeniably, there are public officials today who act in good faith on matters of race in places where Jim Crow once ruled. Their existence, however, does not mean that section 5 is obsolete or that Congress erred in concluding the statute continues to do important work.

The reason lies in the nature of contemporary racial discrimination and the ways in which section 5 operates to address it. Bad actors persist, and section 5 operates as a direct restraint on them.<sup>55</sup> Still, racial discrimination, including the sort proscribed by the Constitution, does not require malice on the part of every public actor connected with a given policy or even malice from most of them. Electoral rules are typically devised and enforced by many different public actors, such that even seemingly innocuous policies provide space in which both overt discrimination and implicit biases may generate substantial obstacles to minority political participation.

The South Carolina voter ID dispute highlights both this phenomenon and the way in which the section 5 regime responds effectively to it. Evidence presented at trial suggested invidious intent on the part of at least some supporters of the new voter ID measure,<sup>56</sup> while uncertainty about the “reasonable impediment” provision, as originally crafted, left room for inconsistent and biased implementation.<sup>57</sup> That risk, moreover, was compounded by uncontested evidence showing minority voters were far more likely to lack DMV-issued photo ID than white voters.<sup>58</sup>

The preclearance process provided the forum in which these concerns were evaluated and ultimately addressed. From the start, it forced deliberation about the contours and implementation of a new photo ID requirement. It was

---

54. See *id.* at \*5 n.5, \*9 nn.7–8 (majority opinion) (expressing concerns about using statute as pretext to exclude, but stressing court’s understanding that state officials would enforce “reasonable impediment” consistently with opinion); see also *id.* at \*20 (Kollar-Kotelly, J., concurring) (noting expansive interpretation is critical for preclearance and adoption of more restrictive reading would constitute change for which federal approval would need to be secured).

55. See *supra* note 52 (citing two recent VRA cases in which court rejected changes Texas submitted for preclearance); see also Ellen D. Katz, *On Overreaching, or Why Rick Perry May Save the Voting Rights Act but Destroy Affirmative Action*, 11 *Election L.J.* 420, 430 (2012) (noting aggressive stance of Texas legislature shows continued relevancy of VRA).

56. *South Carolina v. United States*, 2012 WL 4814094, at \*13–14.

57. See *supra* note 54 and accompanying text (describing court’s reading of “reasonable impediment” provision).

58. See *supra* note 15 and accompanying text (describing evidence Justice Department cited as justifying denial of preclearance).

section 5 that provided the impetus for the legislature to craft the “reasonable impediment” provision in the first instance,<sup>59</sup> and it was section 5 that provided the mechanism through which state officials at trial were able, “often in real time,”<sup>60</sup> to refine the measure so that opportunities for bias in implementation would be minimized. It was, moreover, through the section 5 framework that the court was able to examine and ultimately reject evidence of intentional bias in enactment as unrepresentative.<sup>61</sup>

As Judge Bates explained, the preclearance process did not force South Carolina “to jump through unnecessary hoops,” but instead facilitated an “evolutionary process” that addressed problematic aspects of the voter ID measure.<sup>62</sup> Through its complex web of substantive norms and procedures for their application, the regime provided a forum in which interested and affected parties were able to identify, dispute, and ultimately address the burdens a proposed electoral rule threatened to impose on minority voters.<sup>63</sup>

All of this, notably, occurred pursuant to the VRA, rather than outside the reaches of the regime, and it was in this regard that section 5 provided additional, albeit largely overlooked, service. As Act R54 progressed through the legislature, in communications with DOJ, and in the litigation that followed, state officials engaged not in an open-ended inquiry into what abstract notions of fairness or equality might dictate, but, instead, in a far more concrete and narrow examination of what the VRA mandated. The debate was periodically contentious, to be sure, but it was also circumscribed, focusing throughout on what federal law required rather than on the broader, more open-ended question of what is normatively fair.<sup>64</sup>

In this way, section 5 operated both as a constraint and as an affirmative tool of governance for the officials who crafted and would ultimately implement it. That is, section 5 shaped the development of a less burdensome policy without forcing state officials to spend political capital convincing the skeptical or hostile of anything beyond the measure’s compliance with federal law. The preclearance process accordingly guided and tempered a contentious debate by providing the terms under which debate would occur and the procedures those engaged in it needed to follow.

The discrimination that originally made section 5 necessary has shaped contemporary politics in enduring ways, and it forces public officials to confront questions of equality that are inherently difficult to resolve. To the extent the preclearance regime helps to structure and temper debate, it provides

---

59. See *South Carolina v. United States*, 2012 WL 4814094, at \*21–\*22 (Bates, J., concurring) (noting ameliorative provisions were shaped by need for preclearance).

60. *Id.* at \*4 (majority opinion).

61. See *id.* at \*14 (rejecting argument that derogatory email of state House member established discriminatory purpose).

62. *Id.* at \*22 (Bates, J., concurring).

63. See Katz, *Democrats at DOJ*, *supra* note 6, at 423–30 (describing value of VRA as framework for dispute resolution).

64. See *id.* at 425 (discussing issue in context of Texas voter ID statute). See generally Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 *Wm. & Mary L. Rev.* 725, 735 (1998) (arguing one benefit of “results-based” test for discrimination is it avoids “requiring courts to label [anyone] as racist”).

vital assistance as a means to address and resolve these conflicts.

#### CONCLUSION

Judge Bates closed his concurring opinion in *South Carolina v. United States* with a sound observation: "[T]he history of Act R54 demonstrates the continuing utility of section 5 of the Voting Rights Act in deterring problematic, and, hence, encouraging non-discriminatory changes in state and local voting laws."<sup>65</sup> Deterrence and encouragement are apt terms, capturing how section 5 of the VRA both constrains and facilitates equality of opportunity in the political process. The regime has long provided a necessary constraint on the ill-intentioned, and substantial evidence shows that it continues to do so. But the regime also provides affirmative assistance in tackling the difficult issues that are the legacy of discrimination. The provision of such assistance should fall well within Congress's power to enforce the Fourteenth and Fifteenth Amendments.

---

Preferred Citation: Ellen D. Katz, *South Carolina's "Evolutionary Process"*, 113 COLUM. L. REV. SIDEBAR 55 (2013), [http://www.columbialawreview.org/wp-content/uploads/2013/03/55\\_Katz.pdf](http://www.columbialawreview.org/wp-content/uploads/2013/03/55_Katz.pdf).

---

65. *South Carolina v. United States*, 2012 WL 4814094, at \*22 (Bates, J., concurring).